Neutral Citation Number: [2006] EWCA Civ 1714

Case No: A2/2006/0118

**IN THE SUPREME COURT OF JUDICATURE**
**COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**MR JUSTICE EADY**
**[2005] EWHC 3003 (QB)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2006

**Before :**

**LORD JUSTICE BUXTON**
**LORD JUSTICE LATHAM**
and
**LORD JUSTICE LONGMORE**

- - - - - - - - - - - - - - - - - - - - -

**Between :**

| | |
|---|---|
| **Niema Ash and another** | **Appellants** |
| **- and -** | |
| **Loreena McKennitt and others** | **Respondent** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Mr David Price (solicitor advocate) and Mr Korieh Duodu** (instructed by **Messrs David Price**) for the **Appellants**
**Mr Desmond Browne QC and Mr David Sherborne** (instructed by **Messrs Carter-Ruck**) for the **Respondents**

Hearing dates : 21-23 November 2006

- - - - - - - - - - - - - - - - - - - - -

# Approved Judgment

## Lord Justice Buxton :

## Background

1. I set out no more than is necessary to understand the issues in the appeal. Much of what follows is taken largely verbatim from the judgment of Eady J, which was described by the constitution of this court that granted permission to appeal as detailed and careful. The case before Eady J was heard in private. The claim seeks to prevent the further publication of certain material, so this was a case where a public hearing would have defeated the object of that hearing, one of the cases for privacy that is provided by CPR 39.2(3)(a). The judge enjoined further publication of a significant part of the work complained of. He dealt with the problem of publicity in the course of litigation by (if I may respectfully say so, very skilfully), delivering an open judgment that described the objectionable material in general terms, but appended a confidential appendix in which the actual enjoined material was fully described.

2. Before us, an application was made to hear in private those parts of the appeal that required reference to the material in the appendix. We granted that application, for the same reason as the judge had sat in private. However, we were able without undermining the judge's order to hear the major part of the appeal, including all of the legal argument, in public. That was achieved by the care exercised by Mr Price and by Mr Browne QC in presenting their arguments, and we are grateful to them for their skill and co-operation in that respect.

3. The First Claimant is Loreena McKennitt, a Canadian citizen, who has for many years run a business around her composition and performance of folk and folk-related music. She has sold millions of recordings and has from time to time toured various parts of the world playing live concerts. The Second and Third Claimants (who play no active role in the proceedings) are Hampstead Productions Ltd and Quinlan Road Ltd. These are companies incorporated under the laws of Ontario which are owned and controlled by Ms McKennitt. The copyright in the musical and literary works comprised in her songs, as well as that in the sound recordings of her performances, is owned by various corporate entities.

4. The proceedings are based upon alleged breaches of privacy or of obligations of confidence, said to arise either by implication of law or, in some instances, from express contractual provisions. The case concerns the publication in 2005 of a book "Travels with Loreena McKennitt: My life as a Friend" ["the book"]. This was written by the First Defendant, Niema Ash, who was formerly a friend of Ms McKennitt. She and her long term partner, Mr Tim Fowkes, had often socialised with Ms McKennitt and entertained her while she was in England. Moreover, they had sometimes worked closely with her in connection with her business here and abroad and accompanied her on a contractual basis on one foreign tour in particular. That tour followed the release of an album in 1997 called "The Book of Secrets". It was to promote this album that a European and American tour took place in 1998, in connection with which Ms Ash agreed to carry out the services of a merchandise supervisor and she was retained for that purpose by the Second Claimant company.

5. The Second Defendant in these proceedings (which equally plays no active part in them) is a company called Purple Inc Press Ltd, which was incorporated in this

jurisdiction in April 2005 for the purpose of publishing the book in question. The sole director is Ms Ash.

6. The nub of Ms McKennitt's claim is that a substantial part of the book reveals personal and private detail about her which she is entitled to keep private. That claim is brought against the background that Ms McKennitt is unusual amongst world-wide stars in the entertainment business, in that she very carefully guards her personal privacy. The judge rightly saw that to be a matter of great importance, such as to require him to make findings about it at the very start of his judgment. In §§ 6-8 of the judgment he said:

> 6. Ms McKennitt has vehemently asserted in these proceedings that she has always sought to keep matters connected with her personal and business life private and confidential. It was confirmed in evidence before me that, whenever a press conference or interview takes place, it is impressed upon those concerned that enquiries about her personal life are very much off limits. Indeed, it seems to have been accepted by Ms Ash (at least on page 313 of her book) that she protected her reputation and her privacy "with the iron safeguard of a chastity belt".
>
> 7. In so far as there have been exceptions to her primary rule of protecting her privacy, Ms McKennitt has emphasised that she has occasionally released some information which "she felt comfortable with", and in respect of which she was able to control the boundaries herself. This has apparently occurred mainly in connection with a charity which she founded and promoted in connection with water safety and the prevention of boating accidents. This followed a tragedy in 1998 when her fiancé (together with his brother and a friend) died in a drowning accident in Canada. She has accepted that, for these purposes, it is sometimes necessary to provide personal detail in order to bring home to people the risks inherent in sailing and the need to take precautions. The personal impact upon her highlights the dangers, she believes, in a way that could not be achieved by general and impersonal safety warnings. When, in this connection, Ms McKennitt has spoken about the death of her fiancé, she has done so on a controlled and limited basis with which, again, she "feels comfortable".
>
> 8. Ms McKennitt, therefore, places at the centre of her present claim the proposition that her private life and indeed her business affairs are entitled to protection on the basis of a duty of confidence, and are not in the public domain by reason either of her fame in itself or of the limited revelations to which I have referred.

## The course of the appeal

7. There is an extant appeal to this court in relation to the judge's costs order, which this judgment does not address. Otherwise, the judge refused permission to appeal against his substantive order, and that refusal was repeated by a single Lord Justice on paper. However, on an ex parte application by Mr Price (who had by then taken over the matter, Ms Ash having represented herself at, though not up to, the trial) permission to appeal was granted, the Lord Justice who delivered the judgment on that occasion observing that

> this is an important and developing area of law where an appeal on these facts may help to clarify and define some of the relevant principles even if it does not alter the outcome

Possibly emboldened by that indication, the argument in this appeal has ranged widely, and certainly beyond the narrow limits of the facts of the case. While necessarily addressing some considerable part of that argument, I will need later in the judgment to bring us down to ground to the actual issues in this case. And also, alarmed by what appeared to be on foot, a representative range of media organisations, including Times Newspapers Ltd, the Press Association and the BBC, applied to intervene. We suggested that that matter could be managed not by a formal intervention but by our taking note, and asking the parties to take note, of the detailed submissions in the application to intervene, and the authorities there set out. The media parties (as I will refer to them) were good enough to agree to that course. We also received a letter from the Publishers Association, which we indicated to the parties that we had read. We took those steps without prejudice to the law or practice on intervention by commercial as opposed to public or public interest parties, which law and practice remains in a state of some uncertainty.

**A taxonomy of the law of privacy and confidence**

8. It will be necessary to refer to the underlying law at various stages of the argument, and it would be tedious to repeat such reference more than is necessary. Since the content of that law is in some respects a matter of controversy, I set out what I understand the present state of that law to be. I start with some straightforward matters, before going on to issues of more controversy:

    i) There is no English domestic law tort of invasion of privacy. Previous suggestions in a contrary sense were dismissed by Lord Hoffmann, whose speech was agreed with in full by Lord Hope of Craighead and Lord Hutton, in *Wainwright v Home Office* [2004] 2 AC 406 [28]-[35].

    ii) Accordingly, in developing a right to protect private information, including the implementation in the English courts of articles 8 and 10 of the European Convention on Human Rights, the English courts have to proceed through the tort of breach of confidence, into which the jurisprudence of articles 8 and 10 has to be "shoehorned": *Douglas v Hello! (No3)*[2006] QB 125[53].

    iii) That feeling of discomfort arises from the action for breach of *confidence* being employed where there was no pre-existing relationship of confidence between the parties, but the "confidence" arose from the defendant having acquired by unlawful or surreptitious means information that he should have known he was not free to use: as was the case in *Douglas*, and also in *Campbell v MGN* [2004] 2 AC 457. Two further points should however be noted:

    iv) At least the verbal difficulty referred to in (iii) above has been avoided by the rechristening of the tort as misuse of private information: per Lord Nicholls of Birkenhead in *Campbell* [2004] 2 AC 457[14]

v) Of great importance in the present case, as will be explained further below, the complaint here is of what might be called old-fashioned breach of confidence by way of conduct inconsistent with a pre-existing relationship, rather than simply of the purloining of private information.

Something more now needs to be said about the way in which the rules laid down by articles 8 and 10 enter English domestic law.

9. Most of the articles of the Convention impose negative obligations on the state and on public bodies. That accordingly affects the content of the articles and the obligations that they create, which are obligations owed only by public bodies. When those articles were introduced into English law by the medium of the Human Rights Act 1998, and recited in Schedule 1 to that Act, that content did not change and could not have changed. That is why, whatever the structure adopted by English law for giving effect to the Convention, most of the articles, since their content is restricted to creating obligations on public bodies, do not and cannot create obligations owed by private parties in private law. Article 8 has, however, always been seen as different; as, in this regard, has article 11, freedom of assembly, on which latter see *das Leben v Austria* (1988) 13 EHRR 204[32]. Not in its terms, but as extended by jurisprudence, article 8 imposes not merely negative but also positive obligations on the state: to respect, and therefore to promote, the interests of private and family life. That means that a citizen can complain against the state about breaches of his private and family life committed by other individuals. That has been Convention law at least since *Marckx v Belgium* (1979) 2 EHRR 330, and a particularly strong statement of the obligation is to be found in *X and Y* v *Netherlands* (1985) 8 EHRR 235.

10. More difficulty has been experienced in explaining how that state obligation is articulated and enforced in actions between private individuals. However, judges of the highest authority have concluded that that follows from section 6 (1) and (3) of the Human Rights Act, placing on the courts the obligations appropriate to a public authority: see Baroness Hale of Richmond in *Campbell* at §132; Lord Phillips of Worth Matravers in *Douglas v Hello!* at §53; and in particular Lord Woolf in *A v B plc* [2003] QB 195[4]:

> Under section 6 of the 1998 Act the court, as a public authority, is required not to act "in a way which is incompatible with a Convention right". The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles.

11. The effect of this guidance is, therefore, that in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10. Those articles are now not merely of persuasive or parallel effect but, as Lord Woolf says, are the very content of the domestic tort that the English court has to enforce. Accordingly, in a case such as the present, where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by article 8? If no, that is the end of the case. If yes, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10? The latter enquiry is commonly referred to as the balancing exercise, and I will use that

convenient expression. I take the two questions in turn. Some aspects of the jurisprudence overlap between the two questions, but it remains necessary to keep the underlying issues separate. I have well in mind, in addressing article 8, the warning given by Lord Nicholls of Birkenhead in §21 of his speech in *Campbell*:

> in deciding what was the ambit of an individual's 'private life' in particular circumstances courts need to be on guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the touchstone of private life is whether in respect of the disclosed acts the person in question had a reasonable expectation of privacy.

## Article 8: was the information private?

*Background*

12. The judge listed a large number of parts of the book that were said by Ms McKennitt to consist of private information. He refused protection for many of them because he regarded their content as "anodyne", imprecise or already known to the public. In an authority shown to us after argument had closed, *M v Secretary of State for Work and Pensions* [2006] 2 AC 91[83] Lord Walker of Gestingthorpe pointed out that interference with private life had to be of some seriousness before article 8 was engaged. The spirit of that guidance was indeed respected by the Judge in the analysis just described. It will be necessary to describe the remaining matters, in respect of which the judge did grant injunctive relief, with some particularity, but the general nature of the information sought to be restrained was indicated by the Judge in his §11:

> Ms McKennitt's personal and sexual relationships.
>
> Her personal feelings and, in particular, in relation to her deceased fiancé and the circumstances of his death.
>
> Matters relating to her health and diet.
>
> Matters relating to her emotional vulnerability.
>
> The detail of an unhappy dispute between Ms McKennitt, on the one hand, and Ms Ash and Mr Fowkes on the other, concerning monies advanced to them by Ms McKennitt to assist in the purchase of a property in 1997 and the subsequent litigation in the Chancery Division (which was settled on the basis of a Tomlin order without ever coming to a public hearing).

13. I should say straightaway that the last matter, which I shall refer to as the property dispute, raises issues different from the other matters complained of, and I will deal

with it separately towards the end of the judgment. The other parts of the book in respect of which relief was granted can be identified as follows, for convenience repeating the numeration in the claim, which was also used by the judge:

i) Item 4: what the Judge describes in his §17 as "a rather intimate conversation between Ms McKennitt and Ms Ash (which would otherwise certainly not have been in the public domain)"

ii) Item 5: what the Judge describes in his §18 as "extensive references in the book to Ms McKennitt's relationship with her fiancé, who died in the boating accident in 1998"

iii) Item 9: a detailed account of events at Ms McKennitt's cottage in Ireland, and of the physical arrangements there, including a period when Ms Ash and Mr Fowkes did building work at the cottage.

iv) Item 13: what the Judge described in his §13 as "intimate revelations" about the state of Ms McKennitt's health after the bereavement described in (ii) above.

v) Item 14: revelations about Ms McKennitt's fragile condition during a visit to Tuscany after the bereavement

vi) Item 15: discussion of terms and conditions of a contract entered into by Ms McKennitt with a recording company

vii) Item 34: an incident in a hotel bedroom shared by Ms McKennitt and Ms Ash; and a report of a telephone conversation in which Ms McKennitt revealed the state of her health.

14. The nub of Mr Price's argument in this part of the case, based both on the account given in the judgment and repeated above, and also on the more detailed examination of the book that we undertook in the private part of the hearing, was that the judge's finding that all of the above was private information went far beyond anything previously decided. That, it was suggested, could be seen by comparison with the facts of cases like *Campbell* and *Douglas*. I am not at all sure that that argument is correct, even on its own terms. *Campbell* concluded that although it was not, on the facts, private information that Ms Campbell suffered from drug addiction it was private information that she was seeking treatment for that addiction. *Douglas* concluded that unauthorised photographs of a wedding were private even though the couple were perfectly content, indeed contractually bound, to allow authorised photographs of the same event to be published. I would be hard pressed to say that the matters listed by Eady J were less obviously intrusive into Ms McKennitt's life. But there is a much more formidable reason why this assault on Eady J's conclusions must fail. That is to be found in the nature of the relationship between Ms McKennitt and Ms Ash, to which I now turn.

*A pre-existing relationship of confidence*

15. Recent leading cases in this area, such as *Campbell*, *Douglas* and the most recent case in the ECtHR, *Von Hannover v Germany* (2005) 40 EHRR 1, have wrestled

with the problem of identifying the basis for claiming privacy or confidence in respect of unauthorised or purloined information: see § 8(iii) above. There, the primary focus has to be on the nature of the information, because it is the recipient's perception of its confidential nature that imposes the obligation on him: see for instance per Lord Goff of Chievely in *A-G v Guardian Newspapers (No2) ["Spycatcher"]* [1990] 1 AC 109 at p 281A. But, as Lord Goff immediately goes on to say, in the vast majority of cases the duty of confidence will arise from a transaction or relationship between the parties. And that is our case, which accordingly reverts to a more elemental enquiry into breach of confidence in the traditional understanding of that expression. That does not of course exempt the court from considering whether the material obtained during such a relationship is indeed confidential; but to enquire into that latter question without paying any regard to the nature of the pre-existing relationship between the parties, as the argument for the appellant in this court largely did, is unlikely to produce anything but a distorted outcome.

16. The Judge made substantial findings of fact as to the nature of the relationship between Ms McKennitt and Ms Ash, and the expectation of confidence that that created. None of this was challenged on appeal, nor could it have been. Because of the importance of this aspect of the case I set out part of the Judge's account, from §§ 71-74 of the judgment:

> 71. It is also clear from a number of quite explicit passages in the book that Ms Ash realised that substantial parts of it, at least, would fall within the scope of a reasonable expectation of privacy or a duty of confidence. Mr Browne drew a number to my attention. At the beginning of the book, for example, Ms Ash actually describes an "intimate relationship of almost 20 years with an unfledged small town girl". She also announces to readers that she will be "releasing personality frailties previously concealed in the protective cocoon of anonymity". It is obvious that she was only able to do so by reason of the "intimate relationship".
>
> 72. On page 18, Ms Ash records that Ms McKennitt "confided to me" information about her London friends – which she then proceeds to reveal. Likewise, on page 84, she sets out another piece of information which she expressly states was "confided to me". The tit-bit in question may not be of particular significance, but it does illustrate that Ms Ash was well aware that some material was imparted to her in the context of a close friendship and that she is, nevertheless, prepared to reveal it in order to attract readers. The point is again emphasised on page 93, where she states, "She cared for us and we cared for her. We were her closest friends and she knew she could count on our unqualified loyalty". That is, of course, a fundamental aspect of Ms McKennitt's complaint.
>
> 73. Similarly, on page 82, she refers to "my friend Loreena who had revealed her innermost self to me; who had trusted me with her vulnerability". Two pages later, she describes herself and Mr Fowkes as "Loreena's close friends, [who] occupied a privileged, unique position".
>
> 74. The degree of intimacy between the two women is again emphasised on page 118:

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

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

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

17. The Judge added to his findings about the nature of the relationship and Ms Ash's perception of it in his §90:

> I am quite satisfied…that Ms Ash was only too aware, at the time of and prior to publication, that much of the content of the book would cause concern and distress to Ms McKennitt because of its intrusive nature. Accordingly, not only a reasonable person standing in her shoes, but Ms Ash herself would be conscious that she was thereby infringing the "trust" and "loyalty" to which she referred in the book. I shall consider the specific complaints in due course, although I need hardly add that it is not everything in the book which infringes privacy (and Ms McKennitt does not suggest otherwise).

18. The Judge accordingly approached, and correctly approached, his consideration of the passages complained of against the background of a pre-existing relationship of confidence, known to be such by Ms Ash, while at the same time not assuming that that covered everything that happened between the two women with the cloak of confidence. I will briefly review his findings on the items listed in §13 above, all of which findings are unassailable.

19. Item 4 concerned what the Judge in his §132 described as "private and intimate observations": Ms Ash must have known that she was not at liberty to broadcast them to the world.

20. Item 5 deals with Ms McKennitt's relationship with her fiancé and the outcome of his death in 1998. The Judge in his §133 described the passages in the book as "remarkably intrusive and insensitive". Having had the benefit, if that is the right word, of reading the whole of the book's treatment of this subject, I would think that the Judge's characterisation was if anything restrained.

21. Item 9 was addressed by the Judge in his §§ 135-136. He said:

> 135. Item 9 concerns Ms McKennitt's Irish cottage. It is not her only house, but it is nevertheless a home. That is one of the matters expressly addressed in Article 8(1) of the Convention as entitled to "respect". Correspondingly, there would be an obligation of confidence. Even relatively trivial details would fall within this

> protection simply because of the traditional sanctity accorded to hearth and home. To describe a person's home, the de̒cor, the layout, the state of cleanliness, or how the occupiers behave inside it, is generally regarded as unacceptable. To convey such details, without permission, to the general public is almost as objectionable as spying into the home with a long distance lens and publishing the resulting photographs.
>
> 136. True it is that over five or six years Mr Fowkes was engaged, from time to time, in renovation works at the cottage. Ms Ash, too, did a lot of hard work to make it habitable after Ms McKennitt acquired it in 1992. Some of the work was remunerated and some was not. That seems to me to make no significant difference. Whether one is allowed into a person's home professionally, to quote for or to carry out work, or one is welcomed socially, it would clearly be understood that the details are not to be published to the world at large.

22. Criticism was made of the introduction to this passage, in that article 8 cases have tended to be concerned with the security or stability of residence, rather than with privacy within the home. But the Judge clearly spoke only by analogy, pointing out that it should have been and was obvious that events in a person's home cannot be lightly intruded upon; and in the event, as he said in his §138, "it is intrusive and distressing for Ms McKennitt's household minutiae to be exposed to curious eyes". And I would also respectfully agree with his comparison with long distance photography, an exercise generally considered to raise privacy issues. If anything, on the Judge's findings as set out in §17 above Ms Ash knew a good deal better than might a casual photographer that publication of the fruits of her inspection of the cottage and of what happened there was unacceptable.

23. Item 13 concerns revelations about the state of Ms McKennitt's health, their instrusive nature being made the worse by her fragility having been associated with the bereavement. A person's health is in any event a private matter, as the *Campbell* case demonstrated. It is doubly private when information about it is imparted in the context of a relationship of confidence. The Judge was entirely right to say in his §142 that there is a reasonable expectation of privacy in relation to such matters. The same is true of his holding in his §143 in relation to item 14.

24. Item 15 relates to Ms McKennitt's contractual dealings, dealings that we were told, and the Judge assumed, were not public knowledge. If the contractual documents had fallen off the back of a lorry and been picked up by a third party there might be some question as to whether they were of such a nature that he was bound to hold them in confidence. The documents might not come within the category of self-evident privacy that was in the mind of Laws J in his famous example in *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 at 807. But there is no such issue in the case of a person who finds out details of contractual terms because she is in a relationship of confidence with the contracting party. As the Judge said in his §144:

> There is a general discussion on page 26 [of the book] of the contractual terms and of concessions made. Even though it is general, it seems to me that Ms McKennitt is entitled to a reasonable expectation of privacy as to her contractual terms. They are certainly not for Ms Ash to reveal.

25. Item 34 was seen by the Judge as more of a borderline case, but he thought that both occasions were ones on which privacy was to be expected by Ms McKennitt of Ms Ash. He was clearly entitled so to hold.

26. I would therefore respectfully agree with all of the Judge's conclusions as to the reach of article 8. It may also be added, as an indication that he did not approach the case with any preconception, nor any unreasonable hostility to Ms Ash, that there were many stories about the relationship between the two women reproduced in the book that the Judge held not to have been breaches of confidence. I would only comment that in some of those cases I myself might have taken a different view.

27. I must however now deal with a number of arguments presented by the appellant that claim that the Judge failed to apply general considerations that indicated that the items that he identified were not confidential to Ms McKennitt. The principal of these are the concept of "shared experience"; and the effect and authority of the decision of this court in *Woodward v Hutchins* [1977] 1 WLR 760. I shall also need to say something about the recent decision of the ECtHR in *Von Hannover v Germany* (2005) 40 EHRR 1; and the impact on this appeal of the claim in contract.

*Shared experience*

28. Ms Ash argued that all of the matters set out above were not merely Ms McKennitt's experience, but her own experience as well. That gave her a property in the information that should not be subordinated, or at least should not be readily subordinated, to that of Ms McKennitt. This argument is of relevance to Ms Ash's claim under article 10, that she is entitled to tell her own story that includes her various experiences with Ms McKennitt, but as I understood it the contention is also relied on to say that the information was not confidential in the first place.

29. Some support was sought from passages in the judgment of this court in *A v B plc* [2003] QB 195. We shall have to return to that case in more detail when addressing article 10. It is sufficient here to say that it concerned a married professional footballer [A] who sought to prevent publication by a newspaper [B] of his casual sexual relations with two women [C and D]. C and D had sold their story to B. In the course of a wide-ranging review of how a court should handle such a claim, this court said that the right of protection of one party to a bilateral relationship might be affected by the attitude of the other party, and continued, at its § 43(iii):

> Although we would not go so far as to say there can be no confidentiality where one party to a relationship does not want confidentiality, the fact that C and D chose to disclose their relationships to B does affect A's right to protection of the information. For the position to be otherwise would not acknowledge C and D's own right to freedom of expression.

By the same token, it was suggested, Ms Ash's decision that her shared relationship with Ms McKennitt should not be treated as confidential undermined Ms McKennitt's contention that it was confidential.

30. On the facts of our case, as found by the Judge, that argument was wholly misconceived. First, the relationship between Ms McKennitt and Ms Ash, testified to in many places, and not least in the Judge's citations from the book set out in §17 above, was miles away from the relationship between A and C and D. In the preceding paragraph I deliberately and not merely conventionally described the latter as a relationship of casual sex. A could not have thought, and did not say, that when he picked the women up they realised that they were entering into a relationship of confidence with him. Small wonder that Lord Woolf said, *A v B* at §45:

> Relationships of the sort which A had with C and D are not the categories of relationships which the court should be astute to protect when the other parties to the relationships do not want them to remain confidential.

Lord Woolf would have been unlikely to say the same about the relationship between Ms McKennitt and Ms Ash.

31. Second, the Judge made a series of factual findings about the relationship that completely destroy this argument. While Ms Ash had been involved in some of the matters revealed, and (which is rather different) a spectator of many others, the book, which is what this case is concerned with, is not in any real sense about her at all. She gives vent to many complaints about Ms McKennitt; but the interest of those is that they are complaints about Ms McKennitt, and not at all that the complaints are made by Ms Ash. The Judge made that clear in two passages, in §§ 68 and 89 of the judgment:

> 68. It would appear that the fundamental purpose of the book, which Ms Ash has described on its cover as "a must for every Loreena McKennitt fan", was to provide information to her admirers which would not otherwise be available. Much of the content of the book would be of no interest to anyone, I imagine, but for the fact that Ms McKennitt is the central character.
>
> 89. As I have already suggested, whatever Ms Ash's true appreciation of the situation may be, from her perspective, it is difficult for an outsider to understand how the book would be of any interest to the general reader if it were not for the fact that Ms Ash is giving an account of her intimate dealings with a person who is known to many millions of people, throughout the world, interested in folk music and her music in particular. Returning to the Boswell/Johnson analogy, one may characterise the exercise to that extent as largely parasitic. It is the central role of Ms McKennitt, and the revelations about her, which provide the main reason for people to acquire the book. It is, I have no doubt, why her name appears in the title.

32. Those conclusions, which were neither challenged nor could have been, confirm that the matters related in the book were specifically experiences of and the property of Ms McKennitt. Ms Ash cannot undermine their confidential nature by the

paradox of calling in aid the confidential relationship that gave her access to the information in the first place.

*Woodward v Hutchins* [1977] 1 WLR 760

33. This case dates back to an era when the Convention had not invaded the consciousness of English lawyers. I bear well in mind the warning of Lord Woolf in §9 of *A v B* that

> authorities which relate to the action for breach of confidence prior to the coming into force of the 1998 Act…are largely of historic interest only.

Nevertheless, *Woodward v Hutchins* has never been overruled; and its subject-matter has some commonalty with our case, since it concerned the dismissed publicity agent of a well-known group of singers who wished to write a series of articles dealing with their private lives and conduct.

34. The group failed to obtain an interlocutory injunction to prevent publication. The decision was based on two grounds. First, the only reason given by Lawton LJ, with whom Bridge LJ agreed in full, was that to grant interlocutory relief in a case where there were concurrent claims in breach of confidence and defamation would or might undermine the rule in *Bonnard v Perryman*, preventing interlocutory relief in a defamation case where it is proposed to justify. Lord Denning MR took the same view; but his main reason was that articulated by Bridge LJ at p 765D:

> It seems to me that those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in a favourable light are in no position to complain of the invasion of their privacy by publicity that shows them in an unfavourable light.

35. Eady J, at his § 103, thought that the application in *Woodward v Hutchins* failed because the revelations were in the public interest. It would however seem that the view of Lord Denning MR and Bridge LJ was more fundamental than that, in that they thought that in the circumstances the enjoined material was not confidential at all.

36. *Woodward v Hutchins* has come in for a good deal of criticism, of which the point most relevant to our enquiry is that the court was not reminded of the relevance of the contractual relationship between the agent and his former employers. That largely deprives the decision of any direct authority in or relevance to our case. But there is another reason why in any event *Woodward v Hutchins* is of no assistance to us. We were constantly reminded, not least by the appellant, that all of these cases are fact-sensitive. I have set out the Judge's findings of fact about Ms McKennitt's attitude to publicity in §6 above. That is very far different from the sort of conduct and attitude that, in the view of Bridge LJ, would deprive a person's behaviour of the quality of confidence.

*Van Hannover v Germany* (2005) 40 EHRR 1

37. We shall have to return to this authority in connexion with article 10, but it also has some relevance to the reach of article 8. There is little doubt that *Von Hannover* extends the reach of article 8 beyond what had previously been understood, which is no doubt why the appellant and, more particularly, the media parties put before us a series of reasons why we should be wary of the case. I am quite clear that, for the reasons already set out and as given by the Judge, Ms McKennitt can establish her position under article 8 without going anywhere near *Von Hannover*; but since the case was much debated before us, and was referred to by the Judge, it is necessary to say something about it in relation to article 8.

38. Princess Caroline of Monaco sought to prevent the publication in two German magazines of photographs of her indulging in what must be said to have been fairly banal activities in public or effectively public places. The ECtHR held that by refusing her relief the German courts had failed in their duty to respect private life under article 8. The Court's most general statement was in its §50, cited by Eady J in §50 of his own judgment:

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

Based on that general principle, the ECtHR held, in its §53, that "in the present case there is no doubt that the publication by various German magazines of photos of the applicant in her daily life either on her own or with other people falls within the scope of her private life."

39. Eady J suggested, at his §58, that that approach was consistent with the assumption in *Campbell* that article 8 protected a person's reasonable expectation of privacy. That is so in broad terms, but at the same time it is far from clear that the House of Lords that decided *Campbell* would have handled *Von Hannover* in the same way as did the ECtHR. Very extensive argument and discussion was seen as required before Ms Campbell was able to enjoin the publication of photographs of her in the public street, and then only because of their connexion with her medical condition. Had the House had the benefit of *Von Hannover* a shorter course might have been taken.

40. That does not however mean (to anticipate an argument that will arise again under article 10) that the English courts should not now give respectful attention to *Von Hannover*. The House of Lords in *Campbell* made no specific findings as to the content of article 8 save in the very general terms extracted by Eady J. As it is put in a work shown to us by the media parties, Professor Fenwick and Mr Phillipson's *Media Freedom Under the Human Rights Act* (2006), at p 764, "the test propounded-of a reasonable expectation of privacy, of whether the information is obviously private-is to be structured by reference to the Article 8 case law". It thus

remains for the national court to apply that case law, as it currently stands, to the facts before it. It was therefore certainly open to Eady J to have regard to *Von Hannover* in relation to the very different facts of the present case.

41. Perhaps realising the force of observations such as the foregoing, the media parties, in particular, were most anxious to persuade us that the ECtHR went no further in *Von Hannover* than to hold that the Princess's privacy had been invaded by a campaign of media intrusion into her life, of which the enjoined photographs were the fruit. The taking and publication of the photographs would otherwise not have been in itself an invasion of privacy. They cited in support some observations of Fenwick and Phillipson at p 768 of their book, though it is fair to say that the learned authors also say that that analysis is not without its difficulties. The judge, at his §53, did not accept that analysis, nor would I. While it is quite correct that there is reference in the judgment of the ECtHR to media intrusion, it is not possible to say that the general statements of principle set out in §38 above are so limited. And Mr Browne was able to show us authority from the ECtHR decided since *Von Hannover* that applies those statements in situations that were not ones of media intrusion. Of those, the most significant is *Sciacca v Italy* (Application 50774/99), §§ 27 and 29 of the judgment of the ECtHR applying *Von Hannover* to a case that was not one of press harassment, and citing the jurisprudence of *Von Hannover* in entirely general terms.

42. I would therefore conclude that to the extent that it is the appellant's case that the judge should not have had regard to *Von Hannover* when considering the first question of whether article 8 was engaged; and to the extent if at all that the issue matters for the determination of this part of the case; that complaint is unfounded.

*The contractual obligations*

43. When Mr Fowkes and Ms Ash were embarking on the tour referred to in §4 above Ms McKennitt caused them to be presented for signature with a written contract that set out significant obligations of confidentiality. Mr Fowkes signed, Ms Ash did not do so until the tour was long over. Eady J held, at his §129, that Ms Ash well knew that she was bound in any event by obligations of confidentiality, and indeed had given that as her reason for not signing anything. To the extent that it matters, it would appear that, by going on the tour and continuing in employment and association with Ms McKennitt when, as the Judge found, she well knew of the contractual terms, Ms Ash adhered to those terms: and I would be prepared to read the Judge as having so found. But the reality of the matter was, as the Judge said in his §130, the provisions of the written contract did not add much to the obligations that Ms Ash owed in equity by reason of the closeness of her personal relationship with Ms McKennitt.

44. I revert to the matter directly in issue. The Judge was right to hold that Ms McKennitt had succeeded in demonstrating that the matters that he enjoined fell under article 8. I must therefore now go on and consider the appellant's argument that her article 10 rights of expression in respect of those matters outweighed that article 8 protection.

## Article 10: the balancing exercise

*The role of this court*

45. Despite the very extensive analysis of the facts and issues that the speeches contain, the ratio of the majority of the House of Lords in *Campbell* appears to have been that, in the absence of an error of principle on his part, the Court of Appeal should not have interfered with the trial judge's assessment of the balance between articles 8 and 10: see Baroness Hale of Richmond at §158, and Lord Hope of Craighead at §§ 87 and 101, together with Lord Hope's criticism of the unreality of the approach of the Court of Appeal in his §99, the latter view being endorsed by Lord Carswell at §165 of his speech. That approach is, with great respect, plainly correct. It was properly, albeit inevitably, adopted by Mr Price. The very short answer to this part of the appeal is, therefore, that the Judge indeed made no error of principle, and therefore his conclusion rejecting the respondent's case under article 10 must stand. However, lest that seems too bloodless a resolution of the disputes, and in order to demonstrate that the Judge indeed made no error of principle, I will descend into somewhat greater detail.

*The Judge's methodology*

46. In a passage headed "A need to balance Convention rights" the Judge, basing himself on *Campbell* and on *Re S(FC)(A child)* [2005] 1 AC 593, set out the principles to be applied when article 8 rights were relied on to restrain publication. No criticism was made of the formulation or the relevance of those principles, nor could it have been made. The Judge's principles were:

    i) Neither article has as such precedence over the other.
    ii) Where conflict arises between the values under Articles 8 and 10, an "intense focus" is necessary upon the comparative importance of the specific rights being claimed in the individual case.
    iii) The court must take into account the justifications for interfering with or restricting each right.
    iv) So too, the proportionality test must be applied to each.

47. Three comments may be made. First, it was a recurrent complaint of the appellant that the Judge had not paid respect to or applied section 12(4) of the 1998 Act, which requires "particular regard" to be paid to the article 10 right. But from his statement of the principles the Judge clearly had in mind what was said by Lord Steyn in *Re S* at §17, that neither article 8 nor article 10 "as such" has precedence over the other. That guidance bound him, as it binds us. Second, it is well worth noting that one of the cases specifically mentioned in article 10.2 is preventing the disclosure of information received in confidence.

48. Third, the appellant complained that the Judge, when addressing the individual items of which complaint is made, had not then applied the balancing test separately to each one of them. But that conflicts with what the Judge said in his §67:

> I need naturally to consider each of the passages in the book singled out for complaint separately, not only to decide whether

> in each case the threshold test for privacy is passed (that is to say, whether or not there would be a reasonable expectation of privacy), but also to consider, if that initial test has been satisfied, whether any other "limiting factor" comes into play such as public domain or public interest.

The suggestion that the Judge, having so directed himself, needed nonetheless to repeat that direction as a mantra every time he came to a specific issue is quite unreal. And when significant issues in relation to article 10 did arise in a particular instance those issues were addressed by the Judge separately from the general guidance that he had given himself.

49. However, I need to address some general complaints raised by the appellant. Those were that the Judge had not respected the right of Ms Ash to tell her own story; a complaint that the Judge had not given sufficient weight to the extent to which information in the book was already in the public domain; and a complaint that the Judge had undervalued the public interest in the disclosure that Ms Ash wished to make, in the course of that analysis failing to follow the binding guidance of this court in *A v B plc* [2003] QB 195.

*Ms Ash's right to tell her own story*

50. A concern that Ms Ash might have been deprived of her article 10 right to tell her own story was one of the matters that weighed with the court that was persuaded to grant permission to appeal. The point featured heavily in the appellant's argument, strong reliance being placed on the observation at § 11(xi) of *A v B* that

> The fact that the confidence was a shared confidence which only one of the parties wishes to preserve does not extinguish the other party's right to have that confidence respected, but it does undermine that right.

Based on that, the argument then moved to the striking proposition that the Judge should have held that Ms McKennitt's article 8 rights, if any, were to be subordinated to the article 10 rights of Ms Ash.

51. That argument again completely ignores the Judge's findings of fact. He held that the confidence was "shared" only in the sense that Ms McKennitt had admitted Ms Ash to her confidence, which confidence Ms Ash knew should be respected: see §16 above. As a result, Ms Ash had no story to tell that was her own as opposed to being Ms McKennitt's: see §§ 30-31 above. And, even if that were not so, it needs no intense focus to conclude that on the facts the right of Ms Ash must yield to the right of Ms McKennitt.

52. A major part of Ms Ash's article 10 case thus fails. Nor, for the record, was it at all fair to the Judge to say that he had simply ignored that article 10 right. He devoted a section of his judgment to the issue, at his §77, though he did not express himself in quite the terms set out above.

*The public domain*

53. It is perhaps inevitable that, although the enquiry is now under article 10, it still tends to be conducted in the traditional terms of the English law of confidence. As we shall in due course see, that is particularly the case in *A v B*. But the general principle is no doubt correct in both cases, that information that is already known cannot claim the protection of private life. Mr Price however advanced a striking extension of that principle, that once a person had revealed or discussed some information falling within a particular "zone" of their lives they had a greatly reduced expectation of privacy in relation to any other information that fell within that zone. This argument was used in particular in respect of Ms Ash's revelations about Ms McKennitt's health and her distress at the death of her fiancé. The material said to contain revelations by Ms McKennitt falling within the same zone were remarkably sparse, which is in itself an indication of how protective Ms McKennitt has been of her privacy. The Judge dealt with the argument in these terms, in his §§ 79-80:

> 79. Ms Ash produced a number of articles on the basis of which she argued that, at least in certain respects, Ms McKennitt had revealed aspects of her personal life and beliefs to the general public. She chose to confine her submissions to a limited number of articles, partly for reasons of time, although it is reasonable for me to proceed on the basis that she selected the examples which she thought best illustrated her point. If that is so, I did not find the submission very compelling in the light of the material contained in the book. Conversations with, or behaviour in the presence of, close personal friends would appear to me to be significantly different from the sort of material revealed by Ms McKennitt in the past. Also, as I have already pointed out, there is in this context a significant difference between choosing to reveal aspects of private life with which one feels "comfortable" and yielding up to public scrutiny every detail of personal life, feelings, thoughts and foibles of character.
>
> 80. In any event, it is important that a large proportion of the material Ms Ash relied upon was specifically revealed by Ms McKennitt in the context of her attempts to promote water safety and to support the Cook-Rees Memorial Fund. A classic example is provided by an interview in May 1999 with the journal *Le Lundi*. It is somewhat surprising that Ms Ash should think that this carefully measured, and no doubt in itself distressing, exposure of her own feelings in a particular context should give her the right to reveal at considerable length what Mr Browne described as "her pitifully grief-stricken reaction to the death of [her fiancé], his brother and a friend". It goes on for some eight pages. One's reactions and communications to a friend in the immediate aftermath of personal bereavement are surely a classic example of material in respect of which there would a "reasonable expectation" that one's privacy would be respected.

54. I respectfully agree. It was cruelly insensitive to use Ms McKennitt's promotion of the Cook-Rees fund, and her explanation of her reasons for setting up the fund, to

suggest that she had thereby opened up whole areas of her private life to intrusive scrutiny.

55. Mr Price expressed concern at the Judge's view that a person can limit publication to what he wishes to be published. But, with respect, the Judge seems to me to have been completely right. If information is my private property, it is for me to decide how much of it should be published. The "zone" argument completely undermines that reasonable expectation of privacy. Mr Price's real concern was, I think, not with the Judge's view in general terms, but with the possibility that he thought to be contained within it that a *public* figure could censor or control what was published about them. That raises questions of a different order, to which I now turn.

*The public interest: and Ms McKennitt as a public figure*

56. One might instinctively think that there was little legitimate public interest in the matters addressed by the book, and certainly no public interest sufficient to outweigh Ms McKennitt's article 8 right to private life. That is what the Judge thought and, as already pointed out, in the absence of error of principle his view will prevail. That conclusion was contested under this head in two respects, which it is necessary to keep separate. First, there was a legitimate public interest in the affairs of Ms McKennitt because she was a public figure, *and for that reason alone*. Second, if a public figure had misbehaved, the allegation in the present case being of hypocrisy, the public had a right to have the record put straight. The parallel for that argument was the case of Ms Campbell, who could not retain privacy for the fact that she was a drug addict because she had lied publicly about her condition.

57. The first of these arguments involves consideration of two recent authorities, already introduced, *Von Hannover* and *A v B*, to which I must now return.

*Van Hannover*

58. There is no doubt that the ECtHR has restated what was previously thought to be the rights and expectations of public figures with regard to their private lives. The court in its §58 recognised the important role of the press in dealing with matters of public interest, and the latitude in terms of mode of expression there provided. But a distinction was then drawn between a watchdog role in the democratic process and the reporting of private information about people who, although of interest to the public, were not public figures. At its §§ 63-64 the ECtHR said this:

> 63. The Court considers that a fundamental distinction needs to be made between reporting facts-even controversial ones-capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to imparting information and ideas on matters of public interest it does not do so in the latter case.

> 64. Similarly, although the public has a right to be informed, which is an essential right in a democratic society that, in certain special circumstances, can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this is not the case here. The situation here does not come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant's private life.

59. There is more in the same sense. If we follow in this case the guidance given by the English courts, that the content of the law of confidence is now to be found in articles 8 and 10 (see §10 above), then it seems inevitable that Ms Ash's case must fail. Even assuming that Ms McKennitt is a public figure in the relevant sense (which proposition I suspect the ECtHR would find surprising), there are no "special circumstances" apart from the allegation of hypocrisy dealt with in the next section to justify or require the exposure of her private life. But the appellant argued that English courts could not follow or apply *Von Hannover* to the facts of the present case because we were bound by the contrary English authority of *A v B*. That effectively required Ms McKennitt's private affairs to be exposed to the world, hypocrite or not.

*A v B*

60. The facts have already been set out. The judgment of this court is notable for the detailed guidance that it contains as to how a court should address complaints about invasion of privacy by public or allegedly public figures. The appellant placed particular reliance on the court's § 11(xi):

> Where an individual is a public figure he is entitled to have his privacy respected in the appropriate circumstances. A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure. The public figure may hold a position where higher standards of conduct can rightly be expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows. In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and legitimate interest in being told the information. If this is the

> situation then it can appropriately be taken into account by a court in deciding on which side of the line a case falls. The courts must not ignore the fact that if newspapers do not publish information that the public are interested in, there will be fewer newspapers published, which will not be in the public interest. The same is true in relation to other parts of the media.

61. The appellant relied on two parts of this account. First, that "role models", voluntary or not, have less expectation of privacy. That was reinforced by a later passage in the judgment, at § 43(vi):

> Footballers are role models for young people and undesirable behaviour on their part can set an unfortunate example. While [the trial judge] was right to say on the evidence that was before him that A had not courted publicity, the fact is that someone holding his position was inevitably a figure in whom a section of the public and the media would be interested.

Ms McKennitt, it was said, was inevitably a figure in whom a section of the public would be, and was, interested. Second, the general interest in supporting the "media" in the publication of the sort of material that sells newspapers should extend to biographies and literary works generally, such as the book was claimed to be.

62. The width of the rights given to the media by *A v B* cannot be reconciled with *Von Hannover*. Mr Price said that whether that was right or wrong, we had to apply *A v B*, in the light of the rule of precedent laid down by the House of Lords in *Kay v Lambeth LBC* [2006] 2 WLR 570, in particular by Lord Bingham of Cornhill at §§ 43-45. Put shortly, the precedential rules of English domestic law apply to interpretations of Convention jurisprudence. Where, for instance, the Court of Appeal has ruled on the meaning or reach of a particular article of the Convention, a later division of the Court of Appeal cannot depart from that ruling simply on the basis that it is inconsistent with a later, or for that matter an earlier, decision of the ECtHR.

63. I would respectfully and fully agree with the importance of that rule. The alternative, as an earlier constitution of this court said, is chaos. But I do not think that the rule inhibits us in this case from applying *Von Hannover*. If the court in *A v B* had indeed ruled definitively on the content and application of article 10 then the position would be different; but that is what the court did not do. Having made the important observation that the content of the domestic law was now to be found in the balance between articles 8 and 10, the court then addressed the balancing exercise effectively in the former English domestic terms of breach of confidence. No Convention authority of any sort was even mentioned. It may well be that aspect of the case that caused a later division of this court to comment, per Lord Phillips of Worth Matravers MR in *Campbell v MGN* [2003] QB 633 [40]-[41]:

> When Lord Woolf spoke of the public having 'an understandable and so a legitimate interest in being told' information, even including trivial facts, about a public figure,

> he was not speaking of private facts that a fair-minded person would consider it offensive to disclose. That is clear from his subsequent commendation of the guidance on striking a balance between art 8 and art 10 rights provided by the Council of Europe Resolution 1165 of 1998. For our part we would observe that the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media. We do not see why it should necessarily be in the public interest that an individual who has been adopted as a role model, without seeking this distinction, should be demonstrated to have feet of clay.

64. However that may be, and wherever that leaves courts that would have to apply the guidance given in *A v B,* it seems clear that *A v B* cannot be read as any sort of binding authority on the content of articles 8 and 10. To find that content, therefore, we do have to look to *Von Hannover*. The terms of that judgment are very far away from the automatic limits placed on the privacy rights of public figures by *A v B*.

65. But, in any event, even if we were to follow *A v B,* the guidance that that case gives does not produce the outcome in our case that is sought by the appellant. First, as to the position of Ms McKennitt, she clearly does not fall within the first category mentioned by Lord Woolf, and "hold a position where higher standards of conduct can be rightly expected by the public": that is no doubt the preserve of headmasters and clergymen, who according to taste may be joined by politicians, senior civil servants, surgeons and journalists. Second, although on one view Ms McKennitt comes within Lord Woolf's second class, of involuntary role models, I respectfully share the doubts of Lord Phillips, set out in §63 above, as to the validity of that concept; and it would in any event seem difficult to include in the class a person such as Ms McKennitt, who has made such efforts not to hold herself out as someone whose life is an open book. Third, it is clear that Lord Woolf thought that role models were at risk, or most at risk, of having to put up with the reporting of *disreputable* conduct: such as was the conduct of claimant before him. Ms McKennitt does not fall into that category; but to make that good I need to go on to the second part of this argument, that exposure is legitimate to demonstrate improper conduct or dishonesty.

66. In so doing I have not overlooked Lord Woolf's second general point, that weight must be given to the commercial interest of newspapers in reporting matter that interests the public. That view has also received criticism, and it seems clear that this court in *Campbell*, in the passage cited above, was not entirely happy with it. It is difficult to reconcile with the long-standing view that what interests the public is not necessarily in the public interest, a view most recently expressed by Baroness Hale of Richmond in *Jameel v Wall Street Journal* [2006] 2 AC 465[147]:

> The public only have a right to be told if two conditions are fulfilled. First, there must be a real public interest in communicating and receiving the information. This is, as we all know, very different from saying that it is information that interests the public-the most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large

> sections of the public but no-one could claim any real public interest in our being told all about it.

It is fortunately not necessary to pursue that issue further, because it is merely a general factor, that cannot be said to have any significant impact on the present case.

*Hypocrisy*

67. This is the charge brought against Ms McKennitt, which is said to justify telling the world about her private behaviour and attitudes. Much of the book (for instance the matters about health or bereavement) does not fall into this category in any event. The complaint is that Ms McKennitt treated Ms Ash, and others, badly in two main respects, in the Irish cottage and in connexion with the property dispute, and that that was inconsistent with her public position about proper behaviour and respect for others.

68. Once again, this argument simply fails on the facts. The Judge made findings in his §§ 98-100 about the material on which Ms McKennitt's alleged announcement of her principles was based, the "compass points". He found them, as I do, a fragile basis for any public interest defence; and indeed said, at §100, that they were

> simply being used as an excuse by Ms Ash to enable her to escape her obligations of confidence and, in her own phrase, "unqualified loyalty"

And the Judge concluded that in any event Ms McKennitt had not behaved disreputably or insincerely in any way.

69. Some criticism is made of the Judge having said in his §97 that "a very high degree of misbehaviour must be demonstrated" to trigger a public interest defence. As an entirely general statement, divorced from its context, that may well go too far. But the Judge was speaking of the particular situation argued before him, where not the conduct in itself, but the fact that it had previously been lied about or treated with hypocrisy, was said to be the basis for disclosure. In *Campbell* it was the fact that Ms Campbell had not merely said that she did not take drugs but had gone out of her way to emphasise that she was in that respect unlike other fashion models that deprived otherwise private material of protection: see per Lord Nicholls of Birkenhead, [2004] 2 AC 457[24]. By contrast, as the Judge clearly thought in his §97, the conduct complained of in the case of Ms McKennitt fell well below the level that would justify complaint on the ground of hypocrisy.

70. The most sustained attack in the book on Ms McKennitt's probity and honesty is to be found in the last forty pages, that address the property dispute. The Judge found that all or almost all of the allegations were untrue, and that the incident revealed nothing whatever to Ms McKennitt's discredit: see §41 of the judgment. But since this part of the case involves other difficulties I deal with it separately.

## The Property Dispute

*Background*

71. In April 1997 Mr Fowkes and Ms Ash were contemplating buying a house in London in (informal) partnership with a Ms Gavin. A third share in the house required a contribution of £30,000, which Ms Gavin had promised. When she dropped out of the project Ms McKennitt offered to contribute the £30,000 in her place. Contemporary documents demonstrated, and the Judge found, that Mr Fowkes accepted and intended that Ms McKennitt was to have a third share in the property. In October 1998, without informing Ms McKennitt, Mr Fowkes re-mortgaged the property, the name of the mortgagee eventually appearing on the Land Register being different from the body that, belatedly, had been identified to Ms McKennitt's solicitors by Mr Fowkes. Because they were uncertain as to what was afoot the solicitors registered a caution on the property on 28 January 1999.

72. Desultory exchanges with a view to settling the parties' interests then took place but, with matters not resolved, in January 2001 the Land Registrar instructed Ms McKennitt to issue proceedings: which she did but, as the Judge found, only with reluctance. In those proceedings Ms Ash and Mr Fowkes claimed, as Eady J held falsely, that Ms McKennitt's contribution of £30,000 had been a gift; and documents produced on discovery in the present proceedings showed, as the Judge again found, that Ms Ash's intention was to further her bargaining position by attacking Ms McKennitt's reputation, and that that explained her motivation in writing the book: see Eady J at his §§ 121 and 122. The proceedings were eventually settled by way of a Tomlin order. Eady J further found, his §§ 126-127, that evidence that it was alleged would be given in support of Ms Ash's defence in the property proceedings, and which was set out in the book, was untrue.

73. In the present proceedings Ms Ash alleged that Ms McKennitt had brought the Chancery proceedings dishonestly. That very serious allegation was withdrawn shortly before trial. But Ms Ash continued to claim throughout the trial that Ms McKennitt had no moral right to claim her money and that she was being vindictive in doing so: see Eady J's judgment at §125.

*The privacy claim*

74. The history of the property dispute occupies the last forty pages of the book. They make a detailed and on its surface compelling attack on Ms McKennitt's conduct, and on her hypocrisy in presenting herself to the world as a moral, or even half-decent, person. As Eady J found, those pages are seriously misleading. He had to address that issue because this part of the book was strongly relied on as demonstrating the public interest in revealing the true nature of Ms McKennitt's character: see §69 above. Leaving aside for the moment the implications of the untruthfulness of the material, can Ms McKennitt prevent its publication on the ground that it infringes her privacy?

75. This issue is not as straightforward as the other issues in the case. By the time that the dispute came to litigation the relationship of trust and confidence between Ms McKennitt and Ms Ash had broken down. The placing of the caution on the property, and certainly the issuing of proceedings, had placed the dispute in the

public arena. The mere fact of the payment of £30,000 could not be a private matter. However, the Judge took a fairly short approach to this issue. Having referred at some length to the litigious correspondence, and Ms Ash's revelatory document with regard to her motivation in the proceedings, he continued at §124:

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

76. That passage is criticised by the appellant as suggesting that matters included within a Tomlin order by that fact alone become, or remain, confidential. Such a proposition would be too wide. But attention to the Judge's whole finding, and to the context in which it is placed, indicates that he was principally concerned not about the bare bones of the claim, which in themselves were routine enough, but about the motivation of Ms Ash's defence, and the allegations that were made in support of it, which were going to be sustained if the matter came to trial. That becomes the more obvious if one reads the book, as the Judge of course had. There the whole matter is in effect relitigated in terms that had been abandoned as a result of the Tomlin order, and there is a sustained and highly critical commentary on Ms McKennitt's correspondence and the handling of the negotiations before trial. The Judge is therefore in effect saying that the dispute, so far as it concerned the motives and conduct of Ms McKennitt, had originated in the relationship of trust between Ms McKennitt and Ms Ash and represented an attempt by Ms Ash to show that that trust had been broken. If the matter had come to trial, not only the narrowly legal terms of the dispute but no doubt also the whole history between the two women would have been dragged into the spotlight. Then Ms McKennitt might not have been able to complain of the extensive relation of that history in the book. But that is not what happened. The effect of the Tomlin order was, as the Judge said, that the correspondence and the details of the dispute were kept from the public eye. Ms McKennitt was well entitled to expect that those matters, private in their nature as arising out of her relationship with Ms Ash, would remain private; and they would have remained private had Ms Ash not chosen to reveal her version of them in the book. The Judge was well entitled so to find.

77. I would therefore in principle uphold the Judge's enjoining of the last part of the book, that addresses the property dispute. The complaint is made that that forbids the recitation even of matters that are plainly in the public domain, such as the caution and the pleadings. That may be so. But Mr Browne was entitled to point out that Ms Ash had taken no steps to discuss with Ms McKennitt or her advisers what it was acceptable to reveal and what was not acceptable. She cannot therefore complain if the breadth of her treatment draws in matters that, taken on their own, might be publishable.

*The falsity of the allegations: and herein of defamation*

78. Mr Price however had a further answer. The Judge had found that most or all of the book's allegations about the property dispute were untrue. There could therefore be no claim in breach of confidence. Whatever the position in defamation, the falsity of what Ms Ash had written was a complete defence, a defence in no way undermined by the appellant's case at trial having been that the whole of the book was true.

79. It would not reflect well on our law if that plea were to succeed. Ms McKennitt and her advisers cannot be criticised for choosing the wrong cause of action. They came to court to contest the truth of the book's allegations, and the Judge made his findings about those allegations, because the falsity undermined the public interest defence, and not because an allegation of falsity was inherent in the basic claim itself. If it could be shown that a claim in breach of confidence was brought where the nub of the case was a complaint of the falsity of the allegations, and that that was done in order to avoid the rules of the tort of defamation, then objections could be raised in terms of abuse of process. That might be so at the interlocutory stage in an attempt to avoid the rule in *Bonnard v Perryman*: a matter, it will be recalled, that exercised this court in *Woodward v Hutchins*.

80. That however is not this case. I would hold that provided the matter complained of is by its nature such as to attract the law of breach of confidence, then the defendant cannot deprive the claimant of his article 8 protection simply by demonstrating that the matter is untrue. Some support is given to that approach by the European cases shown to us by Mr Browne that indicate that article 8 protects "reputation", broadly understood; but it is not necessary to rely on those cases to reach the conclusion that I have indicated.

## Disposal

81. I would therefore dismiss the appeal. In so doing I would pay tribute to the judgment of Eady J and to his handling of the case. This cannot have been an easy case to try, but the Judge succeeded in isolating the essential elements and producing a judgment that is of the greatest help in understanding the case without at the same time releasing into the public domain any of the matter that he rightly held should not be there.

## Lord Justice Latham:

82. I agree.

## Lord Justice Longmore :

83. I entirely agree with the judgment of Buxton LJ and have nothing to add save a few words on the Property Dispute beginning at paragraph 71 of my Lord's judgment.

84. As to that I agree that Ms McKennitt was well entitled to protection in general by virtue of the private nature of her decision to make a loan to Ms Ash of £30,000 and the private nature of the subsequent dispute. The fact that some documents such as the caution and the claim form may be public documents would mean that mention

of the above could not be restrained but the private story behind these documents is quite another matter.

85. The argument before the judge and this court was somewhat bedevilled by the assertion that what Ms McKennitt was really complaining about was the alleged falsity of Ms Ash's assertion that Ms McKennitt was being vindictive in making a claim which she had no moral right to make. It was then said that there was no right of privacy in relation to false statements, in respect of which the tort of defamation was, in any event, available.

86. This argument, in my judgment, is untenable. The question in a case of misuse of private information is whether the information is private not whether it is true or false. The truth or falsity of the information is an irrelevant inquiry in deciding whether the information is entitled to be protected and judges should be chary of becoming side-tracked into that irrelevant inquiry. Cases such as Interbrew SA v Financial Times [2002] EWCA Civ 274, [2002] EMLR 446 (where a party claims protection on behalf of a source transmitting false information) are, of course, entirely different.

87. Eady J, however, had no option but to become involved in that inquiry in the present case. It was only shortly before trial that Ms Ash's counsel withdrew the allegation contained in the book that Ms McKennitt had brought the Chancery proceedings dishonestly knowing that she had no legal right to do so. The watered-down claim that Ms McKennitt was being vindictive in pursuing an immoral claim, said now to be the public interest justification for publishing the private information, could not be intelligently adjudicated upon without the judge deciding whether that claim was true or false. That meant that he had also to decide the truth or falsity of other incidental allegations made by Ms Ash in seeking to re-argue through her book the matters already disposed of by the Tomlin order. But the fact that it may be relevant to decide the truth or falsity of matters raised in support of an Article 10 claim to freedom of expression does not mean that, if matters are shown to be false, the claim to misuse of private information then disappears.

88. I would also like expressly to associate myself with the tribute to Eady J paid by Buxton LJ in the last paragraph of his judgment. His careful (and correct) judgment has made the task of this court much easier than it might otherwise have been.