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Case No: HQ05X00542

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/11/2007

Before:

THE HONOURABLE MR JUSTICE EADY

- -

Between:

Prince Radu of Hohenzollern	**Claimant**
- and -	
1. Marco Houston	**Defendants**
2. Sena Julia Publicatus Ltd	

- -
- -

Patrick Moloney QC (instructed by Carter-Ruck) for the Claimant
Stephen Cogley and Emmet Coldrick (instructed by Blake Lapthorn Tarlo Lyons) for the Defendants

Hearing dates: 22nd to 25th October 2007

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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

The Hon. Mr Justice Eady:

Introduction

1. In my earlier ruling on meaning, on 23 October 2007, I described the nature of this case only in the briefest outline. It is now necessary to go into further detail in order to resolve the defence of privilege, by way of preliminary issue, in accordance with an order made on 16 March 2007 by consent. In performing that task, I have been greatly assisted by counsel and especially by their review and analysis of recent case law.

2. The Claimant was at one time a professional actor and is now the husband of Princess Margarita (whom he married in 1996). She is the daughter of the former King of Romania (to whom I shall refer throughout as "King Michael"). Since January 1999, the Claimant has used the title Prince Radu of Hohenzollern–Veringen. This came about, according to his pleaded case, as a result of the title being granted to him, at the suggestion of King Michael, by the head of the Hohenzollern-Sigmaringen family, namely Friedrich Wilhelm Fürst von Hohenzollern. This grant, which had been publicly announced at the time by King Michael, would appear to have been formally embodied in a document headed (and referred to throughout the hearing) as the "Urkunde". The German word simply connotes a deed or instrument. It is signed, or purports to be signed, by the Fürst.

3. The background, put shortly, is that the royal house of Romania originally derived from the Hohenzollerns in the mid-nineteenth century. In 1866, when the principality of Romania was still under the control of the Ottomans, Prince Carol of Hohenzollern-Sigmaringen became its ruler. Following independence from the Ottomans in 1877, Prince Carol became the first King of Romania in 1881. He was succeeded by his nephew, who became King Ferdinand, in 1914. On his death in 1927 King Ferdinand, in turn, was succeeded by his six year old grandson, King Michael. There was a hiatus in his reign between 1930 and 1940, when King Michael's father ruled as King Carol II. He was deposed by Antonescu in 1940 and King Michael (now aged 19) resumed the throne. He was exiled in 1947.

4. The article complained of appeared towards the end of September 2004 in a magazine called *Royalty Monthly* (Vol. 19, No. 5) under the heading "Scandal in Romania as Princess Margarita's husband is branded an impostor". The magazine is edited by the First Defendant, Mr Marco Houston, and published by the Second Defendant, Sena Julia Publicatus Ltd. It covers matters concerning the various royal houses around Europe, both as to what might be called society gossip and as to more serious historical and genealogical subjects. The voluminous files in this case include a range of back numbers to illustrate its content. It obviously has a rather specialist readership and the circulation in the United Kingdom is only of the order of 6,000, but it is published widely around the world, although not (except possibly through a few subscriptions) in Romania itself.

The words complained of

5. The article was accompanied by a number of photographs, including one of the Urkunde itself. It is not very clear and derived from a faxed copy sent to the magazine. Nonetheless, the Claimant's case is that the clear message from the article is that it is not genuine and that, in so far as the Claimant purports to derive his title

from it, he is doing so falsely. Indeed, the article reports that the Fürst and his "distinguished elder son" have themselves repudiated the document and suggested that the signature at the foot of it is a forgery. The text of the article itself is contained in my ruling of 23 October, but I should include it here too, as this judgment needs to be self-contained:

> **"Scandal in Romania as Princess Margarita's husband is branded an impostor**
>
> A major scandal has enveloped Radu Duda, husband of ex-King Michael of Romania's daughter, Margarita. Mr Duda is accused of falsely claiming to have been given a title by the Hohenzollern family and, thereafter, of abusing the family name and using the title for personal monetary gain.
>
> Mr Duda's princely status was not given to him by ex-King Michael (who, as a non-reigning monarch, cannot give titles; nor can he adopt because it is prohibited by the Romanian Royal Constitution). Mr. Duda claims that Prince Frederick Wilhelm, Head of the Hohenzollern family, the German princely house from which the Romanian Royal family descends, accorded him the rank by special decree. The House of Hohenzollern denies this claim. When it was pointed out that by German law it is illegal to bestow any titles since the demise of the Kaiser in the early 1900s, Mr. Duda changed his assertion and claimed he had been adopted by the princely family. Documents to this effect have, at the time of going to press, yet to be made public.
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> At a press conference in Bucharest held on 5 August a delegation, representing the House of Hohenzollern, flew in from Germany. At that time, a letter was read from the House of Hohenzollern clarifying the demand to cease and desist the use by Radu Duda of the title and family name of Hohenzollern. The letter was signed by the distinguished elder son of the Fürst, Prince Karl.
>
> One of the attendees was His Excellency Ambassador Richard Carlson. He is the former director of Voice of America and American Public Broadcasting Television and, presently, vice chairman of a foundation organized by the former CIA director James Woolsey. Ambassador Carlson expressed his concern that a man whose sole credential was to have graduated from an acting school in Bucharest, who has faced published accusations charging him with being a member of the dictator Ceaucescu's Secret Police during the Cold War, had used the apparently false title of "Prince of Hohenzollern" to gain access to NATO committees.
>
> If the allegations are true, then a false prince succeeded to gain access and graduate from the Romanian Military Academy, the

Marshall European Centre for Security Studies and is presently a board member of the NATO House. All accorded on the basis that he was supposedly a prince of one of the most distinguished families in Europe, the Hohenzollerns.

Ambassador Carlson stated that because of the situation Mr. Duda had placed himself in by his actions, he could be easily blackmailed, and thus, he posed a potential risk to the security of the international leaders he had come in contact with.

The political and security implications are considerable.

Questions are also being raised as to why Mr. Duda, an actor by profession, chose to involve himself in areas involving national security.

An example that has been cited is that of Lord Anthony Snowden (*sic*), whose background is also in the arts. He had been given his peerage by HM Queen Elizabeth II. As someone versed in photography, he used his rank to promote the Arts. Why then, some ask, hasn't Mr. Duda used his title in more artistic arenas rather than in that of military information and NATO?

The security concern is that Mr. Duda, who has no background in military studies and whose only work experience was as a theatrical player, and who is alleged to have had the rank of a lieutenant in the Secret Police, gained access to members of the royal families of Europe by use of the Hohenzollern name.

The letter from the House of Hohenzollern denouncing Mr. Duda is being circulated to Royal Houses and governments.

Following the press conference, ex-King Michael's nephew, Prince Paul of Romania, was contacted whilst on a trip to Holland.

As the representatives of one of the two branches of the Romanian Royal Family he issued the following statement: "Prince Paul of Romania was informed in a meeting with Hohenzollern family, in Germany, in the presence of their lawyer, about the abusive use of the family title by Mr. Radu Duda, which damaged both the family and the Romanian state's good name. In that meeting Prince Paul was informed that the Fürst (the head of the Hohenzollern family) told his son that he never signed this document granting a title to Radu Duda. Mr. Duda abusively used the name of Hohenzollern and thus tricked the Romanian government to gain access for high positions."

In response to the allegations, Mr. Duda has produced a faxed certificate of entitlement which, he asserts, proves that his title

> is genuine. Curiously, the crest used in this fax is not that of the Hohenzollerns but that of the Romanian Royal House.
>
> Additionally, commentators and historians who have examined this certificate, point out that a crest is normally at the top of a document, not at the bottom.
>
> Whether Mr. Duda will take further action to demonstrate the document's legitimacy or repudiate the allegations made against him is unknown at this time"

6. I ruled that the article, *inter alia*, bore the following defamatory meanings:

> "…that there is a very strong case against the claimant, which to the present time he has failed convincingly to refute, to the following effect: (1) that the claimant was not granted a title or rank by the Fürst and that his claims to the contrary are false; (2) that he is relying upon a document, namely the Urkunde, in support of his claims, although it is not genuine and indeed contains a forged signature purporting to be that of the Fürst; (3) that he has used a rank to which he is not entitled in order to deceive people into according him access to social circles and to particular official roles, to which he would otherwise not be admitted, including NATO committees, and also for monetary gain; (4) that he has created a security risk because what he has done has exposed him to blackmail; (5) that having been told (by some unspecified person) that the Fürst had no power to grant a title by German law, the claimant shifted his stance and falsely claimed to have been adopted by the Hohenzollerns".

7. One of the points raised on the Claimant's behalf is that he was referred to throughout as "Mr Duda", thus underlining the weakness of his case. Quite apart from the dispute over the Claimant's title, the article makes a distinct allegation, to the effect that he was previously, under the Ceaucescu regime, an officer in the Romanian secret police (sometimes referred to as the Securitate). Both these allegations are obviously seriously defamatory. The Defendants have raised pleas of justification, which do not fall for determination at this stage, but it is right nonetheless to record that the Claimant vehemently denies both charges.

The Claimant's case in summary

8. It is his case both that the title was indeed granted by the Fürst, whatever he may subsequently have said about it, and that he was never a member of the Securitate or a collaborator with it. Indeed, he had gone on record earlier saying that this charge was "unfounded" when it surfaced in the Romanian media. He has pleaded in the reply what he says was the full extent of his involvement. That is to say, that he was once asked in 1986 to write reports for the secret police about a forthcoming trip to Israel.

He declined to do so, but when he returned from the tour he supplied, on request, a poster and a copy of the programme (which was in any event a matter in the public domain) together with details of where he had performed. Although this part of the case will not have to be decided (if at all) until a later trial, it is right at least to make clear by way of summary what each side says about it. For the moment, I am concerned with the plea of privilege. I can summarise the nature of this defence from the statement of case as follows.

The defence of privilege

9. It is said that "the subject as a whole" is a matter of interest to the readership of the publication. I take this to be a plea of "common interest" privilege: see e.g. *Kearns v General Council of the Bar* [2003] 1 WLR 1357. More important, the defence is also framed in terms of the general privilege explained in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127. It was on this form of privilege that most attention was focussed in evidence and submissions. If it fails, it is difficult to see how "common interest" privilege could survive on its own. Reliance is placed on the Claimant's status and public functions. An attempt is also made positively to plead that the publication was in the public interest and that the information was handled "responsibly".

10. It is also pleaded that the article was a report of what occurred at a press conference held in Bucharest on 5 August 2004. This is not under any statutory provisions, but represents a variant of common law privilege.

11. Since the case was argued partly on *reportage* and partly on the basis of a more general "public interest" defence, it is right to have regard to two very recent decisions of the Court of Appeal (both presided over by Ward LJ) which address these forms of privilege and the relationship between them. I have in mind *Roberts v Gable* [2007] EMLR 457 and *Charman v Orion Publishing Group* [2007] EWCA Civ 972. I should adhere to that guidance, while naturally applying the principles expounded to the circumstances of this particular case. It has been emphasised recently on a number of occasions that the courts should be "flexible" in their approach to privilege defences.

12. It is said, first, that the Claimant has fulfilled various public roles, both in Romania and internationally, so that the subject-matter of the allegation is of genuine public interest. In judging whether this is so, it would be right no doubt to have in mind not merely the narrow perspective of the public interest in this jurisdiction, but also the international dimension. As I suggested in *Lukowiak v Unidad Editorial SA* [2001] EMLR 46 at [45]-[46]:

> "… In theory, it might be possible for the publishers and proprietors of a newspaper selling copies throughout Europe to take legal advice as to the defences available in each jurisdiction and the differences between them. Yet it is difficult to see how, if they were *required* to do so as a matter of law, this constraint could have other than a severely chilling effect on their freedom of expression.
>
> 46. Specifically when the courts in England have to consider whether a particular defendant had, or may have had, a duty

> (legal, social or moral) to publish the particular words complained of, it must surely be necessary to take into account the circumstances confronting a hypothetical defendant at or prior to publication. These would include circumstances applying outside this jurisdiction. It cannot be right, as a matter of principle, that the issue of duty should be judged by an English court on the hypothetical basis that the publication was only taking place in England and Wales. The court is considering whether or not there is a duty to communicate the relevant information to the world at large; that is to say, to place it in the public domain generally. It would not be appropriate to attempt to draw fine distinctions in such cases between duties that might be owed, for example with reference to one jurisdiction and not others. This international dimension would have to be borne in mind, or so it seems to me, when addressing most, if not all, of Lord Nicholls' ten non-exhaustive tests set out in *Reynolds v Times Newspapers Ltd* …."

13. The nature of the public roles carried out by the Claimant upon which the Defendants place particular reliance is pleaded on the basis of the letter before action dated 25 November 2004; that is to say, that he has held "meetings with the Prince of Wales, with Members of Parliament and members of the House of Lords, with representatives of the British-Romanian Chamber of Commerce". That passage related to activities within this jurisdiction. It had also been explained that on a wider stage:

> "Our client has been appointed Special Representative of the Romanian Government for Integration, Co-operation and Sustainable Development, a post with ministerial rank, by the Romanian Government. In this capacity he works with the ministries of Integration and Foreign Affairs and other government institutions in, amongst other matters, promoting Romania's membership of the NATO and the European Union, encouraging foreign investment in Romania and promoting Romania's economic, commercial and business interests, culture and history. He is extremely concerned at the impact which the publication of these allegations might have on his work and reputation"

14. I have little doubt that the subject-matter of the article taken as a whole is of public interest. It used to be said that the test to apply was whether or not it was in the public interest to publish the defamatory allegations *about the claimant*: see e.g. *Blackshaw v Lord* [1984] QB 1. That is because it was thought necessary to focus on the tortious element of the publication. More recently, however, it seems that the appropriate criterion is rather whether the subject-matter of the publication, more broadly, can be categorised as being of public interest. Then it becomes necessary to decide whether it is in the public interest for the allegations, irrespective of their truth or falsity, to be published to the world at large: see e.g. *Loutchansky v Times Newspapers Ltd (Nos. 2-5)* [2002] QB 783 at [41(iii)]. If it is, then there is deemed to be a duty so to publish:

see e.g. *Jameel (Mohammed) v Wall Street Journal Europe* [2007] 1 AC 359 at [48]-[50]. When the court comes to the conclusion, in relation to the article as a whole, that the public has a right to be told, the specific inclusion in the story of the allegations about the claimant has to be assessed according to whether it was reasonable to include them as part of the overall picture: *ibid.* at [51]. That is a different approach from the traditional one, at least in theory, since the court used to ask whether there was a duty to publish the defamatory words themselves. In the present case, it makes no difference since the Claimant is at the heart of the story. Here, the defamatory allegations about him cannot be characterised as merely incidental to a wider theme.

15. Lord Nicholls observed in *Reynolds*, the court should be slow to conclude that a publication was not in the public interest and any ongoing doubts should be resolved in favour of publication.

16. Critical questions would appear to be whether the allegations are an example of "responsible journalism", appropriate to the gravity of the allegations and the circumstances in which the Defendants published them, and (as far as the *reportage* defence is concerned) whether or not the Defendants were fairly and neutrally covering both sides of a debate or controversy.

The law of "*reportage*"

17. It is necessary to consider first the recent developments so far as *reportage* is concerned. It is interesting to note that in *Roberts v Gable* at [74] Sedley LJ warned that this defence "needs to be treated restrictively". In his view, it has had the effect of modifying the repetition rule, and that is the express reason he gave. It would be right, however, in this context to remember also that in a true *reportage* case the journalist does not need to verify the allegations being reported. Indeed, as Simon Brown LJ commented in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2002] EMLR 13, the process of verification could be regarded as inconsistent with objective reporting. That is because it is the accuracy (and balance) of the *reporting* which is important, rather than the accuracy of the underlying allegations.

18. As it was put by Ward LJ at [61] in *Roberts v Gable*:

> "If upon a proper construction of the thrust of the article the defamatory material is attributed to another and is not being put forward as true, then a responsible journalist would not need to take steps to verify its accuracy. He is absolved from that responsibility because he is simply reporting in a neutral fashion the fact that it has been said without adopting the truth".

One can well understand, against that background, why it was thought that the defence should be applied "restrictively". It is important to scrutinise the particular circumstances of each case to make sure that it is indeed an example of true *reportage*.

19. On the other hand, reliance on this form of privilege does not entail that any special "tone" needs to be adopted. As Sedley LJ made clear, nothing in the law denies the

reportage defence to a defendant who is "taking a perceptible pleasure" in reporting the controversy.

20. Similarly, in *Roberts v Gable* itself, I had made the point that a journalist or publisher will not be deprived of such a defence merely by reason of having a particular personal or corporate political stance. What is important is not so much the political stance of the defendant, but rather the way in which the particular dispute or controversy is being reported. Thus, in the present case, even if Mr Houston happens to sympathise or agree with the case put forward in his article by the Hohenzollerns, that in itself would not deprive him of the opportunity to rely on a *reportage* defence. All depends on whether the particular controversy is, notwithstanding his personal views, being fairly presented to the readers. Naturally, a journalist is entitled to take a particular stance, and indeed vigorously to advocate the merits of one side, in a public dispute. What he cannot do, however, is then to pray in aid the form of privilege known as *reportage*. As was said in *Charman* at [48]:

> "The protection is lost if the journalist adopts what has been said and makes it his own or if he fails to report the story in a fair, disinterested, neutral way".

21. Because the Court of Appeal in *Roberts v Gable* wished to arrive at its conclusions in the light of a thorough analysis of the law's recent developments, reference was made to broadly comparable American jurisprudence and, in particular, to the case of *Edwards v National Audubon Society* 556 F. 2d 113. I bear in mind that both Ward LJ (with whom Moore-Bick LJ expressed his agreement) and Sedley LJ sounded a "cautionary note" in relation to the principles there set out. As Sedley LJ commented:

> "Where rights to reputation and privacy have wilted somewhat in the bright light of First Amendment jurisprudence, the English common law, now reinforced by the European Convention on Human Rights, seeks to hold the two in a sometimes difficult balance, calibrated by the concept of responsible journalism".

It is nonetheless important to note that, even in the American context, it is a requirement of the *reportage* defence that the reporting of "charges", regardless of the reporter's private views as to their validity, must be "accurate and disinterested". Reference was also made to "the press's right of neutral *reportage*": see the citation in the judgment of Ward LJ at [45].

22. It was noted also (at [46]) that those criteria had been met in relatively few cases in the United States, since *Audubon*, and that "neutral reportage had, therefore, rarely been applied by the courts to immunise publication". It is thus reasonable to proceed on the basis that the courts in the United States, consistently with the remarks of Sedley LJ, have also approached this defence in a "restrictive" way.

Was the article an example of "reportage"?

23. Bearing these recently stated principles in mind, I should now seek to apply them to the facts of the present case. I must first consider whether the article consists of reporting and turn later, if it does, to assess its fairness and neutrality.

24. Mr Moloney's primary submission, on behalf of the Claimant, is that the article is not properly to be regarded as an exercise in reporting at all, but is rather a "*mélange*" in which there is some reporting of allegations made by third parties (not always accurate), some direct assertions of fact by the author, and some comments which also appear to be his. Mr Houston himself in the witness box described the article as follows:

> "It is an attempt to give a summary of events at the press conference and to give an overview of those events with some relevant commentary which was appropriate at the time. I did not try to solely represent the press conference."

25. Of course, an article does not lose the status of "report" merely by including other material by way of background or journalistic colour, but a reader should be able to recognise what is reporting and what is not.

26. If the defamatory allegations in question are to be found within parts of the article that are recognisable as *reportage*, then the defence may be available notwithstanding that the article contains other material in addition. Conversely, if the libel is contained in parts of the article which are separate and distinct from the reporting element, it would be necessary to rely on some other defence (which might include another form of privilege, for example that which Mr Cogley characterises as "classic *Reynolds*"): see *Charman* at [56]-[57].

27. In this case the *reportage* defence has both a broader aspect and one that is more narrowly focussed. Broadly, it is contended that the article reports (fairly and neutrally) a public controversy as to the genuineness, or otherwise, of the Claimant's princely title and the use he has made of it. More narrowly, it is also said that it consisted of a report of the press conference in Bucharest on 5 August 2004.

28. The press conference appears to have been organised on the initiative of two citizens of the United States, namely Mr Richard Carlson and a lawyer called Mr Brad Johnson. I am not convinced that during the hearing the parties got to the bottom of how and why this press conference was set up, but it does not necessarily make any difference. The fact is that two private citizens from the United States decided to hold a press conference in Bucharest to denounce a member of the Romanian royal family. Mr Carlson stated in court that he was acting in his private capacity and not on behalf of anyone else, whether Prince Paul of Romania, the Hohenzollerns or the United States government.

29. He described why he was doing it in emphatic, not to say truculent, terms:

> "I actually was doing it as I thought a public service because I was going to be in eastern Europe and I was offended personally by the idea of this – what I thought was – a phoney title and this exercise in dragging the ex-King around in this dog and pony show to convince the countries that they should join up, that Romania should be in NATO and so forth, and Radu should play some part in it, based on what I had read of it, and I didn't think that made sense … I discussed this with a number of people including a former head of NATO and,

> anyway, so they all had some support in the idea that I would join in this news conference and do something to inhibit the use of the Hohenzollern title that was getting him into meetings with people who were serious people."

He later corrected himself and said that it was with a former deputy director of NATO that he had discussions, and referred also to having other friends who were involved in NATO. I confess to not finding this an easy passage in his evidence to understand. He seems to be saying that there was a feeling among NATO, or former NATO, personnel that the Claimant should not have access to NATO. This despite the fact that the Claimant's public roles appear to have been carried out on behalf of, or with the approval of, the current Romanian government – not because of a "phoney title". (The prime minister went on record as saying that, in effect, the title carried no weight with him, as such, but he was only concerned with the Claimant's personal qualities.) There is also the reference to King Michael himself in a "dog and pony show". Apart from the fact that it was intended to be disparaging, I do not quite grasp its relevance to the attack on the Claimant or who was supposed to be "dragging him around".

30. Mr Johnson appears to have been acting in his professional capacity (to a limited extent at least) for the Hohenzollerns. As Mr Carlson put it, "… he definitely had the Hohenzollerns as a client in the – within the limits of this use of the family name".

31. Prior to these events, Mr Johnson had also acted for two women in the United States who had apparently claimed at some stage to have been approached by the Claimant with offers of some form of title in exchange for cash. Although they were thinking of claiming some remedy against him, no notification of this had ever been made to the Claimant. Nor were the women identified until Mr Carlson chose to reveal their names in the witness box. It seems, therefore, that Mr Johnson might have been acting in a dual capacity at the press conference, partly on their behalf and partly on behalf of the Hohenzollerns. His witness statement was put in evidence, but he did not attend to be cross-examined and the position is by no means clear. Mr Houston did not discuss matters with Mr Johnson before publication, which seems surprising in view of the fact that this story of the two women appears to be the primary basis for suggesting that the Claimant was "using the title for personal monetary gain".

32. What is clear, however, is that the press conference was largely organised by Ms Ana-Maria Pascaru, a public relations consultant, who was at the time the head of protocol to Prince Paul of Romania. Also involved was Mr Laszlo Forrai. He was apparently brought in as a freelance public relations adviser by Ms Pascaru to assist in organising the conference and he was remunerated by her. Both gave evidence at the trial.

33. It was well known, and in particular known by Mr Houston, that there had been a long and bitter dispute between different branches of the Romanian royal family. Each descends from King Carol II, although by different wives. Prince Paul is on one side, and King Michael and Princess Margarita on the other. Although the Claimant appears to have had his suspicions, it has been denied by Mr Carlson that he was collaborating in any way with Prince Paul in his denunciation of the Claimant. It is said to be simply a coincidence that he engaged his head of protocol to organise the conference. Ms Pascaru also gave evidence that she did not directly communicate with Prince Paul between receiving her instructions and holding the press conference, although she had informed his office. There is no basis for me to find, therefore, that

the decision to denounce Prince Radu at a press conference was taken by way of prior collaboration between Mr Carlson, the Hohenzollerns and Prince Paul.

34. Mr Houston appeared to be under the impression (in evidence on 22 October) that Ms Pascaru and others "had been called in by the US embassy to organise a press conference". He then reaffirmed his understanding:

> "She had been asked by the American embassy to be involved in the organisation of the press conference".

Mr Laszlo Forrai also said that he had been told by Ms Pascaru, when she asked for his help, that she had been asked to organise the press conference by the US embassy. This may not be easy to reconcile with the notion that Mr Carlson and Mr Johnson were acting in a purely private capacity, but that is how the evidence stands. Inevitably, therefore, how and why the embassy came to be involved remains something of a mystery. But, again, it is not critical.

35. Whatever its origins, the press conference seems to have been addressed to matters of public interest, albeit of a highly controversial nature. A representative of King Michael, Ms Mezincescu, was able to attend at very short notice and was granted admittance. She brought with her a copy of the Urkunde, which took Mr Carlson by surprise. She made it clear that King Michael and the Claimant were contending that the grant was genuine. Nevertheless, the announcement was made in the course of the press conference that this document did not contain, as it appears to on its face, the signature of the Fürst: rather, it was denounced as a forgery. If it was a forgery, it could hardly be suggested that the Claimant was unaware of it. The allegation was plainly a very serious one, reflecting not only on the Claimant himself but upon King Michael's family as a whole. This sudden announcement must have caused astonishment to those present. Yet that was where matters stood at the end of the press conference. The assertion of forgery was simply left in the air.

36. Prince Paul chipped in, shortly afterwards, by means of the press release referred to in the article. This was in very strong terms and would appear to strengthen the charge of dishonesty being made against the Claimant (and King Michael). Thus not only were the scales heavily tilted against him, but most of the ammunition directed towards his character came from people overtly hostile. The question arises in these circumstances, assuming the controversy to be one of public interest, how it could be covered in a manner that qualified as "responsible journalism". As Lord Nicholls described it in *Bonnick v Morris* [2003] 1 AC 300, 309:

> "Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in return for the [*Reynolds*] privilege".

37. It was clear that the Hohenzollerns were accusing the Claimant of being an impostor and of promulgating a forged document (albeit not necessarily forged by him personally). The Claimant had put it forward as genuine and thus, by implication, if he persisted in that claim, would be conveying the message that the Fürst and his "distinguished elder son" must themselves be lying. This is surely a startling state of affairs which needed to be approached with scrupulous care. If the matter was to be

presented purely by way of *reportage* (as opposed to coming down on one side or the other), it would require careful balance so that readers would be able broadly to understand what each was saying. If, on the other hand, it was intended by a process of investigative journalism to determine where the truth lay, the fullest inquiry was required into each side of the dispute.

38. At this point I need to address Mr Moloney's argument that the defamatory allegations do not fall within the category of *reportage* at all. He relies on a variety of matters. For example, in purporting to report the press conference, Mr Houston drew upon what had been described as an "accredited transcript". That is not an accurate description of the document, since it appears to have been based on (or a "rewrite" of) a press release written in advance of the press conference itself. That emerged during the evidence of Mr Forrai. It seems to have been prepared by him and a woman called Anca Paduraru. It is right to make it clear, however, that up to the time of publication Mr Houston believed that it was a transcript. He now recognises that it does not correspond to the video recording and transcript put in evidence of what actually took place. Whatever he thought, it remains the fact that he was not accurately reflecting what was said at the conference.

39. Some of the derogatory remarks about the Claimant were not said at the press conference at all. The following two passages in the article are clearly of importance:

> "Ambassador Carlson expressed his concern that a man whose sole credential was to have graduated from an acting school in Bucharest, who has faced published accusations charging him with being a member of Ceaucescu's Secret Police during the Cold War, has used the apparently false title…
>
> The security concern is that Mr Duda, who has no background in military studies and whose only work experience was as a theatrical player, and who is alleged to have had the rank of lieutenant in the Secret Police ….".

Yet Mr Carlson said nothing about the Claimant having been an actor or as to his military credentials, or lack of them. Nor did he refer to or adopt the "accusation" that he was a lieutenant in the Securitate. The "accredited transcript" does not even suggest that he did. I cannot see how those allegations can qualify as *reportage*. I conclude from the evidence that the only references to the Securitate came after the formal press conference had come to an end. After the session broke up, certain journalists approached individuals informally and asked questions. It seems that one or more of these journalists referred to the allegations, but that was as far as it went. Even at that stage they were not endorsed by Mr Carlson or Mr Johnson. They were plainly not in a position to do so.

My conclusions on "*reportage*"

40. The article fails to match the strict criteria identified in *Roberts* and *Charman*, whether it is supposed to be a report of the press conference or a report of the more general dispute over the Claimant's title. On the one hand, it purports to relay significant criticisms of him from the press conference which were never uttered. On the other, while it reports the accusations of the Hohenzollerns and Prince Paul, and

> "rubbishes" the Urkunde, no attempt is made to state his side of the argument – beyond the bare fact of his reliance on the (apparently discredited) Urkunde. The circumstances are not like those in *Roberts v Gable*, where the readers could infer that there were two conflicting accounts but could draw no ready conclusion as to which was correct. Here, the scales are heavily tilted against the Claimant because he has not answered (so far as the reader can tell) either the forgery or the Securitate allegation. Nor has he responded to the charge of shifting his ground and claiming to have been "adopted".

The concept of "responsible journalism"

41. In the circumstances I must now turn to the alternative argument based on "responsible journalism" (as most recently explained in *Charman*).

42. The role of "responsible journalism" has been addressed more than once in recent years. I have already quoted Sedley LJ in *Roberts v Gable* at [75]:

> "… the English common law, now reinforced by the European Convention on Human Rights, seeks to hold … a sometimes difficult balance, calibrated by the concept of responsible journalism".

43. Lord Nicholls also explained the concept of "responsible journalism" in terms of trying to achieve an acceptable balance or reconciliation: see *Reynolds* at pp. 200-201. On the one side, obviously, is freedom of speech and the corresponding right of the public to be told; on the other, the reputation of the individual concerned.

44. Now, perhaps, this tension would be expressed more overtly as being between competing Convention rights under Article 10 and Article 8, since it has subsequently been acknowledged in Strasbourg that the protection of reputation is one of the functions of Article 8: see e.g. *Radio France v France* (2005) 40 EHRR 29; *Lindon v France* [2007] ECHR 836. Be that as it may, Lord Nicholls went into some detail about the considerations to be put in the scales alongside freedom of speech, albeit without express reference to Article 8:

> "To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration, and the means employed must be proportionate to the end sought to be achieved.
>
> Likewise, there is no need to elaborate on the importance of the role discharged by the media in the expression and communication of information and comment on political matters. It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment. In this regard it should be kept in mind that one of the contemporary functions

> of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally.
>
> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others."

45. It is now recognised that when Convention rights come into conflict the courts must apply an "intense focus" to the facts of the case without according automatic priority to any one Convention right over another: see e.g. *Re S (A Child)* [2005] 1 AC 593 at [17], *per* Lord Steyn. It is against that background that judges must grapple with the notion of "responsible journalism".

The steps taken by the Defendants prior to publication

46. Mr Houston went through the steps he did take prior to publication to find out more. He spoke to several people, including Mr Carlson, Ms Pascaru, Mr Forrai, and Mr Brookes-Baker (of Debretts). He seemed to rely mostly on Ms Pascaru. He was asked if he had received most of the documents and information from her and he replied "Quite possibly, yes". He was also asked how it was that he thought the PR representatives of the "attacker" (i.e. Prince Paul) were the best source of verification. He replied: "I think they were a reliable source for the information that I needed".

47. What is striking is that they all presented one side of the story only. There was absolutely nothing from the Claimant, King Michael, Princess Margarita, Mr Vasiliu (their official spokesman), or even Ms Mezincescu. The story in the magazine came to an abrupt end with the denunciation of the Urkunde by the Hohenzollerns and Mr Brookes-Baker.

48. Even Mr Brookes-Baker, who died in March 2005, appears to have had a reasonably close involvement with Prince Paul and not least in connection with a book called "Historical Facts on the Succession Rights of the Romanian Royal Family". Mr Houston accepted in the course of cross-examination that the book put forward all the

evidence in support of Prince Paul's claims in the dynastic dispute. What is more, he had published a letter in *The Times* in September 1996, stating that Princess Margarita on her marriage should henceforth be referred to only as "Mrs Duda", and addressing the consequences for the rights of succession. Questions of this kind would ultimately depend on matters of law or custom, as to which no expert evidence has been introduced. I cannot form a view on the dynastic dispute, or rights of succession, but the evidence suggests that Mr Brookes-Baker at least had decided that Prince Paul's claims in this regard were well founded. I emphasise that no criticism is intended of Mr Brookes-Baker. He was entitled to put forward any argument he wished and to espouse any cause.

49. The only point being made on the Claimant's behalf is that Mr Houston should not have confined his attempts at verification to those on one side of the argument. None of those he consulted could have been expected to put the Claimant's case. If he wished to present a fair picture of the dispute, or even to advance his own conclusions as a piece of investigative journalism, there was no substitute for going to someone – even if only one person – who could represent the Claimant's side of the dynastic dispute, or more importantly deal with the forgery allegation, and give a response to the rumour about the Securitate.

50. As to the contribution of Prince Paul, it would be obvious to Mr Houston that he was someone who (in Lord Nicholls' terminology from *Reynolds*) had "an axe to grind". I reiterate that it is not for me (certainly at this stage) to determine the truth of Prince Radu's claim to use the title; nor yet to enter into the merits of the dynastic dispute. Wherever the truth lies, however, there can be little doubt as to the strength of feeling on Prince Paul's part, so far as the Claimant is concerned. His press release referred, in terms, to the Claimant's "lie". Allegations of dishonesty coming from that source needed to be approached with caution by a responsible journalist and not merely taken at face value.

51. It is said that the case which he espouses as to the Romanian succession has been vindicated in court decisions in various European jurisdictions. I am sure that is right, although the matter has not been explored in evidence, but that does not determine the matter of Prince Radu's own title. That is a separate issue, which turns at least in part upon whether the Fürst did, or did not, make the grant as it appears from the Urkunde. No doubt it would also be relevant to investigate the position in law (both German and Romanian), but the parties did not adduce any expert evidence – presumably because they did not consider it necessary for resolving the issues of qualified privilege.

52. Some inquiries were made by Mr Houston as to the authenticity of the Urkunde, but these were hindered by the poor quality of his copy. He consulted, for example, Mr Brookes-Baker but he, although no doubt a noted authority on such matters, would only be as reliable as the information supplied to him – and he too had only a poor quality reproduction.

Steps which the Defendants omitted to take

53. An obvious step to take would have been to ask for a good copy of the Urkunde, such as was ultimately supplied at trial. When asked to consider this in cross-examination,

Mr Houston appeared to agree that the crest was not that of the Romanian royal family. What he actually said was:

> "I would say you could argue now that it looks like a hybrid, I would say. So arguably I would have had to modify that opinion with the original [of the Urkunde] but I did not have it".

54. To identify it would require close scrutiny by an expert, but Mr Houston had to agree that in material respects it approximated more closely to the heraldry of the Hohenzollerns than that of the Romanian royal family. Yet it had simply been asserted in the article as a fact that:

> "Curiously, the crest used in this fax is not that of the Hohenzollerns but that of the Romanian Royal House".

55. One of Mr Cogley's arguments was that there is no reason to suppose that any inquiries that Mr Houston could have made of the Claimant or his family would have borne fruit. He relies on the fact that the Claimant chose not to go into the witness box. But that is to reverse the burden of proof. It is for Mr Houston to establish that the steps he took were reasonable and consistent with responsible journalism. In any event, the matter has to be judged immediately prior to publication. What would a responsible journalist have done at that stage? There is no point in judging that by reference to evidence given (or not given) in 2007. We cannot now put the clock back to August 2004, but I see no reason to assume at that point that a clearer copy of the Urkunde would not have been made available, in response to a reasonable request for information.

56. A responsible journalist would surely have approached the Claimant, Ms Mezincescu, or Mr Vasiliu (the spokesman for King Michael's family) in view of the gravity of the allegations, in order to seek information or better documentation. The last sentence of the article states that it is "unknown at this time" whether the Claimant would take further action to demonstrate the legitimacy of the Urkunde or repudiate the allegations against him. Yet Mr Houston made no attempt to find out. When asked about this in cross-examination, Mr Houston's explanation was that:

> "… What I thought at the time of publication was this is, in effect, part one. I have left it open to further possibilities and if and when they do respond that would, in effect, be part two".

57. In other words, he chose not to seek out the Claimant's side of the story but, if something had been said later on his behalf, he would or might have given that coverage (as a follow up). He relied on Ms Pascaru to inform him if any response from the Claimant was forthcoming.

58. He also said that the story had been given considerable publicity in Romanian newspapers and he made the assumption that, if the Claimant had not put out a public response to that, he would not be likely to speak to him as the editor of a journal based in England.

59. He did know, however, that the then Prime Minister of Romania (Mr Nastase) had, shortly after the press conference, expressed confidence in the Claimant; yet he chose not to give any coverage to that. That appears to be because he regarded him as "massively controversial". He also suggested that the Prime Minister's remarks were not sufficiently "focussed" for his purposes:

> "He said Prince Radu is a good guy. He does not know if he has a title or not. He does not care if he is a Baron or a Count, or a Prince ….. From my point of view, dealing in a more focussed way on those specific issues, he did not offer me anything and I did not feel that the story, as it was written, said anything directly to Prince Radu's character. He discussed the title – his use of it. I did not say he was a bad guy. I did not say he should step down from his positions."

60. When one reads the article, it is impossible to conclude that it did not reflect directly on the Claimant's character or the appropriateness of his occupying public "positions". The article relies on allegations (which remain unanswered) to the effect that he is using a bogus title to give access to various roles and for personal gain. It can hardly be said that it does not reflect on his character or, for that matter, that the Prime Minister's endorsement of his qualities was irrelevant. Indeed, it might be thought, by the casual observer, that he would have more direct knowledge as to whether he was performing his public role under false pretences than Mr Carlson or Mr Johnson. Since the whole story was "controversial", that does not seem a good reason for shutting out what the Prime Minister had to say. Nor is it very convincing to claim, as Mr Houston did in evidence, that "it was not appropriate at that time to put it into the story".

61. A further point taken by Mr Cogley is that the burden lies on the Claimant to prove that any steps which could and should have been taken, but were not, would have made a difference to the nature of the information published. There is no authority to support the submission and that is not surprising. This is not a claim in negligence. Moreover, as I have recognised, the burden of establishing the defence of privilege lies on the defendant. That is hardly capable of dispute. I shall return briefly to this causation argument in due course: see [75] below.

62. The clear impression is left by the article that the Securitate allegation had gone unanswered by the Claimant and was therefore likely to be true. In fact, the Claimant had publicly stated, some time before, that it was "unfounded". Mr Cogley, however, suggested that this was tantamount to leaving the accusation unanswered. He recognised that the Claimant's public statement was to the effect that "there was no substance to it". That being so, I fail to understand how reporting of the accusation can be "responsible" if it is not at least made clear that it was publicly denied. Mr Cogley argues that the Claimant should have given more detail. There was not much more he could say, since the rumour he was challenging was of a general nature. To say that the accusation of being an officer in the Securitate is "unfounded" is unambiguous. There was no more detail which called for repudiation.

Was this article an example of "responsible journalism"?

63. In *Reynolds* (at p.205) Lord Nicholls identified ten non-exhaustive "matters to be taken into account". They were said to be "illustrative only"; they are not to be treated as hurdles to be overcome but only, as Mr Cogley submits, to be "borne in mind". All depends on the circumstances. For example, in *Roberts v Gable* none of the "matters" listed weighed in favour of privilege, but the defence of *reportage* was nevertheless upheld. That illustrates what Lord Nicholls called "the elasticity of the common law principle".

64. If it is right for these matters to be "taken into account" or "borne in mind", as relevant considerations, a judge needs to apply them to the facts of the case in hand. That is what I must now attempt.

65. The first matter relates to "the seriousness of the allegation". If a person is to be "branded an impostor" and as having been a member of Ceaucescu's secret police, that must surely be regarded as high on the scale of gravity. As Lord Nicholls commented:

> "The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true".

66. Secondly, there is "the extent to which the subject matter is a matter of public concern". Here there is no dispute about that.

67. Thirdly, there is the source of the information. "Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories". In this case "the events" would be, presumably, the reliance on the allegedly bogus Urkunde and the Claimant's supposed role in the Securitate. As to the former, those with direct knowledge would be the Fürst (and quite possibly his son), King Michael and the Claimant. As to the Securitate, the only such person (as far as the evidence discloses) would be the Claimant. Neither Mr Johnson nor Mr Carlson would have direct knowledge of either "event". It is also clear from the evidence that, whatever the merits of the dynastic dispute, neither the Hohenzollerns nor Prince Paul could be regarded as dispassionate observers or impartial so far as the Claimant is concerned.

68. Fourth, it is necessary to consider the steps taken, or not taken, to verify the information. That is one of the most important factors in the present case.

69. Fifth, in so far as it can be regarded as a separate issue, one has to consider "the status of the information". That is already apparent from the observations I have made under "sources". The allegation about the bogus Urkunde, as it emanates from the Hohenzollerns, may be thought of as having higher status. It comes, so to speak, "from the horse's mouth" (albeit indirectly). The problem is that there is more than one "horse" in this case. The Claimant was not given the chance to answer the claim of forgery. It just came as a bolt from the blue. That obviously undermines the status of the allegation. It is not obvious why, to a remote observer such as Mr Houston, the statement that the Claimant was an impostor should be regarded as inherently

authoritative, any more than the statement from him that the title was genuine. It was certainly not something so plainly definitive that it could be accepted unquestioningly.

70. Sixth, there was no "urgency" here. The story was not one that needed to be broadcast instantly (e.g. for reasons of public health or safety). In any case, the magazine was not going to be published until several weeks after the press conference. There was plenty of time to check out the story and either publish both sides (by way of *reportage*) or come to a definitive conclusion on the proposed coverage (by way of investigative journalism).

71. Seventh, there is the factor of whether comment was sought on the proposed coverage from the Claimant. Here it was not. Mr Cogley emphasises that an approach to the relevant claimant will not always be necessary (as Lord Nicholls of course recognised). When I asked him in what circumstances it *would* be necessary, he responded that he did not know. I have always understood that it is regarded as good journalistic practice to give the subject of serious accusations an opportunity to comment unless there are compelling circumstances to justify not taking that step. Mr Cogley submitted that there was no need to do so; alternatively I should assume that, if an approach had been made, the Claimant would not have responded.

72. That may be a reasonable assumption in some cases (see e.g. *Roberts v Gable*), but I see no reason to make it here. Lord Nicholls pointed out that the person concerned "may have information others do not possess or have not disclosed". Here, the Claimant obviously did have such information. He knew whether he was putting forward what Mr Carlson called a "phoney title". More than that, he had the original of the Urkunde which on its face bore what appeared to be the Fürst's signature. He would know too whether, when caught out, he had made a false claim to have been adopted by the Hohenzollerns.

73. Also, he was the best possible source of information as to any involvement with the Securitate. If this was not a case for giving the "impostor" a chance to comment, it is difficult to imagine when such an approach should be made. It should not be taken for granted that a person accused of dishonesty will say "No comment" or merely give a bare denial. That was perhaps particularly unlikely here since, as Mr Houston knew, Ms Mezincescu had been despatched in haste to attend the press conference for the very purpose of producing the Urkunde and refuting the allegations. There would be no reason to suppose that the Claimant would thereafter wish to "clam up" on the subject.

74. Eighth, the article did not contain the Claimant's side of the story on either the forgery or the secret police allegation. Of course it said that he was relying on the Urkunde, but his response to the new suggestion that it had been forged was not obtained. This is another factor which is especially germane to the present case.

75. In relation to Lord Nicholls' seventh and eighth points, I should also bear in mind what was said in the Court of Appeal judgment in *Galloway v Telegraph Group Ltd* [2006] EMLR 221 at [75]:

> "… it does appear to us that, before a newspaper publishes allegations of fact which involve the taking of money from a regime such as Iraq for personal gain, in circumstances in

> which it knows that it cannot justify the allegations, it should at the very least put the thrust of the allegations to the person concerned in order to give him the opportunity of saying whatever he thinks appropriate. … the *Daily Telegraph* did not do so. Accordingly the articles did not contain, in Lord Nicholls' words, the gist of the claimant's side of the story in response to the allegations of personal gain".

There is no hint of a suggestion that the burden lay on Mr Galloway to prove that, if such an approach had been made, it would have led to a significantly different story (as Mr Cogley submits).

76. I can adapt the approach of the Court of Appeal to the facts of this case. It would seem to follow that before a magazine publishes allegations of putting forward a bogus title for, *inter alia*, personal gain, and of working for the secret police under a regime such as that of Ceaucescu, in circumstances in which it does not (as yet) know that it can justify the allegations, "it should at the very least put the thrust of the allegations to the person concerned".

77. The ninth of Lord Nicholls' factors is "tone". Nothing much turns on the style of the magazine, but I need to consider whether the article did no more than to raise queries or call for an investigation. "It need not adopt the allegations as statements of fact". Consistently with my rulings on meaning, it seems clear that this article went well beyond raising queries or calling for an investigation. It conveyed the message that there is a very strong case against the Claimant which he has failed convincingly to refute. It did not necessarily "adopt the allegations as statements of fact", but it advanced a persuasive case against him.

78. The tenth factor is the general one about "circumstances of publication". Nothing additional needs to be said about that.

My conclusion on "responsible journalism"

79. Standing back from these individual factors, I need finally to consider the matter "in the round": see e.g. *Galloway v Telegraph Group Ltd* at [76]. Is it right to uphold the defence of privilege (as happened e.g. in *Roberts v Gable*) notwithstanding the fact that some of Lord Nicholls' questions have been answered negatively? That turns upon the broader question to which I referred earlier; namely, whether it was in the public interest to publish this article in the magazine regardless of its truth or falsity. That in turn depends on whether it was an example of "responsible journalism". Were the steps taken to gather and publish the information responsible and fair, as contemplated by Ward LJ in *Charman* at [66]? This is a judgment for the court to make, but having regard to the range of reasonable decisions open to an editor in Mr Houston's position. It is not a question of what I would have done: I am not a journalist.

80. In the end, I have come to the conclusion that the publication of this article did not meet the criteria recently expounded in *Charman*. I take into account all the matters I have mentioned in the body of this judgment. It is especially significant, in my assessment, that such serious allegations were put into circulation without giving any opportunity for the Claimant's side of the story to be stated on the alleged forgery of

the Urkunde, its use for personal gain, his false claim that the Hohenzollerns adopted him, or his alleged service in the secret police. (I need hardly add that this conclusion is not to be equated with saying that privilege is lost because Mr Houston tripped over one or two of Lord Nicholls' ten "matters". That would be absurd. As always, the assessment has to be "in the round".) Accordingly the plea based on *Reynolds* also fails. The preliminary issue is thus resolved in favour of the Claimant.

An epilogue

81. Mr Cogley helpfully drew my attention, after closing submissions, to the decision of the Strasbourg court in *Flux and Samson v Moldova* on 23 October 2007. I cannot see that it adds anything new: it is rather an application of established principles to the facts of the case. It is well known both in domestic and European jurisprudence that value judgments are not required to be proved to be objectively true (indeed they cannot). There must be room for the expression of opinions honestly held. That is why we have the long established defence of fair comment. That may or may not become a significant issue in the present case, although it will no doubt be strongly argued that the offending passages are factual in character. The plea of justification may have to be determined in due course. It is not in dispute that journalists need to be permitted "a degree of exaggeration or even provocation", and the law of justification makes full allowance for that.

82. It appears that the European court in *Flux* attached importance to the "balanced tone of the article". Crucially, having presented one party's view, it also informed the readers of the other party's story. Yet, in the present case, balance was missing. Here there are (to adopt the language used in the judgment) "particularly strong reasons" for ruling against the Defendants on the issue of privilege – reasons of public policy which are reflected in domestic law.

83. That is because the balance between the protection of reputation, on one side, and of freedom of speech on the other is now to be calibrated by the standard of "responsible journalism". An important element in that, as Ward LJ and others have made clear, is that of "fairness". Here I am afraid that this was lacking. Lord Nicholls noted in *Reynolds* at p.202:

> "The common law does not seek to set a higher standard than that of responsible journalism, a standard the media themselves espouse. An incursion into press freedom which goes no further that this would not seem to be excessive or disproportionate."

In the circumstances the interests protected by Article 8 seem to have been largely left out of account. The court thus needs to redress the balance.

84. Not least, as I have held, the Claimant's reputation was attacked on several fronts without giving him a chance to respond. In those circumstances, there is no reason why the Defendants should be accorded a privilege, such as to excuse them from having to prove, on a balance of probabilities, that the defamatory allegations were substantially true.