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Case No: HC05C02569

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2005

Before :

THE HON. MR JUSTICE EADY

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Between :

Loreena McKennitt **Hampstead Productions Ltd** **Quinlan Road Ltd**	**Claimants**
- and -	
Niema Ash **Purple Inc Press Ltd**	**Defendants**

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- -

Desmond Browne QC and David Sherborne (instructed by **Carter-Ruck**) for the Claimant
The first Defendant appeared in person and represented the second Defendant

Hearing dates: 21st to 29th November 2005

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Approved Judgment

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

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THE HON. MR JUSTICE EADY

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The Hon. Mr Justice Eady:

1. The parties

1. The First Claimant in these proceedings is Loreena McKennitt, a Canadian citizen, who has for many years run a business around her composition and performance of folk and folk-related music. She has sold millions of recordings and has from time to time toured various parts of the world playing live concerts.

2. The Second and Third Claimants are, respectively, Hampstead Productions Ltd and Quinlan Road Ltd. These are companies incorporated under the laws of Ontario which are owned and controlled by Ms McKennitt. The copyright in the musical and literary works comprised in her songs, as well as that in the sound recordings of her performances, is owned by various corporate entities.

3. The present proceedings are based upon alleged breaches of privacy, and/or of obligations of confidence, said to arise either by implication of law or, in some instances, express contractual provisions. The hearing took place in private but the contents of this judgment have been so drafted as to avoid intruding, so far as possible, on any of the more intimate detail which the Claimants wished to protect. I took the view that the judgment should therefore be publicly accessible in its entirety.

4. The particular focus of the Claimants' concern is the publication of a book earlier this year with the title "Travels with Loreena McKennitt: My life as a Friend". This was written by the First Defendant, Niema Ash, who was formerly a friend of Ms McKennitt. She and her long term partner, Mr Tim Fowkes, had often socialised with Ms McKennitt and entertained her while she was in England. Moreover, they had sometimes worked closely with her in connection with her business here and abroad and accompanied her on a contractual basis on one foreign tour in particular. This followed the release of an album in 1997 called "The Book of Secrets". It was to promote this album primarily that a European and American tour took place in 1998, in connection with which Ms Ash agreed to carry out the services of a merchandise supervisor and she was retained for that purpose by the Second Claimant company.

5. The Second Defendant in these proceedings is a company called Purple Inc Press Ltd, which was incorporated in this jurisdiction in April 2005 for the purpose of publishing the book in question. The sole director is Ms Ash.

2. Ms McKennitt's attitude to her privacy

6. Ms McKennitt has vehemently asserted in these proceedings that she has always sought to keep matters connected with her personal and business life private and confidential. It was confirmed in evidence before me that, whenever a press conference or interview takes place, it is impressed upon those concerned that enquiries about her personal life are very much off limits. Indeed, it seems to have been accepted by Ms Ash (at least on page 313 of her book) that she protected her reputation and her privacy "with the iron safeguard of a chastity belt".

7. In so far as there have been exceptions to her primary rule of protecting her privacy, Ms McKennitt has emphasised that she has occasionally released some information which "she felt comfortable with", and in respect of which she was able to control the

boundaries herself. This has apparently occurred mainly in connection with a charity which she founded and promoted in connection with water safety and the prevention of boating accidents. This followed a tragedy in 1998 when her fiancé (together with his brother and a friend) died in a drowning accident in Canada. She has accepted that, for these purposes, it is sometimes necessary to provide personal detail in order to bring home to people the risks inherent in sailing and the need to take precautions. The personal impact upon her highlights the dangers, she believes, in a way that could not be achieved by general and impersonal safety warnings. When, in this connection, Ms McKennitt has spoken about the death of her fiancé, she has done so on a controlled and limited basis with which, again, she "feels comfortable".

8. Ms McKennitt, therefore, places at the centre of her present claim the proposition that her private life and indeed her business affairs are entitled to protection on the basis of a duty of confidence, and are not in the public domain by reason either of her fame in itself or of the limited revelations to which I have referred.

3. The remedies sought

9. Against that background, the Claimants seek a declaration that by publishing and disclosing certain identified information contained in her book Ms Ash and her company have acted in breach of confidence and/or in breach of the terms of the confidentiality agreement. It is disputed that either Defendant is bound by any such duty. Alternatively, it is said that there has been no breach because the information contained in the book is so banal, inconsequential or anodyne as not have about it the "quality of confidence".

10. An injunction is sought also to restrain the Defendants from selling, disclosing, publishing, disseminating, promoting or communicating certain specified information, which has been identified and subsequently narrowed down in a schedule of items from the book. It is not sought to restrain publication of the book in its entirety, but obviously the effect of the orders sought would be that it could only be published following substantial revision and amendment. Although there is also a claim for damages, the Claimants recognise that they are unlikely to recover much from the Defendants, in view of their financial circumstances, but a claim is made nevertheless.

4. The five categories of "confidential information"

11. At this stage I should identify the particular matters in respect of which the Claimants seek restraint. As narrowed and defined, they fall into the following categories:

    i) Ms McKennitt's personal and sexual relationships.

    ii) Her personal feelings and, in particular, in relation to her deceased fiancé and the circumstances of his death.

    iii) Matters relating to her health and diet.

    iv) Matters relating to her emotional vulnerability.

v) The detail of an unhappy dispute between Ms McKennitt, on the one hand, and Ms Ash and Mr Fowkes on the other, concerning monies advanced to them by Ms McKennitt to assist in the purchase of a property in 1997 and the subsequent litigation in the Chancery Division (which was settled on the basis of a Tomlin order without ever coming to a public hearing).

12. It is this dispute over the acquisition of Ms Ash's home which is said primarily to motivate the revelations in the book. It is submitted on Ms McKennitt's behalf that this motivation can be inferred from the disproportionate amount of space given to it in the book (which is unlikely to be of much interest to outsiders) and the tendentious terms in which it is described. It also emerges, so it is said, from certain answers given in the course of evidence in this case.

5. The specific passages complained of

13. Be that as it may, I should now turn to the specific allegations in respect of which protection is now claimed. The complaints are numbered in accordance with the original schedule.

14. First, there are short passages in chapter 2 of the book on pages 6 and 7 which hint quite strongly at a relationship with a friend of Ms Ash at about the first time she met her in the early 1980s. The Defendants' response, drafted by her former counsel Mr Elliott, is that the information is trivial and anodyne and not such as to attract a duty of confidence.

15. Secondly, in chapter 5 there is reference to Ms McKennitt having been taken ill while at Heathrow Airport and Ms Ash having made arrangements for her to be transported to hospital and given treatment. There is no objection to recording the mere fact of her having been hospitalised while in London, but objection is taken to a general description of her symptoms and demeanour. It is pointed out, however, on her behalf that Ms Ash did not include any detailed information as to the nature of the condition, diagnosis or treatment. Again, the fact that she was seeing the particular man at the time, who was also a friend of Ms Ash, is said to be anodyne and outside the protection of any duty of confidence.

16. Thirdly, there are a number of passages in the book about Ms McKennitt's relationship with a second man. The response to this complaint is that the mere fact of the relationship is not, as such, confidential. It is said that it was no secret at that time and is not confidential now.

17. Fourthly, there are passages relating to a third male friend. These are partly derived from observations of Ms Ash and comments by the friend concerned. It is said that these are anodyne and that the relationship was in itself no secret. There is, however, one passage in this connection which concerns a rather intimate conversation between Ms McKennitt and Ms Ash (which would otherwise certainly not have been in the public domain).

18. The fifth area of complaint concerns extensive references in the book to Ms McKennitt's relationship with her fiancé, who died in the boating accident in 1998.

The Defendants' response is to the effect that (largely for reasons I have explained) there is a considerable volume of material in the public domain concerning this relationship. It is suggested that the information in the book is comparable, although in large measure drawing upon Ms Ash's recollection and observations.

19. The sixth area of controversy concerns a fifth man, who was a friend of Ms McKennitt for some time. It has been suggested that one passage could be re-written to include the introduction of this man (without any reference to a relationship), simply by way of context or an incidental reference to him.

20. The original complaints numbered 7 and 8 have been withdrawn. Complaint number 9 concerns a number of references in the book to Ms McKennitt's Irish cottage, which she acquired in about 1992 and upon which Mr Fowkes carried out a considerable amount of building and restoration work over a period of about six years. Ms McKennitt has been troubled by stalkers in the past and is particularly concerned at any information which identifies the location of her Irish home. Objection is also taken, however, to a number of references, between pages 231 to 251, to various private rows, arguments or disagreements which took place in connection with the cottage in 1999. They largely concern a breakdown in the relationship of Ms McKennitt and Mr Fowkes over matters which might be thought to have been blown out of all proportion. It is said in response that the descriptions of the house and its renovation are largely anodyne and that, so far as the "falling out" is concerned, this is a matter of public interest. That may seem surprising on the face of it, but I shall need to address the arguments in considerable detail at a later stage.

21. Item 10 is concerned with shopping trips on a visit to Italy and negotiations about the purchase of furniture. This is said on the Defendants' behalf to be "devoid of qualifying details" and anodyne.

22. Item 11 concerns a visit by Ms Ash to Ms McKennitt and her family while they were staying in Arizona over Christmas. It contains a few mild "side-swipes" about Ms McKennitt's mother. The word "anodyne" crops up again and it is said that this was primarily about Ms Ash's own holiday and that Ms McKennitt's concern about the privacy of others (e.g. her mother) is "misplaced".

23. Item 12 concerns a passage in the book about Ms McKennitt's relationships with Ms Ash's friends and reports what purport to be Ms McKennitt's thoughts about them. It is said again that this passage is "anodyne" and that the material is neither private nor confidential.

24. Item 13 concerns a passage about Ms McKennitt's demeanour and indeed her health during her bereavement following the death of her fiancé. This is said to be either "obvious and public domain" or to relate to a conversation that Ms Ash had with a friend of hers about Ms McKennitt's health.

25. Item 14 relates to about 10 pages, largely concerning a visit to Tuscany, but including yet more material about Ms McKennitt's emotional state after the death of her fiancé. The response is by now familiar. It said to be either in the public domain or anodyne.

26. Item 15 concerns a short passage about her contractual arrangements with Canadian Warner. In particular, reference is made in general terms, and without detail, to her royalty rate and to the degree of control allowed her over her music. The response is simply that it is devoid of confidential detail and harmless.

27. Item 16 concerns references to conversations with Ms Ash in which Ms McKennitt expressed her opinion of record companies (in general) in the early days of her career and later as she was becoming successful. Again, this is said to be largely in then public domain and devoid of confidential detail.

28. Items 17 and 18 are concerned with a request by Ms McKennitt to Ms Ash to assist her with arranging a location for filming a promotional video. Essentially, it is said that there is no infringement of Ms McKennitt's privacy and that, after all, the video was intended for public consumption.

29. Item 19 is no longer pursued. Item 20 relates to a passage dealing with the stresses and strains of a European tour and to Ms McKennitt's emotional reaction to some of the frustrations. The Defendants' case is that the material is of a general and anodyne nature which, it is claimed, lacked the sort of detail which would be protected by a duty of confidence. Here, again, in respect of some of the allegations reliance is placed on a supposed public interest, to which I shall need to return in due course.

30. Item 21 is no longer pursued. Item 22 concerns business matters at Ms McKennitt's London office, the financing arrangements for touring and the significance of selling her merchandise. It is said to be of a general nature and devoid of detail which would qualify for legal protection.

31. Item 23 relates to a relatively trivial incident which occurred in Spain when Ms McKennitt was hoping to meet a man called Andrew Gibb (who gave evidence before me) after a concert. It appears to be concerned largely with her reaction to a misunderstanding whereby she missed him – and her behaviour towards Ms Ash in that context. This is said not to be confidential material and, in any event, to be the subject of public interest for reasons which need to be discussed later.

32. Item 24 relates to another experience on tour, when Ms McKennitt explained to Ms Ash her reaction to the pressures and frustrations. This is said to be an "extravagant complaint" which relates to a trivial incident devoid of confidential detail.

33. Item 25 is no longer pursued. Item 26 concerns a sum of money which Ms McKennitt earned from busking in Covent Garden on one occasion in the presence of Ms Ash. The Defendants' response is that the fact of her busking was in the public domain and that she had, on occasion, admitted that it was lucrative. Accordingly, it said not to relate to anything confidential.

34. Item 27 is no longer pursued. Item 28 is concerned again with the pressures of touring and Ms McKennitt's reaction to this and her treatment of staff. It is said that this is not confidential information and that, in any event, there is an argument based on public interest (of the usual kind).

35. Item 29 relates to a tour of the United States and, in particular, the involvement of Ms Ash and her partner Mr Fowkes in merchandising and, in relation to one incident, her behaviour towards Mr Fowkes. This is said not to have about it the quality of confidence.

36. Items 30 and 31 are no longer pursued. Item 32 is concerned with a short passage recounting how Ms McKennitt had invited a dancer, who was a friend of Ms Ash, to her Paris concert. Ms Ash speculates that he might find a part in one of Ms McKennitt's performances. This claim for the protection of confidence is again said to be "extravagant".

37. Item 33 is concerned with the most unfortunate dispute about money between Ms McKennitt, on the one hand, and Ms Ash and Mr Fowkes on the other. The book contained in effect the allegation that Ms McKennitt's claim in the Chancery Division was a dishonest fabrication (referring, for example, to wilful distortion). That was unsustainable and, quite properly, it was expressly withdrawn on 11th November, when the first hearing took place before me and Ms Ash was represented by Mr Elliott. It has not been pursued. The substance of Ms McKennitt's complaint in these proceedings, however, which are based on privacy rather than libel, is that the private negotiations and the Tomlin order itself were confidential. The dirty linen has not been publicly laundered and the parties were entitled to expect that what had passed between them would be kept confidential.

38. There was also a miscellaneous set of complaints itemised compendiously as 34. This was given no specific response in the Defendants' schedule.

39. In identifying the particular passages in Ms Ash's book to which complaints were directed during the course of the trial, I have deliberately kept the descriptions of the information alleged to be confidential or private as general as possible.

6. Ms Ash takes her stand against censorship

40. Before the trial, it was made clear by Ms McKennitt's solicitors that there was no attempt to prevent the whole book from being published and there were discussions about the possibility of certain of the offending passages being re-written so as to exclude the objectionable material. Ms Ash, on the other hand, felt very strongly that this was an attempt at censorship, to which she was opposed in principle. She did not submit any parts of the book for consideration by Ms McKennitt or her advisers in advance of publication and she was, as a matter of law, fully entitled to take that stance. She should not be surprised, however, that litigation followed with uncertain and possibly expensive consequences for the whole book. For lack of information, Ms McKennitt was not in a position to take steps before publication. As Lord Donaldson MR observed in *Leary v BBC*, 29 September 1989 (unreported), CA, which happened to be in the context of a possible contempt of court:

> "I am very concerned that no one should think that on a speculative basis you can go to the courts and call upon the publisher of printed material or television or radio material to come forward and tell the court exactly what it is proposed to

> do, and invite the court to act as a censor. That is not the function of the court. It is different, of course, if there is solid evidence as to what the content of the publication will be and that evidence leads the court to conclude that *prima facie* there will be a contempt of court. Then it would no doubt be right that the defendant should be invited, but not compelled, to tell the court what in fact he intends to publish, because of course if he does not and there is a *prima facie* case that there will be contempt he will find himself faced with an injunction. But that is not the same thing as setting the courts up as a censorship body to which people must submit material on pain of being prohibited from publishing it".

Although that case concerned an anticipated contempt of court, the general principle is clearly relevant also in circumstances where it is a private right which is, or is about to be, infringed.

7. The extent of publication

41. Once publication had taken place, and Ms McKennitt was in a position to form an opinion as to the impact on her rights, proceedings were commenced. On 7th October 2005 a contractual undertaking was given by Ms Ash that no further copies would be released pending the outcome of the claim. According to the evidence, prior to that time only a few hundred copies had been released. Ms Ash believes that she had sent out about 140 review copies and that she has fulfilled orders placed upon her directly to the extent of about 350.

42. To Ms McKennitt's dismay, a copy was sent to her recording company (Warners). This had not been requested and was clearly not for review. Mr Browne therefore invites the inference that it was sent out of spite and to cause damage to her. Indeed, he suggests, that this played a large part in her motivation for publishing the book as a whole. That would be entirely consistent with Ms Ash's assertion on page 313 of the book that Ms McKennitt's "main vulnerability" was her reputation.

43. Following her undertaking, she notified a company called Lightning Source which had printed the book and with whom it would also be possible to place orders. On 11th October Gray J ordered a speedy trial and the process of publication was therefore left in limbo for some two months.

44. There has been something of a dispute as to when Ms Ash notified Lightning Source of her undertaking, and as to how copies of the book came to be purchased after it had been given, but that is not central to the case. She has stated that during a telephone call on Monday 10th October Mr Kinsey assured her that the undertaking would take effect immediately. On her own case she first attempted to notify Lightning Source in writing a week after the undertaking; nevertheless various people acting on instructions from Ms McKennitt's solicitors succeeded in buying a few copies while the undertaking was supposed to be in effect.

45. Because Ms Ash took the course, as she was fully entitled to, of making her own judgment as to the content of her book, it follows that if some or all of Ms McKennitt's complaints are upheld in this judgment, and an injunction accordingly granted, it will inevitably bite on the book as a whole since it is now too late to fillet out any offending material. This will have the consequence that Ms Ash and her company would not (subject to any appeal) be able to go on publishing the book in its present form and without such re-writing as is necessary.

8. A need to balance Convention rights

46. In these circumstances it is quite clear that their rights under Article 10 of the European Convention on Human Rights are engaged. Correspondingly, in certain respects at least, the rights of Ms McKennitt under Article 8 of the Convention are also likely to be engaged – unless, of course, Ms Ash is correct in categorising all the relevant information of which complaint is made as being outside the scope of the protection of Article 8, or of the domestic law of privacy and confidence as it is now rapidly developing. These are matters which I shall have to consider.

47. A useful starting point is to consider the terms of Article 8 itself:

> "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".

48. Any application for an injunction based upon personal rights of privacy, or allegations of breach of confidence, must now be considered in the light of the "new methodology" expounded by the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457 and in *Re S (FC) (A Child)* [2005] 1 AC 593. It is possible to summarise the new approach, in general terms, by reference to the following principles, which have to be borne in mind in any case where it is sought to restrain publication by reason of rights guaranteed by Article 8:

i) Neither article has as such precedence over the other.

ii) Where conflict arises between the values under Articles 8 and 10, an "intense focus" is necessary upon the comparative importance of the specific rights being claimed in the individual case.

iii) The court must take into account the justifications for interfering with or restricting each right.

iv) So too, the proportionality test must be applied to each.

Indeed, in *Douglas v Hello! Ltd* [2001] QB 867 at [137] Sedley LJ indicated that in situations of this kind "the outcome … is determined principally by considerations of proportionality".

49. Convention rights, including those of freedom of expression and privacy, became enforceable in the courts of the United Kingdom in October 2000. When issues engaging Convention rights arise, domestic courts must take into account Strasbourg jurisprudence by reason of s.2 of the Human Rights Act 1998. So too, where legislation falls to be considered, it must be interpreted compatibly with Convention rights so far as it is possible to do so. That is required by s.3 of the 1998 Act. Courts as "public authorities" must act compatibly with Convention rights in their actions.

9. The increasing scope for protecting private life

50. There is recent guidance on the approach to be adopted towards privacy rights in the Strasbourg decision of *Von Hannover v Germany* (2005) 40 EHRR 1. The case is notable especially, perhaps, for the width of the notion of "private life" which the European Court of Human Rights is now prepared to recognise. Princess Caroline of Monaco is a well known person who has, over the years, received a good deal of attention in the media throughout Europe. Moreover, photographs of her, taken in a variety of places, have often appeared in the media. It was in that context that the court reiterated that the concept of private life, as protected by Article 8, would extend to matters of personal identity including photographs. The court continued at [50]:

> "Furthermore, private life, in the Court's view, includes a person's physical and psychological integrity; the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. … There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'".

Reference was made to two other cases involving the United Kingdom: see *PG and JH v United Kingdom* (Application 44787/98) and *Peck v United Kingdom* (2003) 36 EHRR 41. In the light of these cases, a trend has emerged towards acknowledging a "legitimate expectation" of protection and respect for private life, on some occasions, in relatively public circumstances. It is no longer possible to draw a rigid distinction between that which takes place in private and that which is capable of being witnessed in a public place by other persons.

51. The European Court concluded, in the case of Princess Caroline, that there was no doubt that the publication by various German magazines of photographs of her in her daily life "either on her own or with other people" fell within the scope of her private life and the protection of Article 8. It was thus recognised that such protection is not lost simply because third parties may be involved. It will depend on the circumstances. It was also observed at [57]:

> "The Court reiterates that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves …".

52. In that particular case, it so happened that the court was primarily concerned with "images containing very personal or even intimate 'information' about an individual". The principles expounded, however, are not confined to information in photographic form.

53. The court considered in the *Von Hannover* case the particular context of publication and intrusion through the medium of the tabloid press. It was said, for example, that "… photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution". Again, however, there is no particular reason to suppose that where intrusion takes place by means of publication to the world at large, the governing principles are confined to tabloid exploitation. One naturally recognises that the scale and character of tabloid publications can cause particular distress to people who come into the public eye by that means, but the principles according to which privacy rights are protected against intrusive publicity must be of more general application. In any event, it should not be forgotten that Ms Ash sent out copies of her book to such journals as *Hello!* and *The News of the World*, no doubt hoping for wider exposure of her allegations about a well known person and thereby to sell more copies.

10. The modern approach to public interest

54. When addressing the tension between media rights under Article 10 and those of an individual under Article 8, the approach has been to balance the protection of private life against freedom of expression by reference to whether the intrusion makes any contribution to a debate of "general interest". The test was applied in one case of whether or not intrusive references to an individual's private life were "justified by considerations of public concern" or bore on a matter of general importance: see e.g. *Tammer v Estonia* (2001) 29 EHRR CD 257.

55. In the Princess Caroline case, the court drew a fundamental distinction between reporting facts capable of contributing to a debate in a democratic society, relating to politicians and the exercise of their functions, and reporting details of the private life of an individual who exercises no official functions. It is far less likely in the latter case that the press could ever be characterised as exercising its "vital role of watchdog". The court continued:

> "The situation here does not come within the sphere of any political or public debate because the published photos and

> accompanying commentaries relate exclusively to details of the applicant's private life.
>
> As in other similar cases it has examined, the Court considers that the publication of the photos and articles in question, of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public …".

It was recognised (at [67]) that the readers of popular newspapers are not entitled to know "everything" about public figures.

56. The domestic court in Germany was criticised by the European Court for applying the wrong criterion. It had been held that, as a figure of contemporary society "*par excellence*", she could not rely on protection of her private life unless she was in a secluded place out of the public eye and, moreover, succeeded in proving it. The underlying rationale was apparently founded upon freedom of the press and the public interest. In the European Court's view, however, the criterion of spatial isolation, although apposite in theory, is in reality too vague and difficult for the person concerned to determine in advance. Merely classifying the applicant as a figure of contemporary society "*par excellence*" did not suffice to justify such intrusion into her private life. There was accordingly a breach of Article 8 because the German courts had not struck a fair balance between the competing interests. The court concluded that "… the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It [was] clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life". The court also considered that the public had no legitimate interest in knowing where the applicant was and how she behaved generally in her private life – even if she appeared in places that could not always be described as secluded and despite the fact that she was well known to the public.

57. It is important for courts in the United Kingdom to take these considerations into account. It is clear that there is a significant shift taking place as between, on the one hand, freedom of expression for the media and 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 at [77], 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. As Lord Woolf CJ observed in *A v B plc* [2003] QB 195 at 208 "… a public figure is entitled to a private life". Moreover, just as the European Court was not prepared to acknowledge a bright line boundary between private (or secluded) locations and public places, so too there was recognition that the protection of private life "… extends beyond the private family circle and also includes a social dimension".

58. It was shortly before the decision in *Von Hannover v Germany* that the House of Lords handed down its decision in *Campbell v MGN Ltd* (cited above). Nevertheless, it would appear that there is consistency between the approach of the court in Strasbourg and that now being adopted in the courts of the United Kingdom. It is interesting to note that the concept of a "reasonable expectation of privacy" is reflected also in the speeches of their Lordships. As Lord Nicholls observed at [20]-[21]:

> "… but article 10(2), like article 8(2), recognises there are occasions when protection of the rights of others may make it necessary for the freedom of expression to give way. When both these articles are engaged a difficult question of proportionality may arise. This question is distinct from the initial question of whether the published information engaged article 8 at all by being within the sphere of the complainant's private or family life.
>
> 21. Accordingly, in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed acts the person in question had a reasonable expectation of privacy".

This would strongly suggest that the mere fact that information concerning an individual is "anodyne" or "trivial" will not necessarily mean that Article 8 is not engaged. For the purpose of determining that initial question, it seems that the subject-matter must be carefully assessed. If it is such as to give rise to a "reasonable expectation of privacy", then questions such as triviality or banality may well need to be considered at the later stage of bringing to bear an "intense focus" upon the comparative importance of the specific rights being claimed in the individual case. They will be relevant to proportionality.

59. Whether, in any given circumstances, an individual citizen can have a reasonable expectation that his privacy will be protected may depend simply upon the nature of the information itself or, on the other hand, it may depend upon a combination of factors. Sometimes such an expectation will arise from the circumstances in which the information has been voluntarily imparted to another person or persons. In particular, the expectation may be justified by a duty of confidence arising expressly or by implication at the time.

60. Having referred to the judgment of Lord Woolf CJ in *A v B plc* (cited above), Lord Hope observed in *Campbell v MGN Ltd*, at [85], that "… a duty of confidence will arise whenever the party subject to the duty is in a situation where he knows or ought to know that the other person can reasonably expect his privacy to be protected. The difficulty will be as to the relevant facts, bearing in mind that, if there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, that

intrusion will be capable of giving rise to liability unless the intrusion can be justified".

61. Reference was made to the "three limiting principles" identified by Lord Goff in *Att.-Gen. v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109, 282:

> "The first limiting principle (which is rather an expression of the scope of the duty) is highly relevant to this appeal. It is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it. …
>
> The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. There is no need for me to develop this point.
>
> The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure".

62. Lord Hope noted that the "language" has changed following the coming into operation of the Human Rights Act 1998; that is to say, the terminology used nowadays might differ, at least superficially, from that used by Lord Goff in 1988. Nevertheless, in Lord Hope's view the balancing exercise to be conducted today would be essentially the same, although it has to be more carefully focussed and more penetrating. Since the enactment of the 1998 statute, new breadth and strength is given to an action for breach of confidence by reference to Articles 8 and 10. That balancing exercise only begins, of course, once it has been decided that Article 8 is, in any particular respect, engaged.

11. How to decide whether Article 8 is engaged

63. It thus becomes clear that, with respect to any given piece of information, the first task confronting a court is to identify whether there would be a reasonable expectation of privacy such as to engage Article 8 at all. If not, the balancing exercise becomes unnecessary and any claim based solely upon breach of confidence and/or privacy would fail. Another way of putting it, in the conventional language of claims for

breach of confidence, would be to say that the relevant information does not have about it the necessary "quality of confidence": see e.g. *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41; *Douglas v Hello! Ltd* [2003] 3 All ER [182]-[184]; *SmithKline v Beecham plc v Generics (UK) Ltd BASF* [2003] 4 All ER 1302 at [31].

64. On the other hand, where information may be classified as inherently subject to a reasonable expectation of privacy, or it has been passed to another person in circumstances which would have given rise to such an expectation, that protection may be lost if the information has truly gone into the public domain. Courts would be less ready, however, in the case of personal private information (as opposed to commercial secrets) to assume that protection has gone forever by virtue of its having come to the attention of certain readers or categories of readers. In other words, so far as personal privacy is concerned, there may still be some rights vested in the individual citizen capable of protection: see e.g. *WB v H Bauer Publishing Ltd* [2002] EMLR 145.

65. Again, information which would be subject to a *prima facie* obligation of confidence, and correspondingly entitled to legal protection, may turn out *not* to be so protected once the court has applied the "intense focus" to the circumstances. It may be concluded, for example, that protection in those particular circumstances would not be proportionate to the degree of interference which would be entailed for the defendant's Article 10 rights. Alternatively, as Lord Goff had in mind, there may be a countervailing public interest which would require the individual's right to be subordinated.

66. These are all considerations which arise on the facts of the present case. I shall need to consider the various arguments as they arise.

67. I need naturally to consider each of the passages in the book singled out for complaint separately, not only to decide whether in each case the threshold test for privacy is passed (that is to say, whether or not there would be a reasonable expectation of privacy), but also to consider, if that initial test has been satisfied, whether any other "limiting factor" comes into play such as public domain or public interest. In the light of Lord Nicholls' observations which I have cited above, it would seem to be at that second stage that I shall need to consider whether some item of information which is *prima facie* private should escape protection for reasons of being banal, anodyne or trivial.

12. The nature and content of Ms Ash's book

68. Nevertheless, there are some general considerations I should bear in mind. It would appear that the fundamental purpose of the book, which Ms Ash has described on its cover as "a must for every Loreena McKennitt fan", was to provide information to her admirers which would not otherwise be available. Much of the content of the book would be of no interest to anyone, I imagine, but for the fact that Ms McKennitt is the central character.

69. Although Ms Ash has reminded me more than once, with some justification, that the book represents also *her* story, I need to bear in mind that she does not have the

world-wide fame of Ms McKennitt or such a large fan base (although, of course, I acknowledge that she is an author who has published before and that she has been read by some with appreciation). What is more, the title makes it clear that the book is directed towards supplying information about Ms McKennitt. It would presumably not be of huge interest to her fans if it contained no more than information readily available from Ms McKennitt's website or reviews or publicity material about her albums and concerts. There has to be some unique insight which Ms Ash can offer in order to attract a following (her relationship with Ms McKennitt having been likened to that of Boswell and Johnson). The fresh angle she claims to offer is that of recounting what she perceives to have been the deterioration in Ms McKennitt's health and personality brought about by the exposure to public acclaim.

70. In this context, it is of some interest to note that before the final title was chosen Ms Ash had in mind as one possibility "the Book of Revelations" (no doubt intended to be an ironic reference to Ms McKennitt's album "The Book of Secrets"). That very much accords with my own impression of the book's purpose.

71. It is also clear from a number of quite explicit passages in the book that Ms Ash realised that substantial parts of it, at least, would fall within the scope of a reasonable expectation of privacy or a duty of confidence. Mr Browne drew a number to my attention. At the beginning of the book, for example, Ms Ash actually describes an "intimate relationship of almost 20 years with an unfledged small town girl". She also announces to readers that she will be "releasing personality frailties previously concealed in the protective cocoon of anonymity". It is obvious that she was only able to do so by reason of the "intimate relationship".

72. On page 18, Ms Ash records that Ms McKennitt "confided to me" information about her London friends – which she then proceeds to reveal. Likewise, on page 84, she sets out another piece of information which she expressly states was "confided to me". The tit-bit in question may not be of particular significance, but it does illustrate that Ms Ash was well aware that some material was imparted to her in the context of a close friendship and that she is, nevertheless, prepared to reveal it in order to attract readers. The point is again emphasised on page 93, where she states, "She cared for us and we cared for her. We were her closest friends and she knew she could count on our unqualified loyalty". That is, of course, a fundamental aspect of Ms McKennitt's complaint.

73. Similarly, on page 82, she refers to "my friend Loreena who had revealed her innermost self to me; who had trusted me with her vulnerability". Two pages later, she describes herself and Mr Fowkes as "Loreena's close friends, [who] occupied a privileged, unique position".

74. The degree of intimacy between the two women is again emphasised on page 118:

> "We talked non-stop. No topic was off-limit. Loreena told me about boyfriend problems, musician problems, office problems, plans for improving her Stratford farmhouse, her office, plans for her next album …".

On the next page she refers to the "real essence of our friendship":

> "Our closeness was tangible. Loreena would always be there for me. I would always be there for her. Our trust was implicit. I no longer required an exchange of blood to cement friendship. I felt our bond to be so special it was like something secret. Nothing could diminish it. "

75. It is thus not surprising that Mr Browne should contend, on the basis of Ms Ash's own words, that Ms McKennitt had a "reasonable expectation" of privacy and confidence as to conversations and other matters passing between herself, on the one hand, and Mr Fowkes and Ms Ash as "intimate friends" on the other.

76. More generally, the evidence goes overwhelmingly to support the proposition that Ms McKennitt valued her privacy. I heard unchallenged evidence to that effect from people who have worked with her over the years (in particular, Mr Bruce, Ms Standefer and Mr Blackaby). Ms McKennitt, too, told me how she valued what privacy was left to her more and more as the demands of fame and publicity encroached upon her: she drew the analogy of an animal living within an ever diminishing area surrounded by deforestation. As I have already indicated, Ms Ash herself was only too well aware of this. It is not simply a question of neurosis or vanity. As the European Court has acknowledged, even well known people in the public eye are entitled to a degree of privacy. Moreover, Ms Ash refers on page 74 of the book to the fact that Ms McKennitt had in the past been troubled by "stalkers" and "threats to her safety". She records on page 172 that Ms McKennitt was "entirely vulnerable".

13. Why should Ms Ash not be able to tell her own story?

77. Another general point which needs to be addressed is the fact that there are at least two persons involved. There is Ms McKennitt's interest to be protected, although in a context in which Ms Ash herself (and sometimes also Mr Fowkes) had a direct role to play. The question is to what extent it is legitimate to protect one person's privacy when another connected person has a right of privacy and also, correspondingly, a right to waive it in the exercise of freedom of expression: see e.g. *Re Angela Roddy (A Minor)* [2004] 2 FLR 949 at [35]-[38] and [46]-[60], *per* Munby J. This is why it is so important for me to have in mind the recent pronouncements in *Von Hannover v Germany* to the effect that protection of privacy will extend to relations with other persons and embrace a social dimension. It must follow, in broad terms, that if a person wishes to reveal publicly information about aspects of his or her relations with other people, which would attract the *prima facie* protection of privacy rights, any such revelation should be crafted, so far as possible, to protect the other person's privacy. This is important particularly, of course, in the context of "kiss and tell" stories. It does not follow, because one can reveal one's own private life, that one can also expose confidential matters in respect of which others are entitled to protection if their consent is not forthcoming.

14. The relevance of inaccuracy

78. Mr Browne canvassed another point of general significance. Although there is no claim for defamation or malicious falsehood, Ms McKennitt has indicated, in respect of certain parts of the evidence, that the account which Ms Ash has chosen to give is untrue, distorted or misleading. It is not in my judgment, however, permissible to respond by advancing the somewhat simplistic proposition that a reasonable expectation of protection, or a duty of confidence, as the case may be, *cannot* arise in relation to false allegations. As I observed in the case of *Beckham v Gibson*, 29 April 2005 (unreported), the protection of the law would be illusory if a claimant, in relation to a long and garbled story, was obliged to spell out which of the revelations are accepted as true, and which are said to be false or distorted: see also *W v Westminster City Council* [2005] EWHC 102 (QB), Tugendhat J.

15. The public domain argument

79. Next I need to consider how the public domain argument is put in this case. Ms Ash produced a number of articles on the basis of which she argued that, at least in certain respects, Ms McKennitt had revealed aspects of her personal life and beliefs to the general public. She chose to confine her submissions to a limited number of articles, partly for reasons of time, although it is reasonable for me to proceed on the basis that she selected the examples which she thought best illustrated her point. If that is so, I did not find the submission very compelling in the light of the material contained in the book. Conversations with, or behaviour in the presence of, close personal friends would appear to me to be significantly different from the sort of material revealed by Ms McKennitt in the past. Also, as I have already pointed out, there is in this context a significant difference between choosing to reveal aspects of private life with which one feels "comfortable" and yielding up to public scrutiny every detail of personal life, feelings, thoughts and foibles of character.

80. In any event, it is important that a large proportion of the material Ms Ash relied upon was specifically revealed by Ms McKennitt in the context of her attempts to promote water safety and to support the Cook-Rees Memorial Fund. A classic example is provided by an interview in May 1999 with the journal *Le Lundi*. It is somewhat surprising that Ms Ash should think that this carefully measured, and no doubt in itself distressing, exposure of her own feelings in a particular context should give her the right to reveal at considerable length what Mr Browne described as "her pitifully grief-stricken reaction to the death of [her fiancé], his brother and a friend". It goes on for some eight pages. One's reactions and communications to a friend in the immediate aftermath of personal bereavement are surely a classic example of material in respect of which there would a "reasonable expectation" that one's privacy would be respected. Of course, in one sense, Ms McKennitt chose to let her feelings be revealed to a personal friend, but that is a far cry from authorising publication to the world at large. It seems to me that does indeed constitute a betrayal of the "trust" and "loyalty" to which Ms Ash herself acknowledges Ms McKennitt was entitled.

81. Even where material has been revealed to the public, or to a section of the public, in connection with a sensitive topic (such as bereavement), it is important to recognise that the approach of the courts towards personal information differs somewhat from

that adopted in connection with commercial secrets. In the latter context, judges are ready to take a once-for-all approach, since information is either secret or it is not. In the light, especially, of remarks by Lord Keith in *Att. Gen. v Guardian Newspapers (No.2)*, at page 260, there are grounds for supposing that the protection of the law will not be withdrawn unless and until it is clear that a stage has been reached where there is no longer anything left to be protected. For example, it does not necessarily follow that because personal information has been revealed impermissibly to one set of newspapers, or to readers within one jurisdiction, that there can be no further intrusion upon a claimant's privacy by further revelations. Fresh revelations to different groups of people can still cause distress and damage to an individual's emotional or mental well-being. In view of Lord Keith's remarks (and to some extent also the decision in *R v Broadcasting Complaints Commission, ex parte Granada TV* [1995] EMLR 16) I am inclined to take the same approach as in *WB v H Bauer Publishing Ltd* [2002] EMLR 145, to which Mr Browne drew my attention:

> "It may be more difficult to establish that confidentiality has gone for all purposes, in the context of personal information, by virtue of its having come to the attention of certain readers or categories of readers".

One could do worse than set out the test applied by Lord Goff in the passage cited above; that is to say, to ask whether "the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential".

16. The relevance of "Travels with my Daughter"

82. Mr Andrew Gibb, to whom I have already referred, gave evidence on Day 6 of the trial. He was called by Ms Ash. It was obvious, however, that he was not very willing to be participating in this dispute and that he had, at least in the past, been a friend of both the principal protagonists. He had apparently tried to act as an "honest broker" between them and described how, in January 2005, Ms McKennitt had decided to extend an olive branch to Ms Ash. He made it clear that "the book got in the way" and that it was this factor which "put the kibosh" on any reconciliation. He had tried to persuade Ms Ash to consult Ms McKennitt about the book. He had hoped she would get a copy prior to publication:

> "I was trying to encourage a degree of consultation … Yes, I encouraged consultation and it did not happen. … Although there appeared to be room for negotiation and consultation … I always felt that consultation was better. "

83. It seems that the main reason for this was because he anticipated that Ms Ash would be repeating what had occurred in relation to an earlier book of hers called "Travels with my Daughter". I understand that this was published in about 1996 and that it related to events many years before that. It now seems ironic that Ms McKennitt had, as an act of friendship, contributed £4,000 to help Ms Ash defray the cost of publication.

84. Ms Ash told me in evidence that there had been no complaints from her friends or people described in that book and, indeed, Mr Gibb had himself been "very pleased". This turned out to be misleading, to say the least. There is no doubt that the book contains a good deal of personal and indeed salacious material about various friends and acquaintances of Ms Ash. Mr Gibb's wife has since died, but, although she never told him, it appears that she left friends in no doubt that she was *not* pleased with the content of the book. Nor were his children. Although they are now adults, the events described took place when they were much younger. The book contains a photograph of Mr Gibb's wife standing naked with the children beside her (also naked). No permission was sought to use this photograph for publication purposes, and Ms Ash seemed to think that she had been entitled to publish it, without further reference to them, purely because the photograph had originally been supplied by Mr Gibb.

85. Other people referred to in the book, according to Mr Gibb, were also unhappy with the way they had been portrayed. I do not propose to name them in this judgment. But I see no reason to conclude that Mr Gibb has got this wrong. What matters for present purposes is that he clearly anticipated that further intimate revelations in the new book would be likely to cause great offence to Ms McKennitt (especially since, as most people would be aware, she was very sensitive as to protecting her privacy). His warnings went unheeded.

86. It is not surprising that Ms McKennitt herself gave evidence that by 1998 she had become anxious that Ms Ash might wish to publish 'no holds barred' information about her. Although she had not read 'Travels with my Daughter' as a whole, which she found distasteful, she was nevertheless aware of Ms Ash's readiness to publish salacious and embarrassing revelations about former friends.

17. The lack of opportunity for Ms McKennitt to comment before publication

87. Ms Ash had claimed in the course of her evidence that she would not wish to expose details of her friends' lives if they did not wish her to do so. In the light of what she has already published, and also of Mr Gibb's evidence, I do not find that evidence very persuasive. Having regard especially to Mr Gibb's efforts to dissuade her, Ms Ash had some difficulty in explaining why she had been unwilling to consult Ms McKennitt prior to publication or allow her to see some of the allegations about her. The exchange in cross-examination went as follows:

> "MR BROWNE: Why did you not volunteer to Ms McKennitt what you were going to write about her?"
>
> Ms ASH: Because Ms McKennitt did not volunteer to me information of how she would take my home away from me.
>
> MR BROWNE: Is that really your best answer?
>
> Ms ASH: Yes, that is my best answer. Because I do not think Ms McKennitt revealed things to me … I didn't think it necessary to reveal my personal details to her."

The reference to her "home" harks back to the caution which was placed on Ms McKennitt's behalf at the Land Registry and to the ensuing property dispute.

88. Ms Ash had claimed that she sent portions of her earlier book to the people named before publication. In the light of this, Mr Browne asked why she had not taken the same step with Ms McKennitt (who, after all, loomed far larger in the second book then any individual in the first). Ms Ash's answer was revealing as to her motivation and purpose in publishing this book:

> "Ms ASH: These other people were friends of mine that treated me kindly, considerately and with compassion. These were close friends. All these people were friends of mine. Ms McKennitt was no longer a friend of mine".

When pressed, she added:

> "… I didn't feel obligated, as I did with my other friends, to send a copy of the book. I didn't feel obligated any longer to Ms McKennitt".

She denied, however, that this was her motivation for publishing the book or for choosing to make revelations about Ms McKennitt's private life. She said that her "resentment was over", and that she simply wanted to write her own story. Her case thus appears to be that the revelations about Ms McKennitt were merely incidental to her own story and that, in so far as they might be thought intrusive, she was under no obligation to consult her before publication. As she put it on Day 5 of the trial, the book was "about my experiences … my feelings … about my life". Mr Browne described her as "entirely self-centred".

89. As I have already suggested, whatever Ms Ash's true appreciation of the situation may be, from her perspective, it is difficult for an outsider to understand how the book would be of any interest to the general reader if it were not for the fact that Ms Ash is giving an account of her intimate dealings with a person who is known to many millions of people, throughout the world, interested in folk music and her music in particular. Returning to the Boswell/Johnson analogy, one may characterise the exercise to that extent as largely parasitic. It is the central role of Ms McKennitt, and the revelations about her, which provide the main reason for people to acquire the book. It is, I have no doubt, why her name appears in the title.

90. The "falling out" over the financial and property dispute may explain why the book was not shown to Ms McKennitt. It would not even surprise me (although I do not need to decide the point) if it also goes to explain why the book was written at all. I am quite satisfied, on the other hand, that Ms Ash was only too aware, at the time of and prior to publication, that much of the content of the book would cause concern and distress to Ms McKennitt because of its intrusive nature. Accordingly, not only a reasonable person standing in her shoes, but Ms Ash herself would be conscious that she was thereby infringing the "trust" and "loyalty" to which she referred in the book. I shall consider the specific complaints in due course, although I need hardly add that

it is not everything in the book which infringes privacy (and Ms McKennitt does not suggest otherwise).

91. One of the difficulties about Ms Ash's evidence, and the presentation of her case as an advocate in person, is that she is not capable of standing back and making any kind of dispassionate or objective assessment of her motivation or of the consequences of what she has done. She is clearly resentful towards Ms McKennitt and finds it difficult to move on from the breakdown in that relationship. If it were otherwise, she would not have devoted so much of her energy to recounting in such minute detail the day-to-day occurrences in her relationship – most of which could be of no interest to anyone apart from themselves except, perhaps, for somewhat obsessive fans of Ms McKennitt who were hungry for inconsequential detail.

92. Indeed, Mr Browne has submitted that Ms Ash's preoccupation with Ms McKennitt and her activities and her somewhat obsessive attitude towards her is borne out by the curious remark which she made while Ms McKennitt was in the witness box:

> "I am going to say most of my book is almost a love letter to Ms McKennitt".

It is no surprise that Ms McKennitt explained her reaction to reading the book in the following terms:

> "I found it extraordinary, as did many other people. I think the thing that struck me most was what I would say … almost a pathological [account] of affection or attention you had for me … I have had lots of time to ruminate now, since this book has come out about the history of your relationships with various well known people … or celebrities, or whatever you want to call them. No doubt you are not shy to remind everyone about them. I think that in retrospect you have, and certainly had with me, an unnatural and, in my view, almost a pathologically acute 'something' towards me that seemed unbalanced and distorted".

93. It is against this rather unusual background that the genuineness or otherwise of the Defendants' public interest argument needs to be considered.

18. The public interest argument

94. The question needs to be considered of whether Lord Goff's third "limiting principle" comes into effect. As he pointed out, this is closely allied to the old "iniquity" rule, whereby it was not possible to enforce an obligation of confidence in respect of the claimant's iniquitous or unlawful behaviour. Nowadays the principle is not regarded as confined to unlawful activity, or even "iniquity", and it is customary to address the question in terms of a broader "public interest". On the other hand, as Mr Browne has fairly pointed out, it is necessary to confine the concept of "public interest", especially in this context, in a fairly disciplined way. One example considered was that of Miss Naomi Campbell, where it seems to have been recognised on all sides that the

information about her attending a drug rehabilitation clinic was something which could be revealed in the public interest – specifically because she had lied, and thus deliberately misled the public, by suggesting in the past that she had not herself taken drugs. Ms Ash seeks to pray that principle in aid here in a context which Mr Browne submits is materially different.

95. It is elementary that "… there is a wide difference between what is interesting to the public and what it is in the public interest to make known": *British Steel Corporation v Granada Television Ltd* [1981] AC 1096, 1168G, *per* Lord Wilberforce. It also true, especially in relation to "celebrities" and those in the world of the arts and entertainment, that many people are interested "… in many private matters which are of no real concern of theirs and which the public have no pressing need to know": see the general observations of Stephenson LJ in *Lion Laboratories v Evans* [1985] QB 526, 537 C. In order to protect the legitimate rights of such persons to a private life, it is thus necessary to scrutinise with care any claims to public interest – which are sometimes made by the media and their representatives on a rather formulaic basis. The *Lion Laboratories* case represented something of a departure, in the sense that the emphasis shifted away from the old "iniquity rule" and on to the somewhat wider, albeit less precise, concept of "public interest". It is helpful to consider the explanation offered by Griffiths LJ at [1985] 1 QB 526, 550 A-E:

> "The first question to be determined is whether there exists a defence of public interest to actions for breach of confidentiality and copyright, and if so, whether it is limited to situations in which there has been serious wrongdoing by the plaintiffs – the so-called 'iniquity' rule.
>
> I am quite satisfied that the defence of public interest is now well established in actions for breach of confidence and, although there is less authority on the point, that it also extends to breach of copyright: see by way of example *Fraser v Evans* [1969] 1 QB 349; *Hubbard v Vosper* [1972] 2 QB 84; *Woodward v Hutchins* [1977] 1 WLR 760 and *British Steel Corporation v Granada Television Ltd* [1981] AC 1096.
>
> I can see no sensible reason why this defence should be limited to cases in which there has been wrongdoing on the part of the plaintiffs. I believe that the so-called iniquity rule evolved because in most cases where the facts justified a publication in breach of confidence, it was because the plaintiff had behaved so disgracefully or criminally that it was judged in the public interest that his behaviour should be exposed. No doubt it is in such circumstances that the defence will usually arise, but it is not difficult to think of instances where, although there has been no wrongdoing on the part of the plaintiff, it may be vital in the public interest to publish a part of his confidential information. Stephenson LJ has given such an example in the course of his judgment.

> I therefore agree with Leonard J that it is not an essential ingredient of this defence that the plaintiffs should have been guilty of iniquitous conduct".

The reference to an example in the judgment of Stephenson LJ is probably to that contained in a passage at p.538A-C. Having referred to and adopted an observation of Lord Denning MR in *Fraser v Evans* [1969] 1 QB 349, 362 to the effect that "[iniquity] is merely an instance of just cause or excuse for breaking confidence", Stephenson LJ went on to provide a hypothetical example based on the facts in the *Lion Laboratories* case itself. As is well known, it concerned the plaintiff's Intoximeter equipment used by the police for breath-testing:

> "Suppose the plaintiffs had informed the police that their Intoximeter was not working accurately nor safe to use, and the police had replied that they were nevertheless going to continue using it as breath-test evidence. Could there then be no defence of public interest if the defendants sought to publish that confidential information, simply because the plaintiffs themselves had done nothing wrong but the police had? There would be the same public interest in publication, whichever was guilty of misconduct; and I cannot think the right to break confidence would be lost, though the public interest would remain the same.
>
> Bearing this last consideration in mind, in my opinion we cannot say that the defendants must be restrained because what they want to publish does not show misconduct *by the plaintiffs*" (emphasis added).

96. That background is important, Mr Browne submits, because there is no reason to suppose that, where the public interest justification for publishing confidential material *is* the misconduct of the claimant, it is appropriate to apply any significantly lower threshold than that which operated under the traditional "iniquity rule" Has the particular claimant behaved so "disgracefully or criminally" that the public interest requires that his or her behaviour should be exposed? As I have already pointed out, in *Campbell v MGN Ltd* the public interest was said to arise from the fact that Ms Campbell had publicly lied to conceal her drug habit. I have little doubt that, more generally, where a claimant has deliberately sought to mislead the public on a significant issue, that would be regarded as a sufficient reason for putting the record straight, even if it involved a breach of confidence or an infringement of privacy. Such an approach would be consistent with the test applied by the Press Complaints Commission.

97. I am prepared to acknowledge that a court nowadays might not apply quite so strict a test to that laid down by Ungoed-Thomas J in *Beloff v Pressdram* [1973] 1 All ER 241, 260:

> "… the disclosure justified in the public interest, of matters carried out or contemplated, in breach of the country's security,

> or in breach of law, including statutory duty, fraud or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity".

I would nevertheless accept that Mr Browne is broadly correct when he submits that for a claimant's conduct to "trigger the public interest defence" a very high degree of misbehaviour must be demonstrated. Relatively trivial matters, even though falling short of the highest standards people might set for themselves, will not suffice. All of us try to behave well, no doubt, for most of the time but hardly anyone succeeds in achieving that ideal. The mere fact that a "celebrity" falls short from time to time, like everyone else, could not possibly justify exposure, in the supposed public interest, of every peccadillo or foible cropping up in day-to-day life.

98. In this case, the Defendants seek to construct a public interest justification for their wide-ranging revelations out of Ms McKennitt's supposed hypocrisy, based on examples of her behaviour where, it is said, she has fallen short of the standards set for herself on her website from November 2004 onwards in what are described as her "compass points". It is to be noted that it is no part of the Defendants' case now to allege criminality or dishonesty on Ms McKennitt's part – although, as I have indicated at [37] above, it was effectively alleged in the book that she had fabricated her case in the Chancery proceedings. That was a very serious allegation, tantamount to perjury or an attempt to pervert the course of justice. If there were any grounds to support it, there might well have been, to that extent, a powerful argument for a "public interest" justification for revealing it. As it was always said, "there is no confidence in iniquity", and perverting the course of justice would certainly qualify. The present argument put forward on Ms Ash's behalf falls far short of that.

99. The so-called "compass points" were derived from material on Ms McKennitt's website:

> "And just as one builds a company mission statement based on values and principles, I have done the same thing for myself. Certain principles have become my compass points. I reference them whenever I make important choices and decisions, professionally or personally. They are things to which I strive and am pleased to share some of them with you.
>
> Be compassionate and never forget how to love
>
> Think inclusively
>
> Reclaim noble values such as truth, honesty, honour, courage
>
> Respect one's elders and look to what they have to teach you
>
> Be empathetic
>
> Look after the less fortunate in society

> Promote and protect diversity
>
> Respect the gifts of the natural world
>
> Set your goals high and take pride in what you do
>
> Cherish and look after your body, and, as the ancient Greeks believed, your mind will serve you better
>
> Put back into the community as there have been those before you have done the same and you are reaping what they sowed
>
> Participate in and protect democracy. It does not thrive as a spectator sport
>
> Undertake due diligence in everything
>
> Seek balance and space, and solitude
>
> Don't be afraid to feel passionate about something
>
> Learn to be an advocate and an ambassador for good
>
> Be mindful of your limitations
>
> Indulge and nurture your curiosity as it will keep you vital
>
> Take charge of your life and don't fall into the pit of entitlement
>
> Assume nothing and take nothing for granted
>
> Things are not necessarily what they seem"

100. Some people may no doubt think this a little pretentious, but Ms McKennitt has emphasised in the course of evidence that these represent her aspirations or ideals. As such, few could quarrel with them. Ms McKennitt most certainly does not, however, claim to have fulfilled all these high standards throughout her life. She recommends them as goals to which she and others can aspire. It thus becomes clear that they represent a fragile peg on which to hang a public interest defence. Apart from the fact that they only surfaced in November 2004, and can hardly in themselves have triggered Ms Ash's decision to "spill the beans", it is necessary to take note that, if her argument is correct, any person in the public eye who chose to share his or her aspirations with fans, followers, admirers or the general public, would immediately become vulnerable to having every trivial detail in their private lives exposed to public scrutiny. That simply cannot be right. In the light of the background to this case, to which I have referred above, I am quite satisfied that these "compass points" are simply being used as an excuse by Ms Ash to enable her to escape her obligations of confidence and, in her own phrase, "unqualified loyalty". In any event, in the context of criticisms of Ms McKennitt's character, it is only fair to bear in mind the

evidence of some of the witnesses about her substantial and regular support for charitable work (largely anonymous).

101. Mr Browne, quite properly, drew Ms Ash's attention to the Court of Appeal's decision in *Woodward v Hutchins* [1977] 1 WLR 760 because, at least superficially, it might tend to lend some support to her case in this respect. On the other hand, he pointed out that the decision was given *ex tempore* after two hours of argument late one evening. Furthermore, it has met with criticism from various quarters over the last few years. It is interesting to note, for example, the observation of Gummow J in *SK & F v Department of Community Services* [1990] FSR 617, 663:

> "… An examination of the recent English decisions shows that the so-called 'public interest' defence is not so much a rule of law as an invitation to judicial idiosyncrasy by deciding each case on an ad hoc basis as to whether, on the facts overall, it is better to respect or to override the obligation of confidence".

However courteously expressed, English judges need to take careful account of criticisms of that kind, not least in the light of Article 7 of the European Convention and the general desirability that the law, in so far as it permits infringements upon Convention rights and, in particular, those under Article 10, should be declared with as much certainty and precision as possible. Citizens need to be able to regulate their conduct, if necessary with the advice of lawyers, so as to be able to appreciate the potential legal consequences of what they are doing or saying. In this field especially, it is important for the applicable principles to be stated with reasonable clarity.

102. It is demonstrated by Sir Roger Toulson in his book *Confidentiality* (1996) that the Australian courts have departed from the *Woodward v Hutchins* approach. In the book the words of Gummow J are adopted and applied specifically with reference to that case, of which it is said at (pp 89-90) that it "may well be regarded as an instance of judicial idiosyncrasy".

103. An interesting comparison was made also in *Toulson & Phipps* between the *Woodward* case and the later Court of Appeal decision in *Schering Chemicals v Falkman Ltd* [1982] 1 QB 1. In the former case, those who owed a professional duty of confidence to Tom Jones, the singer, were revealing private goings on during an aircraft flight but were permitted to do so for reasons of "public interest". In the latter case the Defendants' professional skills were also engaged to present the plaintiff company in a good light, and an injunction was granted to restrain them from doing the opposite. *Toulson & Phipps* point out the irony, in that the public interest in knowing the truth about a pregnancy testing drug, Primodos, would apparently be far greater than any such interest in the antics of Mr Tom Jones. All this tends to underline how important it is to proceed from principle.

104. In the later work, *The Law of Privacy and the Media*, Tugendhat & Christie (2002), Sir Michael Tugendhat also criticised the basis of the *Woodward* decision and referred to a number of academic criticisms to similar effect. The learned authors emphasised that the Court of Appeal had appeared to pay too little regard to the duties of Mr Hutchins as an employee.

105. There has also been judicial criticism within this jurisdiction. In *Douglas v Hello! Ltd (No. 1)* [2001] QB 967, at [96] Brooke LJ referred to the injunction having been "framed in astonishingly wide terms". So too, in *Campbell v Frisbee* [2002] EWCA Civ 1374, Lightman J queried the continuing applicability of the decision, in the light of more recent developments in the law of confidence, and it was observed in the Court of Appeal in the same case at [34] that the learned judge might well have been right "to suggest that *Woodward v Hutchins* should no longer be applied".

19. The property dispute and the Chancery proceedings

106. It is now necessary for me to set out in further detail the circumstances leading to the Chancery proceedings and the settlement by way of a Tomlin order. The issues would appear to be (a) whether Ms McKennitt has a reasonable expectation of privacy or confidentiality in relation those proceedings and the underlying dispute, and (b) whether, if so, there is any public interest which would justify and require that Ms Ash's Article 10 rights should be accorded priority.

107. It all began in March and April 1997. Mr Fowkes and Ms Ash were planning to buy a property as a home with a friend called Jamila Gavin. She dropped out and, when Mr Fowkes informed Ms McKennitt of this in the course of a car journey, she expressed a willingness to step in to take the place of Jamila Gavin. A third share in the house (in Bodney Road) at that time required a payment of £30,000. The money was duly advanced on 19th April 1997. That is a critical date, since it is necessary to determine the parties' intention at that time. The evidence seems to be clear. Before I address it, however, it is worth recording that, at pages 300-301 of the book, Ms Ash acknowledges that this was a "private dispute between Loreena, Tim and me" which had been propelled into the public domain. She is mistaken in that respect, in the sense that it never did enter the public domain because matters were settled, as I have said, on the basis of a Tomlin order. Moreover, in the book Ms Ash claimed:

> "The intimate details of our relationship with Loreena – the falling out in Ireland, the gift/loan/investment scenario, Loreena's intransigence, her accusations, our accusations, were now widely known, not only in our circle, but by the High Court of Justice".

108. She there acknowledged that the case concerned "intimate details" which would thus, on the face of it, be matters in respect of which Ms McKennitt would be entitled to a reasonable expectation of privacy. (Although Ms Ash again asserts that the details became "widely known", she is mistaken in that respect.)

109. I therefore turn to the evidence. Two days before the money changed hands, on 17th April 1997, Mr Fowkes instructed his solicitor, Mr Read, as follows:

> "The situation now, is that I am buying 12 Bodney Road on my own as far as the mortgage is concerned (50K mortgage) and our friend Loreena McKennitt is contributing £30K cash and Niema & I are contributing £15K cash. These two amounts of cash are going into my account now and both should be there in

> a few days hopefully. Loreena will not be living there, except for the very few odd days that she is free – she lives in Canada, where she owns a couple of places and seems to spend most of her time in airports anyway!
>
> …
>
> We therefore require you to tie up the legal details between the three of us in terms of ownership in trust? Legal joint and equal owners etc. … I hope it is fairly straight forward. We should also make the agreement so that if we or Loreena want to sell then first refusal to the other party(s) is possible".

110. On the same day Mr Fowkes had a telephone conversation with Ms McKennitt's "man of affairs", Mr Bill Bruce, who gave evidence before me and produced a contemporaneous note of the conversation. When he spoke to Mr Fowkes it was clear that the understanding was that the property would be "held in trust for three".

111. If any further confirmation were needed as to the parties' understanding at the material time, there was introduced into evidence an opinion from Mr Fowkes' counsel dated 13th June 2000. (It had already been referred to in the book at page 290.) This recorded that Mr Fowkes had, according to the instructions upon which the opinion was based, taken the view from the outset that the transaction would entitle Ms McKennitt to a beneficial interest in the property. In my judgment, there is no room for doubt. At the crucial date of 19th April 1997, the parties were agreed that Ms McKennitt was to take a third share interest in the property (in substitution for Ms Gavin). It is true that thereafter there were desultory negotiations and discussions, including as to whether the advance should be treated as a loan. I have not attempted to set out the history because it does not assist in the present task. As I have said, the material date for assessing the parties' intentions was 19th April 1997 and on that date the position is clear.

112. On 3rd March 1998, shortly before Ms McKennitt's European tour was to begin, Mr Fowkes faxed her to state, in general terms, that it was his intention to re-mortgage with Virgin Direct, in due course, "when things become less hectic". No more was heard of this for some time. There followed the European tour, the United States tour and then the death of Mr Rees by drowning on 17th July 1998. In the aftermath, Ms McKennitt was involved in winding up his estate and assisting his parents. Not surprisingly, this occupied most of her attention for some months.

113. On 30th October 1998 Mr Fowkes re-mortgaged the Bodney Road property for £71,000 through the Royal Bank of Scotland. This represented a significant increase in borrowing from the original £50,000. It is Mr Fowkes' case that one of the reasons for changing mortgages was that the original mortgagees were not prepared to contemplate a second charge – which he wished to arrange by way of security for Ms McKennitt. Unfortunately, perhaps because, as he put it, "there probably was an awful lot going on in that period of my life", he failed to inform Ms McKennitt or her solicitors (at that time Colman Coyle). Indeed, he did not inform his own solicitors at that stage either, for the reason (he explained) that he was required to use solicitors

designated by the mortgagees. In consequence, no doubt through misunderstanding or lack of communication, his own solicitors (Thelwell Fagan) went on record, as late as 8th April 1999, as saying that the charge secured, following the 30th October re-mortgage, was still £50,000. Even a year later, on 18th April 2000, Thelwell Fagan were stating that the re-mortgage was "from Royal Bank of Scotland to Virgin Direct". In fact the new mortgagees were the Royal Bank of Scotland. At all events, whatever their understanding, it had only been on 20th January 1999 that Thelwell Fagan informed Ms McKennitt's solicitors that there had been a re-mortgage (albeit wrongly described as "to Virgin Direct").

114. A week later, on 27th January 1999, the 30th October 1998 re-mortgage appeared on the Land Register in the name of Royal Bank of Scotland. This caused anxiety to Ms McKennitt's solicitors, Colman Coyle, and they were not surprisingly suspicious as to what was going on. The mortgagees had been wrongly identified to them as "Virgin Direct". There had been a gap of almost three months before they were informed at all. Also, Colman Coyle naturally wondered why, if the purpose of the re-mortgage was (as Mr Fowkes has said) to allow a second charge to Ms McKennitt, such a charge had not been created simultaneously. This was a point raised in their letter of 8th February 1999. In view of the confusion, they took the step of protecting their client's interest by registering a caution on 28th January.

115. Various discussions and negotiations took place thereafter over a considerable period of time. The details do not particularly matter for present purposes. It is perhaps worth noting, however, that on 9th November 1999 Ms McKennitt was offered the return of the £30,000 without interest in full and final settlement and, on 23rd December of the same year, Mr Fowkes' solicitors pressed for an answer as to whether or not Ms McKennitt was prepared to accept that "in full and final settlement". (The property had gone up in value considerably after 1997.)

116. By January 2001, since matters had not been resolved, Ms McKennitt was instructed by the Land Registrar to take proceedings. That is why, reluctantly, she began the litigation in the Chancery Division. For reasons which have become only too clear, Mr Fowkes and Ms Ash advanced as their "primary defence" in that litigation the proposition that the £30,000 advance had been made as a gift – and that accordingly they were under no obligation to repay Ms McKennitt anything at all. As I have explained, that is quite inconsistent with the contemporaneous documents. Ms Ash admitted in court before me, in response to Mr Browne, that they were trying to deter Ms McKennitt from going to court, in order to save their home, by any means they could think of "except … criminal or whatever". In other words, they were prepared to lie.

117. In this context, it is worth recalling the evidence of one of Ms Ash's own witnesses, Ms Joyce Edling, who was in no doubt from a conversation she had with Ms McKennitt on 17th August 2001 that she had no intention of turning them out of their home. All she required was "a one third interest whenever they choose to sell it". She added, somewhat extravagantly, that this was so even if they sold in a hundred years' time.

118. What is clear is that Ms Ash wished to exploit Ms McKennitt's vulnerability, as she perceived it, and to extract a better deal from her by the threat of publicity. It is there in the documents. It was clear that this had angered Ms McKennitt and caused her considerable resentment. As she stated in the witness box, she was not prepared to be taken for "a fool".

119. Because Ms Ash and Mr Fowkes had been advised about the presumption of advancement (which they tried to portray as some medieval quirk of English law, as opposed to a principle of equity), they decided that their best course was to adopt the fiction that the £30,000 had been donated as gift. They were advised that, in order to overcome the presumption, it would be necessary for them to demonstrate that the clear understanding of the parties was different; that is to say, that there had either been a gift or a straight loan without the lender acquiring any interest in the property. In spite of the fact that the contemporaneous documents demonstrate precisely the contrary, they were not deterred.

120. One of the more remarkable documents in the evidence is a letter dated 23rd August 2001 from Ms Ash to her new solicitor (who had been brought in as having a reputation as a tough litigator). Ms Ash indicated that they were prepared to settle (indeed most anxious to do so). She was prepared to accept a compromise settlement at £60,000. She enclosed a draft which she wished the solicitor to send to Ms McKennitt's solicitors, and she added:

> "As you know Loreena is not concerned about money, nor friendship, her main vulnerability is her reputation, which she guards jealously, and this is our strongest bargaining point".

It is quite clear that this is why the "primary contention" was adopted of pretending that the original advance had been a gift. It was hoped that the fear of publicity would deter Ms McKennitt from insisting upon her rights.

121. The draft letter enclosed is quite long, but it is necessary to quote certain passages in order to demonstrate Ms Ash's motivation for adopting the dishonest stance that the £30,000 had been advanced as a gift. It contained the following:

> "Firstly we do not accept your contention that it is unlikely that the court will conclude that the £30,000 was a gift. We have extremely reliable witnesses who have sworn on oath that your client told them, in no uncertain terms, that she was not interested in a share of the property and was giving our clients the money as an act of friendship, witnesses who are so outraged by her behaviour that they are willing to travel great distances to appear in court to testify on our clients' behalf. We also have witnesses to whom your client has admitted that she has changed her original intention as an act of 'punishment', in order to 'teach them respect' and to 'teach them a lesson', after an altercation with one of our clients.

> In order to prove that your client is being misleading about a meeting which she says took place in which she claims our clients asked her for £30,000 and agreed to give her a 31.58% share of the property in return, and which our clients categorically deny, our clients will have to prove that your client is capable of deception, indeed dishonesty. (Our clients never asked your client for £30,000, this amount was offered to them as a gift. Several months after your client transferred the money to our client's account, our clients did offer your client a share of the property which your client refused outright.) Firstly, your client has stated in her pleadings that she was unaware of any work done to our client's home. This is blatantly untrue and we have witnesses and photographs to prove this as well as your recent fax acknowledging that your client was fully aware of work done to the house.
>
> …
>
> (Alan, I'm including the following but am not sure if it should be used in case it is construed as a threat.)
>
> As you are aware, your client has a formidable reputation, not only as a musician, but as a benevolent, gracious, charitable and compassionate, even spiritual, being. She is referred to, in the numerous newspaper and magazine articles written about her, as a Celtic Queen and a 'new star', she is spoken of in reverential terms. Surely she would not want to have this image dispelled by the reporters and camera crew who are bound to attend any court case and who, no doubt, will have a field day depicting this immensely wealthy woman, this spiritual being, this Celtic Goddess, taking her former closest friends to court in an attempt to punish them by resurrecting an ancient English law, which neither she nor they were aware of at the time, to acquire a share of their home – the first home they have ever owned.
>
> Already a Californian magazine has approached our clients. The journalist wants to write an article demonstrating how fame and fortune changes personality, illustrating that often people who have become famous and wealthy think they have become so powerful that they are untouchable. They disregard friends who helped them on the way up, (e.g. Bob Dylan's 'don't say you knew me when') and using Loreena McKennitt as an example of taking close friends to court to acquire property she does not need but in order to 'teach them a lesson' – a version of playing god".

122. This is a somewhat revealing document not only as to Ms Ash's approach to the Chancery litigation but also as to the motivation for writing the book – and the

genuineness of her public interest defence. It is also worthy of note that at the foot of the draft letter she enclosed a manuscript note to her solicitor, including the following:

> "Would it be beneficial to say the initial discussions resulted in a loan (previous barrister said 'if not gift then loan')
>
> Would they have put a caution on the house if ⅓ share was agreed by all? And why all the negotiations for a second mortgage?"

123. Mr Browne submits that this was an attempt to threaten and browbeat Ms McKennitt to accept a lower offer on the basis that, otherwise, she would be exposed as a hypocrite and a bully. This interpretation is certainly consistent with what was said in the book at page 313 to the effect that Ms McKennitt's main vulnerability was her reputation and the rhetorical question on page 295, "Did she really want that kind of publicity?" Incidentally, her suggestion that Ms McKennitt changed her original intention as an act of "punishment" is unsustainable because the caution was registered on 28th January 1999 – over six months before the "altercation" with Mr Fowkes at the Irish cottage.

124. All of this would have remained confidential, were it not for the publication of Ms Ash's book. The whole point of a Tomlin order (recording the ultimate settlement figure of £67,500) is that the parties are able to keep the terms of settlement confidential. Furthermore, there was no need for all the correspondence to become public. There would be no public entitlement of access to those documents or indeed even to the parties' statements of case (save for the particulars of claim). There can be little doubt, therefore, that Ms McKennitt had a "reasonable expectation" of privacy in relation to all these matters.

125. Moreover, far from there being a public interest in disclosing her "iniquity", illegality or otherwise "disgraceful behaviour", the matters I have described above indicate nothing to her discredit whatever. She had no wish to go to law, but it is not surprising that her solicitors felt it necessary to enter the caution in the first place; nor, in view of the lack of progress in negotiations in the meantime, was it surprising that the Registrar pressed for litigation to resolve matters in January 2001. There is nothing at all in Ms Ash's suggestion, withdrawn on 11th November 2005, that the Chancery case was put forward dishonestly; nor indeed in the allegation, still maintained, that Ms McKennitt had no moral right to claim her money and that she was being vindictive in doing so.

126. I should perhaps also record that the "extremely reliable witnesses" who supposedly were able to confirm that the £30,000 had been advanced as a gift were approached by a friend of Ms Ash (not a qualified lawyer). Her brief seems to have been to get them to "beef up" their accounts. One man is stated on page 176 of the book not to have been sure what the exact financial arrangements were but "under the impression" that the money had been offered as a one-off gift. When his affidavit materialised, the account was rather different. It had been "made clear" that the money was a kind of "golden handshake" and Ms McKennitt had actually told him that she had given the money to help good friends and did not expect it back.

127. Another man had, according to the book at page 286, sent a mutual friend a fax (not disclosed in this litigation) which actually recorded that Ms McKennitt "stated very clearly that she wanted no part of any partnership, had enough properties … and that she was simply *lending* Tim and Niema the money to help them get started" (emphasis added). In his affidavit of 15th September 2000 a fundamental change has been wrought: "I was left in no doubt by this conversation [with Ms McKennitt] that Loreena intended to give Tim and Niema this money". This process of alleging in the defence that there had been a gift (when quite plainly there had not) and then having the evidence adjusted to support that false allegation is unedifying, to say the least.

20. The relevance of the contractual provisions

128. When they were about to participate in the European and United States tours as part of Ms McKennitt's crew, Mr Fowkes signed a contract on 16th March 1998 including a confidentiality clause. The evidence of Mr Blackaby was that he gave two copy agreements in an envelope to Mr Fowkes intending that Ms Ash should also sign one. It is common ground that she signed an agreement eventually in the following October after the tours were long over. Although there is a dispute as to why it was left so late, and Ms Ash denies that she was bound by any agreement, I accept the evidence of Mr Bruce that he had pressed her to sign during the intervening months. He said that the line she took was, in effect, that there was no need for her to sign as she was a friend of Ms McKennitt and would raise the matter with her. That rings true. Thereafter he left it to Ms McKennitt to pursue the matter as and when "she had time and felt that the timing was appropriate".

129. Moreover, I have no doubt that Ms Ash was well aware that Ms McKennitt was very protective of her privacy and that restrictions of confidentiality were imposed on all her employees. I find it improbable, for example, that she was unaware that Mr Fowkes had been asked to sign an agreement. In any event, it was never suggested at the time by Ms Ash that she had no intention of being bound by obligations of confidentiality (whether express or implied) and considered herself entitled to publish what she liked. In so far as she fobbed off Mr Bruce, as I accept she did, it was by clear implication on the opposite basis – namely, that *because* she was an old friend of Ms McKennitt, and was loyal to her, there was no need for her to sign a formal agreement. When she did ultimately sign it, she was thereby signifying that she was aware that she had been bound by such obligations of confidentiality throughout. It was called a "crew member agreement" and the confidentiality provisions appeared in Schedule A. The reason why Ms McKennitt was insistent that she should sign the contract, even long after the event, was not simply for the sake of form; she was, as I have already said, becoming concerned that Ms Ash might exploit her inside knowledge through indiscreet publication along the lines of her earlier book.

130. In general terms, it has been recognised that there is less scope for avoiding obligations which have been expressly undertaken in formal circumstances and in exchange for consideration: see e.g. *Campbell v Frisbee* [2002] EWCA Civ 1374 at [22] and *Att.-Gen. v Parry* [2004] EMLR 223 at [14], Lewison J. In the circumstances of this case, however, I am not convinced that the provisions of the written contract (with Hampstead Productions Ltd) add very much to the obligations that Ms Ash

would have owed in equity by reason of the closeness of her personal relationship with Ms McKennitt.

21. My conclusions on the five areas of complaint

131. It is now necessary for me to apply the principles I have summarised to the facts of the case and to decide the extent of the infringements. I will adhere to the numbering of the items in the original schedule of complaints. Although Ms McKennitt and her advisers have narrowed the focus since it was first drawn up, I believe that the net is still cast too wide – but not to a very significant extent.

132. I shall consider first, compendiously, items 1 to 4. Having regard to proportionality, I do not believe that the passing references to friendships with various men are objectionable or offensive by modern standards. The only passage which in my judgment oversteps the mark is that containing the private and intimate observations on page 211 (to which I referred at [17] above).

133. Item 5 (which overlaps to an extent with items 13 and 14) is concerned with the coverage of Ms McKennitt's relationship with her fiancé and his death in 1998. It seems to me that there is a clear distinction to be drawn between general background, much of which would be anodyne or already in the public domain, and the details of her emotional reaction to bereavement. That is remarkably intrusive and insensitive.

134. Item 6 covers the conversations about record companies. I think this is too anodyne and general to require protection.

135. Item 9 concerns Ms McKennitt's Irish cottage. It is not her only house, but it is nevertheless a home. That is one of the matters expressly addressed in Article 8(1) of the Convention as entitled to "respect". Correspondingly, there would be an obligation of confidence. Even relatively trivial details would fall within this protection simply because of the traditional sanctity accorded to hearth and home. To describe a person's home, the décor, the layout, the state of cleanliness, or how the occupiers behave inside it, is generally regarded as unacceptable. To convey such details, without permission, to the general public is almost as objectionable as spying into the home with a long distance lens and publishing the resulting photographs.

136. True it is that over five or six years Mr Fowkes was engaged, from time to time, in renovation works at the cottage. Ms Ash, too, did a lot of hard work to make it habitable after Ms McKennitt acquired it in 1992. Some of the work was remunerated and some was not. That seems to me to make no significant difference. Whether one is allowed into a person's home professionally, to quote for or to carry out work, or one is welcomed socially, it would clearly be understood that the details are not to be published to the world at large.

137. The fact that the work on the cottage was part of Ms Ash's own life does not mean that she is excused from "respecting" Ms McKennitt's entitlement to privacy. Likewise, it seems to me that the right to "respect" for one's privacy at home would cover not merely the physical descriptions of the building or contents but also conversations, communications or disagreements taking place in the home

environment. People feel, and are entitled to feel, free in their homes to speak unguardedly and with less inhibition than in public places. Accordingly, it will be rare indeed that the public interest will justify encroaching upon such goings on. Naturally if criminal acts are committed, such as child abuse or the cultivation of illegal drugs, there would be a public interest to override the normal protection, but nothing of the sort is alleged here.

138. For obvious reasons I am not going to regurgitate the minute details to be found in the book about what was under the lino, the sanitary arrangements, or how many bunk beds were put up when visitors came to stay; suffice to say, it is intrusive and distressing for Ms McKennitt's household minutiae to be exposed to curious eyes and it is utterly devoid of any legitimate public interest. Applying, therefore, the "intense focus" to the parties' respective rights, I have no hesitation in concluding that the complaint is well founded and that the detail rehearsed on pages 55, 56, 59, 231, 233, 234-239, 243-244, 246-251 should not have been published.

139. Item 10 deals with the shopping trip in Italy. There is reference on page 226 to buying furniture and other household items for Ms McKennitt but the description is in very general terms. It does not seem to me to be intrusive. It is trivial and of no consequence, and unlike relatively trivial but intrusive descriptions of a person's home, there is no need for the law to step in and offer protection. Nor is it likely to cause significant distress or other harm to say, of a celebrity or anyone else, that a friend accompanied her on a shopping trip and managed to bargain with vendors to save money. It is anodyne, and not such as to attract any obligation of confidence. I do not even need to ask whether there is any public interest – although, of course, there is not.

140. Item 11 relates to the Christmas visit in Arizona. I cannot see anything in the short passages complained of which could be said to be an infringement of Ms McKennitt's privacy or subject to a duty of confidence.

141. Item 12 is concerned with passages on page 18 or 19 of the book in which a remark is attributed to Ms McKennitt about how well she got on with Ms Ash's London friends. There is also a description of how Ms Ash's family in Canada made her welcome. I came to the conclusion that these are rather anodyne and not sufficiently intrusive to require protection.

142. Item 13 is different. Intimate revelations on pages 206-207 about the state of McKennitt's health following her bereavement in 1998 appear to me to fall firmly on the other side of the line. There is a reasonable expectation of privacy in relation to such matters.

143. Item 14 again relates to the aftermath of Ms McKennitt's bereavement and is concerned with about 10 pages (207-216) dealing with, again, Ms McKennitt's fragile state at that time and details of a visit to Tuscany. This is intimate information gained from communications made at that time by Ms McKennitt because she trusted Ms Ash not to take advantage of her. This section also includes the rather intimate conversation to which I have referred in connection with item 4 above. As has been pointed out by Mr Browne, the section as a whole would be capable of being rewritten

more shortly, so as to refer merely to the fact that there had been a visit to Tuscany and what, in general terms, they did there. I would uphold the complaint, however, about the intimate conversations and Ms McKennitt's fragility.

144. Item 15 is concerned with a contract Ms McKennitt entered into with Canadian Warner for her "next three albums". There is a general discussion on page 26 of the contractual terms and of concessions made. Even though it is general, it seems to me that Ms McKennitt is entitled to a reasonable expectation of privacy as to her contractual terms. They are certainly not for Ms Ash to reveal.

145. Item 16 concerns general remarks on page 21 made by Ms McKennitt in her early days about record companies – but none in particular – and this I would categorise as anodyne and not such as to require the protection of the law.

146. Items 17 and 18 are complaints about the passages on pages 65 to 66 of the book concerning the location of a promotional video. It deals with the telephone conversation between Ms Ash and friends of hers who were willing to let their home be used for that purpose. I do not believe this is an infringement of Ms McKennitt's privacy or that the information is inherently confidential.

147. Item 20 addresses passages in the book between pages 75 and 77. It gives a picture of the panic and stress of a European tour and there is an account of how Ms McKennitt was short tempered with one of her staff. On balance, I have come to the conclusion that it would be going too far to restrain this on grounds of privacy. Unlike some of the other passages in the book, the subject-matter is not confined to intimate revelations or conversations between Ms McKennitt and Ms Ash. Various third parties are involved albeit in general terms. In some ways, it might be thought rather disloyal of Ms Ash to reveal such detail, but I am not convinced that this is a matter for legal redress. It is not so much that the matters are of legitimate public interest, but rather that the threshold is not crossed so as to give rise to a reasonable expectation of privacy in the first place.

148. Item 22 is concerned with a section about Ms McKennitt's business arrangements at her London office on pages 79 to 81. It also concerns events on a 1994 European tour. It is mostly very general, concerning for example the importance of merchandising in helping to off-set the cost of a tour. There is also an episode about the tour manager having to be sacked and coping with the consequences. I think that these are matters which are so general that they would fall outside the notion of a reasonable expectation of privacy.

149. Item 23 relates to the same European tour and to Ms McKennitt's irritability when an appointment to meet Andrew Gibb was missed. The nub of the passage is really how Ms McKennitt treated Ms Ash on this occasion in the light of her frustrations. I believe the complaint here is essentially about the impression given of Ms McKennitt's behaviour, rather than the infringement of truly private or confidential material. Again, therefore, I conclude that the threshold has not been crossed. I would not classify this matter, however, as being of legitimate public interest. It is not necessary to proceed to that stage.

150. Item 24 relates again to Ms McKennitt's conduct on tour. There is a short passage in page 84 comparing how relatively easy it was to perform on stage compared to the pressures of running a tour. Although Ms Ash here uses the words "she confided to me …", I do not believe that this passes the threshold. It is rather anodyne and does not contain anything requiring the law's protection.

151. Item 26 concerns a passage on pages 89 to 90 about busking. It was obviously a matter in the public domain that Ms McKennitt had from time to time busked while in London. The only arguably confidential passage concerns how lucrative it was. I do not believe this crosses the threshold.

152. Item 28 is concerned with a description on page 92. This again is critical of Ms McKennitt and her treatment of staff. Since third parties are involved, it seems to me that this is another example where the true complaint is that she has been shown in an unfavourable light, rather than that genuine intimacies are being revealed or matters of commercial confidence.

153. Item 29 deals with a tour of the United States. First, there is a passage on page 95, which sets out how Mr Fowkes and Ms Ash had helped Ms McKennitt to reduce "unjustified high percentages" made by venue managers and how they claimed to have saved her thousands of dollars as a result, which they found "most gratifying". This again seems to me to be unobjectionable. It is too general and anodyne to have about it the "quality of confidence". It could certainly do Ms McKennitt no harm.

154. There is then a passage on page 121, setting out how Mr Fowkes was treated over a problem about boxes of merchandise being delivered on tour. This is another example of criticism of Ms McKennitt's behaviour towards a member of staff. The member of staff happens to be Ms Ash's partner and I do not think that there is a reasonable expectation of privacy or confidentiality over these matters. I suspect the real complaint is that Ms McKennitt is not put in a very good light, but I have to remember that this is not a libel action.

155. There is a small passage on page 180, in which Ms Ash is again patting herself and Mr Fowkes on the back over their skill in circumventing "ridiculous rules and regulations" in their merchandising activities. This is very general and in my view does not cross the threshold.

156. Item 32 is about the male dancer. It merely says that Ms McKennitt invited him to her next Paris concert. I cannot believe that this attracts the protection of the law because of a "reasonable expectation of privacy".

157. Item 33 I have dealt with at some length above. It concerns the entitlement to privacy over the arrangements between Ms Ash and her partner, on the one hand, and Ms McKennitt on the other in connection with the £30,000 advance and the subsequent litigation. This is an exercise in respect of which, for reasons I have already developed, I consider that there was a reasonable expectation of privacy. Of course, that would have been lost if the matter had come to court. But, since it did not, I consider it to be still protected. Moreover, there is nothing to justify exposing all this private and painful dispute on grounds of legitimate public interest. Similarly, I do not

accept the contention in the Defendants' schedule that, in this instance, the real nature of Ms McKennitt's complaint is that she had been libelled. It is true that Ms Ash chose to put her in a bad light, and I have considered that in the context of determining whether or not there is a public interest in revealing Ms McKennitt's conduct. I am quite satisfied that there is not. As I have said, the whole point of a Tomlin order is that there is a reasonable expectation that the parties can keep matters to themselves.

158. I should also address the four miscellaneous complaints numbered 34. The first concerned a description on pages 115-116 of an outburst at a dinner party when Ms McKennitt expressed her disapproval of the term "whitey". It happened in front of a number of other guests and it does not seem to me realistic to regard all of them as being subject to a duty of confidence in this respect. The second passage (at pages 125-126) records an expression of anger over being "ripped off" by venue managers in Australia. It does not concern any commercially sensitive information and I am unable to conclude that, for any other reason, Ms McKennitt would have had a reasonable expectation of privacy. Thirdly, there is an account of something which happened in a bedroom in a hotel in Hawaii, which Ms Ash was sharing with Ms McKennitt and her mother. It happened when Ms McKennitt was aroused from sleep after going to bed exhausted. On balance, I regard that as a private occasion. What happens in a bedroom, even if it is shared, would appear to be protected by a reasonable expectation of privacy. Finally, there is a relatively trivial matter on pages 256-257. During a private telephone conversation Ms Ash asked after Ms McKennitt's health. She has now revealed the answer. That is a topic in respect of which Ms McKennitt was entitled to a reasonable expectation of privacy. I therefore uphold that complaint also.

22. The need for an injunction

159. In my judgment, Ms McKennitt is entitled to an injunction to restrict further publication of the passages which I have identified. Unless so restrained, the Defendants will continue to publish the book in its present form. When Ms Ash had given her undertaking on 7th October, it is apparent that she was seeking ways of avoiding the consequences or, as she put it, "loopholes". She says that by mistake her e-mail of 14th October, intended for Lightning Source, went into a file rather than being sent. Hence, the first written notification was only sent at 5pm on 18th October. I have not seen all of what is stored on her computer and cannot decide whether her account is accurate or not. It is sufficient to say that there is the need for an injunction because, without it, Ms Ash would have every intention of continuing her publication.

160. She had also communicated some of the material to a Canadian newspaper *The Globe and Mail*. She was certainly responsible for what they published on 6th August 2005 but denies responsibility for a later article (after her undertaking) of 15th October. In a letter of 20th October, her then solicitors (Berrymans) confirmed on her behalf that Ms Ash had not been contacted by or spoken to anyone at *The Globe and Mail* for some weeks and not since proceedings were issued on 20th September. This turned out to be untrue; indeed Mr Posner himself has confirmed that he spoke to her twice in October – including once, before the 15th October article was published, "in early October". Berrymans therefore put the record straight on 10th November, but they did not

confirm that their earlier denial had been made, as Ms Ash now contends, without her instructions. Her explanation for that is that some of her relatives in Canada, with whom she had communicated, *may* have been the source of the second article. Mr Browne has identified a significant number of tell-tales in that article which suggest that the story could only have come from her because it contains reference to facts, post-dating her undertaking and concerned with this litigation, which only she could have known about. I need not go into the details, but it does provide significant evidence underlining the need for an injunction.

161. Technically both Ms McKennitt and Hampstead Publications Ltd have a cause of action which founds their claim to an injunction – Ms McKennitt because of an entitlement to insist upon Ms Ash's equitable duty of confidence and the company because of the obligations contained in the crew member agreement (which I am satisfied Ms Ash knew about, at least in general terms, well before she so acknowledged by her signature in October 1998). Each of those Claimants is therefore entitled to the injunction. They are also entitled to the declaration they seek in accordance with my findings.

23. Damages

162. On the other hand, only Ms McKennitt would be entitled to claim damages for hurt feelings and distress. I would award a relatively modest £5,000. The Company would be entitled to no more than a nominal award.