

AS TO THE ADMISSIBILITY OF

Application No. 28851/95  
and No. 28852/95  
by Earl Spencer and Countess Spencer  
against the United Kingdom

The European Commission of Human Rights sitting in private on  
16 January 1998, the following members being present:

Mr S. TRECHSEL, President  
MM J.-C. GEUS  
M.P. PELLONPÄÄ  
E. BUSUTTIL  
A. WEITZEL  
J.-C. SOYER  
Mr H. DANELIUS  
Mrs G.H. THUNE  
Mrs J. LIDDY  
MM L. LOUCAIDES  
M.A. NOWICKI  
I. CABRAL BARRETO  
N. BRATZA  
I. BÉKÉS  
D. SVÁBY  
G. RESS  
K. HERNDL  
E.A. ALKEMA  
M. VILA AMIGÓ  
Mrs M. HION  
MM R. NICOLINI  
A. ARABADJIEV

Mr M. de SALVIA, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection  
of Human Rights and Fundamental Freedoms;

Having regard to the applications introduced on 28 September  
1995  
by Earl Spencer and Countess Spencer against the United Kingdom and  
registered on 5 October 1995 under file Nos. 28851/95 and 28852/95;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of  
the Commission;
- the decision of the Commission of 2 September 1996 to join the  
applications;
- the observations submitted by the respondent Government on  
23 December 1996 and the observations in reply submitted by the  
applicants on 7 April 1997 together with the Government's  
written  
responses to the Commission's further questions received on  
23 December 1998 and those of the applicants received on  
6 January 1998;
- the parties' oral submissions at the hearing on 16 January 1998;

Having deliberated;

Decides as follows:

#### THE FACTS

The application was introduced the ninth Earl of Spencer (who is the brother of the late Diana Spencer, former Princess of Wales) and by his wife. The first applicant is a British citizen, born in 1964 and he has a permanent address in Northampton. The second applicant is a British citizen, was born in 1965 and has an address in South Africa. The applicants are represented before the Commission by Mr. Simon Ekins, a solicitor practising in London.

#### A. Particular circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

On 2 April 1995 the News of the World, a mass circulation newspaper, published an article entitled "DI'S SISTER-IN-LAW IN BOOZE AND BULIMIA CLINIC". This article extended from the front page to the following two pages of that newspaper and reported the second applicant's admittance to a private clinic for treatment for an eating disorder and for alcoholism. It went into considerable detail on the applicants' personal and family problems and incidents (including the applicants' relationship, the second applicant's unhappiness about living on the large family estate inherited by the first applicant and the first applicant's alleged affair shortly after their marriage). Close friends of the applicants were referred to as sources. The article was accompanied by a photograph of the second applicant taken with a telephoto lens while she walked in the grounds of the private clinic, which photograph was captioned "SO THIN: Victoria walks in the clinic grounds this week".

On 2 April 1995 The People, also a mass circulation newspaper, published an article about the applicants in two parts. The first part was entitled "DI'S SISTER IN THERAPY CLINIC ... EXCLUSIVE" and also referred to the second applicant's admission to a private clinic for treatment for an eating disorder. The second part covered two pages, was entitled "Dorm for Di's sister-in-law as she fights slimming disease" and detailed the state of the second applicant's health and the treatment regime at the clinic and made reference to the amount of telephone calls made by the first applicant to the second applicant at the beginning of her stay at the clinic.

On the same day the Sunday Mirror (also a mass circulation newspaper) published an article entitled "ALTHORP WIFE IN CLINIC - Di's sister-in-law in addiction clinic". This article announced that the "long suffering" second applicant was being treated at a private clinic

for a slimming disease and referred to the effect of the illness on the applicants' marriage and noted that it was also believed that the second applicant was receiving treatment for a drink problem.

Later on 2 April 1995 the first applicant issued a statement confirming the second applicant's admission to the clinic. He condemned the intrusion into the second applicant's personal affairs, asserted that the second applicant was a private individual and stated that he could see no justification for the publication of the story. He argued that if anybody needed privacy and freedom from harassment it was a person suffering from psychological disorders.

A response by the associate editor of the News of the World to that statement of the first applicant was reported in that newspaper on 14 May 1995. That editor argued that the first applicant was a public figure by birth, was no stranger to publicity and had on many occasions encouraged media interest in his home and family in return for fees. As regards the second applicant's health, the associate editor referred to a report dated August 1993 in a magazine on the second applicant's attendance as a guest of honour at a charity evening in aid of the Eating Disorders Association where she had allegedly confirmed to the magazine journalist that she had suffered from such a disorder for many years. He also referred to an interview with the first applicant published in the Daily Mail on 5 August 1993 about the family estate, where the first applicant had revealed that the second applicant worked as a volunteer part-time at a hospital for young girls suffering from anorexia, which illness had plagued the second applicant's teenage years.

On 3 April 1995 the Daily Mirror, also a mass circulation newspaper, published a number of articles entitled "VICKY'S BRAVEST BATTLE". The articles referred, inter alia, to the second applicant's admission to the clinic, to her illnesses, to the usual causes and symptoms of such illnesses and to the alleged rift between the applicants which dated back, according to the article, to the first applicant's alleged affair shortly after their marriage. The applicants' friends were referred to as sources. A photograph of the second applicant, similar to that published by the News of the World, accompanied this article and was captioned "COURAGE Victoria strolls in the grounds of the clinic where she is trying to battle her way back to health".

All of the articles were published, and the photographs of the second applicant in the clinic were taken and published, without the applicants' prior knowledge or consent.

On 3 April 1995 the first applicant complained about the News of the World, The People and the Daily Mirror to the Press Complaints Committee ("PCC"), claiming breaches of certain provisions of the Code of Practice relating to privacy (clause 4 of the Code of Practice), activities of journalists in hospitals and other similar institutions (clause 6) and harassment (clause 8).

Further to this complaint to the PCC, the News of the World printed an article entitled "HYPOCRISY OF THE ARROGANT EARL SPENCER" on 9 April 1995. The article alleged that the first applicant had seized every opportunity to put himself in the public eye. It claimed that the first applicant had received £250,000.00 in October 1992 from a magazine for an interview with the applicants at the family estate which resulted in a nineteen page article. The article also stated that approximately two years later the same magazine was invited to a maternity hospital on the occasion of the birth of the applicants' fourth child. The article went on to point out that the first applicant had admitted having had an affair in interviews with journalists. The article contested the claim made by the first applicant before the PCC and stated that the relevant photograph was published after careful consideration as the paper knew that it could be in breach of the Code of Practice.

The paper went on as follows:

"If it caused offence or distress to Lady Spencer, we apologise to her. But one reason we carried it was to prove our story was true. For Earl Spencer has a rather disturbing tendency to lie through the back of his teeth when the press he so loves to manipulate uncover less than complimentary stories against him".

The PCC concluded that the News of the World had breached the Code of Practice. In the absence of a public interest justification, the PCC did not accept that the publication of a photograph "taken with a telephoto lens of a indisputably unwell person walking in the private secluded grounds of an addiction clinic" could be anything other than a breach of the Code. The PCC considered that, while the first applicant's past relationship with the press may have affected the extent to which he was entitled to privacy in relation to particular aspects of his own life, this did not leave the press free to comment on any matter concerning the second applicant. The PCC did not accept that the second applicant had opened her illness to public scrutiny.

The Daily Mirror agreed to publish an apology prior to the determination of the PCC and therefore the PCC ruled that the complaint against that newspaper had been resolved. The apology of the Daily Mirror was published on 11 April 1995, was addressed to both applicants and related to the publication of the photograph of the second applicant.

As regards the article in The People, the PCC considered that matters of health fell within the ambit of an individual's private life and that the intrusion into the second applicant's private life was not justified. The PCC considered that while the first applicant's past relationship with the press may have affected the extent to which he was entitled to privacy in relation to particular aspects of his own life, this did not leave the press free to report on any matter

concerning the second applicant, particularly, on the second applicant's health and psychological well being. The PCC did not accept that the second applicant had opened her illness to public scrutiny and concluded that The People newspaper had breached the Code of Practice.

On 14 May 1995 the News of the World published the adjudication of the PCC against that newspaper together with an apology. That apology was addressed to the second applicant and related to both the article and the relevant photograph. The People newspaper also published the adjudication and an apology, which apology was addressed to both applicants.

On 17 May 1995 the applicants' solicitors wrote two separate letters to two former friends of the applicants threatening breach of confidence proceedings for an injunction and the pursuit of a "financial claim" and requesting an undertaking regarding further disclosures in order to avoid an injunction hearing. The applicants' solicitors noted that the "grossest example" of their breach of confidence had resulted in the News of the World article of 2 April 1995 - one of the friends had passed on a private letter from the second applicant to the press which letter contained information about the state of her health and both friends had also leaked related information.

A High Court Writ was served with those letters dated 17 May 1995 claiming a permanent injunction:

"restraining the Defendants whether by themselves their servants or agents or otherwise howsoever from disclosing, publishing or revealing to any party whomsoever or causing or permitting to be disclosed, published or revealed without the authority of the Plaintiffs any information concerning the following matters, namely, the private lives, personal affairs or private conduct of the Plaintiffs or their children, relatives, guests and visitors (including members of the Royal Family and their staff);

the confidential financial affairs or business transactions of the First Plaintiff; any incident, conversation, correspondence or communication of a private nature involving the Plaintiffs, their marriage, their children, relatives, guests, visitors or staff; all being confidential information acquired by the Defendants during the course and as a consequence of their friendship with the Plaintiffs and in the First Defendant's position as confidant of the Second Plaintiff."

Since the defendants did not give the requested undertaking, a statement of claim dated 29 June 1995 was served. The statement of claim invited the court to conclude that all or some of the information disclosed to the press since 1989 (including the publications of the News of the World of 2 April 1995) about the applicants had come from one or both of the defendants. In particular, the statement of claim founded this submission on, inter alia, specific correspondence between the second applicant and one of the defendants in March 1995 relating

to the second applicant's admission to a treatment centre which led to the publication in the News of the World of 2 April 1995 and on the publication of other information on 30 April 1995 of which only the defendants could have been aware. The applicants' suspicions had been confirmed by a test letter dated 1 May 1995 containing false information which had been sent by the first applicant to the second defendant - it was clear that the first defendant had also read the letter since he later telephoned the second applicant about its contents; the false information appeared less than a week later in the early editions of a newspaper; and the editor, when notified that it was simply a ploy, confirmed that he had run the story on the evidence of that test letter and the first defendant's telephone conversation with the second applicant. That newspaper had also published parts of the letter of 1 May 1995.

In the statement of claim the applicants also requested, *inter alia*, an injunction in the terms of the summons together with damages (including aggravated and/or exemplary damages for breach of confidence based, *inter alia*, on the "great personal distress" caused to the applicants, the consequent strain on their relationship and the effect on the second applicant's treatment). Alternatively, an account of profits was sought.

On 4 June 1995 the case was settled, the High Court ordering on a consent basis an injunction in precisely the same terms as requested in the Writ.

B. Relevant domestic law and practice

1. Relevant case-law

There is no law of privacy, as such, in England and Wales (*Kaye v. Robertson* [1991] FSR 62, Glidewell LJ at p. 66).

A remedy of breach of confidence exists. It is made up of three essential elements: the information itself must have "the necessary quality of confidence about it", the information "must have been imparted in circumstances importing an obligation of confidence" and there must have been an "unauthorised use of that information to the detriment of the party communicating it" (*Coco v. A.N. Clark Engineers Ltd* [1969] RPC 41, at 47).

Griffiths J. observed in the case of *Bernstein v. Skyviews Ltd.* [1978] 1 QB 479 that the plaintiff's complaint was not that the aircraft in question interfered with the use of his land but that a photograph had been taken from it. He pointed out that "there is, however, no law against taking a photograph" and that the mere taking of a photograph cannot turn an act which is not a trespass into the plaintiff's air space into one that is a trespass. He went on to refer to the possibility of an actionable nuisance if the case in question related to harassment by constant surveillance and photographing of the plaintiff from the air.

As regards the damages recoverable for breach of confidence, Sir Robert Megarry, Vice-Chancellor, stated, in the case of *Malone v. Metropolitan Police Commissioner* [1979] Ch. 344, that:

"<the right of confidentiality> is an equitable right which is still in the course of development, and is usually protected by the grant of an injunction to prevent disclosure of the confidence. Under Lord Cairns Act 1858 damages may be granted in substitution for an injunction; yet if there is no case for the grant of an injunction, as when the disclosure has already been made, the unsatisfactory result seems to be that no damages can be awarded under this head ... In such a case, where there is no breach of contract or other orthodox foundation for damages at common law, it seems doubtful whether there is any right to damages, as distinct from an account of profits."

In 1984 the Court of Appeal granted an injunction, based on breach of confidence, restraining the defendants (the newspaper, its editor and two journalists) from publishing information which had been received from unidentified persons the latter of whom had obtained the information by tapping the plaintiffs' telephones (*Francome and Another v. Mirror Group Newspapers Ltd and Others* [1984] WLR 892).

The "Spycatcher case" (*Attorney-General v. Guardian Newspapers* (No. 2) [1990] AC 109) related to the publication by newspapers of extracts from a book entitled "Spycatcher" in which the author purported to recount his service in M.I.5. The Attorney General wished to restrain publication of the book or of any report or comment on the book. The judgment of Lord Goff (House of Lords) outlined the general principles as regards confidential information, and the corresponding duty not to disclose such information, as follows (p. 281B-C):

"... a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word "notice" advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary; though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious. The existence of this broad principle reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection".

He went on to clarify (p. 281D-E) that he had expressed the circumstances in which the duty arises in broad terms:

"not merely to embrace those cases where a third party receives information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person in breach of his duty of confidence, but also to include certain situations ... where an obviously confidential document, such as

a private diary, is dropped in a public place, and is then picked up by a passer-by."

An order of an account of profits was made against The Sunday Times in relation to its previous publication of extracts of the book and in this respect, Lord Goff commented as follows (p. 286):

"The remedy of an account is alternative to the remedy of damages, which in cases of breach of confidence is now available, despite the equitable nature of the wrong, through a beneficent interpretation of the Chancery Amendment Act 1858 (Lord Cairns' Act), and which by reason of the difficulties attending the taking of account is often regarded as a more satisfactory remedy, at least in cases where the confidential information is of a commercial nature, and quantifiable damage may therefore have been suffered."

The above-cited passages from Lord Goff's judgment on the circumstances in which the duty of confidence arises were quoted with approval in the case of *Shelley Films Ltd v. Rex Features Ltd* [1994] EMLR 134 where the defendant photographic agency had bought and supplied to a newspaper a photograph taken without authorisation on the set of a film which was in closed and secret production. In fixing the agency with the requisite knowledge, the High Court referred to a defendant coming into possession of information in circumstances where he "ought as a reasonable person to know" that the plaintiff intended the information to be kept confidential. The circumstances were considered sufficient to conclude that there was a serious question to be tried as to whether the photographer was subject to an equitable obligation of confidence and as to whether the agency's knowledge of the circumstances in which the photograph was taken was sufficient for it to be subject to the same equitable obligation. Accordingly, an injunction was granted restraining further publication of the photograph in question.

The case of *Hellewell v. the Chief Constable of Derbyshire* [1995] 1 WLR 804, at 805 related to photographs taken of a man while he was in police custody which local shopkeepers had asked the police to supply for use by their security staff to reduce shoplifting. The applicant was unsuccessful in his application for an injunction to prevent the circulation of his photograph, the court finding that the Chief Constable would be bound to succeed in the main action in establishing a "public interest" defence. Laws J stated as follows:

"If someone with a telephoto lens were to take from a distance with no authority a picture of another engaged in some private act, the subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law should protect what might reasonably be called a right of privacy,



although the name accorded to the cause of action would be breach of confidence."

In the case of Michael Barrymore v. News Group Newspapers Limited ([1997] FSR 600), the second defendant had released information as regards his relationship with the first plaintiff (including letters exchanged between them) to the first defendant, the latter foreseeing a series of press articles on the matter. The High Court granted an injunction to restrain further publications of this information in the newspaper. As to the question of compensation Mr. Justice Jacobs pointed out (as regards the letters disclosed and to which copyright attached):

"the financial consequences will no doubt be a matter for the court to decide in due course. I say no more at this stage other than that newspapers which think that they can pay their way out of breach of copyright may find it more expensive than it is worth to print the material."

## 2. The Press Complaints Committee ("PCC")

This is a non-statutory body which was set up by the newspaper industry for the purposes of self-regulation. It commenced functioning in 1991. It is charged with the enforcement of a Code of Practice which was drafted by the newspaper industry's Code Committee and approved by the PCC in June 1993. The Code of Practice states that members of the press have a duty to maintain the highest professional and ethical standards and that in doing so they should have regard to the provisions of the Code of Practice. The Code of Practice includes provisions in relation to privacy (clause 4), activities of journalists at hospitals or similar institutions (clause 6), harassment and intimidation of subjects (clause 8) and in relation to certain public interest exceptions (clause 18).

If a newspaper has been found to be in breach of the Code of Practice, the newspaper is bound by the Code to print the adjudication by the PCC in full and with due prominence. However, the PCC has no legal power to prevent publication of material, to enforce its rulings or to grant any legal remedy against the newspaper in favour of the victim.

## COMPLAINTS

The first applicant submits that the United Kingdom has failed to comply with its obligations under the Convention to protect his right to respect for his private life in that it has failed to prohibit the publication and dissemination of information relating to his private affairs and to provide a legal remedy whereby he could have prevented such action or claim damages thereafter for the loss and distress caused.

The second applicant refers to the taking of photographs with a telephoto lens without her knowledge or consent while she was on the private grounds of a clinic where she was obtaining treatment. She also argues that the United Kingdom has failed to effectively protect her private life in that it has failed to prohibit the taking, sale, publication and further publication of such photographs and to provide a legal remedy whereby she could have prevented such action or claim damages thereafter for the loss and distress caused.

The applicants invoke Articles 8 and 13 of the Convention.

#### PROCEEDINGS BEFORE THE COMMISSION

The applications were introduced on 28 September 1995 and were registered on 5 October 1995.

On 2 September 1996 the Commission decided to join the applications and to communicate the applications to the respondent Government and invite them to submit written observations on the admissibility and merits of the cases.

The Government's observations were received on 23 December 1996 after one extension of the time-limit fixed for that purpose. The applicants' observations were received on 7 April 1997 after two extensions of the time-limit fixed for that purpose.

On 20 October 1997 the Commission decided to hold a hearing on the admissibility and merits of the applications and requested further observations on certain matters. The Government's further observations were received on 23 December 1997 and those of the applicants were received on 6 January 1998.

The hearing was held on 16 January 1998. The Government were represented by Mr. Iain Christie, Agent, Foreign and Commonwealth Office and Mr. James Eadie, Counsel together with Mr. Paul Jenkins and Mr. Philip Stevens as advisers. The applicants were represented by Mr. Michael Briggs Q.C., Counsel, Mr. Jason Coppel, Counsel and by Mr. Simon Ekins, Solicitor.

#### THE LAW

The applicants complain about a failure by the United Kingdom to fulfil its obligations under the Convention to protect their right to respect for their private lives in that it has failed to prohibit the publication and re-publication of information (photographs in the case of the second applicant) relating to their private affairs or to provide a legal remedy whereby they could have prevented such publication or claim damages thereafter for the distress caused. They invoke Articles 8 and 13 (Art. 8, 13) of the Convention.

1. Article 8 (Art. 8) of the Convention, insofar as relevant, reads as follows:

"1. Everyone has the right to respect for his private ... life  
....

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 ... for the protection of the rights and freedoms of others."

The Commission is of the view that it is not necessary to consider the Government's submission that, to the extent that the information published relates to the second applicant only, the first applicant cannot claim to be a victim of a violation of the Convention because the Commission considers that his application is, in any event and for the reasons set out below, inadmissible on other grounds. In addition, the Commission notes that the first applicant submits in his first written observations that the same matters give rise to a separate issue under Article 8 (Art. 8) as regards his family life. However, and even assuming that this complaint has been introduced within the time-limit set down in Article 26 (Art. 26) of the Convention (by way of the full citation of Article 8 (Art. 8) in the application form initially submitted) the Commission is of the view that the matters raised by the first applicant under Article 8 (Art. 8) of the Convention fall primarily to be considered in the context of the private life element of that Article.

The applicants essentially submit that the Government are under a positive obligation to provide effective protection for the rights guaranteed by the Convention. Given the terms of Article 10 (Art. 10) of the Convention, the absence of an effective domestic remedy as regards invasions of privacy by the press constitutes a failure to effectively respect their right to respect for their private lives as guaranteed by Article 8 (Art. 8) of the Convention.

The Government argue that the domestic system as a whole (including remedies in breach of confidence and against trespass, nuisance, harassment and malicious falsehood together with the Press Complaints Commission) provides adequate protection to individuals and an appropriate balance between the often competing rights guaranteed by Articles 8 and 10 (Art. 8, 10) of the Convention.

The Commission recalls that the obligation to secure the effective exercise of Convention rights imposed by Article 1 (Art. 1) of the Convention may involve positive obligations on a State and that these obligations may involve the adoption of measures even in the sphere of relations between individuals (Eur. Court HR, Plattform "Ärzte für das Leben" v. Austria judgment of 21 June 1988, Series A no. 139, p. 12, para. 32).

On the facts as presented by the parties, the Commission would not exclude that the absence of an actionable remedy in relation to the publications of which the applicants complain could show a lack of respect for their private lives. It has regard in this respect to the

duties and responsibilities that are carried with the right of freedom of expression guaranteed by Article 10 (Art. 10) of the Convention and to Contracting States' obligation to provide a measure of protection to the right of privacy of an individual affected by others' exercise of their freedom of expression (see, *mutatis mutandis*, No. 10871/84, Dec. 10.7.86, D.R. 48, p. 158 and No. 31477/96, Dec. 15.1.97, unpublished).

However, the Government's principal argument is that the failure of the applicants to pursue a breach of confidence action against, *inter alia*, the relevant newspapers amounts to non-exhaustion of domestic remedies within the meaning of Article 26 (Art. 26) of the Convention. It is not disputed that the three essential elements of a breach of confidence action are those outlined by Megarry J in *Coco v. Clark Engineers* (loc. cit.).

In the first place, and as regards the nature of the information published, the Government submit that information about a person's medical condition and treatment (*X and Y* 1988 2 AER 648), marriage (*Argyll v. Argyll* 1967 Ch 302), adulterous relationships (*Stephens v. Avery* 1988 1 Ch 449 and *Michael Barrymore v. News Group Newspapers Limited*, loc. cit.) together with consequent commentary on the care arrangements for the children would be considered, in principle, as confidential. The Government therefore consider that the information published on 2 April 1995 was "confidential" information. However, the re-publication of that information on 3 April 1995 would not attract the protection of the law of breach of confidence because once confidential information is disclosed to a substantial number of persons, it loses its confidential nature.

Secondly, and as to the "circumstances importing an obligation of confidence", the Government submit that the true test is whether the newspaper was or should have been aware of the confidence attaching to the information and this comes from the language used in the *Coco* case (loc. cit.). This means that once a newspaper obtained information from the applicants' friends relating to the second applicant's medical condition and treatment and the applicants' relationship and marriage, the newspaper would have necessarily been aware of the nature of the information and, accordingly, the duty of confidence which those friends had owed to the applicants and had obviously broken. This implied knowledge on the part of the newspaper of the breaking of an obligation of confidence, based on the nature of the information itself, is sufficient to fulfil this second element of the breach of confidence action. Anonymous disclosures would work in favour of plaintiffs in view of the necessary conclusions a newspaper should draw from the desire for anonymity when disclosing information of a confidential nature. The Government refer to certain cases (including, *Shelley Films Ltd*, the *Francome* case and the *Barrymore* case, all loc. cit.) where injunctions were granted on the basis of breach of confidence where there were no prior relationships between the

respective plaintiffs and defendants.

Thirdly, and as to "unauthorised use of that information", it is plain, according to the Government, that the applicants consider the disclosure and subsequent publication in the press of such confidential information to constitute unauthorised use of that information. Moreover, the Government submit that once it is established that confidential information was used as a "springboard" to the obtaining of other information (for example, subsequent investigations undertaken to attempt to obtain independent verification of confidential information disclosed), such use of confidential information would constitute "unauthorised use" and would be, accordingly, enjoined (*Seager v. Copydex Ltd* [1967] 1 WLR 923). Therefore, where it is claimed by a defendant that the relevant published information was only partly confidential, the Government submit that once a plaintiff proves that the initial source of information was confidential (and the applicants' case in this respect in the domestic proceedings is, in the Government's view, compelling), the burden of proof shifts from the plaintiff to the defendant who must show that the information was obtained completely independently of the confidential source.

The Government also argue that the above principles apply equally to the photograph of the second applicant because the photograph must be considered in the context in which it was published (namely, accompanied by captions and articles). Taken in that context it was meant to convey and conveys confidential information. Moreover, the Government submit that there is no legal bar to restraining the publication of photographs, relying, *inter alia*, on the obiter dicta of Laws J in the *Hellewell* case (*loc. cit.*) and the injunction granted in the *Shelley Films Ltd* case (*loc. cit.*). Accordingly, the Government's case is that it is not the taking of the photograph which can be sanctioned but rather its subsequent distribution and publication accompanied by captions and the articles. As to the *Kaye* and *Bernstein* cases (*loc. cit.*), the Government point out that breach of confidence was not advanced as an argument in those cases.

Fourthly, and as to the remedies for an action in breach of confidence, the Government point out that while an injunction will be granted to prevent publication or imparting of confidential information, it will be refused if there is a genuine "public interest" in the published material or if the information is considered trivial. They specify that neither of such limitations applies in these cases. In addition, an injunction can be granted after publication in relation to publication of new information but not in relation to the re-publication of the same information. Moreover, and relying on the above-cited extract from p. 286 of Lord Goff's judgment in the *Spycatcher* case, damages can be obtained in addition to an injunction. While the Government do not specify whether the grant of an injunction

restraining publication in the future of new confidential information allows the grant of damages for past disclosures, they note that the applicants claimed exemplary/aggravated damages in relation to past disclosures in the Writ of 17 May 1995.

Furthermore, the Government point out that the remedy of an account of profits is available irrespective of whether or not an injunction could also be ordered. As to the applicants' submission that there is no reported case where such an order has been made, the Government refer to the making of such an order in relation to a past publication against The Sunday Times in the Spycatcher case (loc. cit.). As to the applicants' main objection to the account of profits remedy namely, the difficulties in calculating the amount attributable to the publication in breach of confidence, the Government outline how such a calculation can be done and argue that the above-cited comments of Mr. Justice Jacobs in the Barrymore case (loc. cit.) demonstrate that once a breach of confidence is established, the courts would have scant sympathy for any argument against an award of an account of profits based on difficulties of calculation.

Finally, the Government stress the particular facts of this case and, in particular, the compelling case made out by the applicants in their statement of claim dated 29 June 1995 that the published information of which the applicants complain emanated from a breach of confidence from those former friends. Accordingly, in law, in practice and on the facts of the applicants' cases, the remedy of an action in breach of confidence against, inter alia, the relevant newspapers was accessible to the applicants, was capable of providing redress for their complaints, offered reasonable prospects of success and was an effective remedy which should have been exhausted by them in order to fulfil the requirements of Article 26 (Art. 26) of the Convention.

The applicants submit that the breach of confidence action is in law and practice an ineffective remedy for the invasion of an individual's private life by the media.

In the first place, and as regards the nature of the information disclosed, the applicants agree that the information published on 2 April 1995 was confidential. However, from then on it was in the public domain and its re-publication on 3 April 1995 was not actionable as a breach of confidence. The Barrymore case (loc. cit.) is distinguishable as future instalments disclosing further private matters had been envisaged, with the consequence that an injunction relating to future publications was both relevant and effective for that plaintiff.

Secondly, the applicants consider the second element of the action (the circumstances importing an obligation of confidence) to be the most problematic. They submit that it must be shown that the relevant newspaper had been put on notice prior to publication that the disclosure amounted to a breach of a duty of confidence owed by the

source to the subject of the information. Accordingly, the applicants would have had to prove that the newspapers had the requisite notice both of the friends' duty of confidence and of their breach of that duty. Moreover, such a duty will not exist in the majority of cases of media intrusion and, if it exists, it is difficult to establish. The task is rendered even more difficult by the protection afforded to newspapers (by Article 10 (Art. 10) of the Convention and by domestic law) as regards revealing their sources (Eur. Court HR, Goodwin v. the United Kingdom judgment of 27 March 1996, Reports of Judgments and Decisions 1996-II, p. 483) and the fact that information will often be provided to the newspapers anonymously. If establishing such a duty is possible, it will often relate only to some of the published material and, in such circumstances, the applicants submit that, if a plaintiff cannot prove that the information was unavailable to the defendant by any other means, the plaintiff's case will fail.

As to the remedies available for a breach of confidence, the applicants refer to the impossibility of obtaining an injunction prior to publication in the absence of prior warning. There is no jurisdiction to grant an injunction as regards material already published - so that once the information was published on 2 April 1995, they had no possibility of restraining the re-publication of the same material on 3 April 1995.

In addition, and pursuant to Lord Cairns' Act 1858, the applicants submit that damages cannot be obtained in addition to an injunction but only in lieu of an injunction. Furthermore, if an injunction could not have been granted (and it could not have been granted in relation to prior publications), damages cannot be awarded (Sir Robert Megarry VC, in *Malone v. Metropolitan Police Commissioner*, loc. cit. and Lord Goff in the *Spycatcher* case, loc. cit., p. 286). In any event, their own personal distress (to which the damages would have to relate) falls outside a category of loss for which, in the absence of a special type of contract, damages can be awarded under common law. As to an order of an account of profits, the applicants emphasise the major evidential difficulties associated with proving to a court that the inclusion of the confidential information in a newspaper containing many other articles directly led to an identifiable and calculable profit which could be awarded to a plaintiff. They submit that there is no reported case of an award of an account of profits against a newspaper by reason of the publication of confidential material.

The second applicant emphasises the distinct nature of her complaints from those of the first applicant. She complains only about the taking, distribution and publication of the photograph; in view of the nature of the disclosures, she was more immediately affected by the

matters complained of than the first applicant; and, since she was the sister-in-law of the late Princess of Wales rather than her brother, her private affairs are of even less public interest than those of the first applicant. She points out that, even if Laws J's obiter dicta were the law, the photograph in itself did not show a "private act", the second applicant having been simply walking in the garden. No duty of confidence can be established in this respect - contrary to the position in the Shelley Films Ltd case (loc. cit.), the photographer was in a public place; he was there unknown to and uninvited by the applicant; no privilege was given to the photographer which he had abused; he could have been acting on a tip-off; and there is no evidence to show that the photographer had any idea from where the tip-off came. Accordingly, the publication of the photograph falls completely outside any breach of confidence remedy.

Moreover, the second applicant argues that the reliance by the Government on the above-quoted extract from the Hellewell case does not support in any way the proposition that the law of confidence provides a remedy as regards the relevant photographs. Laws J's comments are accepted by the Government to be obiter dicta. There is no legal authority in Laws J's favour, no subsequent judicial support and overwhelming authority against him (Bernstein v. Skyviews loc. cit. and Kaye and Robertson, loc. cit.); moreover, this latter judgment was binding on Laws J which would distinguish the Whiteside decision of the Commission (No. 20357/92, Dec. 7.3.94, D.R. 76-A p. 80). In any event and even if Laws J's comments could be accepted as covering the disclosure by a photographer of a photograph to the newspapers, the actual taking of the photographs and their re-publication on 3 April 1995 would not be actionable.

Accordingly, the applicants submit that the view which was taken by the Commission in its Winer decision as regards the uncertainty attending the extent and scope of the breach of confidence remedy pertains to date (No. 10871/84, loc. cit. at p. 170). It remains a vague remedy for which there is no statutory or jurisprudential basis. It does not constitute a relevant or effective domestic remedy, there was no other effective remedy for them to exhaust, there is no uncertainty in this respect requiring resolution by the courts and the settlement of ineffective proceedings against former friends does not alter this position. Accordingly, the complaints should not, in the applicants' view, be declared inadmissible on grounds of non-exhaustion of domestic remedies.

The Commission recalls that Article 26 (Art. 26) of the Convention reflects the position that States are dispensed from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system. In this regard, the provisions of Article 26 (Art. 26) represent an



important aspect of the principle that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (Eur. Court HR, Akdivar v. Turkey judgment of 16 September 1996, Reports 1996-IV, No. 15, p. 15, para. 65).

As to the requirements of Article 26 (Art. 26) of the Convention, the Commission recalls that the applicants are only required to exhaust such remedies which relate to the breaches of the Convention alleged and which provide effective and sufficient redress. The applicants do not need to exercise a remedy which, although theoretically of a nature to constitute a remedy, does not in reality offer any chance of redressing the alleged breach (No. 9248/81, Dec. 10.10.83, D.R. 34, p. 78). Accordingly, the Government must establish that the remedy in question was accessible, was one capable of providing redress in respect of the applicants' complaints and offered reasonable prospects of success. Once this burden has been discharged, it falls to the applicants to establish that the remedy advanced by the Government was, inter alia, for some reason inadequate and ineffective or that there were special circumstances absolving them from the requirement of exhaustion of domestic remedies (Eur. Court HR, Akdivar v. Turkey judgment, loc. cit., p. 16, para. 68). It has not been argued and the Commission does not consider that the applications give rise to any special circumstances which would absolve the applicants from exhausting domestic remedies.

Moreover, where there is doubt as to the prospects of success in a particular case it should be submitted to the domestic courts for resolution. This is particularly so in a common law system since, where the courts extend and develop principles through case-law, it is generally incumbent on an aggrieved individual to allow the domestic courts the opportunity to develop existing rights by way of interpretation (No. 20357/92, Dec. 7.3.94, D.R. 76-A, p. 80, at p. 88).

In the present cases, the applicants considered the greater part of the information published on 2 April 1995 to be of a private and confidential nature. The first main area of dispute between the parties relates to the second essential element of the breach of confidence remedy namely, "the circumstances importing a duty of confidence." However, the Commission considers that the difference between the positions of the parties as to the circumstances importing such a duty is, in practical terms, relatively narrow, particularly in light of the description (which is not specifically challenged by the applicants) of Lord Goff in the Spycatcher case of the broad circumstances in which such a duty can be implied. In any event, the Commission considers that the particular facts of these cases reduce significantly the relevance of this dispute between the parties - the pleadings in the domestic proceedings in the present cases demonstrate that these applicants had

a very detailed and strong case pointing to their former friends as the direct sources of the essential confidential information published on 2 April 1995. It notes, in particular, the successful ploy adopted by the first applicant (his letter of 1 May 1995) to seek to confirm the identity of the sources of those disclosures.

Similarly, the Commission would not find convincing any suggestion by the applicants that the information published on 2 April 1995 would be found to derive only in part from the breach of a duty of confidentiality (because, for example, it had been independently verified by investigation) in light of the strong and detailed case of the applicants in the domestic proceedings as to the direct responsibility of their former friends for the relevant publications.

The second main area of dispute between the parties relates to the remedies available on establishing a breach of confidence. The Commission accepts that the applicants have raised some doubt as to the availability of damages for breach of confidence where an injunction could not have been granted. Pursuant to Lord Cairns' Act 1858, it appears that damages are confined to a case where an injunction could have been granted but, for some reason, was not and that where publication has already taken place an injunction could not have been granted.

However, the Commission notes the judgment of Lord Goff in the Spycatcher case (a House of Lords judgment handed down more than ten years after the Malone case in the High Court). It considers that, at the very least, the extract quoted above (from p. 286 of that judgment) shows the developing state of the law relating to the award of damages. In any event, it is not disputed that an account of profits arises irrespective of the grant of an injunction. As regards the award of an account of profits where the publication has already taken place, the Commission notes that an account of profits was ordered against The Sunday Times in the Spycatcher case in relation to publications which had already taken place. Moreover, in light of Mr. Justice Jacob's comments (albeit in the context of breach of copyright) in the Barrymore case (loc. cit.), the award of an account of profits in the Spycatcher case where the relevant articles were published along with numerous others and in view of the extensive nature of the coverage in the relevant newspapers on 2 April 1995, the Commission does not find the applicants' submissions as regards the difficulties in calculating the relevant profits sufficient to warrant a conclusion as to the ineffective nature in Convention terms of an order of an account of profits.

Moreover, the Commission has contrasted the applicants' submissions herein as regards the remedies available on establishing a breach of confidence with the broad terms of the consent order of 4 June 1995. It also contrasts those submissions of the applicants with their claims in the statement of claim for an injunction and damages

(including aggravated and/or exemplary damages for breach of confidence based, inter alia, on the "great personal distress" caused to the plaintiffs, the consequent strain on their relationship and the effect on the second applicant's treatment) or, in the alternative, an account of profits.

It is not disputed that the lack of prior notice of publication will necessarily limit the possibility of obtaining a re-publication injunction. However, it is equally not disputed that an injunction could have been granted to prevent further disclosures which had been found to be in breach of confidence. As to re-publication of the same information on 3 April 1995, the Commission considers that an injunction to restrain publication of further information would have had, at least, a deterrent effect on such re-publication by any newspapers on notice of that injunction.

Furthermore, and as regards the second applicant's complaint which she emphasises relates only to the photograph, the Commission considers it questionable whether the meaning of the photograph together with the identity of the subject and venue would have been understood from the photograph standing alone without at least a caption. In addition, the Commission notes that the Shelley Films Ltd case (loc. cit.) clearly suggests that photographs can of themselves form the basis of a breach of confidence action and, in view of the clearly clandestine manner in which the photograph of the second applicant was taken, the Commission does not consider that the Shelley Films Ltd case is as clearly distinguishable on its facts as is submitted by the applicants. In any event, the Commission considers that its comments above on the action of breach of confidence apply equally to the photograph - in the context of exhaustion of domestic remedies, it is sufficient to note that the second applicant could have (and did in the domestic proceedings) take the breach of confidence action in relation to the photograph together with the accompanying captions and articles.

Finally, the Commission recalls the view expressed in the Winer case (No. 10871/84, Dec. 10.7.86, D.R. 48, p. 158, at p. 170) that the failure to take a breach of confidence action did not constitute a failure to exhaust domestic remedies in view of the uncertainty as to the precise scope and extent of that remedy. The Commission notes that, contrary to the position in the Winer case, the majority of the submissions in the present cases, both written and oral, focused on the scope and extent of that remedy. Based for the most part on judicial authorities dated after the Winer case (the more relevant of which are cited above and which include an important House of Lords judgment of 1990), the parties in the present cases were in a position to describe in detail the essential elements and application in practice of the breach of confidence remedy. Indeed, the Commission considers the extensive and detailed nature of the submissions, of itself, indicates that there has been significant clarification of the scope and extent

of a breach of confidence action.

The Commission therefore considers that the parties' submissions in the present cases do not demonstrate the same level of uncertainty as to the remedy of breach of confidence which prevailed at the time of the Winer decision of the Commission, the domestic courts having extended and developed certain relevant principles through their case-law by interpretation (No. 20357/92, Dec. 7.3.94, loc. cit.).

Accordingly, the Commission considers that the parties' submissions indicate that the remedy of breach of confidence (against the newspapers and their sources) was available to the applicants and that the applicants have not demonstrated that it was insufficient or ineffective in the circumstances of their cases. It considers that, insofar as relevant doubts remain concerning the financial awards to be made following a finding of a breach of confidence, they are not such as to warrant a conclusion that the breach of confidence action is ineffective or insufficient but rather a conclusion that the matter should be put to the domestic courts for consideration in order to allow those courts, through the common law system in the United Kingdom, the opportunity to develop existing rights by way of interpretation.

In such circumstances, the Commission considers that the applicants' complaints under Article 8 (Art. 8) of the Convention are inadmissible under Article 27 para. 3 (Art. 27-3) of the Convention on the basis that the applicants have not exhausted domestic remedies within the meaning of Article 26 (Art. 26) of the Convention.

2. Article 13 (Art. 13) of the Convention provides as follows:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Commission notes that it has rejected the applicants' substantive complaints under Article 8 (Art. 8) of the Convention on the basis that they have failed to comply with the exhaustion of domestic remedies requirement under Article 26 (Art. 26) of the Convention. In such circumstances, the Commission finds their complaints under Article 13 (Art. 13) of the Convention must be rejected as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE

M. DE SALVIA  
Secretary  
to the Commission

S. TRECHSEL  
President  
of the Commission