Neutral Citation Number: [2009] EWHC 411 (QB)

Case No: HQ07X01839

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5 March 2009

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

GARY FLOOD	**Claimant**
- and -	
TIMES NEWSPAPERS LIMITED	**Defendant/ Applicant**
- and -	
(1) COMMISSIONER OF POLICE FOR THE METROPOLIS	
(2) INDEPENDENT POLICE COMPLAINTS COMMISSION	**Respondents**
- and –	
BORIS BEREZOVSKY	**Third Party Applicant**

- -
- -

Kate Wilson (instructed by **Alastair Brett, Times Newspapers Ltd**) for the **Defendant/Applicant**
Jason Beer (instructed by **Metropolitan Police Legal Services**) for the **First Respondent**
Richard Perks (instructed by **IPCC Legal Services**) for the **Second Respondent**
Matthew Nicklin (instructed by **Carter-Ruck**) for the **Third Party Applicant**

Hearing date: 23 February 2009

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

The nature of the claim

1. The Claimant in this libel action is Gary Flood, a police officer. He sues Times Newspapers Ltd in respect of an article in *The Times* on 2 June 2006, published in hard copy and on the *Times* website. It was headed "Detectives accused of taking bribes from Russian exiles". The defamatory meaning of which he complains is essentially that " … there were strong grounds to believe, or alternatively that there were reasonable grounds to suspect, that the Claimant had abused his position as a police officer … by corruptly accepting £20,000 in bribes from some of Russia's most wanted suspected criminals in return for selling to them highly confidential Home Office and police intelligence about attempts to extradite them to Russia to face criminal charges."

2. It was also stated that Mr Boris Berezovsky was a client of an organisation known as ISC, which was run by a friend of the Claimant called Keith Hunter, and that two companies with which Mr Berezovsky was associated had made payments to ISC of the order of £600,000. (Mr Hunter now heads the RISC group of companies, described in the pleadings as "successors" to ISC, which itself no longer exists.) It is right to record that Mr Berezovsky has denied any involvement in the procurement of confidential information.

3. The Defendant wishes to justify the allegations about the Claimant by reference to the *Lucas-Box* meaning that he was the subject of an internal police investigation and that there were grounds which, objectively regarded, justified a police investigation into whether he received payments in return for passing confidential information about Russia's possible plans to extradite Russian oligarchs. This corresponds with what is nowadays sometimes referred to as a *Chase* level three meaning: *Chase v News Group Newspapers Ltd* [2003] EMLR 11.

4. In my experience, pleas of justification on this basis are rare and require careful scrutiny, in order to ensure that the particulars are properly confined. This is a consideration to be borne in mind in dealing with the matters now before the court.

Mr Berezovsky's application to set aside the order against the IPCC

5. There was an application made on behalf of Mr Berezovsky, by notice dated 17 February 2009, with a view to setting aside, either wholly or in part, a third party disclosure order. It was granted to the Defendant by Master Fontaine on 11 September 2008 against the Independent Police Complaints Commission ("IPCC"). Inevitably, as the order was made by consent, no judicial scrutiny was brought to bear on the criteria to be applied in the exercise of this special jurisdiction. In particular, neither Mr Berezovsky nor any other person whose rights were potentially affected (such as Mr Dubov, who has also been represented before me) were addressed.

6. It is submitted by Mr Nicklin, appearing on Mr Berezovsky's behalf, that the order has resulted in the disclosure of a sensitive and confidential document concerning Mr Berezovsky's affairs, despite the fact that it is acknowledged to be irrelevant to the issues in the libel action.

7. Mr Nicklin strongly criticises what has taken place and attributes it to "the combination of the unjustifiable width of the Defendant's third party disclosure application and a conspicuous lack of rigour on behalf of a public authority in discharging its duty to ensure that the interests of privacy/ confidentiality of a third party are properly protected".

8. In the course of the hearing Mr Nicklin was shown copies of other documents which had been disclosed by the IPCC pursuant to the 11 September order, of which he had previously been unaware, despite requests made in correspondence by Mr Berezovsky's solicitors. In the light of that further information, he was compelled to ask for an adjournment of the application relating to the IPCC until he had had an opportunity properly to consider the new material, which he described as "littered" with references to his client. As and when the hearing is resumed, as I understand it, Mr Nicklin will not necessarily be going so far as to ask for the 11 September order to be set aside. He will probably be content to have any sensitive documents shredded. Meanwhile, he continued to address the other application before the court.

The application of Times Newspapers Ltd for disclosure against the MPS

9. There is a further application by the Defendant for third party disclosure, on this occasion against the Metropolitan Police Service ("MPS"). Mr Berezovsky wished to be heard in relation to this application, as an interested party, and Mr Nicklin submitted that in the light of the unhappy experience over the IPCC disclosure, it was entirely appropriate that proper rigour should now be applied to the Defendant's second application. Quite apart from the rights of the parties to the litigation, and those of the interested parties, it is necessary for the court to have regard to the special nature of this jurisdiction and to ensure, so far as possible, that it is exercised in accordance with appropriate constraint and that the relevant criteria are properly addressed.

10. In relation to any third party disclosure application, it is always necessary to focus carefully on the pleaded issues in the case. That is because of the nature and scope of the statutory jurisdiction.

The court's jurisdiction

11. It is provided in s.34 of the Supreme Court Act 1981, as amended, that there shall be a power to make such an order, although it is clear that none should be made if the court considers that compliance with it would be likely to be injurious to the public interest: s.35(1). The relevant rule is currently to be found in CPR 31.17:

> "(1) This rule applies where an application is made to the court under any Act for disclosure by a person who is not a party to the proceedings.
>
> (2) The application must be supported by evidence.
>
> (3) The court may make an order under this rule only where –

> (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings; and
>
> (b) the disclosure is necessary in order to dispose fairly of the claim or to save costs."

12. In the light of this wording, and in particular because of the test of necessity, Mr Nicklin submits that the court should ensure that due rigour is applied in deciding whether or not to grant the order now sought against the MPS. Not only is it appropriate to remember at all times the scope of the issues in the case, as defined by the pleadings, but the Defendant has to show in the particular circumstances that what is now sought, in the schedule to its application, remains "necessary" having regard to the documents obtained on the earlier application against the IPCC. Clearly, for example, any duplication would be inappropriate.

13. One of the points stressed by Mr Nicklin is that in the present case it is not yet possible to identify the issues definitively, since the pleadings are not complete. On 8 May 2008 the Defendant was given permission to amend its defence, but in the course of the hearing it was made clear by Ms Wilson, acting on its behalf, that there would be a further application to amend at some stage in the near future. As yet, no amendment to the reply has taken place to address the amendments already made. It would obviously be sensible to postpone the service of any amended reply until the defence itself is in final form. Nevertheless, this uncertainty highlights the need for the court to ensure that no order for third party disclosure is made on the basis of either pleadings which are historic or assumptions or speculation as to what the issues are going to be in the future.

Mr Berezovsky's particular grounds for concern

14. Mr Nicklin's concerns on behalf of his client need to be assessed against the background of warnings given as long ago as 23 May 2008 to the solicitors for the MPS and to the IPCC. There is no doubt that the IPCC was fully aware from the solicitor's letter of that date of Mr Berezovsky's genuine concern as to the possible disclosure of private and confidential matters concerning him and the arrangements for his security. Despite this, when the matter finally came to court on 11 September 2008, there had been no notification to Mr Berezovsky of the application or the hearing date. He could not, therefore, be represented and the only legal representation on that occasion was on behalf of the Defendant.

15. It was in October 2008 that the IPCC provided documents to the Defendant and, on 12 November, Mr Alastair Brett responded on its behalf stating that those documents touching on the confidential affairs of Mr Berezovsky were of no interest for the purposes of the litigation.

16. On 15 January 2009, however, a communication from Mr Brett to the MPS Legal Department, which was copied to Mr Berezovsky's solicitors, revealed that the IPCC had disclosed a document which Mr Berezovsky considered to be sensitive, and supplied a copy of it to the Defendant, despite the fact that it was of no relevance to the proceedings.

17. Mr Berezovsky's solicitor, therefore, asked the Defendant for a copy of the document on 16 January 2009, but this was declined (on the ground that Mr Brett felt constrained by the terms of CPR 31.22). The document in question appears to have been included in the IPCC disclosure as part of the MPS report on "Operation Narwhal", which was the name given to the MPS investigation carried out into the Claimant's activities under the supervision of the IPCC. Nevertheless, in due course, Mr Berezovsky's advisers obtained a copy from the original authors. For the purposes of this judgment, I need not describe the document in any detail or the reasons why it was considered to be sensitive. All I need say is that Mr Berezovsky's concerns appear to me to be fully justified.

18. Accordingly, on 22 January 2009, his solicitors wrote to the IPCC enquiring why it had consented to the disclosure of such a document without giving him any opportunity to make representations – notwithstanding the fact that it had been notified of his concerns in May 2008. The IPCC was also invited to indicate what other documents had been disclosed pursuant to the 11 September order but, until the hearing before me, the information was not revealed.

19. In the IPCC response of 30 January 2009, one of its lawyers stated that the disclosure would not have been made unless the representatives of the MPS were content. That was because the IPCC took the view that, since the document belonged to the MPS, it would be better placed to make a judgment on whether or not it was "sensitive". (There seems to be a dispute between the MPS and the IPCC on this matter, as the MPS does not accept that it sanctioned the document's release.)

20. Meanwhile, on 30 January, Mr Berezovsky's solicitors wrote to the Defendant asking for an undertaking that it would destroy any copies of the document concerned and provide confirmation that this had been done. The Defendant's immediate response, on 5 February, was to decline the undertaking. Eventually, however, on 19 February, Mr Brett offered to shred the document, but on that occasion he also indicated that there was another four page document of a sensitive nature which had been provided by the IPCC. But this too was thought to have no relevance to the libel action. Mr Brett declined, however, to furnish Mr Berezovsky with a copy, although he was also prepared to shred it. This mystery has now been cleared up, since it appears that the four page document was merely part of the sensitive document and not a separate entity.

21. All that remains, therefore, so far as Mr Berezovsky's application to set aside the 11 September order is concerned, is for Mr Nicklin to consider the other documents handed over during the course of the hearing and, when he is ready, to make his submissions about them. There is no doubt, on the other hand, that this experience has coloured his judgment, and that of his client, as to the way in which the Defendant's application for disclosure against the MPS should itself be handled. Ms Wilson queried why it was that Mr Nicklin needed to be so actively involved in the process, since protection had been afforded to his client by the Defendant's willingness to shred the sensitive document and by the careful provisions incorporated in the draft order, prepared for the MPS application, whereby Mr Berezovsky's advisers would have an opportunity to see any relevant documents relating to him before they were shown to the Defendant. His concerns could be made clear at that stage. To this Mr Nicklin responded that it was necessary, in order to protect his client's interests, to ensure that there was no repetition of the mistakes that occurred at

the IPCC and that the court should take steps to ensure, on this occasion at least, that the statutory criteria and safeguards are properly applied. It is to these that I must now turn.

The principles applicable to third party disclosure

22. It is clear that disclosure against third parties should be regarded as the exception rather than the rule and not simply ordered by way of routine: see e.g. *Frankson v Home Office* [2003] 1 WLR 1952. Mr Nicklin emphasised the different stages which need to be considered in the light of the authorities.

23. The first requirement is that any documents sought must be shown to be likely to support or adversely affect the case of one or other party. Thus, the question to be asked in each case is whether they are likely to help one side or the other. The word "likely" in this context has been considered in the Court of Appeal and is taken to mean that the document or documents "may well" assist: see e.g. *Three Rivers District Council v Governor and Company of the Bank of England (No 4)* [2003] 1 WLR 210.

24. Secondly, the hurdle must be overcome of demonstrating that disclosure of the documents sought is "necessary" in order to dispose fairly of the claim or to save costs. This only arises for consideration if the first hurdle has been surmounted. Unless the documents are relevant in that sense, it is not necessary to address the test of necessity.

25. Thirdly, there is a residual discretion on the part of the court whether or not to make such an order – even if the first two hurdles have been overcome: *Frankson*, cited above, at [13]. It is at this third stage that broader considerations come into play, such as where the public interest lies and whether or not disclosure would infringe third party rights in relation, for example, to privacy or confidentiality. If so, the court must conduct a careful balancing exercise, as the Court of Appeal made clear in *Frankson*.

26. Mr Nicklin submits that, if the court only takes into account third party rights at the last stage, one of the consequences would be that any balancing exercise would have to be carried out against the background of assumptions that the document was relevant (i.e. likely to support or adversely affect one party's case) and that disclosure was "necessary in order to dispose fairly of the claim or to save costs". A third party, such as Mr Berezovsky, could in those circumstances find himself at something of a disadvantage in making submissions for the purposes of the balancing exercise. He would be confronted with conclusions reached on both "relevance" and "necessity" which were to be treated effectively as data beyond argument.

27. Mr Nicklin went on to suggest that the court is only permitted to look at the documents in question, if it is thought appropriate, at stage three, by which time relevance and necessity will have already been determined. This was not, however, accepted on all sides. Mr Beer, for the MPS, referred to dicta rather implying, although not in unequivocal terms, that a judge might be permitted to see the documents at stage one: see e.g. *Frankson* at [19] and [37]. This did not need to be determined, as it happened, since no one invited me to look at the documents and Mr Nicklin was content to address the merits of the Defendant's application by reference

to the statements of case and the categories of documents listed in the schedule to the application.

28. Despite his concerns, Ms Wilson invited me to rule that Mr Nicklin's client's rights and interests would be adequately protected in the light of the precautions put in place between the parties and that he should not, therefore, be permitted to address the court further on the Defendant's application for disclosure against the MPS on those classes of documents which did not refer to Mr Berezovsky or Mr Dubov. The situation is somewhat unusual, but I declined to shut out Mr Nicklin and took the view that he was entitled, in the furtherance of his client's interests, to address the court on all the criteria to be fulfilled – not least because the public policy concerns underlying the wording of CPR 31.17, as a whole, include the safeguarding of third party rights.

29. In any event, the court has a clear obligation to ensure, if necessary of its own motion, that this intrusive jurisdiction is not used inappropriately – even by consent. In exercising its responsibility, the court may well be assisted by submissions made on behalf of any third party the protection of whose interests requires to be considered.

30. So far, I have concentrated on the submissions of Mr Nicklin and Ms Wilson for what are, I hope, understandable reasons. I was, however, assisted by Mr Beer, representing the MPS, who took an essentially neutral stance but invited my attention, briefly, to certain passages in the authorities. In particular, he referred to *Woolgar v Chief Constable of Sussex Police* [2000] 1 WLR 25, 36H, where Kennedy LJ referred to the need to strike a balance between competing public interests. He also indicated what is, in general terms, the appropriate practice in a case where police are minded to disclose documents affecting a third party. An opportunity should be given to any affected person to take advice and seek assistance from the court.

31. Mr Beer also invited attention to the judgment of Dillon LJ in *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225, 259A-B. This passage was concerned with the steps to be taken where police had been served with a *subpoena duces tecum* and the desirability of giving the owner of the relevant documents a reasonable opportunity to state his objections, if any, to their being produced pursuant to the *subpoena*.

32. These were relevant authorities to have in mind, as illustrating the public policy considerations to be taken into account when the interests of third parties are affected. It is perhaps fair to say that these factors should weigh, if anything, more heavily after the enactment of the Human Rights Act 1998, having regard to the obligations imposed on the court as a public authority.

33. It goes without saying that those who supply information in confidence to the police, for whatever reason, are generally regarded as entitled to particular consideration before any order is made for disclosure which might put that confidence in jeopardy: see e.g. the observations in *Taylor v Serious Fraud Office* [1999] 2 AC 177, 219, *per* Lord Hope.

34. I will need shortly to address the terms of the schedule in which the Defendant defines the categories of document sought to be disclosed by the MPS. In general, the court must be astute to ensure that the applicant is not conducting a "fishing expedition"; inherent in this proposition, says Mr Nicklin, is the need to demonstrate that the

documents sought, or the categories as the case may be, do in fact exist. It is not appropriate to require third parties to go off and investigate whether there are any documents which happen to fit the description. In this context, my attention was drawn to the decision of Pumfrey J (as he then was) in *Re Howglen Ltd* [2001] 1 All ER 376, 382, where he observed:

> "It seems to me that, notwithstanding the provision as to costs, the jurisdiction to make an order against a non-party must be exercised with some caution. There is no doubt that an order in respect of specific documents presents no difficulties. However, in respect of a request for a class of documents it seems to me that notwithstanding the provision which I have read relating to the costs of the application and of compliance with any order made pursuant to it, it is none the less necessary to be satisfied that there are documents falling within the classes which are specified and those documents are – not may be – documents in relation to which disclosure will support the case of the applicant or adversely affect the case of one of the other parties to the proceedings."

35. Furthermore, it is pertinent to have regard to the observations of the Court of Appeal in *Three Rivers District Council*, cited above, at [36], where it was reaffirmed that the court has no power to make an order under CPR 31.17 in respect of a class of documents where it is established that there are documents within the class not satisfying the "relevance" threshold (see also *American Home Products Corpn v Novartis Pharmaceuticals UK Ltd* [2001] FSR 784). The point was also made:

> "In particular, the threshold condition cannot be circumvented by an order which puts upon the non-party the task of identifying those documents within a composite class which do, and those which do not, meet the condition: see *Wakefield v Outhwaite* [1990] 2 Lloyd's Rep 157, 163-164 and *Panayiotou v Sony Music Entertainment (UK) Ltd* [1994] Ch 142, 151F."

These authorities are of significance in the instant case because it is apparent that the majority of the documents sought in the Defendant's schedule are grouped into categories or classes.

36. It is elementary, of course, as in relation to the disclosure of documents more generally, that in determining whether a document or class of documents has a potentially relevant bearing on one or more of the live issues in the case, one should focus narrowly on the pleadings as they stand, in order to see how the issues have been defined up to that point. Thus, as I have already pointed out, one cannot be guided by speculation as to how a different case might be pleaded, after a new source of documents is investigated, or as to matters which are merely canvassed in evidence – without being incorporated into a pleading.

37. Against these background principles, Mr Nicklin did not go so far as to suggest that the application should not be permitted to proceed at all until the pleadings are finalised. But he did emphasise that the provisional and fluid nature of the issues needs to be borne in mind. Just because an allegation has been pleaded in the

defence, it does not follow that classes of documents relevant to that allegation will necessarily be disclosable, since it may or may not be admitted by way of the amended reply. The court should thus be careful to ensure that the exercise is driven only by reference to issues that are already crystallised.

What are the live issues as currently pleaded?

38. Following this analysis, and before turning to the individual categories sought in the Defendant's schedule, Mr Nicklin took the precaution of identifying the issues relating to the plea of justification as they currently stand. He set them out as follows:

(a) The *Lucas-Box* meaning sought to be established is that there were grounds which, objectively regarded, justified a police investigation into whether the Claimant received payments in return for passing confidential information about Russia's possible plans to extradite Russian oligarchs.

(b) The plea of justification seeks to establish a series of facts which, objectively judged, justify the police investigation. Any third party disclosure must be relevant to establishing these facts.

(c) As concerns the MPS/IPCC, the directly relevant issues arising from the paragraphs of the particulars of justification are:

(i) Did a person who had previously worked for ISC make an allegation to the Directorate of Professional Standards ("DPS") that Mr Hunter paid a police officer with the code-name "Noah" for confidential information about extraditions?

As against the MPS, the legitimate ambit of a disclosure application would be limited to a record of this initial allegation.

(ii) Did that trigger the investigation into the Claimant, Mr Hunter, ISC and RISC?

It is difficult to imagine how this case can be supported by a document.

(iii) Did the complainant (defined in paragraph 7(e) of the defence as a person who had previously worked for ISC and made a complaint to the DPS that Mr Hunter had made such a payment) have a meeting lasting approximately one hour with two DPS officers believed to be reporting to Det. Supt. Faulkner?

(iv) Did the complainant give the DPS officers a dossier containing the matters identified in paragraph 7(e)(ii) of the defence (i.e. a disk containing financial and other information about ISC)?

(v) Did the complainant tell DPS officers that "Noah" could be the Claimant and that "Atkinson" was an ISC code-name for Mr Berezovsky?

(vi) Did the complainant offer the DPS officers a mobile telephone belonging to Mr Hunter (not in fact handed over)?

As against the MPS, the legitimate ambit of a disclosure application would be limited to a note of this meeting and the items from the dossier.

(vii) Following this complaint, on 28 April 2006, officers from the Specialist Investigations Unit searched the Claimant's home in Bolney and his office and they removed some items.

(viii) At the same time, the Claimant was transferred from the Extradition Unit to the murder squad in order to protect the integrity of the anti-corruption inquiry.

It is difficult to imagine the existence of a document which would support this case beyond the search warrant and record of search. As to the Claimant's transfer, a document might exist containing the instruction to the Claimant.

39. It matters not, for present purposes, whether Mr Nicklin has definitively summarised the issues on justification. What he was seeking to do by this exercise was to emphasise how narrow the focus should be when calling upon third parties to produce relevant documents.

40. Ms Wilson indicated that some of the documents she seeks are intended to relate to the issues raised by the defence of qualified privilege. To this, Mr Nicklin responds that particular scrutiny is required in this context, bearing in mind that, for the purposes of a defence based on the principles outlined in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, the merits have to be assessed against the background of the material available to the journalists at or shortly before publication. On the face of it, therefore, it is difficult to see how the defence could be advanced by the provision of documents which they had not seen and were not at any stage in their possession. Such provision is most unlikely to be "necessary".

The categories of documents sought in the Defendant's schedule

41. Part way through the hearing, Ms Wilson produced a version of the schedule with references given for each category of documents to the part or parts of the pleadings said to give rise to the issues to which they are relevant. I shall refer to this version (although there is no need for me to set out, separately in each category, every passage in the pleadings relied upon).

42. *Category 1:*

All Interpol or other warrants issued for the arrest of Boris Berezovsky plus all documents relating to his arrest plus all 'duty states' of the Claimant in connection therewith together with all documents relating to subsequent work by the Claimant on the application to extradite Boris Berezovsky from the United Kingdom or the bail conditions under which Boris Berezovsky was allowed to remain in this country.

Ms Wilson cites paragraphs 7(a)(v) and 7(d)(iv) of the defence. These allege, respectively, that the Claimant had access to a number of databases; that it is to be inferred that he was privy to confidential information about extradition matters; and

that he played a significant role in handling the extradition request for Mr Berezovsky.

43. Mr Nicklin points out that the Claimant has admitted in his reply that he had access to domestic police databases (and indeed to Interpol databases by the use of specific protocols) and, therefore, the inference can be invited without further ado. As to paragraph 7(d)(iv), this allegation was introduced by amendment and has not yet been answered in an amended reply. There is no reason to assume at the moment that there will be an issue. In the light of this, Mr Nicklin argues that the Defendant has not established the groundwork for demonstrating "relevance" at stage one. That would seem to be correct. Mr Nicklin submits that the category is, in any event, simply too broad, since it would necessarily include documents falling outside the criteria of CPR 31.17(3).

44. *Category 2:*

All or any documents listing any business interests of the Claimant as a serving officer of the MPS including but not limited to his long-standing friendship with Keith Hunter of ISC Global (UK) Ltd and his part ownership of a racehorse or horses and management of a horse-racing syndicate.

Here, Ms Wilson points to several paragraphs in the defence. Paragraph 7(c) alleges a very long-standing close friendship between the Claimant and Mr Hunter, and that is admitted except for the word "close".

45. In written submissions received on 2 March, Ms Wilson emphasised the importance of the "closeness" of the relationship, which remains in issue; that the closeness of the relationship is material to whether there were grounds to investigate. She added, "The documents sought will show whether the Claimant disclosed this relationship and his joint interests with Mr Hunter to his managers". By "joint interests" she meant their horse-racing association and the setting up of a joint bank account. With respect, there would seem to be some confusion between the issue of "closeness", which is largely a matter for argument, and the attempt to obtain documents, showing how much the Claimant disclosed to his managers. As yet, I believe, there is no plea that (a) he had an obligation to disclose details of the relationship or (b) he failed to do so.

46. Paragraph 7(d)(v) alleges that "it would have been easy and tempting for Mr Hunter to seek police information from his friend in relation to Mr Berezovsky who was an ISC client"; that is said to arise from the nature of the relationship. The allegation has not yet been pleaded to, but since it consists largely of comment or inference based upon the admitted relationship, it is difficult to see how MPS documents could be necessary to advance the case.

47. Paragraph 8(c) relates to the defence of privilege. It simply sets out chunks of the police Code of Conduct, which have been expressly admitted in the reply. Paragraph 8(d)(ii) and 8(d)(iii) also relate to the defence of privilege. The former refers to serious concern among senior management at MPS as to the relationships between serving officers and retired colleagues working in the corporate investigations business. That is, to all intents and purposes, admitted in the reply.

48. The latter was added by way of amendment and, therefore, has not yet been pleaded to. It asserts that it is best practice for serving MPS officers to register outside interests and relationships which may give rise to a conflict of interest and/or professional embarrassment. It is a very general allegation, but what the Defendant appears to be fishing for is evidence to support a case not yet pleaded; namely, that the Claimant wrongly failed to register some outside interest or relationship. That would not seem to be consistent with the criterion of "necessity". Furthermore, the category is so broadly drafted as to be likely to include irrelevant documents in any event.

49. *Category 3:*

All minutes of meetings attended by the Claimant plus all 'duty states' of the Claimant from the date on which he joined the MPS's Extradition Unit until November 2003, which refer to matters relating to Russia's attempts to extradite Boris Berezovsky, Yuli Dubov and/or Akhmed Zakayev.

Again, Ms Wilson prays in aid paragraphs 7(a)(v) and 7(d)(iv), which I have already addressed in the context of Category 1. It is to be noted that the request covers duty states for a period of some two years and it is by no means clear how they are supposed to resolve any outstanding issue. They are bound to contain much that is irrelevant and, incidentally, to cause considerable headaches to those in the MPS tasked with the responsibility of identifying what is, or is not, relevant to the issues. The same points are to be made in relation to Messrs Dubov and Zakayev as in relation to Mr Berezovsky. Once again, therefore, it is difficult to see that the Defendant has fulfilled the strict criteria in demonstrating necessity.

50. *Category 4:*

All minutes of meetings kept on files kept (sic) by the MPS's Extradition Unit and accessible to the Claimant from the date on which he joined the MPS's Extradition Unit until November 2003 which refer to matters relating to Russia's attempts to extradite Boris Berezovsky, Yuli Dubov and/or Akhmed Zakayev.

Yet again, Ms Wilson cites paragraphs 7(a)(v) and 7(d)(iv) of the defence. These I do not need to address again. She also cites, in addition, paragraph 7(a)(i). This alleges that the Claimant was involved in handling diplomatically sensitive requests from the Russian government relating to the extradition of a number of wealthy Russians. The short point is that this too has been admitted (subject to minor immaterial qualifications). In any event, the category is extremely wide and covers a period of two years. What is more, it would cover documents having nothing to do with the Claimant directly but which were merely "accessible" to him. Yet again, it would appear that the Defendant has cast the net too wide and, in doing so, has failed to demonstrate "necessity".

51. *Category 5:*

All documents relating to the meeting which took place between officers of the MPS's DPS and an anonymous complainant at a London hotel in February 2006 concerning the Claimant or a person code-named 'Noah' and their relationship with Keith Hunter and/or the company, ISC Global (UK) Ltd, its management, officers and

affairs, including, but not limited to, notes and memoranda recording the setting-up and arrangement of the meeting, the meeting and all follow-up documents relating back to the meeting (with names redacted if necessary).

The first point to be made is that this category replicates that set out under Category 1 of the order made against the IPCC. Evidence would thus be required to demonstrate that it is *also* "necessary" to extract this category from the MPS. At the moment, it would appear to be implicit in the Defendant's case that nothing at all useful was obtained from the 11 September order.

52. Ms Wilson relies here primarily on paragraph 7(e) of the defence, which refers to an allegation made in February 2006 by the "complainant" to the DPS, to the effect that Mr Hunter had paid a police officer with the code-name "Noah" for confidential information. It is said that it was this allegation which triggered the investigation under the code-name "Narwhal". That is not admitted in the reply and the Defendant is put to strict proof. Accordingly, there is at least an issue to which disclosure could be directed.

53. In her written submissions of 2 March, Ms Wilson made additional reference to paragraph 7(h), which is also raised in connection with Category 6 (below) and relates to the searching of the Claimant's premises. She argues that paragraphs 7(e) and 7(h) need to be considered together. She says they both go to the issue of whether there was an ongoing investigation into the Claimant prior to 26 April 2006.

54. The category is nonetheless wide, in the sense that it is almost certain to include irrelevant material. It needs to be demonstrated, to achieve the "necessity" threshold, that further disclosure is required from the MPS *despite* that obtained from IPCC.

55. She also points to paragraph 7.1 of the particulars of claim, which raises the question whether it was the *Sunday Times* journalists who triggered the enquiry. It is relevant in the relatively narrow context of possible impact on the Claimant's feelings. The category is too diffuse to be characterised as "necessary" for resolving the issue.

56. Reference is also made to passages in the reply responding to the privilege defence but, as I have already said, that depends on what the journalists had prior to publication – it is not likely to be materially advanced by third party disclosure.

57. *Category 6:*

All written communications, including but not limited to e-mails and notes of telephone conversations between the MPS's press office and others within the MPS from 26 April 2006 to 2 June 2006 (inclusive) which mention or concern the Claimant.

This again is said to relate to the issue between the parties as to whether or not the inquiry into the Claimant's conduct, under the supervision of the IPCC, was triggered by the "complainant" as a result of a communication in February 2006 or whether, on the other hand, as a number of internal documents would appear to suggest, it was prompted by journalists from the *Sunday Times*. It is, nonetheless, clear that the category is very widely drawn and will almost certainly contain documents that do not pass the threshold required by CPR 31.17.

58. Reference is made by Ms Wilson particularly to paragraph 7(h) which alleges that the Claimant's home in Bolney, West Sussex, and his office, were searched by Specialist Investigations Unit officers following a meeting between the "complainant" and the DPS and the handing over of a dossier by him on 28 April 2006. This is put in issue in the reply, but in order to achieve the threshold the category needs to be more narrowly focused.

59. *Category 7:*

All written communications, including but not limited to e-mails and notes of telephone conversations between the Claimant and other MPS officers from 27 April 2006 to 2 June 2006 (inclusive) which mention or concern the Claimant's work in the Extradition Squad and/or ISC Global (UK) Ltd and/or the Claimant's suspension from work and/or any investigation into him and/or the search of his home and/or office.

This too is criticised by Mr Nicklin for its undue width. Once again, it is directed to the role of the "complainant" and reference is made to paragraph 7(e) of the defence. Similar considerations are therefore raised to those which I have addressed in relation to Categories 5 and 6 above.

60. *Category 8:*

All written communications, including but not limited to all minutes of any meetings held by MPS officers and/or personnel, e-mails and notes of telephone conversations from 27 April 2006 to 2 June 2006 (inclusive) which relate to the Claimant's suspension from work and/or any investigation into him and/or the search of his home and/or office and/or relate to both ISC Global (UK) Ltd and the Claimant.

The first point made in relation to this category is that it replicates Category 2 of the order made on 11 September 2008 against IPCC. Therefore, just as in relation to Category 5, it would be necessary for the Defendant to establish that it is "necessary" to have a second bite at the cherry; in other words, that nothing useful was gained from the same demand made against IPCC.

61. The other point made by Mr Nicklin is that this category, like others, is so widely drawn that it is bound to contain documents that are irrelevant.

62. Ms Wilson refers again to a number of paragraphs in the pleadings, including again paragraphs 7.1 and 7(e). I have addressed these above, but it is also true in the present context that the issues raised would not justify such a broad request.

63. *Category 9:*

The information and any other documents adduced in support of the application made by Detective Constable Kenneth McAuley for a search warrant for the Claimant's home, which was granted on 28 April 2006 by the West London Magistrates' Court.

This category duplicates Category 3 of the order made on 11 September 2008 against IPCC and is thus subject to similar comments to those made in relation to Categories 5 and 8 on the present schedule.

64. *Category 10:*

In respect of the investigation into the Claimant also known as 'Operation Narwhal':

10.2 all correspondence, including but not limited to letters and e-mails, passing between MPS and the IPCC pertaining to the subject matter of the investigation;

10.3 all records of the MPS DPS investigation into the Claimant that a corrupt relationship may have existed (sic) between the Claimant and Keith Hunter and/or others including the ISC Global (UK) Ltd and RISC, including notes, 'prepared statements', intelligence reports, interview notes, 'duty states', analysis of material seized, transcripts of interviews (with interviewees' names redacted if necessary) and transcripts of any interviews with the Claimant (for the avoidance of doubt, including all such records from February 2006);

10.4 all communications between the Claimant and MPS Specialist Crime Directorate concerning the Claimant and his temporary suspension from and reinstatement to the Metropolitan Police Extradition Squad;

…

It is pointed out that paragraphs 10.2 and 10.3 overlap significantly with Categories 4.2 and 4.3 of the order made on 11 September against IPCC. Again, however, there is no evidence to demonstrate that disclosure against MPS is still "necessary" despite that earlier trawl. In her submissions of 2 March, Ms Wilson said that the wording of paragraph 10.2 had been agreed with Mr Beer for the MPS specifically to narrow the documents to those which are about matters investigated (and not correspondence of a general nature). But I am not sure that this meets the point.

65. As to paragraph 10.4 of the schedule, Ms Wilson highlights paragraph 7.2.3 of the particulars of claim, dealing with damages. The Claimant relies in aggravation of damages upon the Defendant's persistence in the allegations despite its being informed of his exoneration, following the inquiry, in December 2006. This aspect of the case in itself would not justify disclosure of this wide category.

66. Moreover, it is clear that these categories are very widely drawn and are thus likely to contain documents that are irrelevant to the issues in the proceedings. For these reasons, it is apparent that the Defendant is unable to discharge its obligation to demonstrate relevance or, for that matter, necessity.

67. Ms Wilson points again, in respect of all of these sub-categories, to paragraph 7(e) of the defence. I have already accepted that there are issues in the case relating to what triggered the inquiry and the extent to which it was linked to a meeting in February 2006. The problems are, essentially, (a) the overlap with the earlier application against the IPCC and (b) the fact that the sub-categories are too broadly drawn to avoid being characterised as "fishing".

68. In so far as she relies on part of the privilege defence, I have already addressed the point that this should depend on what the journalists knew or had in their possession at the time.

69. *Category 11:*

All notes made by DCI Crump and/or DI Slade and/or DS Low of their meeting with Michael Gillard on 9 May 2006.

Here, Ms Wilson prays in aid paragraph 7(h) of the defence, which is not admitted in the reply, save to a limited extent. It is difficult to see, however, why it would be "necessary" for the Defendant to obtain notes made by police officers of a meeting conducted with one of its own journalists. Mr Nicklin suggests that Ms Wilson may have intended to refer to paragraph 8(n), which might justify disclosure of any notes made by the officers of what was said to them on 9 May 2006 – but not the wide category claimed

70. *Category 12:*

All notes made by DCI Crump and/or DS Low of their meeting with Michael Gillard and Jonathan Calvert on 30 November 2006.

Mr Nicklin points out that this meeting post-dated the publication of the article (by some six months). It is thus not easy to see how the notes could be relevant either to the defence of justification or to that of qualified privilege, since in respect of both it would be necessary to assess matters as at the date of publication (2 June 2006). In any event, it is once again by no means clear how it would be necessary to advance either of those defences for the Defendant to have the police officers' notes (if any) of a meeting with its own representatives.

71. Ms Wilson prays in aid in this context paragraph 7(c)(ii) of the defence. This refers to the friendship between the Claimant and Mr Hunter and to their involvement in a syndicate which owned a racehorse. Insofar as any dispute at all arises on these allegations (in paragraph 11 of the reply), I cannot understand how the notes (if any) would assist in resolving it – still less how they could be "necessary" for the purpose.

My overall conclusion on the application of Times Newspapers Ltd

72. It may be possible with a more narrowly focused application for the Defendant yet to obtain an order for third party disclosure against the MPS, but the very strict criteria operating in relation to CPR 31.17 do not seem to me to have been fulfilled yet in respect of any of the categories I have considered.

73. My conclusion, against the background of the circumstances I have described, is that it would not be right to grant the Defendant the order sought against the MPS for disclosure of the categories identified in the Defendant's schedule.