Neutral Citation Number: [2006] EWHC 522 (Ch)

Case No: HC05C03452

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 March 2006

Before :

THE HON MR JUSTICE BLACKBURNE

Between :

HRH The Prince of Wales	**Claimant**
and	
Associated Newspapers Ltd	**Defendant**

Mr Hugh Tomlinson QC and Ms Lindsay Lane (instructed by **Harbottle & Lewis**) for the **claimant**
Mr Mark Warby QC and Ms Christina Michalos (instructed by **Reynolds Porter Chamberlain**) for the **defendant**

Hearing dates: 21, 22 and 23 February 2006

Approved Judgment

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

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THE HON MR JUSTICE BLACKBURNE

Mr Justice Blackburne:

Introduction

1. This is an application by the claimant, His Royal Highness The Prince of Wales, for summary judgment against the defendant, Associated Newspapers Limited, for breach of confidence and infringement of copyright. It arises out of articles, including an editorial comment, which appeared in "The Mail on Sunday" on 13 November 2005. For convenience I refer to that edition of the newspaper as "the 13 November edition".

2. The defendant is the publisher of The Mail on Sunday. The articles were based upon, and contained extracts from, the contents of a typed-up copy of a journal written by the claimant containing impressions and reflections on his visit to Hong Kong between 27 June and 3 July 1997 on the occasion of the formal handover of Hong Kong to the Republic of China. The claimant represented Her Majesty the Queen at the handing-over ceremony. He also attended other events associated with the handover. The journal, referred to in evidence and in argument as the Hong Kong journal, was handwritten by the claimant during the course of his return journey.

3. The claim is not confined to the Hong Kong journal. It extends to copies of seven other journals of the claimant concerned with overseas tours which he has undertaken.

4. The claimant contends that the journals set out his private and personal thoughts and impressions of the tours to which they relate, that these matters were not and (with the exception of the contents of the Hong Kong journal) are still not in the public domain and constitute his confidential information. He contends that prior to publishing the article based on the Hong Kong journal in its 13 November edition the defendant was put on notice of this fact.

5. The claimant further alleges that the journals are original literary works within the meaning of the Copyright, Designs and Patents Act 1988 ("CDPA"), that copyright in them belongs to himself as their author and that by reproducing extracts from the Hong Kong journal in the 13 November edition and by copying and continuing in possession of all eight journals in the course of its business, knowing or having reason to believe that they are infringing copies of copyright works, the defendant has infringed his copyright in them.

6. The contents of the Hong Kong journal are now fully in the public domain. Much of its contents had been revealed in the course of the articles appearing in the 13 November edition. The contents are referred to in the evidence and counsel's skeleton arguments. During the course of the hearing before me, the claimant consented to the press reading the full contents of that journal. The claimant cannot therefore and does not seek to restrain disclosure of any information in that journal. But he does seek an order restraining the defendant from using or disclosing the contents of the other seven journals. He also seeks an order restraining further infringement of his copyright in all eight journals and an order requiring the defendant to deliver up all copies of them in its possession, power, custody or control. He also seeks an inquiry as to damages for breach of confidence and copyright infringement.

7. The defendant denies any wrongdoing. It contends that the information in the Hong Kong journal was not confidential and denies that the claimant had any reasonable expectation that it would be kept from the public. It contends that the information in the journal was not intimate personal information but information relating to the claimant's public life and to a "zone of his life" which he had previously put in the public domain. It claims that, as a result, much of the information was already in the public domain and that other elements of it were of the same or substantially similar character as information that the claimant had made public. It alleges that in any event the information concerned the claimant's political opinions which the electorate had a right to know as being within the ambit of the Freedom of Information Act 2000, alternatively because it relates to the claimant's political behaviour whereby, departing from established constitutional conventions affecting the Heir to the Throne, the claimant has intervened in and lobbied on political issues. Alternatively and for the same reasons, there was a powerful public interest in the disclosure to the public of the information which outweighed any right of confidence the claimant might otherwise have.

8. The defendant further contends that the use of extracts from the Hong Kong journal did not infringe copyright as the use was not of a substantial part and in any event amounted to fair dealing for the purpose of reporting current events and, or alternatively, for the purpose of criticism and review, alternatively publication of it was in the public interest. It contends that the limited use in the 13 November edition made of the claimant's own words was fair and in the public interest because it was a necessary, alternatively legitimate, means of providing the public with accurate information on matters of public interest.

9. The defendant denies that the claimant suffered any loss as a result of the publication complained of, contends that claims to injunctions and delivery up should be dismissed, that use of the Hong Kong journal could be lawfully repeated if the defendant so chose and that, for similar reasons, it would be entitled to publish articles using information or extracts from the other journals although it has no present intention of doing so. On the contrary, it has undertaken to give the claimant notice if it formed such an intention with the result that all relief should be denied in any event.

CPR Part 24.2

10. This being an application for summary judgment made under CPR Part 24.2, I must be satisfied, if the claimant is to succeed, that the defendant has no real prospect of successfully defending the claim and that there is no other compelling reason why it should be disposed of at trial. Mr Hugh Tomlinson QC, who appeared with Ms Lindsay Lane for the claimant, reminded me that the power to grant summary judgment has been described as a "salutary" one which it is important that judges make use of in appropriate cases, that it is not sufficient to defeat the application that the respondent shows a case which is no better than arguable and that, although the application is not to be treated as a summary trial, this does not mean that the court must uncritically accept any assertion of fact.

11. Equally, Mr Mark Warby QC, who appeared with Ms Christina Michalos for the defendant, reminded me that to defeat the application a respondent need do no more than show that his defence has a prospect of success which is real as distinct from

merely fanciful. He pointed to Lord Hobhouse's observation in Three Rivers District Council v Bank of England (No 3) [2001] UKHL 16; [2001] 2 AER 513 at [158] that "the criterion which the judge has to apply under CPR Part 24 is not one of probability; it is absence of reality". Referring to passages from Swain v Hillman [2001] 1 AER 91 at 92j, Three Rivers at [95] and Partco v Wragg [2002] EWCA Civ 594; [2002] 2 Lloyds Reports 343 at 352, he reminded me that the court should consider the merits of the respondent's case only to the extent necessary to determine whether they are sufficient for the case to proceed to trial and that the court should not try issues of fact raised by credible evidence and, as a rule, should decline to entertain prolonged and serious argument in a complex case. Nor, he said, referring to further observations in Partco v Wragg is summary judgment appropriate in a case raising novel issues in a developing area of jurisprudence where decisions should be based upon actual findings of fact. Relying on a dictum of May LJ in Ackroyd v Mersey Care NHS Trust [2003] EWCA Civ 663; [2003] EMLR 36 at [70], he submitted that it would be exceptional to grant summary judgment where to do so would interfere with a journalist's right to freedom of speech under Article 10 of the European Convention on Human Rights ("the Convention") without first examining the facts of the particular case.

12. I bear all of those observations in mind as I approach both the factual background to this claim and the legal principles which apply to it.

The factual background

(a) how the journals came to be written and what happened to them afterwards

13. The claimant's evidence is contained in the witness statements of Sir Michael Peat and Sir Stephen Lamport. Sir Michael is the claimant's Principal Private Secretary. He was appointed to that post in 2002. Sir Stephen was Sir Michael's predecessor and served as the claimant's Private Secretary between 1996 and 2002. Their evidence is to the effect that for some 30 years the claimant has kept handwritten journals recording his personal impressions and private views of his overseas tours. Sir Stephen described them as "candid and very personal, and intended as a private historical record". Each journal is written immediately following the tour to which it relates. The journals are written wholly by the claimant and are not subject to any revision or editing after they have been completed.

14. On his return to this country the completed handwritten journal is photocopied by a member of staff in the claimant's Private Office and circulated to members of his family, close friends and advisers. The claimant does this because he finds it valuable and interesting to have the views of family and friends in response to what he has written. For this purpose he draws up a list of those to whom a particular journal is to be circulated. Accompanying the copy is a handwritten letter from the claimant, or more recently a typed letter from his Personal Assistant or Secretary, to the recipient in question. The copy journal and accompanying letter are sent in an envelope marked "Private and Confidential".

15. The journals are kept under lock and key in the claimant's correspondence archive at Highgrove. A photocopy is kept under lock and key with the overseas tour records at St James's Palace. Sir Stephen Lamport comments that "thereafter access was limited to four authorised members of staff".

16. The claimant does not intend or wish to publish the journals. It is expected that they will be placed in the Royal Archive after his death. It is possible that after his death edited extracts from some of them may be published. Typed copies of the journals are not kept and the claimant has informed Sir Michael that he has not given consent to the making of typed copies of any of them.

17. The Hong Kong journal was written in accordance with the claimant's usual practice. It was written on the return flight. Some fourteen copies were sent to close friends. As some of them were addressed to married couples, it is believed that there were twenty-one recipients of them.

18. The only persons with legitimate access to the journals are the limited number of employees in the claimant's Private Office, all of whom, past and present, have signed confidentiality undertakings, and those to whom the journals are sent by the claimant. In his second witness statement Sir Michael Peat states that he has contacted all of the recipients of the Hong Kong journal and each has personally confirmed that the copy sent to that recipient was kept safely and that neither the original nor a copy was given to The Mail on Sunday or to any third-party. Sir Michael also states that the only politician who has received copies of any of the journals is a person named on the list of recipients of the Hong Kong journal. Although the list of recipients of that journal has been kept confidential, it is no secret, because the matter was mentioned during the course of hearing, that the politician in question was Mr Nicolas Soames MP who is described as a close friend of the claimant.

19. The defendant's evidence about the circumstances in which the journals came to be made and distributed comes principally from Mr Mark Bolland. Mr Bolland was Assistant Private Secretary to the claimant from 1996 to 1997 and served as his Deputy Private Secretary from 1997 to 2002.

20. Much of Mr Bolland's evidence relates to what he describes as "the Prince's role and his perception of it", namely, quoting the current version of the claimant's website, (1) his role as the Queen's representative, (2) his work for charity and (3) his role "promoting and protecting national traditions, virtues and excellence". He expands at some length upon this third aspect of the claimant's role, expresses the view (and gives as an example his opposition to genetically modified foods) that the claimant did not always avoid politically contentious issues but observes that "he [the claimant] was never party-political, but to argue that he was not political was difficult". He refers to the claimant's "very definite aim" as being "to influence opinion", which, he says, the claimant saw as part of the job of the heir apparent, which he carried out "in a very considered, thoughtful and researched way".

21. Mr Bolland goes on to state that the claimant viewed the media as a useful vehicle for getting across to the wider public his views on issues that were important to him. Mr Bolland gives examples and cites the 1994 authorised biography of the claimant by Mr Jonathan Dimbleby. He goes on to comment on the circumstance surrounding the claimant's non-attendance at a return banquet at the Chinese Embassy given by the then President of China during his state visit to this country in 1999. Mr Bolland expresses the view that the claimant failed to attend "as a deliberate snub to the Chinese" and because "he wanted to make a public stand against the Chinese". He states that the claimant staged his boycott notwithstanding attempts to persuade him otherwise. Mr Bolland goes on to state that the claimant instructed him to draw to

the media's attention his boycotting of the banquet, that he did so and that the claimant was delighted at the resulting coverage.

22. Coming to the claimant's journals, Mr Bolland describes them as "just an account of his travels" which the claimant would view "both as a historical record and as a bit of fun". He points out that it was a secretary called Sarah Goodall who dealt with the journals, not Mr Bolland himself. Ms Goodall's task, he says, was to photocopy them once the claimant had finished writing them up. He does not suggest that typed-up copies of the journals were made. He goes on to say that "I believe the Prince would hand Sarah [Goodall] a handwritten list of those to whom the journal should be sent after each trip and later on he would ask her to send them to more people as and when he met someone he thought would be interested". He then explains that "each recipient would receive the journal under cover of a typed but personally signed letter from the Prince or of a handwritten letter from him" adding that "all the private secretaries, myself included, got copies of the journals". He then continues:

> "I do not believe that any full record was kept of the numerous people who received the journals, but I would estimate that at least fifty to seventy-five people would have received each of the journals. I know that the recipients of some of the journals included, for example, some politicians, media people, journalists and actors as well as friends of the Prince."

Mr Bolland does not say who any of those persons were.

23. In paragraph 41 of his witness statement Mr Bolland says this:

> "The journals were not regarded by the Prince or by anyone in his office as being especially 'secret' or as scandalous documents or anything like that. They were not marked 'secret' at all. Nor were they treated in the same way as documents which were regarded as secret or highly confidential."

24. He then refers to the existence of differing levels of security for the treatment of confidential documents "none of which applied to the travel journals", contrasting this with the handling (in locked boxes) of, typically, papers from the Cabinet or Government briefings. He then adds:

> "Anything particularly sensitive would be handed personally to the Prince. But no such concern was paid to the journals, which were not regarded as secret in this way. There was a very relaxed attitude to their contents."

25. The only other evidence from the defendant's side relating to these matters comes from Mr Peter Wright who since 1988 has been the editor of The Mail on Sunday. He refers to an unnamed source whose identity, as a journalistic source, Mr Wright is not willing to reveal. Mr Wright understands this unnamed source to have had "legitimate access" to the journals and quotes the source as stating that the journals were not treated as confidential or secret documents, that staff were encouraged to

read the journals and that no one would have been surprised or cross if secretarial staff made copies and took them home. The secret source is further quoted as stating that the copies of the journals would be sent to senior officials, such as Mr Bolland, and more junior officials who had been on the trip. He states that the secret source gave him sixteen names of people to whom the journals had been circulated and told him that the names "were just a sample of the full list, which by the late 1990s varied from trip to trip but generally ran to between fifty and about seventy-five people". He then states that among the names the secret source provided to him were those of the present Prime Minister, one former Prime Minister, and three other senior politicians, each of whom had been a cabinet minister, as well as a number of other public figures.

26. Sir Stephen Lamport takes issue with Mr Bolland's description of procedures in the claimant's Private Office relating to the treatment of documents, including correspondence. He states that the journals were not sent round indiscriminately, were not sent to casual acquaintances (but only to recipients hand-picked by the claimant), were not treated like routine correspondence and were not routinely circulated to employees in the Private Office. He states that it was not the case that staff generally were encouraged to read the journals. Nor, he says, were members of staff permitted to take copies of them. As to the number of recipients of the journals, Sir Stephen says this varied depending on the nature of the visit covered. He states that the number of recipients grew with time but that in his experience (his period as the claimant's Private Secretary coincided with the period of Mr Bolland's employment in the claimant's service) the numbers of recipients never exceeded forty and was often lower. He adds that Mr Bolland was not involved in the process of circulating the journals and disagrees with Mr Bolland's estimate that the journals were sent to at least fifty to seventy-five people. (In his second witness statement Sir Michael Peat states, quoting the Assistant Treasurer and Records Manager in the claimant's Private Office, that no single journal has been sent to more than forty-six recipients, that the number was often lower and that, with the exception of Mr Soames MP, no journal has been sent to any minister or politician.) Sir Stephen regards as "preposterous" Mr Wright's assertions, based on his unnamed source, that no one would have been surprised or cross if secretarial staff made copies of the journals and took them home. He states that Ms Goodall who was responsible for photocopying the manuscript originals of the journals and posting them (with he claimant's covering letter) to the recipients was not given permission to retain any copies for herself. He further states that the journals were not intended for circulation to ministers or as a means to set out the claimant's opinions on public issues. He states that they were not sent round indiscriminately nor were they sent to casual acquaintances. He says that they were not sent, for example, to the Foreign Office or to British diplomats.

(b) the Hong Kong journal

27. In evidence was a copy of the typed version of this journal which came into the defendant's possession in the way that I will shortly describe. It is not a long document. It is headed "The Handover of Hong Kong - or 'The Great Chinese Takeaway' June 27th - July 3rd 1997".

28. The claimant starts with a brief reference to the flight out to Hong Kong, mentioning that he was seated in what is normally Club Class whereas some of the others whom he names were travelling First Class. He comments on the high temperature and

intense humidity on landing and describes the claimant's pleasure at being once more on the Royal Yacht Britannia on which he was to be based during his stay. He describes his sadness that this was to be the last time he would be using it on an overseas tour. He reflects on the general sadness of others and on the surprise of visiting dignitaries that it was to be decommissioned. He mentions a whistle-stop tour around the ship by the Prime Minister and Mrs Blair and regrets that they were not able to attend a reception or dinner on board and hear people's reactions. He laments that, being in such a hurry, the Prime Minister can never really learn about anything. He reflects on how decisions are taken based on market research or focus groups or on papers produced by political advisers or civil servants and how none will have experienced the matters about which they are taking decisions.

29. He refers briefly to attending a reception in Government House and how that was followed by a dinner on the Royal Yacht Britannia at which he sat next to a Mr Tung, the person whom the Chinese Government had selected to take over from Mr Patten, the retiring British Governor. He describes how he found Mr Tung, refers to Mr Tung's assurance that the Chinese government wanted to show the Taiwanese that Hong Kong would continue to thrive as part of one country with two systems. He refers to the outward optimism of the local people about the immediate future of Hong Kong but also to a concern on their part about creeping corruption and the slow erosion of the rule of law. He also refers to a concern about the Chinese army and the temptation of its poorly paid solders, on discovering how much things cost in Hong Kong, to intimidate or threaten local people.

30. He refers in the briefest terms to his engagements on the second day of his visit, culminating in a dinner on board the Royal Yacht Britannia attended by the Commonwealth Secretary General and the US Secretary of State whom he found to be of good value and well disposed towards the UK. He mentions two of the topics they talked about, but does refer to what anyone said about these or any other matters.

31. He gives an equally brief account of his engagements during the early part of the third day of his tour. He mentions seeing the Prime Minister on his short visit to Royal Yacht Britannia. He refers to having a very good talk with him, describes what an enjoyable person the Prime Minister was to talk to and what a good listener he appeared to be. He describes how the Prime Minister understood the need for Britain to find a fresh national direction in order to overcome apathy and loss of self-belief. He refers to having mentioned to the Prime Minister that the best way was to concentrate on the things that Britain does best as a nation and try to work out how they can be put to best use in a modern context. With that brief exception, the claimant does not refer to what he and Prime Minister talked about.

32. He then goes on to describe the farewell ceremony in a nearby stadium. There is a short paragraph describing the reactions of the Patten family to their farewell-taking of staff at Government House and how, following a soothing cup of tea, they all set off to the stadium for the first part of the handover ceremonies. He refers to the fact that it was raining, to Mr Patten's speech which, he emphasises, had not been shown to the Chinese, and to his emotions at the playing of Elgar's Nimrod Variation after the speech. He describes, in amusing terms, the difficulty of having to deliver a speech in the midst of a noisy and heavy rainstorm. He describes how, soaked to the skin, he went back to the Royal Yacht Britannia to have a bath before attending a

banquet for thousands at Hong Kong's main convention centre and how, being in the bath, he missed a fireworks display.

33. He mentions that he sat next to the Chinese Foreign Minister at the banquet, refers to the elaborate arrangements, which he deplores, that had been worked out by officials of both sides to ensure that when he met the Chinese President there was no loss of face on either side. He describes how having detached himself from what he refers to as "the group of appalling old waxworks" who accompanied him the Chinese President, placed opposite British dignitaries including himself, read a prepared statement to which he, the claimant, had to deliver an impromptu reply. He refers to the speech which the Chinese President then delivered, describes how it was loudly cheered by the assembled audience of party faithful and how, at the conclusion of this "Soviet-style display" Chinese soldiers hauled down the Union Jack and raised the Chinese flag. He remarks, amusingly, on how there was a device to make the flags flutter. He refers to the ceremony ending with a group photograph and handshakes. He then reflects on how they were leaving Hong Kong to her fate, expressed a hope that a particular local political leader would not be arrested when he staged a midnight demonstration and comments on the successes achieved by Britain in Hong Kong.

34. He refers to the differences of approach to the future of Hong Kong in the lead-up to the handover between, on the one hand, Sinologists, supported by a former British Prime Minister and his Foreign Secretary, who had favoured the establishment several years ahead of actual handover of a joint transitional government to avoid upsetting the Chinese and, on the other hand, those like Mr Patten who told him that the process of democratisation in Hong Kong should have begun as soon as the Sino-British agreement of 1984 had been signed even if that would have upset the Chinese. The claimant goes on to reflect that if the Sinologists' line had been followed he does not think that Britain would have left Hong Kong with such an open demonstration of warmth and affection and that Britain could be justly proud of two main elements of its legacy, the rule of law and the English language, observing that the British Council office in Hong Kong would be the biggest in the world and of enormous importance in China.

35. After setting down these reflections he then describes the return to the Royal Yacht Britannia along a jetty lined with well-wishers and friends and former associates of Mr Patten, and the Yacht's emotional departure. He describes how as he stood on the deck he looked at the departing Hong Kong skyline and told himself that perhaps it was good for the soul to have to say goodbye to Hong Kong and the Royal Yacht Britannia in the same year.

36. The remaining one-third or so of the journal is devoted to the journey from Hong Kong to the Philippines and his brief stopover in Manila before boarding his flight home to this country. He describes a storm which was encountered on the way and a rendezvous with a Royal Navy Task Group which had been just out of sight during the handover. He describes a steam-past and subsequent fleet manoeuvres which the admiral in command was determined to carry out despite the awful weather and says how moving the steam-past was. He mentions that the Task Group had been shadowed by Chinese intelligence-gathering and electronic- eavesdropping ships, observing that this was reminiscent of the Soviets when he had been in the Royal Navy over 20 years earlier and that it was no wonder that other countries in the area were getting uneasy about the Chinese and seemed pleased to see the Task Group.

He describes how reassuring and comforting it was to have the presence of the accompanying Task Group during the passage to Manila. He describes very briefly one or two of the naval manoeuvres which took place and his pride at the professionalism of what he witnessed.

37. In his account of the very short stopover at Manila he refers in the briefest terms to taking farewell of the Patten family and of the Royal Yacht Britannia, calling on the Philippines President, a visit he made to a part of the old city, a hotel reception and an official dinner with the President and the delayed departure of the flight home. He reflects on how friendly and warm-hearted the Philippines were and how increasingly crucial the Far East would become as the Chinese develop and exercise their power in the region. He hopes that Britain is able to maintain her presence in the area. The journal concludes that Britain should seek to maximise and exploit her military skills and states that it would be a tragedy and a waste to squander over 300 years of accumulated expertise.

38. I have thought it right to summarise in some detail the contents of the Hong Kong journal to indicate its general nature and to enable a proper assessment to be made of the defendant's arguments in favour of overriding any confidentiality in them which the claimant is otherwise able to establish.

(c) how the defendant obtained copies of the journals

39. According to the defendant's evidence, in early May 2005 Ms Katie Nicholl, who is the Diary Editor of The Mail on Sunday, was approached by an "intermediary" whom the defendant is unwilling to identify offering to sell copies of some of the claimant's journals. The intermediary claimed that the person offering the journals had come by them legitimately, that the source was a man who had worked for the claimant and that the identity of the source would not be disclosed.

40. It appears that Ms Nicholl met the intermediary and was shown a handwritten copy of the Hong Kong Journal. After informing the intermediary that The Mail on Sunday was interested in the journals, she was later sent typed copies of the eight journals by the intermediary. No payment was made for these copies and the handwritten copies shown to Ms Nicholl were not passed to the defendant. Ms Nicholl then entered into negotiations with the intermediary for the acquisition of the journals provided The Mail on Sunday was satisfied, as it later was, that the journals were authentic. Nothing came of the negotiations at that stage. Time passed.

41. On Friday 14 October 2005, Mr Wright (The Mail on Sunday's editor) instructed Ms Nicholl to tell the intermediary that the defendant had another source who also had copies of the journals. (Pausing at this point, it is not suggested that this further source supplied any copies of the journals to the defendant.) Ms Nicholl informed the intermediary that The Mail on Sunday wished to publish the journals from his source but that if that source no longer wished to proceed the documents would be obtained from another source.

42. Shortly afterwards, that same day, Ms Nicholl received a call from a Ms Sarah Goodall, a former employee in the claimant's office. Mr Wright knew from what he had been told by his new source that Ms Goodall had worked for the claimant at St James's Palace. Ms Goodall said that the documents were hers and that she wanted

them returned to her that day. This surprised the defendant which had understood from the intermediary that the source of the typed journals was male.

43. Later that afternoon Mr John Wellington, the Managing Editor of The Mail on Sunday, met Ms Goodall. According to Mr Wellington, Ms Goodall was "very agitated and wanted to just take the material and go", claimed that earlier in the year she was short of money and talked to the intermediary about selling the journals, and claimed that she was a recipient of the journals in her own right. She went on to say that Ms Nicholl had called the intermediary that morning (14 October) putting pressure on him by saying that the paper had another source. Mr Wellington understood that Ms Goodall had got cold feet about the whole project and wanted to stop it. She told him that she did not need the journals project any more, that she had told Ms Nicholl on the telephone earlier that, if she did not get the material back within half hour, she would call Clarence House and that, as Ms Nicholl delayed, she had indeed make the threatened call.

44. By now Mr Wellington had decided to give Ms Goodall the benefit of the doubt that she was the source. He had no reason to think otherwise and her insistence that she had obtained the journals legitimately matched the account The Mail on Sunday had been given by the intermediary. Mr Wellington therefore handed her one set of the documents. This occurred despite the intermediary's denial that Ms Goodall had been the source of them.

45. That same day (after copies of the journals had been given to Ms Goodall) Ms Nicholl contacted the intermediary and raised what Ms Goodall had said. The intermediary told her that the journals had not come from Ms Goodall and that the source was someone else. The intermediary also said that Ms Goodall had not contacted "the Palace" about the matter as she had claimed to have done.

46. On Tuesday 1 November, Mr Wellington again spoke to Ms Goodall, told her what the intermediary had said and tried to get her to explain herself. She replied that she did not know why the intermediary had said what he was reported as saying to The Mail on Sunday. She suggested that the intermediary had wanted to confuse the defendant so that it would be unable to identify her as the source.

47. So much for the defendant's account of the matter. I now turn to the claimant's account.

48. According to the evidence of Sir Michael Peat, on 14 October 2005 Ms Goodall approached Mr Paddy Harverson, who is the claimant's Communications Secretary, and told him that when she had worked in the claimant's Private Office, she had made copies of extract from the journals and had recently tried to sell them to The Mail on Sunday, having asked a friend to make the necessary approach. She claimed that her friend had supplied The Mail on Sunday with copies of the journals, that she had later consulted a lawyer and been told not to sell the copy journals and had then asked the friend to retrieve them. She said that the friend had attempted unsuccessfully to do so.

49. At this point the claimant's solicitors were consulted. In turn they contacted the defendant's legal adviser to say that the contents of the journals were confidential and that publishing them would be a misuse of private information and an infringement of

copyright. The solicitors also pointed out that the copy journals had been removed from the claimant's office without permission and should therefore be returned. Later that same day, 14 October, Ms Goodall phoned Mr Harverson to say that the copy journals had been returned to her by The Mail on Sunday and that she wanted to return them. Arrangements to do so were made and on Monday 17 October Ms Goodall went to the claimant's office and returned the copies. She assured Mr Harverson that the copies she was returning were the only copies that had been made.

50. Ms Goodall had been employed in the claimant's Private Office between May 1988 and December 2000. She had given the usual undertakings of confidentiality. She was dismissed following a disciplinary hearing (unrelated to the issues in this litigation) and had been asked to ensure that all property in her possession belonging to the claimant's Household was returned. She had not been authorised to make typed copies of the journals or to remove photocopies of them from the Private Office.

(d) events leading to the commencement of these proceedings

51. On 5 November 2005 Ms Nicholl telephoned the claimant's Press Office and asked for comments on various excerpts from the Hong Kong journal which she read out over the telephone and which she said were going to be published by The Mail on Sunday. Solicitors became involved. The upshot was that the defendant gave an undertaking not to publish any material from the Hong Kong journal the following day.

52. On 10 November 2005 the defendant wrote to the claimant's solicitors stating that it intended to publish articles drawing on the Hong Kong journal. That evening Sir Michael Peat telephoned the Editor of The Mail on Sunday to make clear that the publication of the material from the Hong Kong journal would amount to a breach both of copyright and of the claimant's confidence in the material. A letter was written the following day confirming what had been said. The letter continued:

> "1. It is unacceptable for staff in His Royal Highness's office to feel free to copy private and confidential documents and to pass them either to members of the public or to the press. A private office cannot be run on this basis and behaviour of this kind flies in the fact of the trust and confidence that is necessary in any employment relationship. By publishing this material, you would be condoning this behaviour.
>
> 2. The purpose of the journals is to record The Prince of Wales's personal and private thoughts and observations, and they are clearly confidential. While it is true that some comments are about public matters, they continue to be confidential despite your assertion to the contrary. The journals are certainly not written with a view to the press cherry picking from them items of interest.
>
> 3. It will be especially unfortunate, following what is a complete betrayal of trust (if not by Miss Goodall then by

> another person in a similar position of trust), if The Mail on Sunday associates itself with this betrayal…"

53. On the same day the claimant's solicitors wrote to the defendant making clear that the claimant did not consent to the publication of the material from his private journals and threatened proceedings if the defendant went ahead. The defendant nevertheless published substantial extracts from the Hong Kong journal in its 13 November edition of The Mail on Sunday. The present proceedings were begun five days later on 18 November 2005.

(e) the Mail on Sunday articles

54. The front page article, headed "Appalling Waxworks", starts 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".

55. The article focuses upon the comments in the Hong Kong journal about the Chinese and, referring to the claimant's criticism of political advisers and focus groups, states that the Prime Minister did not emerge unscathed from the journal. It speculates that the claimant's remarks threatened to "spark a diplomatic row between Britain and the Chinese". It refers to the then very recently completed three-day visit of the Chinese President to Britain and to the claimant's absence from a state banquet at Buckingham Palace held in the President's honour.

56. In a two-page inner spread, the newspaper describes the journal as an "unflinchingly frank and highly perceptive … record" of the handover of Hong Kong to China over eight years earlier. The whole two-page spread is headed by the description of the Hong Kong journal as "a remarkable historical document, which could define [the claimant] as one of the greatest chroniclers of our time". The article asserts that the journal was, like others written after foreign trips, photocopied and posted to "between 50 and 100 friends, relatives, courtiers and political contacts" but notes a claim by Clarence House challenging that number. It refers to the claimant's quest to find ways of 'overcoming apathy' by forging a 'fresh national direction'. It refers to the journal's reference to Britain needing to focus on its traditional strengths with a view to working out how they can be put to best use in a modern context.

57. The article highlights the various disparaging remarks in the Hong Kong journal about the Chinese Government, including the reference in the journal's title to "the Great Chinese Takeaway". The article repeats the journal's reference to the Prime Minister's use of market research and focus groups, describes the journal as revealing the claimant's "sensitive grasp of Sino-British relations", refers to the claimant's comments in the journal on the differences between those who had favoured a transitional government in advance of the 1997 handover and those who favoured taking what the article describes as "a robust line with Beijing" stating that the claimant sided firmly with the latter. The article ends with a reference to the claimant "having boycotted a banquet during the last Chinese state visit six years ago" and that he had done so in support of the exiled Dalai Lama, whom the claimant had entertained at Highgrove. It ends with a further reference to the claimant's absence from the then very recent dinner in Buckingham Palace which he had not attended,

owing to what it reports the claimant's aides as saying was his tiredness on his return from a tour in the USA.

58. A further article on the same two-page spread takes as its theme the "centuries-old convention that the Monarchy does not get involved in politics" and that members of the Royal Family should not express views which could leave them exposed to accusations that they are taking a position on controversial party issues. It claims that the claimant's journals fly in the face of that convention, that the claimant ventures into the political arena and that the journals provide a fascinating insight into how the claimant "discreetly contributes to the formation of foreign policy". The article then repeats some of the claimant's comments in his Hong Kong journal voicing concern about the Chinese which the writer of the article seeks to liken to similar concerns shared by human rights campaigners and security officials in this country. This article, like the previous one, then refers to the claimant's absence from the then recently held state banquet for the Chinese President at Buckingham Palace and the reasons which "courtiers" had given for his absence. It contrasts those remarks with a comment by "a former aide" inferring that, like his action in boycotting a Chinese Embassy banquet held by the then Chinese President on his visit to this country in 1999, the claimant was motivated by the same concerns when absent on this occasion from the banquet.

59. The article repeats the claim that between 50 and 100 copies of the Hong Kong journal had been sent out claiming that the recipients included "leading political figures, including John Major, Douglas Hurd, Tony Blair and, on one occasion, Peter Mandelson". It acknowledges that the recipients would vary from tour to tour and claims support for this understanding from "an unofficial Clarence House source who said that journals were distributed to an audience of 75". It contrasts this with "a senior Clarence House official" insisting that just five or six copies were sent out. It refers to concerns on the part of aides of the claimant that "publication of the journals would not be in the national interest" and that the claimant could be "compromised" if he were not free to express his views frankly without them becoming public knowledge. The article then refers to how during the 1990s the journals were said to have been freely circulated within the claimant's office and then repeats some of the matters which have since appeared in the evidence of Mr Bolland and Mr Wright. The article then goes on to assert that the distribution of documents became more restricted after the appointment of Sir Michael Peat and what it refers to as a review by the Cabinet Office. The article ends by referring to the freedom enjoyed by the author and broadcaster Jonathan Dimbleby (as mentioned by him in the preface to his biography of the claimant published in 1994) "to comb through the claimant's archives at St James's Palace and at Windsor Castle, where an entire floor is filled with scores of thousands of documents and memoranda accumulated over the last four decades" and to the further comment by Mr Dimbleby that he had been "free to read his journals, diaries and many thousands of the letters which he has written assiduously since childhood" and from which he had been "free to quote extensively".

60. Another article, also on the two-page spread, headed "poignant, insightful and witty", claims that the claimant's use of his journals to engage in political debate will "ensure their place in history" and that they also "establish him as a literary figure of genuine stature". The major part of the article is concerned with the claimant's "anger" at the Government's decision to decommission the Royal Yacht Britannia. It refers to the

passage in the Hong Kong journal in which the claimant regrets that the Prime Minister and his wife had no time to attend a reception or dinner on the Royal Yacht Britannia and hear people's reactions to the decommissioning and to the further passage in which he comments that, being in such a hurry, the Prime Minister is unable to learn anything. It also refers to the further passage from the journal in which the claimant shows sympathy for the Prime Minister in view of the hurried life he leads while criticising his reliance on market research and focus groups or on papers produced by political advisers or civil servants. The article also refers briefly to the feelings, as the claimant witnessed them, and the other actions of the Patten family as they made their farewells to Government House and its staff on leaving Hong Kong. It then refers to the passage in the Hong Kong journal where the claimant expresses surprise at travelling out Club Class on the flight to Hong Kong when well-known current and former politicians were travelling first class. It ends with the following flourish:

> "Through their freshness, directness and popular appeal, these journals place the Prince alongside the very best modern diarists such as former Tory MP Alan Clark. When his recollections are published - as Clarence House says they eventually will be - they will surely sell like hot cakes."

61. The editorial comment appearing on a later page in the 13 November edition is short and I shall set it out in full. Headed "Insight of a wise man who is truly fit to be our King" it reads as follows:

> "The reflections of The Prince of Wales on the handover of Hong Kong, which we have now glimpsed for the first time, reveal a thoughtful, perceptive man, deeply committed to the country whose King he will one day be, and its institutions - especially the Armed Forces.
>
> They also show that he has a good sense of proportion, even despite his Eeyore-like conviction that nothing good is ever going to happen to him and his often justified view that modern governments want to steal the privileges of the Crown for themselves.
>
> He grasps that, just because monarchy's flummery is sometimes ridiculous, that does not mean it is redundant. These diaries help to make the case for kingship in general, its continuity, long memory and immunity from political fashion.
>
> Here is a man who has for years had a front seat at the great events in our history, even though he has had no control over them. He has met world leaders when they have had their guard down, seen the backstage tussles of diplomacy at first hand, watched our own politicians as they scurry fretfully to and fro on their way up and on their way down.
>
> True, he has not had to fight for his position. But, equally importantly, he has not had to sell his soul to hang on to it. By

> now he has built up a great balance of wisdom, direct knowledge and experience which are evident in his dry, detached commentaries.
>
> They suggest that he is thoroughly fitted for the task that he will one day inherit. And when, in the distant future, they come to be published in full, they are likely to offer one of the most remarkable and honest historical documents of our age."

Comments on the evidence

62. Although the parties' accounts of events differ in a number of respects which the court cannot resolve on an application for summary judgment, Mr Tomlinson nevertheless submitted that the evidence was sufficiently clear on matters which are relevant to a summary determination of the claim to enable such a determination to be made even though there may be differences of detail. He highlighted three particular points: (1) the extent to which the journals were treated as confidential in the claimant's Private Office, (2) the number of people to whom the journals were circulated and (3) the source of the journals obtained by the defendant.

63. Before I come to those three points, I must first refer to what Mr Warby described as key factual background. He highlighted ten matters. They were (1) the circumstances in which the eight journals were created, (2) the nature of the information in the journals, (3) the nature, basis, content and timing of the articles appearing in the 13 November edition, (4) the nature and circulation of the journals, (5) whether the copy of the Hong Kong journal which came into the defendant's possession was an unauthorised copy and if it was whether the defendant knew this at the time of publication of the articles in the 13 November edition, (6) the claimant's own conduct and attitude towards the contents of the journals and his other writings, (7) the claimant's "other political disclosures", (8) the claimant's public conduct in relation to China and its regime, (9) the claimant's other political behaviour and (10) the relationship between the claimant's political behaviour and the constitutional conventions applicable to the monarchy and the Heir to the Throne. I have listed them in a slightly different order from the order in which they were listed by Mr Warby.

64. What is said by the defendant about each of those items is, in summary form, as follows (taking them in the order listed above):

> (1) The claimant's role on his 1997 visit to Hong Kong was that of an official representative on a diplomatic, public mission on behalf of the Queen and this country. The information in the Hong Kong journal derived from such activities and the same is true of the seven other journals in respect of other overseas tours.
>
> (2) The journals are records of the claimant's public activities, in the sense that they deal with official tours, coupled with observations and opinions deriving from those activities. In the nature of things, many of the events with which the journals deal are public, meaning that they are matters of public record or observation, for example the public ceremonies at the Hong Kong handover. The opinions expressed in the Hong Kong journal are "essentially political in

content" in that they arise out of public events connected with the claimant's official duties.

(3) The nature, basis, content and timing of the articles appear from the articles themselves (which I have summarised). The articles were published in the wake of the claimant's non-attendance at the 2005 banquet at Buckingham Palace for the President of China.

(4) The journals were not created merely for personal contemplation by the claimant but were created for the purpose of circulation with the intention of affecting others' opinions. They were circulated to at least fifty to seventy-five persons, including politicians. The claimant is uncertain and his evidence has changed over just how many copies of the journals were sent out, including in particular the Hong Kong journal in that further names were added to the original list of recipients with the result that the claimant's total was now 21.

(5) The defendant disputes, because it says it did not itself know, whether the copies of the journals which it received were unauthorised.

(6) The claimant not only circulated the journals widely himself but, in the past, has allowed his biographer, Mr Jonathan Dimbleby, free access to past journals and other similar documents and permitted disclosure of them at Mr Dimbleby's sole discretion. As a result, the claimant's political opinions are well known.

(7) Mr Dimbleby's biography of the claimant discloses much information about the claimant's political views. In the same year that the biography appeared, 1994, there was an "authorised documentary" of the claimant in the course of which the claimant made other such disclosures. These are disclosures by the claimant of information that might otherwise have been considered private. No one who reads the newspapers in this country with more than a casual eye over the past twenty years could fail to be aware of the claimant's speeches and writings on political matters.

(8) Contrary to the wishes and policy of the Government, the claimant has consistently been hostile to the communist regime in China and has made deliberate public statements of his opposition to it by boycotting state banquets for the Chinese President in 1999 and 2005 and causing the media to report the former boycott as a political statement. On several occasions he has met the Dalai Lama who is persona non grata with the Chinese. Inconsistently, he has caused public denials to be issued in 1999 that he had snubbed the Chinese.

(9) The claimant accompanies his public political statements by frequent behind-the-scenes lobbying of politicians on a range of policy issues and has "bombarded" ministers with correspondence. Such activity is far from welcomed by the elected politicians who are targeted in this way and is considered wholly inappropriate for the Heir to the Throne. The claimant's description of himself as a "dissident" (as referred to in Mr Bolland's evidence) is an appropriate tag.

> (10) The claimant's political behaviour has long been constitutionally controversial. Constitutional experts have expressed the view that the claimant is under a duty to maintain political neutrality because of the need to avoid partisanship when he becomes the monarch. Frequent objections to his behaviour have been voiced by politicians and commentators. It departs from the constitutional norms.

65. Mr Warby also referred to what he described as "a striking fact" that while damage is alleged in the claim to have occurred, no details have been provided and no evidence has been given on the claimant's behalf of any damage.

66. Subject only to what is meant by "political" and the reference to "widely" in the sixth item, Mr Tomlinson says that there is no dispute about the matters set out in the first, second, third and sixth of those items (as summarised above). Nor is it in dispute that no evidence of any particular damage has been given. There are, he says, issues arising out of the matters alleged in the fourth and fifth items which need to be addressed. These are the matters highlighted by Mr Tomlinson (as mentioned above) and to which I shall return shortly. There is, he says, much in the last four items with which the claimant takes issue but which, the claimant accepts, cannot be resolved on an application for summary judgment. Mr Tomlinson's central submission, which I shall return to in more detail later, is that, even if the facts are exactly as the defendant says in relation to those four items, they are irrelevant to the resolution of the issues in this action. I was therefore invited to proceed as if what is in them is true.

67. That brings me to the three matters identified by Mr Tomlinson where there are differences between the parties and which, he accepts, are material to the issues which arise on this application.

(1) the treatment and purpose of the journals and the numbers circulated

68. I will deal compositely with the first and second of the points identified by Mr Tomlinson, namely the extent to which the journals were treated as confidential, the number of people to whom they were circulated and the purpose in circulating them. This is the issue identified in the fourth of the ten items highlighted by Mr Warby.

69. The defendant relies in this respect on the evidence of Mr Bolland and Mr Wright. It is difficult, however, to attach any weight to the assertions made by Mr Wright to the effect that, according to his independent source - named as "the second source", the journals were not treated as confidential or secret by the claimant's staff and no one would have been surprised or cross if secretarial staff made copies and took them home. Mr Wright has no first hand knowledge of these matters. He does not identify his source and makes clear his unwillingness to do so. He does not indicate whether the source was speaking on the basis of first-hand knowledge or was merely repeating matters reported to him/her by another.

70. On the other hand the conduct of Ms Goodall to which, as reported by both sides, I have referred in some detail, is almost wholly antithetical to the notion that the journals were not treated by staff as confidential. If staff were free to take and keep copies of them on the footing that they were not confidential, her anxiety to retrieve the copies she claims she had made available to the defendant and return them to the claimant's Private Office is inexplicable.

71. The only "first-hand" knowledge to be set against the clear evidence of Sir Stephen Lamport and Sir Michael Peat that the journals were confidential and were treated as such in the claimant's Private Office and against the inferences to be drawn from Ms Goodall's conduct is that of Mr Bolland. But it is to be noted that even Mr Bolland did not say that the journals were not in any sense treated as confidential. He goes no further than to say that "there was a very relaxed attitude" in the Private Office to the contents of the journals. He contrasts this with the treatment of certain documents, for example papers from the Cabinet or Government briefings, which, not surprisingly, were treated as "extremely confidential". Indeed, he refers to the journals as not being regarded by the claimant or anyone in his office as "*especially* 'secret' or as scandalous documents or anything like that". (emphasis added)

72. As to the more general assertion that the claimant's intention in circulating his journals was to influence others' opinions - presumably their political opinions otherwise the point is of no relevance - there is, as Mr Tomlinson pointed out, no evidence at all that this was his purpose. Mr Bolland certainly does not say so. On the contrary, Mr Bolland's evidence about the journals is, as I have already mentioned, that the claimant viewed them "both as a historical record and as a bit of fun" and that the claimant "would try to make them amusing …". As Mr Tomlinson submitted, although this being a summary judgment hearing the court cannot investigate the credibility of witnesses or the value of their evidence, the court is entitled to assume that the defendant has put its evidence at its highest. What Mr Bolland says is, for all practical purposes, the defendant's evidence on this issue. Moreover, Mr Tomlinson pointed out, it is not said by the defendant that there is other evidence or that there are other witnesses whom they have not yet been able to approach who can confirm what Mr Bolland says.

73. Even allowing for the differences of emphasis between the claimant's witnesses on the one hand and Mr Bolland on the other, it is obvious that the claimant regarded his journals as private and confidential. The envelopes in which copies were circulated to persons outside the Private Office were so marked. It is also obvious that staff within the Private Office were not free to treat them as other than confidential any more than they were free to treat other matters which came to their knowledge when working in the Private Office as anything other than confidential. The unchallenged evidence was that the employment contracts of persons in the claimant's service made abundantly clear that any information concerning the claimant which came to the employee's knowledge during that person's employment in the claimant's service was subject to an undertaking of confidence and was not to be revealed to any unauthorised person. There is nothing in the evidence - except, at most, the assertion of the unnamed source whom the defendant is not willing to identify and who is referred to in Mr Wright's witness statement - to say that the purpose of the journals was to influence political opinions. Indeed, one only has to read the Hong Kong journal to appreciate how lame the suggestion is that that might be its purpose.

74. As to the number of people to whom journals were circulated, the point is only relevant if it can be said that the distribution of the journals was so widespread that it could not be supposed that there was any expectation that their contents would be kept confidential. Discounting the assertion of the unnamed source referred to in Mr Wright's evidence (in particular his claim that recipients included the present and a past Prime Minister, other senior politicians and a number of other public figures) the

evidence was that the recipients were individually selected by the claimant, that each received his/her copy under cover of a signed letter from the claimant and that the maximum number of recipients of any one journal was forty-six (according to the evidence of Sir Michael Peat) and seventy-five (according to the evidence of Mr Bolland). The claimant's evidence, which on this point was not directly controverted by any evidence from the defendant, was that fourteen copies of the Hong Kong Journal were distributed and that, taking into account copies addressed to married couples, the number of recipients was twenty-one.

75. There is plainly an issue over just how many copies of each journal were sent and to whom which cannot be resolved on an application of this kind. But whether the upper figure is forty-six or seventy-five (or some figure in between) does not matter. Even if the figure is as many as seventy-five, this does not mean that the journals are not to be treated as confidential. The celebrated wedding reception which featured in Douglas v Hello! Ltd (No. 3) [2005] EWCA Civ 595; [2006] QB 125 and which was found to be a private event so as to lend support to the conclusion that the publication by the defendant of unauthorised photographs of the reception constituted a breach of confidence, was attended by 350 wedding guests.

76. Mr Bolland claims that the recipients included "some politicians, media people, journalists and actors". He is unspecific as to who these persons were. He does not say which journals went to which persons. He does not suggest - and there is no evidence before the court to suggest - that the Hong Kong journal was sent to any journalist or politician other than Mr Soames MP or that any of the other seven were. But whether or not the recipients did include, for example, journalists the striking feature of the evidence is the absence of any suggestion that any recipients of the journals have in the past felt free, without first obtaining the claimant's consent, to publicise the contents of any of the journals. This is all the more striking given that, as is common ground, the claimant's habit of producing handwritten journals of his overseas visits goes back very many years.

(2) the source of the defendant's copies of the eight journals

77. The other factual matter identified by Mr Tomlinson is the source of the defendants' copies of the eight journals and in particular whether the source had come by them legitimately. It is the fifth of Mr Warby's key background facts.

78. The defendant's evidence about this comes from Mr Wright. He refers to Ms Nicholl, The Mail on Sunday's Diary Editor, telling him what she had been told by the unnamed intermediary who, in turn, was reporting what the intermediary's unnamed source had said, namely that "the source was a man who had worked with the Prince in some way … had some involvement in the game of Polo with the Prince and had travelled with him ...". Ms Nicholl's impression, according to Mr Wright, was that "the source was someone of some seniority who was one of the recipients of the journals and had received the journals legitimately".

79. As against that vague and (triple) hearsay account is the fact, apparent as much from the defendant's evidence as from the claimant's, that Ms Goodall, an ex-employee of the claimant and the person who, according to Mr Bolland, dealt with the journals, would photocopy them and then send them out and who, moreover, was in the claimant's service throughout the period when the eight journals were written, had

approached The Mail on Sunday claiming that the documents - the typed-up journals - in the defendant's possession were hers and stating that she wanted them back. She made her approach on the very day, 14 October 2005, that Ms Nicholl had informed the intermediary (shortly before Ms Goodall's approach) that the defendant had another source for the journals and that it would obtain them from that source if the intermediary's source was not willing to proceed.

80. If Ms Goodall was not the source of the copies of the eight journals in the defendant's possession, the coincidence of her call to the defendant is remarkable indeed. Moreover, Ms Goodall was aware of the intermediary because, at her meeting with Mr Wellington later that same day, she mentioned the conversation which Ms Nicholl of the defendant had had with the intermediary that very day. This suggests, at the very least, that Ms Goodall knew who the intermediary was and was able to contact that person. The defendant evidently believed Ms Goodall's account because it gave copies of the journals to her to enable her to return them to Clarence House as she had made clear that she was anxious to do.

81. All of this comes from the defendant's own evidence. The claimant's evidence, which is entirely consistent with this, refers to Ms Goodall's admission to the claimant's Press Secretary that she had removed copies of the journals, had asked a friend to approach the defendant and that it was the friend who had supplied the copies to Ms Nicholl.

82. In short, the evidence is overwhelmingly that the source of the eight journals was Ms Goodall. On what I have read of the evidence I do not consider that the defendant has a realistic prospect of showing otherwise: its only contrary evidence depends on what the unidentified intermediary claims to have been told by an unnamed source.

83. Assuming that the copies came from Ms Goodall (or some other person, as yet unidentified, in the claimant's service) Mr Tomlinson submitted, and I agree, that the copies received by the defendant were not "legitimately" obtained since, on the unchallenged evidence from the claimant's side, persons in the claimant's service were subject to express duties of confidence in relation to items such as the journals. This must be so even if, as Mr Bolland claimed, copies of the (handwritten) journals were left around the claimant's Private Office. Mr Bolland does not suggest that anyone in that office had authority to make any typescripts of the journals. Moreover, as Mr Tomlinson further submitted, even if the source was one of the lawful recipients of the journal (and such a person would presumably have had to have been a recipient of all eight journals) he or she was, on the evidence, subject to an implied duty of confidence since, on the evidence, the journals were sent out to recipients in envelopes clearly marked "Private and Confidential".

84. In short, the evidence again points overwhelmingly to the conclusion that the copies of the journals received by the defendant were not legitimately obtained. The defendant's case that the copies received were legitimate copies rests entirely on what the unidentified intermediary claims to have been told by an unnamed source.

The claim in confidence

85. 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; [2004] 2 AC 457. In that case the

claimant, a famous fashion model, sued the defendant for damages for breach of confidentiality by publishing details of the therapy she was receiving for drug addiction, including photographs of her in a street as she was leaving a self-help group meeting. Although the House was divided over whether publication of this information constituted an unjustified infringement of the claimant's right to privacy in respect of the details of her therapy (the majority finding that it did) there was no division of opinion over the relevant approach in law.

86. Central to the arguments in that case was the interaction of the rights and the qualifications of those rights set out in articles 8 and 10 of the Convention. Article 8 provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

87. Article 10 provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers …
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

88. In Campbell, Lord Nicholls, after explaining (at [17] and [18]) that the values enshrined in articles 8 and 10 were now part of the cause of action for breach of confidence, stated (at [20]) that the initial question was "whether the published information engaged article 8 at all by being within the sphere of the complainant's private or family life". "Essentially" he said (at [21]) "the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privicy." He made clear that this initial question was distinct from the quite separate question which arises which is whether interference with the right by, for example, publication of the information, is justified by recourse to article 8(2) or by recourse to article 10 which, like article 8(2), recognises by article 10(2) that there are occasions when protection of the rights of others may make it necessary for

freedom of expression to give way. "When both these articles are engaged" he said "a difficult question of proportionality may arise".

89. Lord Hope referred to the exercise of balancing the competing rights of privacy and free speech enshrined in articles 8 and 10, once the initial threshold requirement of the need to demonstrate the private (or confidential) nature of what was (or was to be) published had been met, in the following terms (at [105]):

> "The rights guaranteed by these articles are qualified rights. Article 8(1) protects the right to respect for private life, but recognition is given in article 8(2) to the protection of the rights and freedoms of others. Article 10(1) protects the right to freedom of expression, but article 10(2) recognises the need to protect the rights and freedoms of others. The effect of these provisions is that the right to privacy which lies at the heart of an action for breach of confidence has to be balanced against the right of the media to impart information to the public. And the right of the media to impart information to the public has to be balanced in its turn against the respect that must be given to private life."

90. Stressing the importance of the safeguards to be afforded to the press in a democratic society, Lord Hope cited Jersild v Denmark (1994) 19 EHRR 1 (at [31]) that "not only does the press have the task of imparting such information [ie information and ideas of public interest]: the public also has the right to receive them". In a later passage (at [113]), Lord Hope said this:

> "Any interference with the public interest in disclosure has to be balanced against the interference with the right of the individual to respect for their private life. The decisions that are then taken are open to review by the court. The tests which the court must apply are the familiar ones. They are whether publication of the material pursues a legitimate aim and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy. The jurisprudence of the European Court of Human Rights explains how these principles are to be understood and applied in the context of the facts of each case. Any restriction of the right to freedom of expression must be subjected to very close scrutiny. But so too must any restriction of the right to respect for private life. Neither article 8 nor article 10 has any pre-eminence over the other in the conduct of this exercise."

91. Lady Hale put the matter as follows (at [134]):

> "The position we have reached is that the exercise of balancing article 8 and article 10 may begin when the person publishing the information knows or ought to know that there is a reasonable expectation that the information in question will be kept confidential."

92. She later emphasised (at [137]):

> "…that the 'reasonable expectation of privacy' is a threshold test which brings the balancing exercise into play. It is not the end of the story. Once the information is identified as 'private' in this way, the court must balance the claimant's interest in keeping the information private against the countervailing interest of the recipient in publishing it. Very often, it can be expected that the countervailing rights of the recipient will prevail."

93. She too pointed out that neither right takes precedence over the other, that both are qualified and that (at [139]):

> "They may respectively be interfered with or restricted provided that three conditions are fulfilled. (a) The interference or restriction must be 'in accordance with the law'; it must have a basis in national law which conforms to the Convention standards of legality. (b) It must pursue one of the legitimate aims set out in each article. Article 8(2) provides for 'the protection of the rights and freedoms of others'. Article 10(2) provides for 'the protection of the reputation or rights of others' and for 'preventing the disclosure of information received in confidence'. The rights referred to may either be rights protected under the national law or, as in this case, other Convention rights. (c) Above all, the interference or restriction must be 'necessary in a democratic society'; it must meet a 'pressing social need' and be no greater than is proportionate to the legitimate aim pursued; the reasons given for it must be both 'relevant' and 'sufficient ' for this purpose."

94. Lady Hale went on to explain (at [140] and [141]) that application of the proportionality test:

> "…is much less straightforward when two Convention rights are in play, and the proportionality of interfering with one has to be balanced against the proportionality of restricting the other. As each is a fundamental right, there is evidently a 'pressing social need' to protect it."

95. She added that the proportionality test in such a case:

> "..involves looking first at the comparative importance of the actual rights being claimed in the individual case; then at the justifications for interfering with or restricting each of those rights; and applying the proportionality test to each."

96. In a later passage (at [147] to [148]) Lady Hale pointed out that, where freedom of expression was being asserted,

> "There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organisation of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elected office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made."

97. In In re S (A Child) [2004] UKHL 47; [2005] I AC 593 Lord Steyn said (at [17]) that four principles emerged from the opinions in Campbell arising out of the interplay between articles 8 and 10:

> "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."

98. With that brief introduction to the relevant principles I come next to the application of those principles to the facts as disclosed by the evidence. I propose to consider the two questions: namely, reasonable expectation of privacy and the carrying out of the balancing of the claimant's article 8 right to privacy against the defendant's article 10 right to freedom of expression, by reference to the Hong Kong journal and then to consider separately the position of the other seven journals.

(1) a reasonable expectation of privacy: the Hong Kong journal

99. Did the claimant have a reasonable expectation of privacy in respect of the contents of his Hong Kong journal? For the purpose of this application the question is whether the defendant has no real prospect of successfully contending that the claimant had no such expectation. If that question is resolved in the claimant's favour it is clear that at the time the defendant made disclosures of the contents of the Hong Kong journal in the 13 November edition it was on notice of the claimant's claim to privacy in respect of the contents of that and the other journals: it was put on notice by both Sir Michael Peat and the claimant's solicitors.

100. The first point to note is that, whether the Hong Kong journal was circulated among up to seventy-five recipients (as Mr Bolland claims) rather than to no more than twenty-one recipients (as the claimant's evidence suggests), the information in it, that is to say the claimant's description of events during the Hong Kong tour and his impressions and views prompted by those events, was not in the public domain until the defendant issued its 13 November edition of The Mail on Sunday in which many of these matters were set out and commented upon. In Douglas v Hello! Ltd (No 3) [2005] EWCA Civ 595; [2006] QB 125, the Court of Appeal said (at [55]):

> "Information will be confidential if it is available to one person (or a group of people) and not generally available to others, provided that the person (or group) who possesses the information does not intend that it should become available to others."

101. There is no suggestion in the evidence that the information in the Hong Kong journal was generally available to others.

102. It is perfectly plain that the claimant intended these journals to be and to remain confidential notwithstanding their circulation to hand-picked recipients. They were sent in envelopes marked "Private and Confidential". The fact that they could be read and, let it be assumed, were read by staff in the claimant's Private Office, all of whom on the claimant's uncontradicted evidence were subject to duties of confidentiality which clearly extended to matters such as the impressions and views of the claimant of the kind contained in the Hong Kong journal, does not in the least undermine this obvious fact. For the reasons already explained, there is no evidence - beyond, at the most, the assertions of the unnamed source referred to by Mr Wright - to indicate that the claimant had any intention, when writing and distributing his journals, to influence the political (or any other) opinions of those to whom they were sent. I reject Mr Warby's submission that Sir Michael Peat's comment that the claimant finds it valuable to have the views of those to whom he sends the journals in response to what he has written is indicative of a wish by the claimant to influence their opinions. But even if the claimant did have such an intention I cannot see why that fact should detract from his expectation of confidentiality in what he had written.

103. Was the claimant's expectation of privacy in respect of the contents of his journal a reasonable expectation? Mr Warby urged a number of reasons for submitting that it was not or - and this would be sufficient on an application of this kind - that there is a real prospect of showing that it was not. Some of those matters seem to me to go much more to the application of the proportionality test and the carrying out of the balancing exercise rather than to satisfaction of the threshold requirement but I accept, without going into the authorities, that the distinction is not always easy to draw.

104. The first was that the material in the Hong Kong journal did not relate to the claimant's private life in any significant way but rather to the public life of a public figure concerning political events, setting out views and impressions which Mr Warby described as "of a political character". By "political" Mr Warby meant, as he explained, issues of governmental policy and public governance. The information, he said, was obtained and the views were formed by the claimant in the course of official duties carried out on behalf of the nation and at public expense and, to that extent, were of a public and governmental nature rather than of a private and personal

character and the fact that these matters were recorded in an unofficial document does not undermine the point. At best, he said, the information was at the margin of the distinction between these two species of information. It was, he said, a world away from the type of "celebrity information" which has formed the staple fare of many of the post-Human Rights Act privacy claims.

105. Second, Mr Warby submitted that there can be no confidentiality, or no reasonable expectation of confidentiality, in information which, if held by a public authority, would or may well be disclosable under the Freedom of Information Act 2000. As the claimant's Hong Kong visit was at public expense and was carried out on behalf of the public it is highly likely, said Mr Warby, that much of what the claimant did and said was recorded in reports to the Foreign Office or found its way on to other public records. Although the defendant was unable to produce any evidence to indicate that such reporting had occurred, and although (as I was told) no Freedom of Information Act request has yet been made, it was "likely" he said to be there and, if it was, would be disclosable in the course of preparation for a trial or would be obtained under the Act before the claim came on for trial.

106. Third, Mr Warby submitted that the claimant is the epitome of the public figure referred to by Lord Woolf MR in A v B plc [2002] EWCA Civ 337; [2003] QB 195 ("Flitcroft"), who has courted public attention and has done so for views of the same or a similar kind to those contained in the Hong Kong journal. The claimant, he said, has made no secret of his views of the Chinese Government, his boycotting (as the defendant contends it to have been) of the 1999 Chinese Embassy banquet, his reception of the Dalai Lama, and his views on politicians as publicised in Mr Dimbleby's biography and on other matters of a political nature. Not only, said Mr Warby, has the claimant never before brought proceedings or even complained to any newspaper on those occasions when his otherwise secret communications with ministers have been leaked to the press but, according to the evidence of Mr Richard Kay, the Daily Mail's Royal Correspondent for seventeen years until 2003 and currently the Diary Editor of that newspaper, he has on at least one occasion, in September 2002, expressly authorised disclosure of an otherwise secret communication, namely a letter said to have been sent by the claimant to the then Lord Chancellor decrying the litigation culture in this country. As a result, the claimant has, it was submitted, "opened up to legitimate public scrutiny" this "zone" of his life and, having made these matters "public property", cannot now claim a reasonable expectation of privacy in respect of the contents of a journal which covers similar matters.

107. Fourth, Mr Warby submitted that as a persistent and ardent lobbyist of ministers and others on a range of public issues, wielding the influence which only his special status can provide, the electorate has the right to know his views in order to assess and evaluate the conduct of the government. This was said to lead to the conclusion (as I understood the submission) that the claimant could not have any reasonable expectation of privacy in respect of information of a similar political nature merely because it is contained in one of his journals.

108. Fifth, the "political behaviour" of the claimant as Heir to the Throne is such as to represent, it was said, a marked departure from established constitutional conventions, alternatively an attempt to alter such conventions and establish new ones, both of which matters raise questions whether such behaviour is "democratically acceptable"

and about which the electorate has a right to know and reach a decision. As with the previous matter, I understood the submission to be that the claimant could not have any reasonable expectation of privacy in respect of information, so far as contained in his journals, which might reasonably be thought to cast light upon this topic.

109. Sixth, the claimant could not reasonably expect that, having, as the evidence strongly suggested, deliberately boycotted the 1999 Chinese Embassy banquet and intentionally made himself unavailable for the 2005 Buckingham Palace banquet, any information in his Hong Kong journal which might throw light on that matter should be kept confidential.

110. As I have mentioned, several of these matters - particularly the last three - seem to me to go to the proportionality test and balancing exercise and not to whether the claimant had any reasonable expectation of privacy in respect of information contained in his Hong Kong journal. That apart, I am very firmly of the view that, whether taken individually or together, the matters to which Mr Warby referred me do not justify the conclusion that the claimant had no reasonable expectation of privacy in the contents of that journal.

111. The fact that the journal deals with events most of which are a matter of public record is irrelevant. The point about the Hong Kong journal is that it was a record of the claimant's impressions of the events in which he took part on the occasion of his Hong Kong tour. It is his impressions and the musings prompted by those events (and, it may be said, the choice of the events themselves) which are what is significant about the journal.

112. To an extent, as Mr Tomlinson conceded, the claimant's reflections appearing from that journal can be said in the widest sense to be political but I fail to see why that fact should mean that the claimant can have no reasonable expectation of privacy in respect of what he has written. No less immaterial are that the claimant is, assuming he is, a persistent and effective lobbyist, that he is in a position to wield influence, that he is Heir to the Throne and that in the way he goes about these activities he may not be acting in accordance with constitutional convention. Also immaterial in my view is the fact that the public is curious to know what the claimant thinks about the events in which he participates on the nation's behalf.

113. Nor do I see how recourse to the Freedom of Information Act assists the defendant. There is no evidence that the claimant has filed with a public authority any records of the tours to which the eight journals relate. There is certainly no evidence that he has ever filed with any public authority a copy of any of the eight journals. The possibility that he may have done is speculation without the least evidential foundation.

114. The fact that the Hong Kong journal is not of a highly personal or private nature, in the sense that it does not deal with matters of an intimate or medical nature or about members of his family and that its contents are a very long way from the often salacious celebrity information that sometimes features in privacy claims, does not rob the claimant of a reasonable expectation of privacy in the matters to which in his Hong Kong journal he refers.

115. In particular, I dissent from the view that, by speaking out publicly both in speeches and in published articles on issues which in the widest sense are political, the claimant has somehow forfeited any reasonable expectation of privacy in respect of such matters when committed to a handwritten journal not intended by the claimant to be open to public scrutiny. Were it otherwise no politician could ever have any reasonable expectation of privacy in a private diary in which he expresses political views. In this respect there is, to my mind, a world of difference between this case and the situation discussed in A v B [2005] EWHC 1651; [2005] EMLR 36 where by going public on some aspects of his private life - in that case it was the claimant's drug-taking - a person may no longer reasonably expect to maintain privacy, whatever his personal wishes, in respect of related matters. Whether in any case this is so and what in such circumstances the "zone" is of the person's life that is thereby opened up to legitimate public scrutiny - matters which were discussed in A v B (at paragraph 28) - must turn on the particular facts of the case. This is not such a case.

116. For these reasons, the claimant establishes, and does so without any real prospect of the defendant demonstrating to the contrary, that he had a reasonable expectation of privacy in the contents of the Hong Kong journal.

(2) the balancing exercise

117. I have already set out what the balancing exercise - sometimes known as the parallel analysis - involves. Before coming to the parties' submissions on the matter two particular points need to be made.

118. The first is that it is important not to overlook the fact that what may be in the public interest to know and thus for the media to publicise in exercise of their freedom of speech is not to be confused with what is interesting to the public and therefore in a newspaper's commercial interest to publish. This is particularly so in the case of someone like the claimant whose every thought and action is, in some quarters at least, a matter of endless fascination.

119. The second is to note that there is a particular tension where a public figure is involved. In Flitcroft Lord Woolf CJ pointed out (at page 208) that a public figure must, because of his public position, "expect and accept that his actions will be more closely scrutinised by the media" and that "conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure". He said that "if you have courted public attention then you have less ground to object to the intrusion which follows". He nevertheless made clear that "a public figure is entitled to a private life". In Campbell Lord Hoffmann (at [50]) emphasised that human rights law has identified "private information as something worth protecting as an aspect of human autonomy and dignity" and (at [51]) that the new approach to an action for unjustified publication of personal information "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".

120. In McKennitt v Ash [2005] EWHC 3003 (QB) Eady J summarised the importance of this consideration, to which impetus has been given by recent Strasbourg jurisprudence (in particular Von Hannover v Germany (2005) 40 EHRR 1), when he said this (at [57]):

> "It is clear that there is a significant shift taking place as between, on the one hand, freedom of expression for the media and of the corresponding interest of the public to receive information, and, on the other hand, the legitimate expectation of citizens to have their private lives protected. As was made clear [in Von Hannover], even where there is a genuine public interest, alongside a commercial interest in the media in publishing articles or photographs, sometimes such interests would have to yield to the individual citizen's right to the effective protection of private life."

121. He also warned (at [95]) that, in the case of information about well known persons, it was necessary, in order to protect the legitimate rights of such persons to a private life, "to scrutinise with care any claims to public interest - which are sometimes made by the media and their representatives on a rather formulaic basis".

122. I come then to the balancing exercise. The starting point is to identify what for the purposes of article 8(2) the legitimate aim is which is said to justify interference with the claimant's right of privacy in respect of the contents of the Hong Kong journal enshrined by article 8(1) and why it is necessary that that right should be interfered with.

123. Mr Warby identified as the legitimate aim the electorate's right to receive information of four kinds : (1) information which will enable it to understand the nature of the lobbying to which their elected leaders are subject, (2) information which will enable it to assess and pass judgment on the political conduct of the Heir to the Throne, (3) information which will assist it to evaluate the conduct of the claimant in failing to take part in the Chinese Embassy banquet of 1999 and the Buckingham Palace banquet of 2005 and (4) information which corrects the claimant's own public statements about his non-attendance at the 1999 banquet.

124. Mr Warby submitted that the relevant context for these claims was (1) the claimant's status as a persistent and influential lobbyist of ministers and other elected politicians on a range of issues of public interest, (2) his status as Heir to the Throne and the expectation that as future King he should maintain political neutrality, comparing that status and expectation with the claimant's involvement in matters of controversy, (3) his willingness, when it suits him, to make available otherwise confidential documents to enable his views on political matters to be conveyed (for example by means of the authorised biography written by Mr Jonathan Dimbleby), (4) the strong perception, not least from the evidence of Mr Bolland, that the claimant deliberately boycotted the return banquet in the Chinese Embassy in 1999 which was to be contrasted with his subsequent public denials of any such intention and (5), more generally, the claimant's dislike of the Chinese Government. It was necessary in a democracy, said Mr Warby, that a newspaper such as the defendant's should be free to make disclosures from the claimant's Hong Kong journal which touch on these matters. The price of political activism, he said, is transparency.

125. Mr Warby submitted that, given the limited weight to be attributed to the claimant's right of privacy (assuming the claimant was able to establish it) in the contents of the Hong Kong journal (in that they dealt with the claimant's participation in public events and set out his views and impressions of those events, many of which were

political in nature, and did not deal with matters of a personal or family nature), and given also his willingness by speech and articles and by allowing persons such as Mr Dimbleby when writing his biography in 1994 to have access to a whole range of his otherwise confidential papers and, not least, to have access to travel journals, it was proportionate to the legitimate aim earlier identified to interfere with the claimant's right of privacy to the extent that the defendant had done so in the articles which appeared in the 13 November edition. He submitted that there was a pressing social need for the interference since the aims identified were for the protection of the rights and freedoms of the electorate. He further submitted that the defendant was entitled in accordance with well-established Strasbourg jurisprudence to a wide latitude in the presentation and details of the information from the Hong Kong journal contained in the articles and that the defendant had not overstepped those bounds.

126. Coming to the article 10 analysis, although Mr Warby accepted that a legitimate aim to justify interference with the defendant's article 10 right had been identified - namely protecting the claimant's confidentiality in the Hong Kong journal - he submitted nevertheless that the weight to be attributed to that aim was, in view of the journal's contents, so slight that it could not outweigh the importance of the defendant's right to impart (and the public's corresponding right to receive) the information, views and opinions on the topics covered in the articles.

127. In short, he submitted, the analysis yields the same result in both cases, namely that the claimant's right of privacy in respect of the contents of the Hong Kong journal was legitimately overridden.

128. It is necessary in my view to examine carefully what the Hong Kong journal actually says and what the articles appearing in the 13 November edition seek to draw from that journal.

129. As to the claimant's activities as a lobbyist and the concerns to which that fact is said to give rise, there is no mention of lobbying ministers or other politicians in the articles and (with one exception which I will come to) no suggestion in them that any of the information in the journal casts any light on communications between the claimant and ministers. It is in any event no secret that the claimant writes to ministers. It is mentioned in Mr Dimbleby's book. The Hong Kong journal contributes nothing to the subject and the articles have nothing to say about the matter either.

130. What then of the claimant' political conduct as Heir to the Throne and in particular any concern that he may be acting contrary to what constitutional convention requires of him? Again, there is nothing in the articles to suggest that his conduct is being assessed and a judgment made about it. There is not a hint of this in the editorial comment. The articles certainly assert that the Hong Kong journal shows that the claimant entertains strong views about the Chinese Government and other matters. They do not suggest that, for example, the claimant used the opportunity of his Hong Kong tour to involve himself in contentious matters or to press his views on others. The most that is said in the articles is that "the memoirs [plural] … provide a fascinating insight into how he [the claimant] discreetly contributes to the formation of foreign policy". Having read and re-read the Hong Kong journal it is not evident how that particular memoir enables such a conclusion to be reached unless it is because the claimant briefly shared the company (during the tour) of the Prime

Minister during which he suggested, in what is the only specific reference to the claimant expressing any views to a British politician, that the best way for Britain to find a fresh national direction was "to concentrate on all the things that we do best as a nation and try to work out how they can be put to best use in a modern context". It might be thought that that is an expression of view couched at a very high level of generality.

131. What then of the contribution that the Hong Kong journal makes to the claimant's absence from the 1999 and 2005 banquets, the debate that those absences have prompted and the controversy over whether privately the claimant had arranged for the media to understand that his absence was intended to show his disapproval of the Chinese Government when he was denying publicly that that was the reason for his absence? The Hong Kong journal certainly shows the claimant's scepticism of the Chinese Government and its ways and his fears for the future on that account. But it is difficult to see how his comments on these matters cast any but the most peripheral light on his absence two years later from the 1999 Embassy banquet, let alone his absence from a banquet eight years later.

132. The conclusion from all of this can only be that the contribution that the Hong Kong journal makes to any public debate or to any process of informing the electorate about the various matters identified by Mr Warby in the course of his submissions is at best minimal.

133. In these circumstances it is to my mind impossible to say that the disclosures made by the defendant from the journal's contents are *necessary* in a democratic society for the protection of the rights and freedoms of others and that, in consequence, the claimant's entitlement to confidentiality in respect of that journal should be overridden. 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.

134. What then of the other side of the equation? The defendant's right to freedom of expression enshrined in article 10 is obviously extremely important. The vital role of the press in a modern democracy is not in doubt. But article 10(2) makes explicit that the exercise of the right to freedom of expression carries responsibilities, one of which is preventing the disclosure of information received in confidence. That plainly includes the right to protect the confidentiality of a private journal.

135. Mr Tomlinson submitted that this is a case where interference with the defendant's article 10(1) right is justified under article 10(2). He submitted 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. He submitted that it is clear from the editorial comment in the 13 November edition, and from the other articles, that the defendant does not suggest that the Hong Kong journal reveals material about the claimant previously unknown to the public which casts doubt on

his suitability to perform his public functions or which casts new light on his opinions on public issues or which contributes to any current political debate. He submitted that it is clear from the presentation of the material in the 13 November edition that its primary importance is said to be as a "historic document". He submitted that, in any event, the interference with the defendant's article 10 right is a limited one. The defendant was not prevented from publishing information derived from the Hong Kong journal. It has exercised its freedom of expression. The interference is limited to compensation in respect of that publication.

136. Overall, he submitted that the "parallel analysis" reveals that an interference with the claimant's article 8 rights is not justified while interference with the defendant's article 10 rights is justified. He submitted that the "public interest" considerations all point one way.

137. I agree. Mr Tomlinson submitted that it would be remarkable if in a case of this sort there were to be a public interest justification for disclosure where it is not alleged that any of the traditionally recognised categories apply. There was no question of exposure of any kind of wrongdoing or of hypocrisy, or, given the defendant's case, of exposure of anything new about the claimant's opinions. He accepted, of course, that the public interest in disclosure of matters of confidence is not limited in the way that it was once thought to be and must be approached more generally.

138. Standing back from the matter in the way that Mr Tomlinson suggested, it would indeed be remarkable if, in the interests of press freedom, the claimant cannot enjoy confidentiality in the musings and reflections which "as a bit of fun" (to quote Mr Bolland) the claimant chose to commit to paper in the course of his return flight to this country.

139. I must finally ask myself whether these are matters which should not be resolved on an application for summary judgment but should be left to a trial because the defendant has a real prospect of defending the claim at trial or because there is some other compelling reason why the claim should be disposed of at trial.

140. I am not persuaded that the matter should go to trial. The parallel analysis depends upon an examination of the contents of the Hong Kong journal and the use made of those contents in the 13 November edition. There is no issue about the extent of the claimant's various public activities both as Heir to the Throne and otherwise and also in respect of his "political" views and lobbying of ministers; for the purpose of this application it has been assumed on the claimant's behalf that these matters are as the defendant states them to be. The only factual issues are those identified earlier which go to whether the claimant had a reasonable expectation of privacy in the contents of his journals. Stripping away those difference in the evidence which go to matters of detail, there is, for the reasons set our earlier, no real prospect of the defendant showing that the claimant did not have that reasonable expectation of privacy or that, at the time of publication of the 13 November edition, the defendant was not fully on notice of the claimant's claim to confidence and the reasons for it.

141. The claim for breach of confidence in respect of the Hong Kong journal therefore succeeds. As already noted, the relief sought is limited to compensation for the breach.

The other journals

142. I have thus far concentrated on the Hong Kong journal and whether the claimant establishes liability in the defendant for breach of his right of privacy in respect of the contents of that document.

143. What about the other seven journals? There is no evidence before the court to indicate what they contain. Beyond the fact that they are travel journals and concern overseas tours and that they were written and circulated in circumstances similar to the Hong Kong journal, I know nothing about them. In contrast to the Hong Kong journal I am not supplied with any lists of recipients. I am not told to how many persons each of those journals was sent.

144. According to the evidence of Elizabeth Hartley (a partner in Reynolds Porter Chamberlain, the solicitors acting for the defendant) the other journals are of a "similar nature" to the Hong Kong journal. According to Mr Wright they "contain many matters of considerable legitimate interest to the public". Whether that is right or not I am in no position to say.

145. The defendant's position about these other journals is that it has not yet formed any intention to publish any of the information contained in them. It has also made clear that if it decides that it does plan to publish anything from them it will not do so without giving the claimant a minimum of 24 hours' notice of its intention to do so. In that way, it says, the claimant will have an opportunity to submit to the decision of the court the question whether, in the circumstances prevailing at that time, publication is in all the circumstances legitimate. (In passing I would comment, although the matter does not arise on this application, that, given the very many months that the defendant has been in possession of copies of the seven other journals and has therefore had the opportunity to examine whatever it is that those journals say, the provision to the claimant of a minimum of 24 hours' notice of any intention to make disclosures from them would seem to be unreasonably short in any event. I would have thought that a minimum of seven days' notice would have been the least that the claimant could reasonably expect.)

146. The claimant's application for summary judgment in respect of its confidence claim extends as much to the other journals as it does to the Hong Kong journal. Indeed, in one respect, it goes further in that whereas in the case of the Hong Kong journal it does not seek and, now that the contents of that journal are fully in the public domain, cannot seek any injunction to protect any right of confidence in them but merely limits its claim to damages (for which purpose it seeks an inquiry), in the case of the other seven journals it seeks an injunction to restrain the defendant from using or disclosing their contents. In other words, it seeks an injunction to restrain the defendant from exercising its article 10 right to freedom of expression in respect of any of the information contained in those seven journals.

147. On what I have seen in the evidence there is every reason for concluding that the claimant establishes, as much in relation to the other seven journals as he does in relation to the Hong Kong journal, a reasonable expectation of privacy in respect of their contents. That said, I am not willing on a summary application of this kind and without knowing anything of what the journals say to shut out the defendant from arguing at trial that the court should not prevent by a permanent injunction the further

use by the defendant of information contained in those other journals when, for all the court knows, circumstances may arise which may make the disclosure an entirely appropriate exercise of the defendant's right of freedom of expression. Strasbourg and domestic jurisprudence on the operation of the right to freedom of expression enshrined in article 10 makes clear that to justify making any order of the kind which the claimant seeks evidence is required to demonstrate that this is a necessary step. At the very least the court must know what the other journals contain.

148. I am therefore only willing on this application to give the claimant relief for that part of his confidence claim which relates to the Hong Kong journal. Given that its contents are already in the public domain that relief will be confined to an inquiry as to damages in respect of any loss that the claimant can demonstrate that he has suffered by reason of the defendant's breach of his right of confidence in it. I should add that it was not suggested that because the claimant's evidence does not touch on what damage if any he has suffered as a result of the breach of his right of confidence in respect of the contents of the Hong Kong journal he is not for that reason entitled to an inquiry.

The claim in copyright

149. There is no doubt that copyright subsists in the journals and that the claimant is the author of them. There is no suggestion that any of them have been copied from other sources. The journals are, for copyright purposes, original literary works in that original skill and labour were expended in their creation. The contrary is not arguable. (For what it is worth, the defendant itself said, in one of the articles which appeared in the 13 November edition, that the journals established the claimant as "a literary figure of genuine stature".)

150. The only issues which arise are, first, whether the claimant is the owner of copyright in the journals, second, if he is, whether the defendant has infringed his copyright in the journals (or any of them), third, whether, if infringement is otherwise established, the defendant can available itself of any and if so what defences to infringement and, fourth, what relief the claimant should obtain for whatever infringements are established.

(1) Copyright ownership

151. As undisputed creator of the journals, the claimant is the author of them for copyright purposes and, as such, the first owner of copyright in them. See sections 9(1) and 11(1) of the CDPA. There is no suggestion that he has assigned or otherwise dealt with copyright in the works. The only point raised is a contention that the journals are subject to Crown copyright.

152. Section 163 of the CDPA, which deals with Crown copyright, provides that:

> "(1) Where a work is made by Her Majesty or by an officer or servant of the Crown in the course of his duties …
>
> (b) Her Majesty is the first owner of any copyright in the work.

> …
> (2) Copyright in such a work is referred it in this Part as "Crown Copyright" …"

153. There are two answers to this contention. The first is that the claimant is not an official or servant of the Crown in the sense intended by that subsection, namely someone engaged in the service of the executive branch of Government (see Laddie, Prescott and Vitoria, The Modern Law of Copyright and Designs, third edition, at paragraph 36.4). The fact that some or all of the claimant's overseas tours are at taxpayers' expense does not make him an official or servant of the Crown for the duration of the tour in question. Nor, because he may be deputising for the Queen, is he to be somehow regarded as "Her Majesty" for the purposes of the subsection.

154. The second answer is that, in any event, the journals were not made by the claimant "in the course of his duties". They were written by him in his own time and for his own purposes.

(2) Infringement

155. The acts of infringement that are alleged are of two kinds. The first, which concerns acts of primary infringement, consists of the copying of the journals and the issuing to the public of copies of the Hong Kong journal, in each case without the licence of the claimant as owner of the copyright in them.

156. It is not in dispute that the defendant made copies of all of the journals, each in its entirety, and did so without the claimant's licence. This occurred, at the latest, when one of the journals was given to Ms Goodall to return to the claimant and the defendant retained a further set for its own use. This is apparent from paragraph 17 of Mr Wright's witness statement and paragraph 11 of Mr Wellington's. It is not suggested that the defendant had been furnished by the unnamed intermediary with more than one copy of each journal. The making of copies without the claimant's licence was contrary to section 17 of the CDPA which prohibits the reproduction of the copyright work in any material form.

157. Copying for this purpose extends to reproduction of a substantial part of the work. See section 16(3) of the CDPA. It is not in dispute that parts of the Hong Kong journal were reproduced in the 13 November edition and that copies of that newspaper were distributed, by sale or otherwise, to the public. Subject only to whether the extracts so copied were a "substantial part" of the Hong Kong journal and to the so-called fair dealing defences, it is clear that the copying constituted an infringement of copyright contrary to section 17 of the CDPA and that the issue of copies to the public constituted an infringement of copyright contrary to section 18 of CDPA. I will come shortly to those defences.

158. The other act of infringement relied upon, which is in the nature of a secondary infringement, is possession by the defendant in the course of its business and without the claimant's consent as copyright owner of infringing copies of the eight journals knowing or having reason to believe that the copies are infringing copies, contrary to section 23 of the CDPA. The defendant admits possessing such copies. It is clearly on notice of the claimant's copyright claim to the eight journals. Whether or not the defendant had reason to know in detail of these matters before the claim form was

issued (I would be surprised if it did not) the claim to copyright and the reasons for it are explicitly set out in the particulars of claim. Aside from the Crown copyright contention, with which I have dealt, and a further and general contention that it was not in any event appropriate for the claimant to resort to copyright law to vindicate his privacy in the journals (a submission I will come to later), the only defence raised in argument to this part of the copyright claim went to the appropriateness of the relief claimed, in particular whether, as the claimant seeks, I should order delivery up of the infringing copies in the defendant's possession and restrain the defendant from further copyright infringement.

(3) The defences raised

(a) "Substantial part"

159. The defendant contends that what was reproduced in the articles published in the 13 November edition was not a substantial part of the Hong Kong journal. This defence, if it is good, goes only to the acts of infringement based on issuing copies to the public contrary to section 18. The other infringing acts relate to the copying of the entirety of each journal.

160. The defendant has calculated that the extracts quoted verbatim from the journal add up to just over 15% of the whole. It is trite law, however, that substantiality in this context depends upon the quality of what is taken, not its quantity. The parts taken are set out in schedule 3 to the particulars of claim. Not only are they, as Mr Tomlinson and Ms Lane pointed out in their skeleton argument, the parts of the Hong Kong journal which touch on the claimant's opinions and which, not surprisingly, are most likely to be of interest to the newspaper's readers, but they also are the parts which most exactly demonstrate what one of the articles described as the "poignant, insightful and witty" passages of the journal.

161. I am in no doubt that, taken as a whole, the extracts quoted form a substantial part, qualitatively, of the Hong Kong journal. For what the point is worth I also consider that they are substantial in quantative terms. Mr Warby referred only to the fact that the quotations from the articles were short and that the events concerned were well known and described in unoriginal terms. These matters do not go to the question of substantiality. The question is one of law. A trial will not add anything.

(b) The fair dealing defences

162. These are two in number. Like the substantiality defence, these defences go only to reproduction of extracts from the Hong Kong journal. They do not affect the acts of infringement based upon making and possessing copies of the journals.

163. I will take the fair dealing defences in the order in which they were argued before me.

(i) fair dealing for the purpose of reporting current events

164. Section 30(2) of the CDPA 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."

165. The test is objective. The words "reporting current events" are of wide and indefinite scope and require liberal interpretation. See Pro Sieben Media AG v Carlton UK TV Ltd [1999] FSR 610 at 620 to 621. The defence is intended to protect the role of the media in informing the public about matters of current concern to the public. See Ashdown v Telegraph Group Ltd [2002] Ch 149. That case concerned newspaper articles published in late November 1999 which quoted from a minute of an important and highly confidential meeting between, among others, the then leader of the Liberal Democrats and the Prime Minister, which had taken place two years earlier. The meeting had discussed possible future co-operation between the Liberal Democrats and the Government. The Court of Appeal upheld the decision of Sir Andrew Morritt V-C to grant the claimant summary judgment in its claim alleging copyright infringement (there was also a claim in breach of confidence which, however, was not the subject of a summary judgment application). Accepting that, although it had taken place two years before the articles had appeared, the meeting was "arguably a matter of current interest to the public", the court stated that

> "In a democratic society, information about a meeting between the Prime Minister and an opposition party leader during the then current Parliament to discuss possible close co-operation between those parties is very likely to be of legitimate and continuing public interest. It might impinge upon the way in which the public would vote at the next general election. The 'issues' identified by the 'Sunday Telegraph' may not themselves be 'events', but the existence of those issues may help to demonstrate the continuing public interest in a meeting two years earlier."

166. Mr Warby submitted that it is the "events" which need to be "current" not the words being used and that, in the instant case, the current events included the state visit of the President of China, the claimant's not-attendance at the Buckingham Palace banquet, relations generally between Britain and China, and the claimant's "political conduct and its constitutional implications".

167. Mr Tomlinson submitted that the claimant's opinions, so far as disclosed by the Hong Kong journal, are not in themselves a current event and that it is plain that the purpose of the articles in the 13 November edition was to reveal the contents of the Hong Kong journal and report on that revelation as itself a current event rather than to report on some other current event. He submitted that the vast majority of the articles was about the contents of the Hong Kong journal with very little attempt to relate those contents to any separate current event.

168. Although there is much in the articles which cannot conceivably relate to current events, for example the passages reproducing those extracts of the Hong Kong journal concerned with the decision to decommission the Royal Yacht Britannia and with the claimant's amused surprise that, on the flight out, he was travelling Club Class rather than First Class, there are features of the articles which, in the very broadest sense, can arguably be said to relate to current events, taking that expression to include matters of current interest to the public, namely the light that his views on the Chinese

Government might throw on his absence, a few days before the articles appeared, from the state banquet at Buckingham Palace held in honour of the visiting President of China. Beyond that matter, and, very possibly, the continuing public debate on the claimant's conduct of his role as Heir to the Throne and any faint light that his comments in the Hong Kong journal might be thought to cast on that matter, it is difficult to see to what other "current events" the extracts from the journal can be said to relate.

169. It is also necessary to consider whether the dealing was "fair". In Ashdown the Court of Appeal quoted as an accurate and helpful summary of the test of fair dealing the following passage, set out in paragraph 20.16 of Laddie, Prescott and Vitoria:

> "It is impossible to lay down any hard-and-fast definition of what is fair dealing, for it is a matter of fact, degree and impression. However, by far the most important factor is whether the alleged fair dealing is in fact commercially competing with the proprietor's exploitation of the copyright work, a substitute for the probable purchase of authorised copies, and the like. If it is, the fair dealing defence will almost certainly fail. If it is not and there is a moderate taking and there are no special adverse factors, the defence is likely to succeed, especially if the defendant's additional purpose is to right a wrong, to ventilate an honest grievance, to engage in political controversy, and so on. The second most important factor is whether the work has already been published or otherwise exposed to the public. If it has not, and especially if the material has been obtained by a breach of confidence or other mean or underhand dealing, the courts will be reluctant to say this is fair. However this is by no means conclusive, for sometimes it is necessary for the purposes of legitimate public controversy to make use of 'leaked' information. The third most important factor is the amount and importance of the work that has been taken. For, although it is permissible to take a substantial part of the work (if not, there could be no question of infringement in the first place), in some circumstances the taking of an excessive amount, or the taking of even a small amount if on a regular basis, would negative fair dealing."

170. The court in Ashdown went on to observe that, although based on a summary of the authorities before the Human Rights Act 1998 came into force, the principles summarised in that citation were still important when balancing the public interest in freedom of expression against the interests of owners of copyright, while emphasising that it was essential not to apply inflexibly tests based on precedent but to bear in mind that considerations of public interest were paramount.

171. The context for this observation was the court's consideration (at [67]) of why it should ever be contrary to the public interest that a newspaper should have to pay compensation, or account for the profit made, when it makes unauthorised use of the work product of another and its conclusion that section 30 provides examples of situations where this may be justified when set against the fact, recognised by Strasbourg jurisprudence, that the award of damages may discourage the participation

by the press in matters of public concern. This in turn led the court to conclude (at [69]) that the fair dealing defences under section 30 should lie "where the public interest in learning of the very words written by the owner of the copyright is such that publication should not be inhibited by the chilling factor of having to pay damages or account for profits". Earlier in its judgment (at [39]) the court had observed that:

> "In most circumstances, the principle of freedom of expression will be sufficiently protected if there is a right to publish information and ideas set out in another's literary work, without copying the very words which that person has employed to convey the information or express the ideas. In such circumstances it will normally be necessary in a democratic society that the author of the work should have his property in his own creation protected."

The court nevertheless accepted (at [43]) that, as Strasbourg jurisprudence had recognised:

> "There will be occasions when it is in the public interest not merely that information should be published, but that the public should be told the very words used by a person, notwithstanding that the author enjoys copyright in them. On occasions, indeed, it is the form and not the content of a document which is of interest."

172. Against that background, Mr Warby submitted that depending on the circumstances the actual words of the document may be of importance, not just the bald information contained in the document, so that in such a case it will be legitimate to use quotation rather than mere paraphrase or the reporting simply of the substance of the document. Taking each of the three matters referred to in the passage from Laddie, Prescott and Vitoria, he submitted that the defendant's use of extracts from the Hong Kong Journal did not commercially compete in any way with the claimant's exploitation of that journal since it was not intended for commercial exploitation, that the material was not in any event confidential but had been widely circulated and that the defendant had used no more than a moderate amount of the work and had done so for the purpose of political reporting. In considering this last element it was appropriate, he said, to allow the defendant reasonable latitude as regards the selection of precise words and turns of phrase used and the extent to which they are extracted or shown in context. He referred to Fressoz and Roire v France (1999) 31 EHRR 28 emphasising that article 10 of the Convention leaves it to journalists to decides whether or not it is appropriate to reproduce particular material to ensure credibility where the disclosure is of information "on issues of general interest provided they are acting in good faith and on an accurate factual basis and are providing reliable and precise information in accordance with the ethics of journalism". He referred also to what Lord Hoffmann had stated in Campbell (at [62] to [63]), that "The practical exigencies of journalism demand that some latitude must be given" and that "it is unreasonable to expect that in matters of judgment any more than accuracy of reporting, newspapers would always get it absolutely right".

173. Mr Tomlinson submitted that, taking each of the considerations referred to in the passage from Laddie, Prescott and Vitoria, although it was true that the claimant has not sought to exploit commercially his Hong Kong Journal and has no current intention of doing so it is possible, as Sir Michael Peat in his first witness statement made clear, that edited extracts may one day be published after the claimant's death. Second, he said, the Hong Kong Journal has not been published or exposed to the public but its contents had been passed to the defendant in clear breach of confidence as the claimant, through his advisers, made clear to the defendant in advance of publication of the 13 November edition. Third, and in any event, the amount taken by the defendant for the Hong Kong Journal was substantial and far greater than necessary to make any point about a current event, rather than merely giving publicity to the claimant's views.

174. In my judgment, there is no real prospect that this defence will succeed. The copy of the Hong Kong journal was obtained by the defendant as a result of a breach of confidence. The defendant was put on notice of the fact. On the evidence the defendant has no real prospect of showing otherwise. Taken as a whole, the articles were not confined, even allowing a reasonable margin of appreciation, to dealing with current events. The theme of the editorial content was the claimant's fitness to be King and his skills as a chronicler of historical events (a point emphasised by the heading at the top of the two-page spread). The significance of the journal's contents in explaining (to the very limited extent that it might be thought that they do) the claimant's non-attendance at the banquet in Buckingham Palace a few days earlier and his non-attendance at the Embassy banquet six years earlier form only a part of the overall contents of the articles, as does any faint light that they throw on the claimant's conduct of his role as Heir to the Throne. The overall impression conveyed by the articles, which I am as well able on this application to assess as will a judge at a trial, is that the choice passages from the journal have been selected for publication and comment, and that this has been done with the purpose of reporting on the revelation of the contents of the journal as itself an event of interest. In Ashdown the Court of Appeal (at [82]) criticised the extent of the reproduction of the confidential minute in that case in the following terms:

> "It appears to us that the minute was deliberately filleted in order to extract colourful passages that were most likely to add flavour to the article and thus to appeal to the readership of the newspaper. Mr Ashdown's work product was deployed in the way that it was for reasons that were essentially journalistic in furtherance of the commercial interests of the Telegraph Group."

Those comments precisely reflect the view that I take of the use made by the defendant of the contents of the Hong Kong journal in the 13 November edition.

(ii) fair dealing for the purpose of criticism or review

175. The relevant provision is section 30(1) of the CDPA which, so far as material, is as follows (incorporating amendments made with effect from 31 October 2003):

> "(1) 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 …
>
> But in determining generally for the purposes of that subsection whether a work has been made available to the public no account shall be taken of any unauthorised act."

176. The defendant's reliance on this provision is misplaced since it is plain that the Hong Kong journal has not been made available to the public. Circulation of copies of the journal to a number of carefully selected recipients, even if the overall total is as many as Mr Bolland claimed, does not amount to making it available to the public. The defendant has no real prospect of showing otherwise. Mr Warby endeavoured to persuade me that the journal was lawfully made available to the public by the defendant's own lawful publication of it for the purpose of reporting current events. But if it has been lawfully published for that purpose, the defendant has no need to rely on any defence under section 30(1) whereas, if it has not, the defence on his own argument does not lie. Since I do not consider that the extracts were lawfully published under section 30(2), or for that matter under any more general public interest defence (as to which see later), it follows that the point does not arise. I should add that the fact, if fact it be, that *information* contained in the journal has been lawfully published by the defendant, for example as a result of the parallel analysis which arises where the court is required to carryout a balancing exercise between articles 8 and 10 when considering whether the claimant's right of privacy in the contents of the journal is overridden, does not mean that the copyright work itself has been made available to the public.

177. The articles' description of the Hong Kong journal as "a remarkable historic document which could define [the claimant] as one of the greatest chroniclers of our time" and as "poignant, insightful and witty" and as revealing "a thoughtful perceptive man, deeply committed to its country whose King he will one day be…" and as establishing the claimant "as a literary figure of genuine stature" lead me to the conclusion that the defendant would have had a reasonable prospect of establishing a fair dealing defence under section 30(1) if it could have established or, for present purposes, demonstrated a real prospect of establishing that the copyright work had already lawfully been made available to the public. This is because, taken as a whole, the articles seem to me to deal with the Hong Kong journal for the purpose of criticism or review, rather than for the purpose of reporting current events.

(c) A wider public interest defence?

178. Mr Warby submitted that if section 30(2) does not provide a defence the defendant can rely on a public interest defence under section 171(3) of the CDPA on the same grounds as are relied on in respect of the confidence claim.

179. Section 171(3) preserves the defence of public interest in copyright cases. In Ashdown the Court of Appeal made clear (at [58]) that the circumstances in which public interest may override copyright are not capable of precise categorisation or definition and pointed out that, with the Human Rights Act 1998 in force, "there is the clearest public interest in giving effect to the right to freedom to expression in those rare cases where this right trumps the rights conferred by the 1988 Act". The court emphasised, however, that it would be very rare for the public interest to justify the copying of the form of a work to which copyright attaches rather than refer simply to the information conveyed by the copyright work. This is no doubt because, as the court pointed out later in its judgment (at [66]), the fair dealing defences under section 30 will normally afford the court all the scope it needs properly to reflect the public interest in freedom of expression and, in particular, the freedom of the press and therefore "there will then be no need to give separate consideration to the availability of a public interest defence under section 171".

180. Mr Tomlinson pointed to those passages and submitted that the public interest must be greater to justify using the form of the words appearing in the copyright work than to justify the use of the information contained in the work. He submitted that in the absence of any specific clear public interest considerations, over and above those available under the fair dealing defences, it would be wholly disproportionate to extinguish the claimant's property rights in his copyright work, as will be the case if a public interest defence can be established. I agree. I can see no basis for supposing that, having no real prospect of establishing either of the fair dealing defences, the defendant has any greater prospect of establishing a public interest defence preserved by section 171(3). There is nothing in the material before me to indicate that this is or may be one of those rare cases where the public interest trumps the rights conferred by the CDPA. Mr Warby did not seriously suggest that this is or may be such a case.

(d) Surrogacy

181. Mr Warby submitted that the copyright claim was put forward as a fall-back to the claim in privacy and that, given the stated absence of any intention on the claimant's part to publish the journals, the claim was not motivated by commercial considerations. The claimant's objective, he said, is to prevent disclosure of information rather than to protect the expression of his works or to sanction (by damages) the disclosure which has already occurred. He quoted from Freedom of Speech, second edition, by Professor Eric Barendt (at page 262) that "The use of copyright to protect personal privacy can be regarded as an abuse of the former right... It is surely wrong to allow a copyright action to succeed, when it acts as a surrogate for a privacy claim which would, rightly or wrongly, almost certainly fail." He cited as an illustration of this proposition the refusal of Lightman J in Service Corporation International plc v Channel Four Television Corporation [1999] EMLR 83 to grant an interim injunction to restrain the broadcasting by the defendant of a film indicating that the claimant engaged in malpractices in the conduct of one of its funeral homes.

182. In that case the claimant, aware that the defendant intended to broadcast the film, threatened that if it was shown a claim might be brought in defamation and for breach of confidence. In the event, the claims brought were for breach of confidence, breach of copyright and trespass. The judge, in dismissing the application for an interim injunction, found that there were no arguable causes of action in respect of any of those three claims, that the evidence suggested a good prospect of the defendants

having a public interest defence to the copyright claim and that in any event the relief should be refused on discretionary grounds relating to limited prospects of success coupled with the public interest in disclosure of a matter deeply affecting the public, balance of convenience and delay. In the course of his judgment, Lightman J observed that if a claim based on some other cause of action was in reality a claim brought to protect reputation and reliance on the other cause of action was merely a device to circumvent the rule against the grant of an interlocutory injunction where the claim was in defamation and the defendant intended to plead justification (as seemed likely in the case of the claims advanced before him), then the overriding need to protect freedom of speech required the same rule to be applied.

183. I can quite see that the court will not countenance reliance on copyright to prevent disclosure of some kind of wrongdoing, such as was suggested by the evidence in Service Corporation. In the field of copyright this is a matter covered by the public interest defence preserved by section 171(3). See, for example, Lion Laboratories Ltd v Evans [1985] QB 526 discussed in Ashdown. That is not this case. Nor, of course, is this a disguised claim in defamation. The contrary has not been suggested. Once one strips away any possible public interest defence and any suggestion that this is some kind of disguised claim to protect reputation, there is no scope in my view for arguing, as in effect the defendant does, that the court will only entertain a copyright action if the claimant can demonstrate an intention to publish his work or otherwise exploit it for some commercial purpose. As was pointed out in Ashdown (at [30]), copyright is essentially a negative not a positive right. It gives the copyright owner the right to prevent others from doing what the CDPA recognises the owner alone as having a right to do. The right is not conditional, even inferentially let alone expressly, on an intention to exploit the copyright work commercially. Copyright is a property right. Subject to the "exceptions, exemptions and defences" provided for in the CDPA, including, residually, any general public interest defence, a copyright owner does not have to justify the assertion of his copyright. The fact alone that the copyright owner may have no present intention of exploiting his property right does not justify another in expropriating that right for himself for free. The fact, if fact it be, that the copyright owner asserts his copyright in a work in order to maintain privacy in the work does not appear to me to be any kind of abuse of his ownership right. The position is no different where the claim is advanced as an alternative or, as it is put, as a fall-back to a claim in privacy. It was not suggested in Ashdown that the fact that the claimant advanced a claim in confidence as well as in copyright (which alone was the subject of the summary judgment application) provided any kind of impediment.

184. In my judgment, there is no substance in this further suggested defence.

(4) Relief

185. The relief for his copyright claims which the claimant seeks in respect of the Hong Kong journal is an injunction to restrain further infringement of his copyright in the work and an inquiry as to damages in respect of any loss which he can demonstrate that he has suffered arising out of the defendant's infringement of his copyright in it. He does not seek an account of profits.

186. In Ashdown the court recognised (at [45] to [46]) that, even in those rare cases where the right to freedom of expression comes into conflict with the protection afforded by

the CDPA, notwithstanding the express exceptions to be found in that Act, the court is bound, insofar as it is able, to apply the Act in a manner which accommodates the right to freedom of expression. It envisaged the first way in which it may be possible to do so might be by declining the discretionary relief of an injunction, commenting that usually such a step would be sufficient. The court went on to observe that if a newspaper considered it necessary to copy the exact words created by another it could see no reason in principle why the newspaper should not indemnify the author for any loss caused to him. "Freedom of expression" the court said "should not normally carry with it the right to make free use of another's work".

187. In the present case I can see no reason why in respect of the Hong Kong journal the claimant should not be granted the inquiry as to damages which he seeks for copyright infringement, an injunction to prevent further infringement of his copyright in that work and delivery up of all infringing copies of it in the defendant's possession, power, custody or control. Having established his cause of action, damages, if he can show any loss, seem to me to follow almost as a matter of course.

188. It was submitted on the defendant's behalf, however, that now that all of the information contained in the Hong Kong journal was in the public domain, any further injunction to prevent copyright infringement would be inappropriate, that the defendant like the rest of the media was now entitled to deal fairly with the work under section 30 of the CDPA and therefore that the defendant should not be obliged to exercise those rights "in the shadow of contempt proceedings". I do not agree. There is nothing disproportionate in granting an injunction against further copyright infringement and an order for the delivery up of all infringing copies of that journal. The defendant has already exercised its freedom of expression by commenting at length on its contents and quoting freely from it. The fact that all of the information contained in it is now in the public domain does not give the defendant, or anyone else, any right to infringe the claimant's copyright in the work. Any risk that the defendant runs from any further attempt at a fair dealing with the journal does not, in the circumstances, seem to me disproportionate given the claimant's entitlement to protect his copyright interest in it.

189. As regards the other seven journals, the claimant seeks an injunction to prevent infringement of his copyright in them and the delivery up of all copies of them in the defendant's possession, power, custody or control, together with an inquiry as to damages in respect of any loss which he can show that he has suffered in consequence of these further acts of copyright infringement.

190. The defendant resists any relief in respect of the seven other journals, whether for an injunction to restrain any further infringement of copyright or for the delivery up of all infringing copies, or for damages, on the ground that, as I have already mentioned, although their contents were not put in evidence, they have been read by Mr Wright and by Elizabeth Hartley and their evidence, which the claimant has not attempted to contradict, is that "they are of a similar character" to the Hong Kong journal and "contain many matters of considerable legitimate interest to the public". Mr Warby submitted that if it is permissible to deal fairly with a copyright work for the purpose of section 30 it must be permissible to possess a copy of the work itself otherwise the right is rendered meaningless. Possession of a copy for such a purpose, he submitted, falls within the ambit of "dealing" for the permitted section 30 purpose. He further submitted that the court has never yet ordered delivery up of a work that a newspaper

asserts is or may be in the public interest to publish merely because the copy of the work may infringe the copyright of the person seeking the order for its delivery up. He submitted that the court should therefore be slow to do so in this case, particularly as the defendant has undertaken not to publish any part of the contents of those seven journals without first giving the claimant's lawyers at least 24 hours' prior notice of its intention to do so. He drew my attention to passages in the judgments in Microsoft Corporation v Plato Technology Ltd (unreported) 15 July 1999, Court of Appeal, and Ocular Sciences Ltd v Aspect Vision Care Ltd [1997] RPC 289 to emphasise that relief by way of injunction or delivery up must be tailored to match the case and be fair to the defendants and that there may be circumstances where no relief by way of injunction or delivery up is appropriate.

191. Ms Lane submitted that the relief claimed in respect of the other seven journals is entirely standard. It cannot be right, she said, that merely on the off-chance that a person may be able to establish a fair dealing with a copyright work at some future date that person is to be permitted in the meantime, and for what may be an indefinite period of time, to make and retain infringing copies of the work and, for all the copyright owner knows, distribute copies to others, without risk of any kind of sanction. The fact that the defendant has not yet formed any intention to deal in any way with the other seven journals does not put it in any more favourable position. Nor does the fact that the person in possession of the infringing copy is a newspaper. For the court to decline any relief in such a case would, she said, be tantamount to robbing the copyright owner of his property in the work.

192. I see very great force in what Ms Lane submits. But I remind myself that this is an application for summary judgment. I regard as eminently arguable that, just as the defendant may be able to demonstrate at trial that - at any rate in advance of the court having seen what they contain - the court should not prevent by permanent injunction the possible future use of information contained in the other seven journals when, for all the court knows, circumstances may arise which may make the disclosure an entirely appropriate exercise of the defendant's right of freedom of expression, so also should the defendant be free, as part and parcel of the exercise of that right, to quote verbatim extracts from the journals and that, in the meantime, it would be an illegitimate curtailment of its article 10 rights to have to return the copies it has of those seven journals. I regard this as a difficult question. It brings into play the impact of the Human Rights Act 1998 on the protection afforded to copyright by the CDPA. This particular aspect of the dispute was not debated at any great length before me. I am left in sufficient doubt about the correct answer to think that it would not be right to come to any final conclusion on the point on an application of this kind.

Result

193. The application succeeds in respect of the claims in confidence and copyright concerning the Hong Kong journal. The claims in respect of the other journals must go forward to trial.