Neutral Citation Number: [2011] EWHC 2705 (QB)

Case No: HQ11X00308

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/10/2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

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Between :

(1) THE COMMISSIONER OF POLICE OF THE METROPOLIS (2) THE SERIOUS ORGANISED CRIME AGENCY	**Claimant**
- and -	
(1) TIMES NEWSPAPERS LTD (2) MICHAEL GILLARD	**Defendant**

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William McCormick QC and Iain Daniels (instructed by **Edward Solomons, Director of Legal Services MPS**) for the **First Claimant and Soca Legal Department for the Second Claimant**

Gavin Millar QC and Anthony Hudson (instructed by **Simons Muirhead & Burton**) for the **Defendants**

Hearing dates: 18,19,20 and 22nd July 2011

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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 TUGENDHAT

Mr Justice Tugendhat:

1. The Second Defendant ("Mr Gillard") is an experienced investigative journalist who has written extensively on matters relating to the police and crime. The First Defendant ("TNL") is the publisher of The Sunday Times. Mr Gillard received copies of leaked documents originating from the files of the two Claimant law enforcement agencies ("the Claimants"). The date,. source and circumstances of the leak have not been disclosed to the court, and have not been discovered by the Claimants.
2. On 23 May 2010 Mr Gillard wrote, and TNL published, an article ("the Article") headed "Underworld kings cash in on taxpayer land fund". The Article referred to Mr David Hunt as a man "whose criminal network is allegedly so vast that Scotland Yard regards him as “too big' to take on". The words in quotation are quoted from the leaked documents, and Mr Gillard accepts that he had the leaked documents in mind when he wrote the Article. The Article is to a substantial extent plainly based on the leaked documents. Mr Hunt has sued TNL for libel in separate proceedings ("the Libel Action").
3. Mr Hunt is not a party to this action brought by the Claimants, and has not been able to make any representations to the court. It is essential that any reader of this judgment should understand that nothing in this judgment is intended to, or should be read as, containing any finding adverse to Mr Hunt. Mr Hunt has the same right to his reputation and to the presumption of innocence that everyone enjoys. The fact that the Claimants believe that he is the head of renowned organised crime group (“OCG”) does not mean that he is guilty. It is all too well known that there have been miscarriages of justice in the past where innocent people have been convicted of crimes of which the police, journalists and others believed them to be guilty.
4. There is an open judgment and a closed judgment in this case. In this open judgment I repeat matters which were published in the Article. But there must be a restriction on reporting of the contents of the closed judgment in order to protect the confidentiality of the information referred to in the closed judgment. It is for that reason that the hearing before me was in private except when the parties were making submissions of law.

THE PROCEDURAL HISTORY

5. The Claimants commenced this action by a claim form issued on 28 January 2011. In it the Claimants alleged against TNL and Mr Gillard breach of confidence, conversion, and breach of the Data Protection Act 1998. They applied for injunctions, delivery up of the leaked documents and other relief, including an order that the Defendants disclose the sources of the leak. On 27 January 2011 I had granted an interim injunction. This is the trial of the breach of confidence claims by the Claimants. The only relief now applied for is for injunctions to restrain breaches of confidence and delivery up of those documents which the court holds that TNL are not entitled to use. Mr Gillard has not disclosed his sources, and the other claims for relief have not been pursued.
6. The delay between the publication of the Article in May 2010 and the commencement of these proceedings in January 2011 is to be seen against the following background.
7. On 25 June 2010 Mr Hunt issued two claims for libel. The first claim is against TNL, (“the Libel Action”). The second claim is against Evening Standard Ltd ("ES"), which had published an article containing similar allegations (“the ES Action"). On 30 September 2010 TNL served a Defence in the Libel Action. This included defences of Justification (or Truth) and *Reynolds* public interest privilege. On 15 October ES served its Defence. ES pleaded Justification, and that Mr Hunt has a general bad reputation for being the head of an OCG.

8. On 29 November 2010 TNL issued an application against the First Claimant ("MPS") for third party disclosure in the Libel Action. No order has been made on that application.
9. On 2 December 2010 I heard an application by Mr Hunt to strike out TNL's defence in the Libel Action. In the course of that hearing, Mr Millar indicated that TNL wished to reconsider the form of its Defence, and on that basis I struck out most of that part of its Defence and gave permission to apply to amend.
10. On 4 January 2011 counsel for TNL prepared a draft Amended Defence in the Libel Action. It made reference to the leaked information. TNL communicated it to the Claimants before serving it on Mr Hunt. It was following this that the Claimants applied for the injunction and commenced these proceedings, as stated above. Thus the injunction was granted on 27 January 2011, and the Claim Form and Particulars of Claim issued on 28 January 2011.
11. On 25 February 2011 TNL applied for a stay of the libel action, either generally, or pending the conclusion of the present proceedings. On 22 March 2011 and 18 April 2011 I heard and refused an application by the Defendants to vary the interim injunction ([2011] EWHC 776 (QB)). On 15 and 21 June 2011 I heard and (as to some parts) refused applications in this action, including an application by the Defendants for disclosure ([2011] EWHC 1566 (QB)). Meanwhile, no further steps have been taken in the two libel actions.

OUTLINE OF THE CLAIMS AND THE DEFENCE

12. It is convenient to start with a brief outline of the claims and the defences, and return to the law further on in this judgment.
13. The dispute between the parties now relates to 10 documents. In the Claim Form the injunction sought was to restrain the Defendants "from using the confidential materials (save by order of the court)". At the close of the trial the form of injunction sought was set out in a draft order, with claims that documents be delivered up, redacted and deleted in ways that correspond to the form of the injunction. The form of the injunction was to restrain the Defendants: "(1) making any use of document 4 or 6 or the information therein; (2) making any use of document 5 or 7 or the information therein, save [in the form of a plain paper transcript]; (3) making any use of the highlighted information within documents 1, 2, 8, 9 or 10; (4) making any use of document 3 or the information therein."
14. In the Defence the Defendants admitted coming into possession of the five documents which they had by then disclosed to the Claimants in redacted form, and they admitted that Mr Gillard knew or had reason to believe that the documents were confidential. They denied that any breach of confidence or other unlawful act had been committed by either of them. They contended that the information was properly and lawfully received, either in the course of legitimate newsgathering activities or investigative journalism on matters of public interest, or for the purposes of defending the Libel Action. They stated that their intention was to use the documents in defending the Libel Action "to the extent permitted by the court to do so".
15. The Claimants are public authorities. Claims for breach of confidence by public authorities are different from claims by individuals. The difference was explained by Lord Goff in *A-G v Guardian (No* 2) [1990] 1 AC 109, 283C-D, 258H: "although in the case of private citizens there is a public interest that confidential information should as such be protected, in the case of Government secrets the mere fact of confidentiality does not alone support such a conclusion, because in a free society there is a continuing public interest that the workings of government should be open to scrutiny and criticism. From this it follows that, in such cases, there must be demonstrated some other public interest which requires that publication should be restrained".

16. Since the passing of the Human Rights Act 1998, there is a further explanation for the difference: individuals have Convention rights, but public authorities do not.
17. Accordingly, in their Particulars of Claim the Claimants identify the basis of their claims as their obligations pursuant to HRA s.6(1) to act only in ways compatible with the rights and' freedoms' set out in Sch 1 to that Act. These obligations include a responsibility to protect the rights of individuals. Rights relevant to this case are the right to respect for individuals' private and family life (Art 8) (which includes the duty to safeguard their personal data, in accordance with the Data Protection Act 1998). Art 8 (Right to respect for private and family life) provides:

> "1 Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

18. The Claimants also base their claim on their own duties and responsibilities to prevent and detect crime. At the same time the Claimants recognise the right (of the Defendants and others) to freedom of expression, subject to the qualifications of that right set out in Art 10(2). Art 10 provides:

> "1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, .conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of ... public safety, for the prevention of disorder or crime, ... for preventing the disclosure of information received in confidence".

19. The Claimants contend that improper disclosure of their confidential information carries risks in the present case of attacks, or threats of attacks, upon the persons or property of individuals identified in, or identifiable from, the confidential information. Such persons include individuals who are, or who may be suspected of being, informants, past or serving officers of the Claimants, and their friends and families. The Claimants also contend that such disclosure puts at risk, not only their ongoing investigations into persons presently suspected of crime, but also their ability to carry out their functions generally. Disclosure risks revealing methods of investigation, and the extent of the information known to them and, which may be just as important, the extent of information unknown to them. It tends to discourage individuals from providing information in the future to the Claimants, and to discourage other law enforcement agencies (whether in the UK or abroad) from sharing information with them. It leads officers who record information about suspected criminals to limit what they record. It damages the confidence of the public at large in the Claimants' ability to prevent and detect crime. Disclosure of information about individuals is an interference with the rights of individuals under Art 8 and the Data Protection Act 1998.

20. A number of claims originally included in the Claim Form and Particulars of Claim are no longer pursued. There was a claim for conversion of the documents the property of the Claimants, a claim for an order that the Defendants disclose the identity of the individuals from whom the confidential information was obtained, and those to whom it has been disclosed, and a money claim, by way of account of profits. The claim that remains live is one for delivery up based on the confidentiality of the information, not any right of property.
21. The Claimants accept that the Article was on a matter of public interest. It is a critical feature of this case that the Claimants also believe, as the Defendants allege, that Mr Hunt is the head of an OCG who has not been brought to justice. It is that view of Mr Hunt which forms the basis of the Claimants' claim that disclosure of the confidential information gives rise to risks to the lives, well being and property of the individuals (and their friends and families) identified in, or identifiable from, the leaked documents.
22. The Defendants challenge neither the entitlement of the Claimant to sue; nor the validity of the principles on which the Claimants base their claims. The Defence is that the Defendants were entitled to receive, use and publish the. information in question under Art 10 (in so far as it was published in the Article) and they are entitled under Art 6 and Art 10 to further use and publish it to the extent necessary to make good their defence of justification in the libel action. It is said that the Article was on matters of high public interest, in that Mr Hunt was known to the Claimants as the head of an OCG, but that he had not been brought to justice, and was seeking to benefit financially from the compulsory purchase of plots of land in Canning Town.
23. They contend that there is a further public interest in the Defendants being enabled to defend themselves in the Libel Action, not only by their defence of *Reynolds* privilege, but also by their defence of justification. The Defendants contend that as a matter of evidence the Claimants have not established that the risks described above in fact exist in the particular instances which remain in dispute in this case. Alternatively, the Defendants contend that the Claimants have not established that it is necessary or proportionate that the matters relied on in support of the. Claimants' claims should restrict their right of freedom of expression.

THE ISSUES IN THE LIBEL PROCEEDINGS

24. In its Defence to Mr Hunt's libel action TNL pleads justification and qualified privilege.
25. The meanings which TNL states that it will justify are (1) that Mr Hunt is a violent and dangerous criminal and the head of an OCG involved in murder, drug trafficking and fraud (2) that he was, alternatively there are reasonable grounds to suspect that he was, responsible for the intimidation of the main prosecution witness against him when being prosecuted in 1999 for a violent assault and (3) that, alternatively there are reasonable grounds to suspect that, he threatened to kill Mr Billy Allen and attacked Mr Allen and his minders at a court hearing, and then avoided prosecution for the same through intimidation of his victims.

THE DISPUTED INFORMATION

26. In late December or early January TNL disclosed five of the ten documents to the Claimants, being the documents TNL intended to rely on in its defence in the Libel Action, together with a copy of the draft Amended Defence. In the course of the process of disclosure in this action, on 28 April 2011, the Defendants disclosed to the Claimants a further five documents. It is common ground that the issues in this action relate exclusively to these ten documents. Initially the Claimants objected to any use of any of the documents.
27. The ten documents are before the court in a form bearing redactions made by the Defendants in order to protect their sources. Where the Claimants object to the disclosure of only parts of the document, they have marked with highlighter the

passages which contain names and other information which they contend should not be disclosed. In the course of the proceedings, including the trial itself, the Claimants have revised their objections. They have considered each of the documents, and have identified passages in some of the documents, and in other cases whole documents, to the disclosure of which they now object. The objections still maintained at the end of the trial are listed under eleven headings (A to K) as follows: A - Risk to person: general - 30 items remaining in dispute; B - Identification of sensitive source/risk to person: general - small circle of knowledge - 8 items remaining in dispute; C - Identification of source / risk to person: small circle of knowledge particular incident - 10 items remaining in dispute; D - Identification of source *I* risk to person: 1 - 18 items remaining in dispute; E - Risk to person 2: - 14 items remaining in dispute; F - Identification of source / risk to person 2: - 6 items remaining in dispute; G - Reference to Third Party Agencies: - 8 items remaining in dispute; H - Disclosure of police methods: - 13 items remaining in dispute; I - Legal professional privilege ("LPP"): - 6 items remaining in dispute; J - source information on third parties: - 1 item remaining in dispute; K - SOCA document: - whole document remaining in dispute.

28. In opening, Mr McCormick made clear that the Claimants' stance is that the case requires the court to carry out the balancing exercise, which is familiar in principle, where there are competing Convention rights. In these proceedings the Claimants are not claiming public interest immunity ("PII"). If the Claimants pursue their application for third party disclosure in the context of the libel proceedings, then at that point the Claimants would claim PII. In these proceedings the Claimants are asserting their rights (and obligations) to protect the confidential information contained in the documents in question, including the personal information relating to those individuals (whether they are officers, sources or have other roles) who are named in, or identifiable from, the documents, and the Defendants already have the documents. So it is not a case of immunity to a claim for disclosure of documents.
29. It will be necessary to consider at the end of this judgment how, if at all, any relief to be given in these proceedings can be tailored to reflect the rights of TNL in the Libel Action. One of the points taken for the Claimants is that on carrying out the balancing exercise that is required, different results may follow, depending upon the stage at which the libel proceedings have reached, upon what documents Mr Hunt may himself have disclosed and upon what the issues in the Libel Action eventually turn out to be.
30. Mr Millar submits that the relief in this action should be final in the sense that there is to be no injunction, or that any injunction is not to be subject to subsequent variation in the light of developments in the Libel Action. He also made submissions as to why, on the evidence, no balancing exercise can arise, and how, if it does, it should be conducted.
31. Before turning to the remaining issues that arise in respect of the documents it is necessary to consider the submissions of law made by the parties as to the different considerations that must be taken into account if and in so far as the court is required to balance the public interests involved.
32. In his closing submissions Mr McCormick accepted that the evidence before the court in this case does not come up to the standard that would be required for him to make a successful submission based on Art 2 (right to life): see *In re Officer L* [2007] 1 WLR 213 5 at paras 20 and 21. But he submits that there is no necessity in this case for the Claimants to reach that standard, given the other bases they have for their objections to the proposed use of those parts of the documents to which they maintain their objections.
33. One reason why the evidence may not come up to the standard required in *Officer L* may be because Mr Critchell has no direct knowledge of the circumstances relating to

individuals who might be at risk. He is not the author of any of the documents. I shall consider the implications of this lack of knowledge on the part of the Claimants' witnesses in the discussion under Art 8 below.

ECHR Art 6 - THE RIGHT TO A FAIR TRIAL

34. The Art 6 right in issue before me in this judgment is TNL's right to a fair trial of the Libel Action. There is a difference between the parties as to what this requires in the present case. They agree that a fair trial includes the requirement that there be equality of arms between the parties. Art 6 includes: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ... "
35. Mr Millar submits that in *Dombo Beheer BV v The Netherlands* (1993) 18 EHRR 213 at paras 33 and 35 the Strasbourg Court defined the principle as follows: "'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".
36. Mr Millar also cited *de Haes and Gijsels v Belgium* (1997) 25 EHRR 1. In that case the Strasbourg Court held that the journalists (the applicants in Strasbourg) had not had a fair trial in the libel action in which they were defendants in the national courts. They were sued by judges whom they had accused of bias in family proceedings in which the custody of children had been awarded to the father. The articles complained of referred to expert medical reports and statements which suggested abuse by the, father. Although the journalists in that case either had (or had access to) the expert reports, they did not rely upon them, in order not to disclose their sources. Instead they asked the national court to order production of the reports, which the national court refused to do. At para 58 the Strasbourg Court said: "The outright rejection of their application put the journalists at a substantial disadvantage vis-à-vis the plaintiffs. There was therefore a breach of the principle of equality of arms".
37. That case was similar to the present, in that the journalists had access to the documents in issue, but differs from the present in that TNL in the present case wishes to rely upon the documents which it has. TNL is not, in the present proceedings, seeking a production order. That may be a significant difference for some purposes, but the case shows that the inability of the journalists to rely on material evidence is what made the trial unfair.
38. However, Mr McCormick submits that the requirement of equality of arms is satisfied if both parties to the action in question are in the same position. Since Mr Hunt will not have copies of the document in issue in this case, Mr McCormick submits that there will be equality of arms. *De Haes* is a case where the plaintiff judges had had sight of the documents.
39. In my judgment that was not the critical point in the case. Whatever may be the position in Belgian law, under English law the burden of proof is on the defendant in a libel action. In my judgment, if the defendant is deprived of the means to prove his case, there is not equality of arms. The fact that a claimant does not need certain documents to prove his case may mean that he is not in an equal position with a defendant who does need them, but is refused access to them.
40. It has, of course, long been the case that the law on discovery, as developed in equity, placed the interests of justice in a given action (that is to say the interests of justice in the court receiving all relevant evidence at trial) above the interests of parties, and even non-parties, in the confidentiality of documents and information. Only in rare cases is confidentiality of such a high order that it prevails over the requirement to give disclosure. It is rare even for special measures to be thought necessary to protect confidentiality.

41. Two classes of cases where confidentiality may override the interests' of justice in the action in question are legal professional privilege (which almost always prevails) and PII, which may or may not prevail, depending upon the circumstances. As Lord Templeman put it in *R* v *Chief Constable of West Midlands, ex p Wiley* [1995] 1 AC 274 at p280F: "Public interest immunity is a ground for refusing to disclose a document which is relevant and material to the determination of issues involved in civil or criminal proceedings. A claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest in securing justice."
42. Examples of where the public interest might outweigh the interests of justice in the case in question are well known. Some which are relevant to the present case are referred to in the cases cited in the speech of Lord Woolf in *Wiley:* protection of sensitive material relating to police policy and operational matters; protection of the identity of informants (p286F-G), disclosure of anything that might give useful information to those who organise criminal activities (p290D), undermining assurances given to those who make statements to the police (p297D). The protection of the identity of informants is at least as important, if not more important, for law enforcement agencies such as the Claimants as it is for journalists and other publishers, such as the Defendants.
43. In the present case it is because the Claimants are not resisting an application for disclosure, that the case is not one of PII. The Claimants are seeking to preserve confidentiality by bringing this action. But the principles upon which the Claimants rely are to some extent similar to the ones that give rise to PII, and little turns on the fact that they are Claimants, rather than respondents to a disclosure application.
44. If there is a difference it is that if this were a disclosure application by TNL, then TNL would have the burden of establishing that disclosure of the documents was necessary (CPR Part 3 1.17(3)(b)). Since TNL already has the documents, it is relieved of the burden under that rule in this case (although the burden of proving necessity may arise independently, for example where it is the Defendants who claim to be entitled to override the Art 8 rights of third parties).
45. As Mr Millar notes, in cases where the' state is a party (as claimant or prosecutor) to the proceedings, the state is often torn between two conflicting interests: it may wish to adduce the material in order to establish its case while at the same time it may wish to keep back the material in order not to defeat other interests that it has, such as the protection of sources. But the Claimants are not a party to the Libel Action, so Mr Millar submits that in the present case the Claimants are not in that "healthy dilemma" (as it was referred to by Lord Kerr in *Al Rawi* v *The Security Service* [2011] UKSC 34 at para [96]).
46. It is true that the Claimants are not parties to the Libel Action. But it does not follow that the Claimants are not in a dilemma. I have no evidence as to what view the Claimants take of the Libel Action. I see no reason why they would, view it with favour if Mr Hunt won libel damages from TNL, given that they believe that he is the head of an OCG and that MPS agrees that he was seeking to profit from the compulsory purchase of land as TNL alleged in the Article.
47. I conclude that there may in principle be an interference with TNL's right to a fair trial with equality of arms if it is prevented from relying on documents in support of its defence. 'The fact that Mr Hunt may also be denied access to the same documents would not mean that there was equality of arms, because Mr Hunt does not need those documents to prove his case.
48. But I also conclude that if the basis on which TNL is prevented from relying on documents in support of its defence is one of the bases referred to in *Wiley* (para 42 above) then it will not necessarily follow from that that TNL will be denied a fair trial. The duty of the court to ensure a fair trial is a duty owed to all those whose interests

are engaged, including not just the parties, but also non-parties. Many trials are conducted in circumstances where one party may be precluded from relying on some relevant evidence on the basis that the public interest in preventing publication of that evidence outweighs the public interest being able to put all relevant evidence before the court. Whether or not a fair trial of the Libel Action will in fact be possible is an issue that will have to be resolved in the Libel Action, not in this action.

ECHR Art 8- THE RIGHT TO RESPECT FOR PRIVATE LIFE

49. There is no dispute that the court must have regard to the Art 8 right to protection of the private life of each of the individuals named in, or identifiable from, the documents in question in this case.
50. Mr McCormick submits, and Mr Millar does not dispute, that insofar as the information impacts upon either the reputation, or the private life, of an individual, then the Art 8 rights of that individual are engaged. Mr McCormick lists the Art 8 rights as follows. The documents contain many statements which are highly defamatory of many individuals. Those statements have been made, and are held, in confidence. The damage to the reputation of those accused of extremely serious criminal conduct will be immense. Of at least as much concern is the disclosure of information which impacts upon the other aspects of the private and family lives and homes of identified persons. These include .police officers who have expressed reasonable fears for the safety of themselves and their families, including at their homes. Information has been provided by informants and officers, and recorded by officers, in the expectation that it will be kept confidential, and that it will certainly not be placed before the very person said to pose the threat. It would obviously add the worst form of insult to an already keenly felt injury if the vulnerability of such an officer was made known to the public, and hence to the person responsible for that fear.
51. Moreover, the risk is not only to those individuals who are identified in the documents. As the Claimants submit, where information is recorded by the police, the police will not always know how many people other than their informant know that information. If the information recorded is known only to a small circle of people associated with the subject of the information, and if the subject of the information knows (or believes he knows) the identities of the individuals who make up that circle, then all actual members of the circle, together with all those mistakenly supposed to be members, will be at risk. There is no means for the police to identify all members of the relevant circle, let alone those who may be mistakenly supposed to be members of the circle.
52. In addition, of course, there are the Art 8 rights of Mr Hunt, including his right to his reputation. But Mr Hunt's rights will be addressed in the Libel Action, and I do not consider them separately in this judgment.
53. The position of third parties in the present case gives rise to a particular difficulty, In an action for breach of confidence or privacy, it is commonly the subject of the information who is the claimant (although that is not always so). In such a case the subject of the information can speak as to his own Art 8 rights. But in the present case, as in *Ashworth Hospital* v *MGN* [2002] 1 WLR 2033, the Claimants invoke the Art 8 rights of members of the public (not parties to the action) to whom they owe a duty to protect those rights.
54. It was unnecessary for the parties to address me on the provisions of the Data Protection Act 1998. As public authorities under the Human Rights Act and Art 8, and under the common law (for example *Marcel* v *Commissioner of Police for the Metropolis* [1992] Ch 225), the subjects of confidential information have a right to make representations before information relating to them is disclosed by the police. But reference to the 1998 Act is helpful. For example, s.7(4) provides: "Where a data controller cannot comply with the request without disclosing information relating to

another individual who can be identified from that information, he is not obliged to comply with the request unless- (a) the other individual has consented to the disclosure of the information to the person making the request, or (b) it is reasonable in all the circumstances to comply with the request without the consent of the other individual".

55. Moreover, the information in question in this case would clearly be sensitive personal data as defined in s.2 of the 1998 Act: "(g) the commission or alleged commission by him of any offence, or (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings".
56. Sch 3 of the 1998 Act makes specific provision for the processing of sensitive personal data, requiring explicit consent from the subject of it. It also makes an exception for the use of such data when it is necessary for the administration of justice, and for other reasons. However, the fact remains that very serious interests of third parties are at stake in this action, and those third parties have not been asked, and it is not practicable to ask them, for their consent, or even their views. Indeed the fact that the Claimants' witnesses have little knowledge of the position of the third parties concerned is one of the grounds on which Mr Millar submits that the Claimants have failed to demonstrate that it is necessary to interfere with the Defendants' Art 10 rights.
57. It is not always necessary for third parties to be consulted before information provided by them in confidence is used without their consent. In *Ex parte Coventry Newspapers Ltd* [1993] QB 278 a newspaper was being sued by .police officers who had been the subject of an investigation for fabricating confessions on the basis of which an accused had been convicted. The officers had been vindicated by the Police Complaints Authority. Nevertheless, the newspaper published an article suggesting that the police officers had removed fabricated interview notes from a file. The Court of Appeal Criminal Division subsequently allowed the accused's appeal against conviction on a reference under s.17(1)(a) of the Criminal Appeal Act 1968. The Court of Appeal had ordered disclosure to the accused, for use at the hearing of the reference, of all documents in the possession of the Police Complaints Authority. These documents included statements taken from witnesses to whom assurances had been given that the statements would not ordinarily be used otherwise than for the investigation of the complaint against the police officers or for any criminal or disciplinary proceedings that might follow. These documents proved vital to the success of the appeal. Following the quashing of the conviction, the newspaper applied to the Court of Appeal for an order that the accused be released from his undertaking to the court (not to use the documents disclosed to him for any other purpose) in order to enable him to release the documents to the newspaper for it to use to advance a defence of justification which it had not previously been in a position to plead, The newspaper asked to be permitted to use the documents in this way in the expectation that admissible evidence would become available to support the plea of justification at the trial of that libel action. The accused represented the newspaper's only possible source of the documents at that stage. If it obtained the documents, it expected to sub-poena the Police Complaints Authority. The Court of Appeal noted that the documents were ones clearly recognised on authority to be subject to a PII claim (as the law was understood to be at that time), which was a further basis (in addition to the implied undertaking) for the newspaper not being entitled to see or use the documents.
58. The Court of Appeal acceded to the newspaper's application. In the passage cited by Lord Woolf in *Wiley* at p303, Lord Taylor explained the court's reasons for permitting the accused to provide the documents to the newspaper in the circumstances of that case: "it seems to us nothing short of absurd to suppose that those who cooperated in

this investigation - largely other police officers and court officials - will regret that cooperation, or that future generations of potential witnesses will withhold it, were this court now to release the documents to [the newspaper] to enable them to defeat, if they can, an allegedly corrupt claim in damages."

59. In the present case the position is different: those who cooperated in the investigation of Mr Hunt, whether members of the public or police officers, might well not be willing to accept the release of the .information concerning themselves to Mr Hunt. I am ready to assume that, as in *Coventry,* many if not all of them would wish that the allegedly corrupt claim for libel by Mr Hunt be defeated. If the information recorded in the disputed documents is correct, the claim is corrupt. But in their eyes that consideration would surely be overridden by a concern to protect the reputations and private lives of themselves and their families and associates.
60. It seems to me too simplistic to say, as I understand to be the effect of Mr Millar's submission, that, in circumstances where it is impossible for these third parties to be heard in this action, it must follow that the court must hold that the Claimants have failed to discharge the burden of proof upon them of demonstrating the necessity of interference with the Defendants' Art 10 rights.
61. There is thus no issue of law for me to determine under this heading. The only issue is how (if at all) to protect rights the existence of which is not in issue as a matter of law. I shall consider that question below.

ECHR Art 10(1) - THE RIGHT TO FREEDOM OF EXPRESSION

62. Mr Millar submits that the Art 10 rights in issue in the present case are ones to which the court should give a high degree of protection. The subject matter of the Article contributes to public debate of general interest. .It relates. to allegations that Mr Hunt has committed crimes of the utmost gravity, that he has not been brought to justice, and is about to make high profits on a land transaction involving public funds. This is an instance of the press performing the role of watchdog which has been stressed repeatedly in the well known Strasbourg case law cited by Mr Millar, which it is unnecessary for me to refer in this judgment (other than *Castells* v *Spain* (1992) 14 EHRR 445 cited below).
63. Moreover, in the present case Mr Millar submits that the Art 10 right is of the highest importance for a further reason. The use for which the documents and information in question are required is not now the publication or a further article in the press. The use is for TNL to defend itself in the Libel Action, both to prove the truth of what was published in the Article, and, to prove that TNL and Mr Gillard acted as responsible journalists.
64. In *Wiley* at p303 the House of Lords held to be wrong the class privilege previously thought to apply to documents generated by an investigation by the Police Complaints Authority. The reason why in the *Coventry* case the Court was willing to release the confidential witness statements to the newspaper which was being sued for libel was, as cited by Lord Woolf: "to enable them to defeat, if they can, an allegedly corrupt claim in damages".
65. The *Coventry* case thus demonstrates the high importance that the Court attached to a newspaper being able to defeat a libel action being brought against it by persons it had accused of serious crime (police officers in that case). The Court held that the balance of public interest in that case lay in enabling the newspaper to use the documents the subject of a PII claim to defeat the libel claim, if it could.
66. That there is a public interest in the use of information, in particular in the context of the administration of justice, is one of the "three limiting principles" which set the bounds of what is or is not a breach of confidence: *A*-G *v Guardian Newspapers Ltd* [1990] 1 AC 109, 282E-F. Disclosing iniquity is one example, and, as in the *Coventry* case, that principle is engaged in this case. (There is no suggestion that it is engaged in the present case in the more common and direct way, that is to say it is not suggested

that the documents disclose iniquity on the part of the Claimants or of any public official, but only of Mr Hunt, his suspected associates and some of his victims.)

67. While not disputing that the Article is speech which should attract a high degree of protection from the courts, Mr McCormick submitted that protection of the Art 10 right of TNL to freedom of expression would be fully achieved if TNL is permitted to defend itself in the Libel Action by the public interest defence. It is not necessary for the purposes of Art 10 that TNL should be permitted to defend itself by proving the truth of the allegations in the Article, so long as it can defend itself by another defence recognised by English law.
68. Neither side could cite any authority on whether Art 10 entitles a defendant in libel proceedings to defend himself by proving the truth of the allegations complained of in circumstances where the defendant has available an alternative defence.
69. I prefer Mr Millar's submission. The desire of TNL to use the documents in question to prove at trial the truth of the allegations in the Article engages its right under Art 10. In my judgment, to prevent TNL doing that, otherwise than in accordance with Art 10(2), would be a breach of TNL's Art 10 rights, even if it were able to defend itself by another defence, such as *Reynolds* privilege. In any event, at any stage before the end of a libel trial, it may be impossible to know whether a defendant has available to him a defence other than a defence of truth. That will be one of the issues in such a libel trial.
70. TNL's desire to use the documents in the Libel Action is not merely ancillary to its desire to defend the Art 10 right it exercised when it published the Article. The deployment of the documents at trial is itself a form of expression, and a form which should attract a high degree of protection from the courts.
71. I do not cite authority for this conclusion, because none of the cases cited to me by Mr Millar seem to me to be directly in point. But the proposition which I have accepted seems to me to follow from the many well known cases on Art 10 which he did cite. There may be more than one reason why speech should attract a high degree of protection from the courts, but what matters is whether or not the court concludes that the speech in question should attract a high degree of protection. Even where citation of multiple authorities from different strands is proper for an advocate, it may be unnecessary for the court to do the same, once the court has decided that the speech in question should attract a high degree of protection.
72. Moreover, the principle of freedom of expression in proceedings in court is so highly valued by the law that it is given effect to by the defences of absolute (and in some cases qualified) privilege and witness immunity. These principles can be traced back to the origins of the right to a fair trial, which had already been recognised before it was included in Magna Carta in 1215. They were certainly recognised by the sixteenth century (see P Mitchell *The Making of the Modern Law of Defamation,* Hart 2005) and are probably the earliest recognition in English law of the principle of freedom of expression.

BALANCING ECHR Art 10(1) AND RIGHTS UNDER Art 8 AND Art 10(2)

73. There was no dispute between the parties on Mr Millar's submissions on the effect of Art 10(2). It is as explained by Lord Bingham in *R* v *Shayler* [2003] 1 AC 247. At para 23 he said: " ...It is plain from the language of article 10(2), and the European Court has repeatedly held, that any national restriction on freedom of expression can be consistent with article 10(2) only if it is prescribed by law, is directed to one or more of the objectives specified in the article and is shown by the state concerned to be necessary in a democratic society. "Necessary" has been strongly interpreted: it is not synonymous with "indispensable", neither has it the flexibility of such expressions as "admissible", "ordinary", "useful", "reasonable" or "desirable": *Handyside* v *United Kingdom* (1976) 1 EHRR 737, 754, para 48 . One must consider whether the interference complained of corresponded to a pressing social need, whether it was

proportionate to the legitimate aim pursued and whether the reasons given by the national authority to justify it are relevant and sufficient under article 10(2): *The Sunday Times* v *United Kingdom* (1979) 2 EHRR 245, 277-278, para 62.

74. Lord Bingham also gave guidance, at para 26 in *Shayler,* as to the approach of the Strasbourg authorities on the need to preserve the secrecy of state information relating to intelligence and military operations in order to counter terrorism, criminal activity, hostile activity and subversion. He concluded that: "The thrust of these decisions and judgments has not been to discount or disparage the need for strict and enforceable rules but to insist on adequate safeguards to ensure that the restriction does not exceed what is necessary to achieve the end in question. The acid test is whether, in all the circumstances, the interference with the individual's Convention right prescribed by national law is greater than is required to meet the legitimate 0bject which the state seeks to achieve".

75. As to the doctrine of proportionality, Lord Hope gave guidance in *Shayler* at paras 60 and 61:

> "60. The European Court has not identified a consistent or uniform set of principles when considering the doctrine of proportionality: see Richard Clayton, "Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle" [2001] EHRLR 504, 510. But there is a general , international understanding as to the matters which should be considered where a question is raised as to whether an interference with a fundamental right is proportionate.
>
> 61. These matters were identified in the Privy Council case of *de Freitas* v *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 by Lord Clyde. He adopted the three stage test which is to be found in the analysis of Gubbay CJ in *Nyambirai* v *National Social Security Authority* [1996] 1 LRC 64...The first is whether the objective which is sought to be achieved-the pressing social need-is sufficiently important to justify limiting the fundamental right. The second is whether the means chosen to limit that right are rational, fair and not arbitrary. The third is whether the means used impair the right as minimally as is reasonably possible. As these propositions indicate, it is not enough to assert that the decision that was taken was a reasonable one. A close and penetrating examination of the factual justification for 'the restriction is needed if the fundamental rights enshrined in the Convention are to remain practical and effective for everyone who wishes to exercise them."

76. Mr McCormick accepts that the Claimants must meet the standards laid down in *Shayler*. However, Mr McCormick submits that the Order sought by the Claimants in this case is necessary for the prevention of disorder and crime, as well as to protect the rights of others (as discussed above). On the evidence of the Claimants' witnesses, disclosure of the disputed documents to Mr Hunt carries the risk of damaging the functioning of the Claimants, both generally and in relation to Mr Hunt. It is necessary to keep from Mr Hunt information which he does not already have, from which he can learn about the methods of the Claimants and what the Claimants do and do not know about him. It is necessary to keep from him information as to whether he is the subject of current investigations, or not. And disclosure to Mr Hunt in this case will

undermine the confidence of informants generally that their communications to law enforcement agencies will be kept confidential.

77. Finally, the balancing exercise required as between Art 8 and Art 10 is explained in the often repeated words of Lord Steyn in *Re* S *(A Child)* [2005] 1 AC 593 at para 17:

> "...The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell* v *MGN Ltd* [2004] 2 AC 457. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the' specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

78. Mr Millar has found no civil case in which the relationship between Art 6 and Art 8 has been considered by the ECHR. But he submits that the position must be the same as in criminal cases, where the Strasbourg Court has set out the position in *van Mechelen v Netherlands* (1997) 25 EHRR 647. At para 53 the Strasbourg Court cited its judgment in *Doorson v Netherlands* (1996) 22 EHRR 330 at para 70. The jurisprudence requires that the Art 8 interests of non-parties be protected by the national court. The Strasbourg Court there said that "... principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify". The Strasbourg Court said that the convention required that "the handicaps under which the defence labours be sufficiently counterbalanced by the procedures followed by judicial authorities".
79. Those cases were concerned with witness anonymity and the special measures that are available to be taken in a criminal trial where the witness is at risk.
80. Mr Millar submits that, while the court must have regard to the Art 8 rights of the non-parties, in doing so it must balance the Art 6 and Art 10 rights of TNL in the scale. Mr Millar is clearly right to accept that the national courts are required to have regard to the Art 8 rights of non-parties. How the requirements of Art 6 and Art 8 are both to be achieved in a civil action such as this is another matter. As Mr Millar points out, Art 6 is an unqualified right, whereas Art 8 is a qualified right. But in *van Mechelen* the Strasbourg Court does not suggest that that provides a simple answer: namely that Art 6 always prevails. On the contrary, the words cited above include that "the interests of the defence are [to be] balanced against those of witnesses or victims called upon to testify".
81. Further, in *R (Mohamed)* v *Foreign Secretary (No* 2) [2011] QB 218 at para [135], where the court was considering how redaction of a judgment sought on the basis of PII certificates could be reconciled with the principle of open justice (which is also enshrined in Art 6) Lord Neuberger MR referred to the passage in Lord Templeman's judgment in *Wiley* cited above, and said:

> "135 .... where a minister has concluded that the public interest justifies excluding a passage from the open version of a judgment, the court must first consider whether there is anything in the suggestion, and, if there is, then unless the inclusion of the passage would have a grave effect on the public

> interest (in which case that would be the end of the matter), the court must then carry out a balancing exercise ...
>
> 141 ....The first step is to assess the arguments raised in relation to the public interest in the redacted paragraphs being excised; ... The second step is to consider the arguments in favour of publishing the redacted paragraphs. The third step involves striking a balance between the two competing sets of arguments ... "

82. I also note that in relation to the first step referred to in para [141] Lord Neuberger MR had earlier stated in para [135]:

> "In a case such as the present it is salutary to bear in mind what Lord Reid said in the *Conway* case, at p 943g, namely 'cases would be very rare in which it could be proper [for a court] to question the view of the responsible minister that it would be contrary to the public interest to make public the contents of a particular document'. Especially, I would add, when it comes to issues such as national security ... "

83. Serious organised crime, such as both the Claimants and Defendants believe Mr Hunt to be organising, is not an issue of national security in the same way as the issues raise in the *Mohamed* case. But it is very serious indeed.
84. More recently, in *Al Rawi* the Supreme Court held, Lord Clarke dissenting, that a closed procedure could not be used in an ordinary civil claim as a substitute for a PII determination. Lord Mance, with whom Lady Hale agreed, explained how the court conventionally approaches the PII balancing exercise in the civil context (although in that case the court had not yet seen the documents, whereas in this case I have seen them):

> "102...Where a prima facie case of public interest immunity is made out, ... [and] When the court is balancing the competing interests, Cross & Tapper on Evidence, 12th ed (2010), p. 484 suggests, with reference to case law from various common law jurisdictions, that "the court will take into account factors such as the seriousness of the claim for which disclosure is sought, whether or not the government is itself a party or alleged to have acted unconscionably, the relevance of the particular evidence to the dispute, taking into account other possible sources of evidence, and on the other side, the nature of the state's interest, and the length of time that has elapsed since the relevant discussion took place.
>
> 103. Thus, in both a criminal and a civil context, a judge dealing with an issue of PII has necessarily to form a view as to' the relevance of the material for which PII is claimed. This is a fortiori the position if a judge, having concluded that, in the public interest, material cannot be disclosed, goes on to consider whether, as a result, the case has become untriable: see *Carnduff* v *Rock* [2001] EWCA Civ 680, [2001] 1 WLR 1786, below."

85. In *Al Rawi* the Supreme Court accepted that a successful PII claim could indeed make an issue untriable so that the court seized of the case would simply have to refuse to adjudicate upon it. See Lord Mance at [108]:

> " ...In some circumstances, therefore, the court is faced not with a binary choice, between trial with or without the material for which PII has been claimed, but with a trinary choice: the third possibility is no trial at all - whoever happens to be the claimant then has no access to the court at all.
>
> 109. Logically, this third possibility may be capable of feeding back into the decision whether a claim for PII should be allowed. If the effect of a successful claim to PII is that the case will not be tried at all, that introduces a different dimension, which may affect the striking of the balance of competing interests (para 103 above) ..."

86. In the present case there is little that I can do to take into account the possibility that, if I uphold the Claimants' claims, the libel action might become untriable. This is because whether that action will be triable or not will be decided in separate proceedings. But I note that it is a factor, and that if that were to happen, Mr Hunt would contend that that would be an interference with his rights under Art 6 and Art 8. There is a precedent for a libel action being held untriable, although not on PII grounds, but on the ground that it could not be tried without a breach of Parliamentary Privilege: *Hamilton* v *The Guardian,* The Financial Times, July 22, 1995, cited in Gatley on Libel and Slander 11th ed para 13.32.
87. However, *Al Rawi* makes clear that I can take into account the factors set out by Cross & Tapper on Evidence, 12th ed (2010), p. 484. Mr McCormick notes that in this action the Claimants' conduct is not criticised, and the interests raised by the Claimants are ones of high importance. Mr McCormick lays particular stress on "the relevance of the particular evidence to the dispute" and "other possible sources of evidence". As to the relevance of the particular evidence to the dispute, he submits that if the disputed documents add nothing to the defence of TNL, the balance will fall against disclosure. And in any event, it is not yet clear what the dispute in the Libel Action will be, since there is as yet no Amended Defence, still less any Reply, or disclosure by Mr Hunt. As to other possible sources of evidence, he submits that a plea of justification can properly be made by TNL without the use of any of the material now objected to by the Claimants, and that at that point Mr Hunt will be bound to give disclosure of material which would make it unnecessary to override the PII claims made by the Claimants.
88. The parties have agreed in principle that measures that may be taken by a court to meet the requirements of both Art 6 and Art 8 (and Art 2) are those suggested by Lord Woolf in *Wiley* at p307A: "It may be possible to provide any necessary information without producing the actual document. It may be possible to disclose a part of the document or a document on a restricted basis. An assurance may be accepted by counsel. In many cases cooperation between the legal advisers of the parties should avoid the risk of injustice. There is usually a spectrum of action which can be taken if the parties are sensible which will mean that any prejudice due to non disclosure of the documents is reduced to a minimum."
89. Lord Clarke in *Al Rawi* at para 148 also referred to other possible measures which have been considered in the present case, including giving gists of information and making admissions of fact. It remains to be seen what stance Mr Hunt would take on any of these measures.

90. MPS has made considerable efforts in the present case to redact documents, and to offer to permit certain information in a format other than the one in which it is at present recorded, all with a view to offering to permit TNL to use and disclose the unredacted parts of the documents. This is consistent with the approach recommended by Lord Woolf. So far as a number of documents in issue are concerned, the issue I have to decide is whether that partial disclosure adequately reflects the balance required between TNL' s Art 6 rights on the one hand, and the Art 8 and Art 10(2) rights that are to be balanced in this case.
91. Mr Millar submits that the Claimants have not made proposals that go beyond redactions. That may have been so up to a point, but in his closing submissions Mr McCormick did indicate that in relation to certain information, MPS is prepared to give a gist in some instances.
92. Mr Millar made further submissions as to inferences I should draw from the fact that the Claimants did not commence proceedings when the Article was published, but waited a month to elapse from the time when the first five of the disputed documents had been disclosed to them by TNL in December 2010. He submitted that that conduct does not suggest that the Claimants considered that the rights they now seek to enforce were serious or urgent matters. I reject that submission. There was little exploration of this point in the evidence. In any event, I prefer to judge the seriousness or otherwise of the disputed matters from the evidence directed to that point, and find little assistance in the inference sought to be drawn from the fact that the Claimants did not bring these proceedings earlier.
93. In the light of the foregoing principles, Mr Millar submitted that on the evidence before this court, there is nothing to give rise to any balancing exercise. The Defendants dispute that the Claimants' evidence even begins to establish a grave effect on the public interest (as required in *Mohamed),* and does not address in the detail required for a valid PII claim the factors set out in Art 10(2) which might in principle provide a justification for the interference with the Defendants' right freedom of expression under Art 10(1). I shall return to this below.

WHAT CONSTITUTES A BREACH OF CONFIDENCE?

94. For there to be confidentiality in law the information in question must have certain qualities: it must have the necessary quality of confidence, it must not be trivial, and it must not be in the public domain. There is no issue as to these matters. In the present case Mr McCormick submits that the documents came from a source which was obviously subject to confidentiality, and confidentiality arises in relation to: "(1) individual pieces of information which are not known widely or at all outside the Claimants or other similar agencies; (2) information which the Claimants do not know; (3) the totality of the information held by the Claimants (including information which is widely available outside the Claimants); (4) the analysis of the information held by the Claimants".
95. The Claimants need to control the extent to which the information which they hold (or do not hold) on persons such as Mr Hunt is known. The same applies to how that information is co-ordinated to provide an overall intelligence framework and any approach to future investigations. SOCA considers this to be particularly important given its specific remit.
96. Accordingly, he submits that, given the circumstances in which the documents were received, each of the Defendants is bound by the same duty of confidence as the source or confidant who leaked the documents.
97. Mr Millar submits that there is no settled test in the law of confidence by which the scope of the equitable obligation of confidence is to be assessed (put differently, how misuse is to be judged). There is an analysis by Simon Brown LJ in *R* v *Department of Health, ex parte Source Informatics Ltd* [2001] QB 424 at [24] - [30] of how different courts have approached this issue. In that case the court was concerned with the use to

which pharmacists could put information derived from patients' prescriptions, and in particular whether if could be used in anonymised form for sale to the applicants, and by them to pharmaceutical companies. The court held that it could be so used. Simon Brown LJ held at para [31] that: "... the confidant is placed under a duty of good faith to the confider and the touchstone by which to judge the scope of his duty and whether or not it has been fulfilled or breached is his own conscience, no more and no less. One asks, therefore, on the facts of this case: would a reasonable pharmacist's conscience be troubled by the proposed use to be made of the patients' prescriptions?"

98. In *London Regional Transport* v *Mayor of London* [2003] E.M.L.R. 4 Sedley LJ at [53] considered the case where the recipient of the information is exercising his/her ECHR Art 10 right to impart information in the public interest. Here, he said, both the common law and the Strasbourg law recognise "the propriety of suppressing wanton or self-interested disclosure of confidential information; but both correspondingly recognise the legitimacy of disclosure, undertakings notwithstanding, if the public interest in the free flow of information and ideas will be served by it...."

99. He suggested that the test involving the imaginary reasonable recipient's conscience might be bettered in this situation by postulating: "a recipient who being reasonable, runs through the proportionality checklist [ie under ECHR Article 10] in order to anticipate what a court is likely to decide, and who adjusts his or her conscience and conduct accordingly".

100. Mr McCormick submits that the analysis of Sedley LJ in *LRT* was obiter, and that the test of Simon Brown LJ, namely conscience, is different, and is the applicable test.

101. Mr McCormick submits that on that test the cause of action for breach of confidence was complete when Mr Gillard looked at the leaked documents. He cites *Imerman* v *Tchenguiz* [2011] 2 WLR 592 at para [72]: "If a defendant looks at a document to which he has no right of access and which contains information which is confidential to the claimant, it would be surprising if the claimant could not obtain an injunction to stop the defendant repeating his action, if he threatened to do so. The fact that the defendant did not intend to reveal the contents to any third party would not meet the claimant's concern: first, given that the information is confidential, the defendant should not be seeing it; secondly, whatever the defendant's intentions, there would be a risk of the information getting out, for the defendant may change his mind or may inadvertently reveal the information."

102. Mr McCormick submits that there is evidence of the state of the Defendants' consciences from the manner in which they have behaved. They initially refused to admit that there were a further five leaked documents. In my judgment there is no conflict between what Brown LJ said in *Source Informatics* and what Sedley LJ said in *LRT*. Sedley LJ's approach is .consistent with what Lord Goff said in *A-G* v *Guardian (No* 2) [1990] 1 AC 109, 283A-B, and 283G-284A. Lord Goff envisaged that the recipient of apparently confidential information would carry out "such investigations as are reasonably open to" him and that the test of whether there could be an interference with freedom of speech with a view to preserving confidentiality would be that of necessity and proportionality under Art 10(2).

103. Conscience for the purposes of the law of equity denotes an objective standard of right and wrong, as understood by the reasonable person: If the court were obliged to give effect to any view claimed to be an expression of conscience, it would not be law but anarchy. That the test is objective appears not only from Lord Goff's analysis, but also, and more explicitly, from the discussion in *Royal Brunei Airlines Sdn Bhd* v *Tan* [1995] 2 A.C. 378 of a different equitable

concept, namely liability for assisting a breach of trust. That turned on what was "unconscionable" conduct. Lord Nicholls recalled at p392 that: "Unconscionable is a word of immediate appeal to an equity lawyer. Equity is rooted historically in the concept of the Lord Chancellor, as the keeper of the Royal Conscience, concerning himself with conduct which was contrary to good conscience. If unconscionable means no more than dishonesty, then dishonesty is the preferable label."

104. The House of Lords preferred in the context of that case to substitute the word dishonesty. A breach of confidence may also involve dishonesty. Those who seek to gain personally from using or selling the commercial or private information of their employers or partners are in some cases acting dishonestly (eg *G & G* v *Wikimedia Foundation Inc* [2009] EWHC 3148 (QB) and *DFT* v *TFD* [2010] EWHC 2335 (QB), where the claims were that confidential information was being used for the purposes of blackmail). And what Lord Nicholls said of dishonesty applied equally to any other form of unconscionable conduct. Lord Nicholls explained the concept at p389:

> "acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstances. This is an objective standard. At first sight this may seem surprising. Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is a description of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. .... However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual."

105. At p390-391 Lord Nicholls said:

> "The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance" flatly, decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct. Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party, such as his experience and intelligence, and the reason why he acted as he did."

106. In summary, the law of confidentiality is a part of the law of equity. In equity conscience is not the equivalent of a personal judgment or preference, however deeply held. Conscience sets an objective standard that must be met by everyone. In this context I would take as the relevant meaning of "conscience"

(as given in the OED): "the faculty or principle which pronounces upon the moral quality of one's actions or motives, approving the right and condemning the wrong". The law requires that people should inform themselves of what is right and wrong, or at least that they should be judged by the standards of a person who has done that, even if they themselves have not. In cases where it is questions of honesty that are raised, the standard will be that of the reasonable person as described in *Royal Brunei*. In cases which engage Convention rights, the primary source of what is right and wrong is the requirements of the Convention rights engaged. That is an objective test, although there is a subjective element. On some questions there may be only one possible answer a reasonable person can give. On other questions there may be a range of answers within which reasonable people can differ. That a fact may be objectively true or false, or an action objectively right or wrong, does not imply that it is always easy to ascertain which of the two alternatives it is. But difficulty of ascertaining a right answer does not mean that there is no right answer, but only opinions. Nor does it mean that the court must give equal respect to all views as to what the answer is.

107. 106. As it is put by Toulson and Phipps on Confidentiality (2006 edition) para 6-035: " ... it is for the court to rule on the legal criteria which govern the question whether and in what circumstances public interest may justify disclosure. Within those criteria, a person should not be held to have acted unconscionably if their decision was reasonable".

108. 107. That passage follows a discussion of two cases: *Woolgar* v *Chief Constable of Sussex Police* [2000] I WLR 25 (a public law case) and *W* v *Egdell* [1990] 1 Ch 359 (a private law case).

109. In *Woolgar* the plaintiff sought an injunction to restrain the police from disclosing to the regulatory body for nursing the transcript of a confidential interview with a nurse. Kennedy LJ (with whom the other members of the court agreed) considered that a decision whether to disclose confidential information was a matter for the police, subject to judicial review of whether their view was reasonable. He said at p36H:

> "Even if there is no request from the regulatory body, it seems to me that if the police come into possession of confidential information which, in their reasonable view, in the interests of public health or safety, should be considered by a professional or regulatory body, then the police are free to pass that information to the relevant regulatory body for its consideration. Obviously in each case a balance has to be struck between competing public interests, and at least arguably in some cases the reasonableness of the police view may be open to challenge."

110. In *Egdell* the plaintiff applied to a mental health review tribunal, and to support his application for a transfer to a regionally secure unit he sought a report from the defendant as an independent consultant psychiatrist. The defendant did not accept the view that the plaintiff was no longer a danger to the public. Concerned that the report should be known to those treating the plaintiff, the defendant disclosed the report to the medical officer and copies were subsequently sent to the Secretary of State and the Department of Health and Social Security. He did this without the consent of the plaintiff, who claimed it was a breach of professional duty of confidentiality. The claim and appeal were dismissed on the basis that, exceptionally in the case of a doctor/patient relationship, the public interest overrode the plaintiff's private right.

111. The passage in *Egdell* cited by Toulson and Phipps is from the judgment of Bingham LJ, as he then was, at p 422: "Where, as here, the relationship between doctor and patient is contractual, the question is whether the doctor's disclosure is or is not a breach of contract. The answer to that question must turn not on what the doctor thinks but on what the court rules. But it does not follow that the doctor's conclusion is irrelevant. In making its ruling the court will give such weight to the considered judgment of a professional man as seems in all the circumstances to be appropriate."

112. In para 6-035, immediately before the passage already cited, the editors of Toulson and Phipps considered that the fact that these two cases were adjudicated under public law and contract law respectively would not be a satisfactory basis for drawing a distinction between the tests to be applied in the two. They wrote: "In considering whether the interests of public health or safety should permit a doctor or the police to disclose information in given circumstances importing an. obligation of confidentiality, without the consent of the person to whom the obligation is owed, it does not seem satisfactory to draw a distinction according to whether there was an underlying contract."

113. The editors of the second edition of the The Law of Privacy and the Media (OUP 2011) para 12.215 suggest that assistance may be derived from *Bolam* v *Friern Barnet Management Commmittee* [1957] 1 WLR 582. Although that was not cited in *Woolgar* or *Egdell,* the words in *Egdell* "considered judgment of a professional man" may be an implicit reference to the test recognised in *Bolam:* standards of professional negligence are measured by reference to responsible body of professional opinion. If so, the opinion of the doctor that the plaintiff was dangerous was a matter of clinical judgment, but the decision whether or not it was right to disclose that opinion without the plaintiff's consent was not. It was a matter for the doctor's conscience. Nevertheless, the court would give weight to the doctor's judgment.

114. But whether or not Bingham LJ had in mind the *Bolam* test, and a fortiori if he did not, the court in *Egdell* was giving respect to the conscience of the doctor, just as the court did, in stronger terms, in *Woolgar*. For the court to do that is to give effect to the fundamental right to freedom of thought and conscience (guaranteed by HRA s.13 and Art 9: "Everyone has the right to freedom of thought, conscience and religion") as well as to the right of freedom of speech guaranteed by Art 10. If the court is to give effect to these rights it must (as with all Convention rights) do so generously, that is it must give a generous interpretation of what a reasonable person may believe to be right or wrong. As the court said in *Handyside* v *UK* (1979-80) 1 EHRR 737 at [49]: "Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'". To do otherwise could be to require the court to make decisions which are properly in the realm of professional people, such as police officers and doctors and editors and journalists. In some cases it could be to make the law an instrument for enforcing uniformity of thought.

115. Respect for the subjective judgment of the person disclosing personal information for the purpose of journalism is also required by the Data Protection Act 1998, s.32. That legislation gives effect to Art 8, and to Directive *95/46/EC,* neither of which are related to the equitable doctrine of conscience. S.32 (1)(b) and (c) provide: "(1) Personal data which are processed only for the special purposes [defined in s.3 as journalism, literature and the arts] are exempt from any provision to which this subsection relates if- (a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material, (b) the data controller *reasonably believes that,* having regard in particular to the special importance of the public· interest in freedom of

expression, *publication would. be in the public interest,* and (c) the data controller *reasonably believes that,* in all the circumstances, compliance with that provision is incompatible with the special purposes". (emphasis added)

116. The HRA s.12(4) is to a similar effect. It requires the court to have regard to relevant privacy codes, and the relevant code in this case is the PCC Code. That requires the editor to demonstrate that he reasonably believed that publication would be in the public interest. Under the heading Public interest that includes:

> "3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest."

117. Accordingly, the evidence of how the Defendants have in fact acted in this case may be one factor, since it may demonstrate their subjective state of mind. But in this case the evidence from which I prefer to judge the past or intended actions of the Defendants is the considered judgment of the Defendants as explained in evidence, to which the court must give such weight as seems in all the circumstances to be appropriate, having regard also to the range of judgments open to a reasonable person to give in all the circumstances of the case.

118. Eady J in *Mosley v News Group Newspapers Ltd* [2008] EMLR 20, [2008] EWHC 1777 (QB) at paras [136] to [141] considered this question. At para [137] he said:

> "Even though I concluded that this was not the case, should some allowance be made for a different view on the matter? The answer is probably in the negative, because it is only the court's decision which counts on the central issue of public interest.
>
> [137] It might seem reasonable to allow in this context for some difference of opinion. I cannot believe that a journalist's sincere view on public interest, however irrationally arrived at, should be a complete answer. A decision on public interest must be capable of being tested by objectively recognised criteria. But it could be argued as a matter of policy that allowance should be made for a decision reached which falls within a range of reasonably possible conclusions. Little was said in submissions on this aspect of the case.
>
> [138] It would seem odd if the only determining factor was the decision reached by a judge after leisurely debate and careful legal submission - luxuries not available to a hard-pressed journalist as a story is breaking with deadlines to meet. Obviously, on the other 'hand, the courts could not possibly abdicate the responsibility for deciding issues of public interest and simply leave them to whatever decision the journalist happens to take."

119. His conclusion that the opinion of the journalist and editor were irrelevant was clearly a tentative one; and obiter. Although the case was one of confidentiality, and not just privacy alone, he did not receive much in the way of submissions on this aspect of the case.

120. In my judgment Mr McCormick cited para [72] of *Imerman* out of context. First, that case concerned a claim by a private individual, not a claim by a public authority (see para 15 above). Second, those words were included in the section of the judgment headed "The relief to be granted where there is a breach of confidence". In para [69] the court made clear that those words are to be understood in the context where there is no defence (or limiting principle): "In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and. were (or ought to have been) appreciated by the defendant to be, confidential to the claimant. It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence. It seems to us, as a matter of principle, that, *again in the absence of any defence on the particular facts,* a claimant who establishes a right of confidence in certain information contained in a document should be able to restrain any threat by an unauthorised defendant to look at, copy, distribute any copies of, or to communicate, or utilise the contents of the document (or any copy), and also be able to enforce the return (or destruction) of any such document or copy." (emphasis added)

121. It follows that whether or not I accept Mr McCormick's submission that the Claimants have a complete cause of action against the Defendants based on the past and threatened use of the documents must depend on the conclusion I reach in relation to each disputed item of information. If there is information as to which no limiting principle applies, then the cause of action will be complete. If there is information as to which there is an applicable limiting principle, there is no cause of action at all: the claim will fail. If there is information as to which there may be an applicable limiting principle (but it is not yet clear), the relief granted must reflect that conclusion.

BREACH OF CONFIDENCE AND LEAKS TO JOURNALISTS

122. Mr Millar submits that the position of a journalist to whom confidential information is leaked is different from that of the person who leaks the information. First, the journalist does not have a contractual or other relationship with the body or person from whose files the document is taken (in this case MPS and SOCA) such as an employee who is leaking a document will have. So unless the journalist has engaged in some wrongdoing in order to obtain the document (such as bribing the custodian of the document, or deceiving him, or breaching the Official Secrets Acts), the journalist's position is to be determined only under the general law of confidentiality and data protection, and not under any contract. He cites *Merseycare NHS Trust* v *Ackroyd* [2006] E.M.L.R. 12 para [155].

123. The point is better expressed by Lord Donaldson MR in *A-G* v *Guardian Newspapers (No 2)* [1990] 1 AC 109 at p183B, to which Mr McCormick referred. Lord Donaldson MR accepted that "a newspaper's duty is not necessarily co-terminous with that of its informant, the confidant". The reason he gave related to the specific facts of that case, but would apply to a greater or lesser extent in other circumstance. In that case the confidant was Mr Wright, a former member of the Security Service, and special provisions applied. Lord Donaldson expressed the reason as follows: "because newspapers, unlike members of the service, have not voluntarily submitted themselves to a virtually all embracing regime of secrecy".

124. In the present case, it seems likely that the confidant or informant was a member or former officer of MPS or SOCA. I assume that officers have voluntarily submitted themselves to a regime of secrecy which is not in any relevant respect

significantly less all-embracing than that applying to members of the Secret Service.

125. Further Mr Millar submits that the journalists are recognised in the ECHR jurisprudence as having the role of watchdog which is necessary to the proper functioning of a democracy under the rule of law.

126. Mr McCormick submits that, as Lord Donaldson MR went on to explain at p 183D-F, it is an error to suppose that "newspapers have a special status and special rights in relation to confidential information, which is not enjoyed by the public as a whole. ... the existence of a free press ... is an essential element in maintaining parliamentary democracy and the British way of life as we know it. But it is important to remember why the press occupies this crucial position. It is not because of any special wisdom, interest or status enjoyed by proprietors, editors or journalists. It is because the media are the eyes and ears of the general public. They act on behalf of the general public. Their right to know and their right to publish is neither more nor less that of the general public. Indeed it *is* that of the general public for whom they are trustees".

127. Lord Donaldson's explanation of the law as expressed in that passage is entirely consistent with the law since the passing of the HRA. The Art 10 right to freedom of expression is a right that is given to all people. There is no special Convention right for proprietors, editors or journalists. Thus the Contempt of Court Act 1981 s.10, which is relied on so often by journalists (and is relied on by Mr Gillard in this case) makes no distinction between journalists and others: it simply refers to a publication for which a person is responsible. It provides: "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

128. By ss.19 and 2(1) of that Act, "for this purpose "publication" includes any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public".

129. However, there is a distinction between different types of speech, and different roles that people may play, which is not captured by Lord Donaldson's statement of the law. That is the distinction between the activity of journalism and other forms of expression, albeit that any form of expression may be made by anyone, and there is no special status of being a journalist.

130. In the past, in order to communicate with the public at large, it was necessary to have access to the costly equipment associated with printing on paper, or broadcasting through radio and television. It was therefore possible in most cases to identify the activity of journalism with the activities of those who were engaged professionally as proprietors, editors, broadcasters and journalists. What the internet has done is to enable any member of the public to communicate directly with the rest of the public at large at almost no cost. So the difference today is that the activity of journalism can in practice be carried on by amateurs who do not need professional publishers or broadcasters, and it is in fact carried on by amateurs in that way to an increasing extent. Today it is very difficult, if not impossible, to distinguish the activity of journalism from simple self-expression by reference only to the medium through which the communication to the public is made. The distinction between journalism and mere self-expression must be made on the basis of the nature of the speech in question.

131. Although journalists enjoy no special status or rights in law, the activity of journalism does. Journalism is given a special status in a number of English statutes, including the Police and Criminal Evidence Act 1984 ss.9 and 13. For example, in the Data Protection Act 1998 (which is relied on in this case by the Claimants) s.32 is headed "Journalism, literature and art". The section recognises Art 10 rights and makes special provision where the processing of data "is undertaken with a view to the publication by any person of any journalistic, literary or artistic material".

132. It is to be noted that the statute refers to "journalism" and "journalistic material", and not to "journalists". This is consistent with the Strasbourg jurisprudence. That distinguishes between types of speech rather than types of speaker. The type of speech to which it gives most protection is that which is directed to informing public debate (or, as it sometimes put, imparting information and ideas on political questions and on other matters of public interest). It is that type of speech which is referred to by a figure of speech as "the press", or as journalism, in that body of case law. The Strasbourg jurisprudence does not look to the form in which the speech is published, and, if it is in a particular form, categorise it as journalism even if its content is no more than gossip which does not inform public debate.

133. Thus in *Castells v Spain* (1992) 14 EHRR 445 the Court considered a statement made by Mr Castells in an article published in a weekly magazine. Mr Castells was not a professional journalist. He was a lawyer and a senator. But he was in this instance carrying on the activity of journalism. The Court repeated what it has said in many other cases, namely:

> "43. In the case under review Mr Castells did not express his opinion from the senate floor, as he might have done without fear of sanctions, but chose to do so in a periodical. That does not mean, however, that he lost his right to criticise the Government. In this respect, the pre-eminent role of the press in a State governed by the rule of law must not be forgotten. Although it must not overstep various bounds set, inter alia, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest (see, mutatis mutandis, the *Sunday Times* v. *The United Kingdom* judgment of 26 April 1979, Series A no. 30, p. 40, para. 65, and the *Observer and Guardian* judgment, cited above, Series A no. 216, p. 30, para. 59 (b)). Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society (see the *Lingens* v. *Austria* judgment of 8 July 1986, Series A no. 103, p. 26, para. 42)."

134. Art 10, and s.10 of the Contempt of Court Act 1981 are amongst the best known examples of the special' status given by the law to journalism. Those provisions are designed to enhance the freedom of the press by protecting journalistic sources, and that includes sources who may have acted unlawfully in leaking information: *Ashworth* para [38]. As the Strasbourg Court said in *Financial Times* v UK (2010) 50 EHRR 46, [2010] EMLR 21:

> "59 ... Furthermore, protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital 'public watchdog' role of the press may be undermined and the ability of the press to provide accurate and reliable reporting may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect that an order for disclosure of a source has on the exercise of that freedom, such a measure cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest (see *Goodwin,* cited above, § 39). …
>
> 63 ... While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose and disclosed intentionally falsified information, courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. In any event, given the 'multiple interests in play, the Court emphasises that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 § 2".

135. In the present case I accept Mr Millar's submission that both the Article itself, and the proposed use of the confidential material in the Libel Action, are types of journalism and speech to which the law must afford protection of a high order.

136. Where speech is of that highly protected type, then the reasonable journalist who receives information from a confidential source will have that weighty factor to put into the scale on the side in favour of publication. If there is nothing more weighty to put into the other side of the scale, and in all the circumstances the balance falls in favour of publication, then publication will not be a breach of confidence on the part of the journalist. A fortiori it will not then be a breach of confidence for the journalist to have looked at the confidential information.

137. In the *LRT* case, the issue before the court was whether publication of a report by Deloittes was likely to be a breach of confidence. The effect of the redactions made to Deloittes' report in that case, together with the limiting principle of the public interest in the disclosure to the public of the balance of the report, was that it was held that such disclosure was not a breach of confidence. Robert Walker LJ, as he then was, at para 36 of his judgment, cited with approval this passage from Toulson and Phipps on Confidentiality (1996 edn) para 6-11: " the true principle is not (as dicta in some cases suggest) that the court will permit a breach of confidence whenever it considers that disclosure would serve the public interest more than non-disclosure, but rather that *no obligation of confidence exists in contract or in equity,* in so far as the subject matter concerns a serious risk of public harm (including but not limited to cases of 'iniquity') and the alleged obligation would prevent disclosure appropriate to prevent such harm." (emphasis added)

138. That passage is framed by reference to the public interest in preventing harm. But it must apply equally to any other form of public interest that qualifies as a limiting principle to confidentiality.

139. In the present case the question whether or not publication of the Article was in the public interest is an issue in the Libel Action. If TNL cannot establish either of its defences of truth or public interest *(Reynolds)* privilege, then that might have consequences for the answer to the question originally raised in this action, namely whether the publication of the Article was a breach of confidence.

140. As things have developed, the Claimants do not now ask me to answer the question whether the publication of the Article was a breach of confidence, and there is no threat of the Defendants making any further publication of the documents or information in question, other than in pursuit of TNL's defence in the Libel Action. It seems to me that the question whether it is in the public interest that TNL be allowed to deploy all relevant evidence in its defence to the Libel Action is different from the question whether it was in the public interest for TNL to publish the Article. It is normally in the public interest that a defendant should be permitted to deploy all relevant evidence in its defence to a claim, whether or not the defence ultimately succeeds.

THE PUBLIC DOMAIN

141. The Defendants contend that there is no breach of confidence so long as they do not put information into the public domain, and that they do not intend to use any confidential material in the future defence of the Libel Action in a way that will place it in the public domain. The extent to which any particulars or evidence advanced by them in that action will be put in the public domain will be a matter for the judge in that action. The judge has powers to control this by sitting in private or making any other necessary derogation from the principle of open justice. On this point alone, submits Mr Millar, the Claimants' claim fails.

142. Mr McCormick submits that the power of the judge in the Libel Action to derogate from open justice does not meet the point at all. He submits that the member of the public to whom the confidential information will first be communicated is Mr Hunt himself. And if Mr Hunt is the criminal that the Defendants say he is, then it is unreal to trust to him to preserve the confidentiality of the information which is disclosed to him, notwithstanding that he may receive that information with implied undertakings which are imposed on all litigants.

143. I have no hesitation in accepting Mr McCormick's submissions. Mr Hunt is high on the list of members of the public from whom the Claimants wish to keep the information and documents in question. Derogations from open justice once he has received the information will not maintain the confidentiality of the information in the context of this case, if Mr Hunt is the head of an OCG as both the Claimants and the Defendants believe him to be.

144. Mr McCormick goes further, and suggests that it is to the advantage of Mr Hunt to bring the Libel Action if he can thereby discover what the Claimants know, or do not know, about him. From this it is to be inferred, together with the assumption that the Claimants and the Defendants are both correct in their belief that he is the head of an OCG as the Article alleges him to be, that the motive for Mr Hunt in bringing the Libel Action is not to clear his name, but to discover what the Claimants do and do not know about him.

145. It is impossible for me to adopt this interpretation of events on the material before me, and without hearing Mr Hunt.

WHETHER THE CLAIMANTS SHOULD HAVE BROUGHT SEPARATE PROCEEDINGS

146. Mr Millar submits that the Claimant should not have brought these collateral proceedings, but should instead have raised the issues in the Libel Action. He refers to a passage in *Wiley* at p306 where Lord Woolf said: "Because it may be necessary to weigh the conflicting public interests for and against disclosure, the balance between which will vary from case to case, it is preferable, where possible, that the issue of the status of the documents and their contents should be determined, where this is necessary, in the actual proceedings in which they are relevant. The relationship between the respective public interests may vary as the case proceeds to trial and even during the trial and it can complicate the determination of the issue for it to be dealt with in separate proceedings."

147. By CPR Part 32.1 the court was given a power to exclude evidence that would otherwise be admissible. Mr Millar submits that the Claimants could have made an application under that rule: see *Imerman* at paras [170]-[171]. If they had done so, then the court would have had to balance the various Convention rights engaged. The rights engaged were in that case Art 6 (the wife's right to a trial with all the available evidence and the husband's argument that a trial using documents wrongfully obtained from him would be unfair), Art 8 (the husband's right to respect for the privacy of his documents which the wife had wrongfully obtained) and Art 10 (in that case the wife's right to say what she wanted to say in the litigation).

148. Mr Millar submits that by bringing these proceedings the Claimants may be seeking to avoid the need rigorously to undertake the exercise described by Lord Woolf in *Wiley* and Lord Clarke in *Al Rawi*.

149. Mr McCormick submits that these proceedings are properly brought, for a number of reasons, including the following. The Claimants are still seeking injunctive and other relief which would not be available to them as interveners in the Libel Action. They would not have had the right to disclosure of documents which has enabled them to receive disclosure of the further five documents in this case which were only disclosed in April 2011. The Defendants had declined an invitation to produce any further confidential documents when that invitation had been made by letter dated 6 January 2011 immediately following receipt by the Claimants of TNL's draft Amended Defence. There would be difficulties in the Claimants intervening in the Libel Action, because Mr Hunt would be entitled to see all material shown to the judge in that action. The, Claimants acknowledged in their skeleton argument for this trial that any injunctive relief should be subject to permission to the Defendants to apply to the court for a variation in the event that it were to appear that TNL would suffer prejudice in the Libel Action which had not been demonstrated, or considered, in this action.

150. Mr McCormick points out that in *Wiley* the applicant for judicial review was also the person who was plaintiff in the proceedings for damages and that the same person was respondent in the judicial proceedings and defendant in the claim for damages. It was in that context that Lord Woolf made the remarks he did. He also cites a line of cases where such collateral proceedings have been brought, best known by reference to *Lord Ashburton v Pape* [1913] 2 Ch 469.

151. In that case the parties to the collateral action were the same as the parties to the substantive action. The substantive action was for debt. The defendant to each action had obtained documents which were subject to the plaintiff's legal professional privilege. The court granted an injunction restraining the defendant from using the documents. At p473 Lord Cozens-Hardy MR referred to *Calcraft v. Guest* [1898] 1 QB 759 as authority for the proposition: "that if a litigant wants to prove a particular document which by reason of privilege or some circumstance he cannot furnish by the production of the original, he may

produce a copy as secondary evidence although that copy has been obtained by improper means, and even, it may be, by criminal means."

152. But the court went on to hold that that was no answer to the claim for an injunction in collateral proceedings.

153. Nevertheless, I accept that in principle Lord Woolf's remarks could apply to a case where one of the parties to the collateral proceedings is not a party to the substantive action (the Libel Action in this case). The advantages would be the same as those he set out in *Wiley*.

154. On the other hand, there are good reasons for collateral proceedings in this case: the Claimants are claiming relief which they could not claim by intervening in the Libel Action (injunctions and delivery up), they became entitled to disclosure from the Defendants, and there is avoided any difficulty that might arise from the fact that Mr Hunt might have a standing in the Libel Action which he does not have in this action.

155. Mr Hunt has already through counsel objected to the same judge hearing this action and the Libel Action. That objection has not been the subject of a ruling. But if the Claimants were to have intervened in the Libel Action, they would have required that their application be heard in private, and in the absence of Mr Hunt. Even if that would be possible (as to which I express no view), an application to exclude Mr Hunt would face an obstacle in the principle that both parties to an action should be informed of anything that is communicated by either of them to the judge. As Lord Neuberger MR said in *Al Rawi* [2010] 3 WLR 1069, [2010] EWCA Civ 482 at para 14: "Under the common law, a trial is conducted on the basis that each party and his lawyer sees and hears all the evidence and all the argument seen and heard by the court."

156. If the judge decided to exercise his power to exclude admissible evidence, then he would have seen it or have been told the gist of it, and Mr Hunt would not know all that the judge had been told. In the context of the present case Mr Hunt puts forward an argument that the trial would then be unfair, as already submitted on his behalf by Mr Tomlinson (but not yet ruled upon).

157. In my judgment, although little turns on the point, the Claimants cannot be criticised for bringing these proceedings. First, the relief originally claimed included much that could not have been claimed by them in the Libel Action. Even now, after the claim has been narrowed, the claim for delivery up of documents on the footing that they contain confidential information, could not have been advanced if the Claimants had merely been respondents in the Libel Action to an application for third party disclosure. And in the course of this action the Claimants have obtained sight of the further five documents produced on disclosure, which they would not have obtained but for that procedure in this action.

158. Further; there is no knowing what course the Libel Action will take. If the Claimants are right to seek to protect the Convention rights of the individuals named in, or identifiable from, the documents, and to protect confidential information about their methods and other matters for the purposes referred to in Art 10(2), then the proper way of doing that is for them to bring these proceedings, as they have done. It is proper to restrain the use of the information (if the Claimants are entitled to that relief) whether the Libel Action proceeds or not.

159. Finally, there is a practical solution to the problem which Mr Millar submits should have led to the Claimants intervening in the Libel Action. If there are documents or information in this case which I decide can never be used by TNL in the Libel Action, then that is an end of the matter so far as this court is concerned, and there is no problem that would have been better resolved by an

application in the Libel Action. But if there are documents or information about which my decision may not be final, for the reasons given by Lord Woolf in *Wiley* (the relationship between the respective public interests may vary as the case proceeds to trial and even during the trial), then any order that I make in these proceedings need not be final (in the sense that it cannot be varied by this court). Any order that I make can be subject to a provision which permits the parties to bring the matter back to the court, either to the judge trying this action or to the judge trying the Libel Action, as may be appropriate, and thus to afford the parties the flexibility which Mr Millar .submits could only be achieved by the Claimants intervening in the Libel Action.

160. This is a course which the Claimants have themselves suggested.

LEGAL PROFESSIONAL PRIVILEGE

161. Mr McCormick submits that the court can, and ordinarily should, restrain the use in legal proceedings of a document which is covered by legal professional privilege on the basis of the law of confidentiality. He cites a recent case in the *Ashburton* v *Pape* line, *ISTIL Group Inc* v *Zahoor* [2003] EWHC L65 (Ch). Lawrence Collins J, as he then was, summarised the privilege as follows at para [52]: "Although there are obvious cases of overlap, a distinction is normally drawn between legal advice privilege (sometimes called simply legal professional privilege) and litigation privilege. The former extends to all communications between the client and the client's legal adviser for the purpose of obtaining or giving legal advice. The privilege exists whether litigation is anticipated or not. Litigation privilege attaches to communications which come into existence with the dominant purpose of being used in aid of pending or contemplated litigation".

162. 161. Lawrence Collins J cited *R v. Derby Magistrates' Court, ex parte B* [1996] AC 487, 507 where Lord Taylor of Gosforth CJ said that legal professional privilege is "much more than an ordinary rule of evidence .... It is a fundamental condition on which the administration of justice as a whole rests."

163. He then said in his conclusions as to the law:

> "93. Fifth, there is nothing in the authorities which would prevent the application of the rule that confidentiality is subject to the public interest. In this context, the emergence of the truth is not of itself a sufficient public interest. The reason why the balancing exercise is not appropriate is because the balance between privilege and truth has already been struck in favour of the former by the establishment of the rules concerning legal professional privilege: see *The Aegis Blaze* [1986] 1 Lloyd's Rep 203, 211; *R v. Derby Magistrates Court, ex parte B* [1996] AC 487, 508.
>
> 94. Sixth, other public interest factors may still apply. So there is no reason in principle why the court should not apply the rule that the court will not restrain publication of material in relation to misconduct of such a nature that it ought in the public interest to be disclosed to others ... "

164. In that case Lawrence Collins J did decide that he was entitled to balance the public interest in supporting legal professional privilege on the one hand, and the public interest in the proper administration of justice on the other hand. His reason was that it was a case where there had on any view been forgery. There is nothing of the nature of forgery or other iniquity in the documents In question in this case.

165. Mr Millar submits that any privilege that may have attached to the documents or any part of them has been lost, and that the documents are now admissible and should be admitted in the Libel Action.

166. I accept the submission of Mr McCormick. It is clear from *ISTIL* and *Imerman* that the court can prohibit a party from adducing in evidence documents obtained from the other party if the circumstances are such that justice so requires, and the court should normally do so where the documents are the subject of legal professional privilege. This is so even when the documents have been read.

167. There remains for consideration whether particular items of information, or parts of documents, are in fact privileged. I shall deal with that below.

WHETHER TNL WILL SUFFER AN UNFAIR TRIAL WITHOUT THE .DOCUMENTS

168. In addition to points already mentioned (that the pleadings in the Libel Action are not yet closed, that the evidence that TNL wishes to adduce from the disputed documents may be available to it from disclosure to be given by Mr Hunt, and that any risk of unfairness that may become apparent in the future can best be addressed by a further application to this court), Mr McCormick submits that TNL is unable to establish any prejudice to it in the Libel Action at present for a number of reasons. All that TNL needs to do is to plead a proper defence, as ES has done. ES has resisted a strike-out application by Mr Hunt even though its article was "lifted" from that in the Sunday Times, and ES has not been able to refer to any of the documents. Many of the Particulars of Justification in the draft Amended Defence appear to be based, not on the disputed documents but, on other sources of information identified by Mr Gillard in his first witness statement, including the book "Judas Pig" and the accounts to Mr Gillard of the author and of Mr Allen. That book was written under the pseudonym of Horace Silver by a former "partner in serious crime" to Mr Hunt and his brother Mr Stephen Hunt.

169. The Defendants have also disclosed press cuttings and public searches in this context. When those portions of the MPS documents to which objection is not taken by the Claimants are added, there is relatively little that TNL cannot plead. In his first witness statement Mr Gillard states that he has been investigating topics including Mr Hunt for eleven years. He has not produced the notes and records of the interviews/investigations to which he referred in evidence which would clearly add to the material available to plead an amended defence. Thus it is not shown by TNL that, without the confidential information from the Claimants' documents, it cannot adequately plead the substance of a defence of truth.

170. Accordingly Mr McCormick submits that there is no basis for a finding that TNL's Art 10 rights will be interfered with if the Order sought by the Claimants is granted. I accept that submission.

EVIDENCE HEARD AT THIS TRIAL

171. Oral evidence was given by Mr Evans in relation to the SOCA document, and by Mr Critchell in relation to all the other documents, as recorded above. I also read other witness statements that were not the subject of cross-examination.

172. Mr Evans confirmed the truth of a statement made earlier in the proceedings by Mr Mulley. He confirmed that the document was for internal use of SOCA only, and that SOCA had failed to establish how it came into the possession of the Defendants. He knew of no previous occasion when such a document had been leaked.

173. Mr Evans made clear that his evidence is not based on any personal knowledge of the facts referred to in the SOCA document, but follows his reading of

documents in which SOCA has an interest, and nothing more. SOCA's activities differ from those of the police. The police investigate in reaction to events that have already occurred, such as a robbery. SOCA's activities are pro-active. SOCA does not intentionally disclose whether or not it is investigating a person or matter. It is important that the subject of any investigation should know as little as possible about the fact of the investigation, and of what information SOCA does or does not have. He therefore refused to confirm or deny whether SOCA had any current or planned activities in relation to Mr Hunt that might be affected by the use of the documents in the defence of the Libel Action.

174. There was one exception to this. Mr Evans stated that Mr Hunt was aware that search warrants had been executed at addresses associated with him and that Mr Hunt may know that SOCA officers had been involved in that.

175. Mr Critchell made three witness statements. He is an experienced officer with the MPS. In his third statement, prepared for the trial, he said that he had examined the documents with a view to establishing whether any of the contents may be disclosed. He applied tests, both in relation to persons named in the draft Amended Defence in the Libel Action and to any person not so named, namely whether the disclosure would: (1) reveal police covert methods or tactics; (2) pose a risk to any person whether named or unknown; (3) reveal intelligence that could identify a sensitive source and thereby pose a risk to a person or a covert activity. He made redactions on a copy of each .document and drew up a schedule detailing each one.

176. The work done on the documents by Mr Critchell led to the preparation of the list of headings and items in para 27 above. In carrying out this exercise he directed himself by reference to Art 2 and Art 8 of the Convention. He also directed. himself in accordance with the principles that would apply if the documents were to be considered for disclosure in a criminal trial and consideration were being given to public interest immunity.

177. Mr Gillard and Mr Caseby gave evidence for the Defendants. Mr Gillard is not only an investigative journalist of great experience. He is also the author of a number of books, including "Untouchables" (2004) which focussed on corruption and the work of the MPS anti-corruption squad. He has also investigated the workings of the major criminal gangs operating in and around the London area. He has been investigating Mr Hunt and his associates for the past 11 years.

178. In his witness statement of 18 March 2011 Mr Gillard identified a number of points which give rise to a public interest in the Article. These were (a) evidence of corruption in the enforcement arm of the London Borough of Newham, in which the Olympic site is situated, (b) allegations of police corruption (c) organised crime figures in East London fighting over land earmarked for regeneration and (d) failure by the MPS to tackle organised crime in Newham.

179. Mr Gillard has previously published allegations that Mr Hunt was involved in organised crime. Although his book "Untouchables" is not about Mr Hunt, there are a number of such references to him in that book. As a result of his investigations into Mr Hunt Mr Gillard came to the view that Mr Hunt is the head of one of the most notorious OCGs in the country.

180. It appears from Mr Gillard's witness statements, both that of 18 March and a further one of 4 July 2011, that the documents in issue in this case are not his only sources of information about the matters pleaded in the draft Amended Defence. He states that he considers that it his duty to publish information such as is contained in the Article, and that it is also his duty' to act responsibly, in. particular in protecting his sources, and those officers and witnesses who have been threatened with violence by Mr Hunt or his associates, and in

compromising any police operations. He said he had discussed the documents only with lawyers and that the documents were kept securely by him.

181. Mr Gillard states that police officers were motivated to speak to him by their concern that Mr Hunt would launder the proceeds of his crimes and so appear as the legitimate businessman that he claims in the Libel Action that he is. He states that none of his sources, whether of information or the documents in issue in this case, were paid, or asked for payment. Their purpose was to expose, in the public interest, failings in the criminal justice system and within the MPS. They approached him because they knew he knew how to use information from confidential sources.

182. There are a number of possible motives for leaks of confidential information to journalists. But whatever the motive, it is to the advantage of the informant to claim to the journalist that his motive is honourable. A former President of NBC News has suggested a list of five motives (Lawrence K Grossman in *Free Speech and National Security* S. Shetreet ed, Nijhoff 1991, p79), of which whistle blowing is the last in his list: "(a) The ego leak, giving information to satisfy a sense of self importance. (b) The goodwill leak, currying favour with a reporter in the hope of favourable treatment in the future. (c) The promoter leak, a straightforward pitch for a proposal or a policy. (d) The trial balloon leak, floating a proposal or a policy. (e) The whistleblower leak, the last resort of disgruntled civil servants who cannot get satisfaction through official channels".

183. There are other possible motives. Motives may be dishonest and manipulative. In *Financial Times* v *UK* paras [23] and [26] it is recorded that the judge at first instance found that the source had acted "to create a false market in the shares of the Claimant and SAB, a serious criminal offence", although the Court of Appeal had not found that that was proved. In the absence of any further information about the sources, it is impossible to enquire into, or challenge Mr Gillard's statement as to the motives his sources claimed to him. But in the absence of any other evidence, I can make no findings, and I make no assumptions about the true motives of his informants.

184. Mr Gillard also states that he has never intended to put into the public domain any of the information contained in' the documents which would risk compromising any law enforcement operations. In so far as Mr Gillard is stating that he has no intention of publishing such information in a book or some form of journalism, I accept that statement. As to the effect of him being permitted to use the information in the Libel Action, that is another matter, because the effect of such use is a matter of law, and is not limited by Mr Gillard's personal intentions.

185. Mr Gillard's evidence was given in private at my direction. I was concerned that it would be unfair to Mr Hunt if Mr Gillard were to make in public the detailed allegations against Mr Hunt that are set out in his witness statements, with the protection of absolute privilege, but without Mr Hunt having any opportunity of responding to the allegations. After consideration, the parties decided to make no representation to me that Mr Gillard's evidence should be treated as having been heard in public.

186. Mr Caseby was the Managing Editor of the Sunday Times at the relevant time and had oversight of the publication of the Article. As is well known, that newspaper has a strong tradition of investigative journalism and has published many stories over the years on matters in the public interest. He gave evidence stating that in his view also the Article was investigative journalism in the public interest. In his view any restriction on TNL' s ability to defend the Libel Action undermines its right to publish serious articles on matters of public interest.

CONCLUSIONS

187. As noted above, there is no dispute between the parties in this action that the Article was in the public interest. Nor did Mr McCormick dispute that the aim of TNL to defend the Libel Action was also in the public interest. But it remains for me to assess the importance of the public interest in TNL being able to use the information, and in particular, in its being able to use the information in support of a defence of justification or truth. In coming to that conclusion, I reject the submission that I can infer from their conduct that the Defendants believed that what they were doing was wrong. I find that the beliefs of Mr Gillard and Mr Caseby are reasonable, namely that it is very much in the public interest that the Article be defended by a defence of justification in the Libel Action. Mr Gillard and Mr Caseby are highly experienced journalists, with particular experience in this field. They have given proper consideration to the matter, in the case of Mr Gillard after many years of working on the subject. I find that these aims are to a very high degree in the public interest, having regard to the extreme gravity of the allegations against Mr Hunt, and the extent to which the public is in danger if the allegations are true, but the truth remains unknown to the public.

Art 6

188. As already noted, whether or not TNL can have a fair trial of the Libel Action is an issue to be tried in that action. But if I took the view that any order that I was minded to make in this action would be bound to mean that TNL could not have a fair trial of the Libel Action, then I would say so. That would then have fed back into the conclusions that I reached in this judgment. That is not the view I have reached. I have not reached the conclusion that the order that I propose to make would be bound to mean that TNL could not have a fair trial of the Libel Action.

Art 10 – the relevant intended use of the disputed documents

189. The test for Art 10 is whether, in all the circumstances, the interference with TNL's right is greater than is required to meet the legitimate object which the state seeks to achieve.

190. By the end of the trial the issues had been narrowed to this extent. The relevant right that the Defendants are now claiming is a right solely to use the information in the documents in dispute for the purposes of defending the Libel Action. I am not concerned with any other use.

191. However, in my judgment the issue can be narrowed further. The Libel Action will proceed in stages, if it proceeds at all. The interference with the legitimate aims set out in Art 10(2), including and in particular the Art 8 rights of others, should also be no more than is necessary and proportionate.

192. It follows that, as at the time this judgment is delivered, I do not need to consider more than TNL's right to use the information and documents for the purpose of pleading its Amended Defence in the Libel Action. That is the exercise of their Art 10 rights that is in prospect in the immediate future. If, following the service of the Amended Defence, TNL needs to use the information or documents for any other step in that action, then the rights of the parties and of non-parties can and should be re-assessed at that stage At that stage much may depend upon what, if anything, Mr Hunt admits in his Reply, or on what documents he discloses in accordance with CPR Part 31. For this purpose the order will provide that this matter can be brought back before this court.

193. So except in so far as is made clear below, I do not take into account in this judgment any right that TNL may claim to use the information or documents at any stage beyond the service of its Amended Defence.

194. In his written Closing Submissions Mr McCormick included a review of the draft Amended Defence. This was with a view to showing what parts of that document the Claimants did not now (that is by the end of the trial) object to

being disclosed to Mr Hunt. The review reflected both the fact that on some matters Mr Gillard had given evidence that he had sources other than the disputed documents, and the fact that agreement had been reached between the parties on some of the passages in the disputed documents that Mr Critchell had originally marked as being objected to. The upshot is that the Claimants now have objections to only eight passages in the draft Amended Defence. Before considering the information relating to these, there are the following conclusions that I have reached in relation to some of the headings, but which are not subject to any permission to bring them back before this court.

Art 8 - *Risk to person - Headings A to F and J*

195. The consequence of the considerations set out above (under the heading ECHR Art 8) are that there is material before the court upon the basis of which I am bound to have regard to the Art 8 rights of police officers, informers, those whom a criminal might suspect of being police informers, and the families and associates of all of these. I cannot conclude that those rights are not to be taken into account on the basis that the evidence for the Claimants is not specific as to any of the individuals concerned, and that even the identities of many of them are not given in the documents in issue.

196. This case differs from most PII hearings in criminal trials in that the evidence in a criminal trial is likely to be available from officers engaged in the investigation which has led to the criminal trial. In such a case the officers will be in a position to give detailed evidence. That will always be desirable, and in some cases essential. But it would not be right to apply that standard in this case, given the evidence that exists of the risks to those individuals who might be identified or identifiable to Mr Hunt of his associates (whether accurately or mistakenly).

197. Item 86 p89/90 [184/185] in the Schedule of disputed items is under the heading "A - Risk to person: general". It records that a person who had spoken to the police believed that the judge in the civil case (that is a judge who participated in one of the hearings relating to Mr Allen's claim against Mr Mathews) is corrupt and in the pocket of Mr Mathews. The judges who sat on those hearings are of course identifiable. However, I accept Mr Millar's submission that this record does not give rise to any, or any additional, risk of harm to any judge.

198. The other items are addressed in the Closed Judgment.

Reference to third party agencies - Heading G

199. Item 23 p43[138]: the disputed words are "and other agencies". The fact that the Claimants work with other agencies is a matter of public knowledge, and there can be no objection to the disclosure of these three words. Item 38 p53[148]: the disputed words are a list of telephone numbers for London hospitals. There is no evidence that these are numbers which are unlisted, or otherwise unavailable to the general public. There can be no objection to the disclosure of these.

200. The other items are addressed in the Closed Judgment.

Disclosure of Police Methods - Heading H

201. The items in dispute are addressed in the Closed Judgment.

LPP - Heading I

202. In the circumstances of this case there is no balancing exercise to be carried out in respect of those parts of the documents that are covered by LPP. There is nothing that could override that privilege, for the reasons given above by Lawrence Collins J.

203. The only issues under this head are whether passages in the documents that the Claimants submit are covered by LPP are such as a matter of fact and law. My decision on these is in the Closed Judgment.

THE SOCA DOCUMENT - Heading K - Document 3

204. The view of Mr Evans has not been shown to be unreasonable. It is true that it is difficult for the Defendants to show that, because Mr Evans gave so little information. At this stage I do not consider that I ought to differ from the view expressed by Mr Evans.

205. There is no reason in my judgment why the Defendants should be ordered not to make any use at all of the disputed documents. Such an order would, as Mr Millar pointed out, require TNL to instruct a new team of lawyers for the Libel Action. For TNL to use the information in the disputed documents for the purpose of planning how to defend the Libel Action would not interfere with the rights of third parties, nor any of the legitimate aims specified in Art 10(2). In principle, there can be no objection to TNL using the knowledge that it has derived from the disputed documents, other than those protected by LPP, in support of applications for third party disclosure. Whether in any particular instance there might be an objection would have to be decided in the circumstances prevailing at the time of the application.

Outstanding issues on the draft Amended Defence

206. A number of passages in the draft Amended Defence must be deleted or altered for one or more of the reasons given above. These will be identified in the order that is to be drawn up. The reasons that apply will be apparent to a reader of the Closed Judgment. It is possible that in some cases the passages may be altered to be less specific, and thus permissible.

207. For these reasons the Claimants' claim succeeds to the extent set out in this judgment and the Closed Judgment. I invite counsel to submit a form of order, to be agreed so far as possible.

208. The length and complexity of this judgment reflects the many and difficult points argued by counsel. The arguments were proportionate to the public importance of the issues and interests at stake in this litigation and the Libel Action. I am indebted to counsel for their assistance.