Neutral Citation Number: [2009] EWHC 2375 (QB)

Case No: TLJ//09/0275

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/10/2009

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

GARY FLOOD	**Claimant**
- and -	
TIMES NEWSPAPERS LTD	**Defendant**

- -
- -

James Price QC and William Bennett (instructed by **Edwin Coe**) for the **Claimant**
Richard Rampton QC and Kate Wilson (instructed by **Times Newspapers Ltd In House**) for the **Defendant**

Hearing dates: 15 16 17 and 20 July

- -

Judgment

Mr Justice Tugendhat:

1. The Claimant is a Detective Sergeant with the Metropolitan Police Service ("MPS") Extradition Unit. The Defendants ("TNL") is the publisher of, amongst other titles, the two very well known newspapers, The Times and The Sunday Times. On 2 June 2006 TNL published in The Times newspaper an article ("the article") referring to the Claimant under the title:

> "Detective accused of taking bribes from Russian exiles. Police investigating the alleged sale to a security company of intelligence on the Kremlin's attempts to extradite opponents of President Putin, Michael Gillard reports".

2. TNL also published the article on its website, and has continued to publish it there.

3. There was an investigation by the Directorate of Professional Standards ("DPS") of the MPS into allegations of corrupt practice said to have been committed by the Claimant. There is an issue as to when it commenced, and on the basis of whose information the investigation commenced and was continued. There is agreement that,

as from 28 April 2006, DCI Crump was the Senior Investigating Officer and DS Low assisted him. In the course of that investigation search warrants were obtained and executed at the home of the Claimant and at other premises. From that date he was removed from the Extradition Unit until January 2007, when he returned to it.

4. On 2 December 2006 they made their report ("the Report") but the result was not made known to the parties until early September 2007. They reported that they had been

> "unable to find any evidence to show that [the Claimant] … has divulged any confidential information for monies or otherwise. Consequently there are no recommendations made as to criminal or discipline proceedings in relation to that matter".

5. The text of the article, so far as material, reads as follows (the paragraph numbers are added):

> "[1] Allegations that a British security company with wealthy Russian clients paid a police officer in the extradition unit for sensitive information are being investigated by Scotland Yard.
>
> [2] The officer, who has been moved temporarily from his post, is alleged to have provided Home Office and police intelligence concerning moves by Moscow to extradite a number of Russia's wealthiest and most wanted men living in Britain.
>
> [3] Anti-corruption detectives are examining documents detailing the client accounts of ISC Global (UK), a London based security firm at the centre of the investigation. The financial dossier, seen by The Times, shows that ISC was paid more than £6 million from off-shore companies linked to the most vocal opponents of President Putin of Russia.
>
> [4] Between 2001 and 2005, ISC provided a variety of specialist security services including "monitoring" the Kremlin's attempts to extradite key clients to Moscow, where they face fraud and tax evasion charges.
>
> [5] A former ISC insider passed the dossier to the intelligence arm of the anti-corruption squad in February. The informant directed handlers to a series of ISC payments, totalling £20,000, made to a recipient codenamed Noah. Detectives from Scotland Yard professional standards directorate were told that Noah could be a reference to an officer in the extradition unit who was friendly with one of ISC's bosses.
>
> [6] The officer under investigation has been identified as Detective Sergeant Gary Flood. His home and office were raided last month.
>
> [7] A spokesman for the Metropolitan Police said yesterday:

> "We are conducting an investigation into allegations that a serving officer made unauthorised disclosures of information to another individual in exchange for money".
>
> [8] Anti-corruption detectives are examining the relationship between Sergeant Flood and a former Scotland Yard detective, one of the original partners in ISC. The men admit to being close friends for more than 25 years but deny any impropriety and are willing to co-operate with the inquiry.
>
> [9] Sergeant Flood has not been suspended. His lawyer said: "All allegations of impropriety in whatsoever form are categorically and unequivocally denied."
>
> [10] ISC Global was set up in October 2000 by Stephen Curtis, a lawyer. He was already acting for a group of billionaire Russians led by Mikhail Khodorkovsky and Leonid Nevzlin, who controlled Yukos Russia's privatised energy giant…
> [15] The dossier also reveals that … Boris Berezovsky was a client of ISC.
> [16] … Two companies linked to Mr Berezovsky – Bowyer Consultants Ltd … and Tower Management Ltd … - appear to have made payments totalling £600,000 to ISC.
>
> [19] ISC stopped trading last year after Curtis, the chairman, died in a helicopter crash. Subsequently, two former Scotland Yard officers, Keith Hunter and Nigel Brown, whom Curtis recruited to set up ISC, fell out and Mr Hunter bought the company and renamed it RISC.
>
> [20] A spokesman for Mr Hunter said: "Neither my client nor his associated companies have ever made illegal payments to a Scotland Yard officer."
>
> [21] Mr Brown, who lives in Israel said: "Scotland Yard recently contacted me as a result of receiving certain information. I have been asked not to discuss this matter."

THE ACTION

6. On 31 May 2007 the Claimant issued his Claim Form for libel. That was just before the expiry of the one year limitation period, but before the results of the investigation were known to him or to TNL. The claim is in respect of both the print and the website publications. He claims that the words complained of meant that there were strong grounds to believe, or alternatively that there were reasonable grounds to suspect, that he had abused his position as a police officer with the MPS extradition unit by corruptly accepting £20,000 in bribes from some of Russia's most wanted suspected criminals in return for selling to them highly confidential Home Office and police intelligence about attempts to extradite them to Russia to face criminal charges, that he had thereby committed an appalling breach of duty and betrayal of trust and had thereby committed a very serious criminal offence.

7. A Defence was served (which is now in a re-re-Amended form), and a Reply (now in its Amended form). The Defence pleads defences of justification and qualified privilege in relation to both the print publications and the website publications of the article. I am not concerned with the defence of justification. It is sufficient to set out the meaning which TNL seeks to justify. It is that:

> "the Claimant was the subject of an internal police investigation and that there were grounds which objectively justified a police investigation into whether the Claimant received payments in return for passing confidential information about Russia's possible plans to extradite Russian oligarchs".

8. The defence of qualified privilege is what is known as a *Reynolds* defence. Detailed circumstances are pleaded. TNL draw no distinction in this defence between the print publication on 2 June 2006 and the subsequent website publications. In summary, and in conclusion, TNL plead that

> "in the circumstances the publication of the article was in the public interest and its journalists acted responsibly in composing and publishing it".

9. The Reply pleads in detail to the defences. The Claimant in his Reply does distinguish between the print publication and the subsequent website publications. Although he pleads to the public interest defence in terms which apply to both the print and the website publications, he also alleges, in relation to the website publication, that the circumstances changed as time passed, further information came to TNL, and that there was no continuing public interest in the website publication. I shall deal with the website publication separately.

10. On 2 June 2009 Eady J ordered that there be a trial of the defence of qualified privilege by judge alone as a preliminary issue. That is the issue that I have tried. In the event that the defence of qualified privilege were to fail (before me or in another court), then the defence of justification remains to be tried, and there is no order for that to be tried by judge alone. It follows that it would be undesirable for me to express a view as to the meaning of the article. The parties both submit that it is unnecessary for me to make any decision on meaning. TNL admits that the article is defamatory. The meanings pleaded by the parties respectively are not so far apart that a decision on meaning is required for the purposes of considering the defence of qualified privilege. Accordingly I heard no submissions on what meaning the article would be understood to bear by the reasonable reader. Both parties have made brief submissions on the meaning which they submit that a responsible journalist should have considered, following *Bonnick v Morris* [2003] 1 AC 300 para [25]. Nothing turns on this at this stage, and I see no need to say any more about it.

11. The witnesses who gave evidence for TNL were Michael Gillard, and Jonathan Calvert (collectively "the journalists"), and Michael Gillard Senior ("Mr Gillard"). Michael Gillard is the main author of the article. He is a freelance and experienced investigative journalist who has worked for a number of well known newspapers and TV channels. Between 2001 and 2004 he researched and co-authored a book 'Untouchables' on corruption and other problems in the MPS. Mr Gillard is the father

of Michael Gillard. He is himself a very well known journalist, with a particular expertise in financial matters. He conducted some the enquiries which led to the publication of the article. TNL had previously published in the issue of The Sunday Times dated 14 May 2006 a related article headed "British lawyer hatched Putin smears". That was also written by Michael Gillard, but that article was written by him in collaboration with Mr Calvert. Mr Calvert is an employee of TNL who held the position of editor of the Insight column in The Sunday Times. The two titles are edited and published separately. The subject matter of the article in The Times had been considered for publication as part of the article in The Sunday Times, but in the event they were published as two separate articles in the separate newspapers. There was no witness employed by The Times newspaper. Each of the three witnesses for TNL was cross-examined, in the case of Michael Gillard, over a considerable period of time.

12. The witnesses for the Claimant were himself and Mr Hunter. Mr Hunter is himself a former police officer. He is identified in the article as 'one of the original partners' in 'ISC Global (UK) Ltd ("ISC"), a London based security firm at the centre of the investigation'. ISC is the company referred to in the article as having allegedly paid money to the Claimant for confidential information for the benefit of ISC's clients, including Boris Berezovsky, and other prominent Russians living in England. Mr Hunter is now the Chief Executive Officer of and sole owner of ISC, which has been re-named RISC Management Limited.

13. Mr Rampton for TNL submitted that all the evidence of the Claimant was irrelevant, and that the evidence of Mr Hunter in the first of his two witness statements was also irrelevant. Mr Rampton accepted that the evidence in his second witness statement was relevant. In his second statement Mr Hunter identifies the individuals who he says are the confidential sources relied on by Michael Gillard, whose anonymity has been preserved by Michael Gillard. He gives evidence of the facts from which he says the identification can be inferred. In the event Mr Price did not ask me to decide whether any of those individuals were in fact sources. It was agreed that I would determine the issue of relevance, if necessary, in this judgment. In the meanwhile, the two witnesses for the Claimant were sworn and tendered for cross-examination. Mr Rampton did not ask either witness any questions.

14. There were also put before the court a number of documents which were made by MPS, mainly by DCI Crump. On 5 November 2008 TNL obtained copies of these documents from the Independent Police Complaints Commission ("IPCC") on an application for disclosure of documents from a non-party. The IPCC had concluded that no action was warranted against the Claimant. It provided its file of evidence to TNL.

MICHAEL GILLARD AND THE MPS INVESTIGATION

15. Michael Gillard's evidence about the MPS investigation figured prominently in the trial. Michael Gillard's evidence is that the investigation by MPS was into allegations made to MPS, which he maintains were made to MPS by the person referred to in the article as 'a former ISC insider' ("the ISC Insider"). Michael Gillard's evidence is that when, on 27 April, he approached MPS about what the ISC Insider had told them in February, he was given to understand by MPS that there was an investigation into those allegations, and that MPS did not suggest to him that the investigation which

they then referred to was an investigation into his, Michael Gillard's, allegations. The article includes in para [7] the statement put out by the police, which was one of the reasons why Michael Gillard understood what he did. It is accepted that that statement was not in fact 'yesterday' (as stated in the article, ie 1 June 2006), but, by journalistic licence, the statement referred to is the one that was actually made on 28 April in an e-mail to Michael Gillard timed at 17.38. The e-mail states that it is in response to questions from Michael Gillard and continues:

> "We are currently conducting an investigation into allegations that a serving officer made unauthorised disclosures of information to another individual in exchange for money.
>
> The investigation is ongoing"

16. The Claimant's case, on the other hand, is that on 27 April 2006 there was no (or no ongoing) investigation by MPS into allegations concerning him, and that the investigation that started on 28 April was, as DCI Crump recorded, an investigation into the allegations made against him by Michael Gillard. The Claimant's case is that TNL's case is circular: Michael Gillard made allegations to MPS about the Claimant, and then purported to report on the ensuing investigation as if the allegations had been made to MPS by a third party. In other words, by the article Michael Gillard was making the news, not reporting it.

17. By way of background, Michael Gillard had been investigating the allegations the subject of the article since December 2005 and had received information from four sources. My findings on Michael Gillard's investigation are set out below. Michael Gillard has exercised his right to withhold the identities of all of them. He spoke to three of them himself, and he referred to these as A, B and C. But the most important was the ISC Insider, and that person was seen and spoken to by Mr Gillard. Those sources had informed Michael Gillard that the ISC Insider had communicated to the Intelligence Development Group ("IDG") of the Directorate of Professional Standards ("DPS") of MPS, at a meeting in February 2006, allegations which the ISC Insider also communicated to Mr Gillard, and information in the form of a note ("the Note") made by A of information from the ISC Insider, of which Source A gave a copy to Mr Gillard.

18. However, Michael Gillard was also informed by his sources at a later date that the police did not appear to have taken the information seriously, or to have sought more information from the ISC Insider. The result was that in April Michael Gillard considered that the police might not be conducting properly their investigation into the allegations of the ISC Insider. He then decided, together with Mr Calvert, to put questions to the Claimant, to Mr Hunter and ISC (directly and through Jack Irvine), to Mr Berezovsky (through Lord Bell).

19. In his witness statement Michael Gillard records that before doing this he and Mr Calvert considered whether they might be in danger of blowing a covert corruption operation by alerting the Claimant, but they thought this most unlikely. On 22 March Michael Gillard had met Source C, and Source C said to Michael Gillard that someone at ISC had tipped off Mr Hunter during the Christmas 2005 period that he and the company were being looked at by the media. Michael Gillard records in his witness statement that he considered that if the corruption allegation were true, it was

likely that Mr Hunter would have alerted the Claimant. It was for these reasons that he discounted the idea that they were in danger of blowing a police operation. He added:

> "In fact, part of the public interest in this story was the possibility that [MPS] was not fulfilling its anti-corruption prevention and detection strategy".

20. Michael Gillard also explains his understanding of the various units of MPS that he refers to. He states that IDG is the covert side of DPS, and that within IDG there is Source Management Unit ("SMU"). SMU handles informants with intelligence of police corruption.

21. Michael Gillard and Mr Calvert had intended to approach the Claimant directly and in private, and had attempted to do so at his home on the evening of 26 April. They could not find where he lived, and went to the house of his brother, who is also a serving police officer. Following that visit, on 27 April 2006 Michael Gillard received a call from Ruth Shulver from the MPS Press Office.

22. When Ruth Shulver called Michael Gillard, she told him that the Claimant had asked her to call him. After making sure that the Claimant really did want him to tell Ruth Shulver what it was about, he told her (according to the transcript):

> "we are intending to publish a story this weekend and it involves our understanding that Scotland Yard has received information that Mr Flood is, has been, in a corrupt relationship with a former Scotland Yard detective in relation to providing information about extradition of certain individuals who are clients of the former Scotland Yard detective's private security company".

23. Michael Gillard states that his interpretation of the call was that Ruth Shulver had already had a discussion with the Claimant about the allegations which he wanted to discuss with the Claimant. He suggested that to Ruth Shulver in the conversation. She denied that, and Michael Gillard did not believe her denial. The matter was not put to the Claimant in cross-examination because, on TNL's case, that would not be relevant.

24. Ruth Shulver asked if Michael Gillard wanted reactions from both the Claimant and MPS. She invited him to send an e-mail with the nature of what he was asking.

25. On Thursday 27 April 2006 at 15.57 Michael Gillard and Mr Calvert sent the e-mail they had prepared for the Claimant for Ruth Shulver to forward to him. In these approaches by e-mail and (in some cases) orally they stated that The Sunday Times would be publishing a story that weekend. They invited comments in writing by midday the following day. The main allegation put to the Claimant in the e-mail was in these terms:

> "My understanding is that Scotland Yard received information early this year alleging that Mr Hunter paid you for information that you are privy to as a member of the Yard's Extradition Unit. This information would be of particular use to certain

> Russian individuals, some of whom were clients of ISC Global (UK)… We understand that Scotland Yard has been given financial accounts detailing how money was transferred from Berezovsky companies to ISC Global accounts here and in Gibraltar. In addition Mr Hunter's 'suspense account' is said to have made a series of payments of at least £20,000 to 'Noah' … We understand that you have been identified to the police as 'Noah'".

26. Meanwhile, on 27 April at 11 am, Michael Gillard and Mr Calvert went to Mr Hunter's office. He would not see them, and they left a business card. Mr Hunter telephoned Mr Calvert shortly afterwards, saying that they should put their allegations in an e-mail, and he would put the matter in the hands of a public relations person (that is Mr Irvine).

27. The e-mail from Mr Calvert containing the questions for MPS to answer was sent on 28 April at 11:25. Michael Gillard states that its purpose was "to smoke out [MPS]'s position on what they had or had not done since receiving the intelligence in February". It includes a number of questions about the Claimant's past in the police service and asks for an opportunity to discuss matters with a senior officer of MPS who is familiar with the background to the case. It refers to an initial complaint having been made to officers of the SMU. One question reads:

> "4. Turning to the recent allegations, when were they received and what has the Yard done about them?"

28. It was to this e-mail that MPS gave the response cited in para 15 above. That response was signed by Mr Maskell, the head of the Corporate Press Office of the DPS. Michael Gillard comments that MPS was clearly not interested in briefing them off the record. Michael Gillard states that in his experience, had DPS been carrying out a covert operation, it would have been normal to ask a responsible newspaper like The Sunday Times to back off. That might have been done through editorial channels, and not necessarily communicated directly to the journalists. But no such approach was made. Michael Gillard interpreted the response by MPS as significant. MPS did not deny the allegations as laid out in the e-mails to the Claimant and to the Press Office about the intelligence received earlier in the year of a corrupt relationship. The words 'currently' and 'ongoing' were used. If MPS had wished to convey that the investigation had just started, other words would have been appropriate. In any event MPS could have said that, and MPS could have said, if it were the case, that the investigation was into allegations by The Sunday Times. And if MPS had investigated the February intelligence and discounted the allegations, then MPS would have had every reason to say so. It would have been in accordance with MPS media policy, which requires openness and honesty. Those were Michael Gillard's reflections on the response by MPS.

29. On 28 April 2006 the Claimant's solicitors wrote to The Sunday Times a short letter denying all allegations of impropriety, and saying that the Claimant declined their offer to discuss the allegations.

30. On 2 May, following an exchange of letters on 28 April, solicitors for Mr Hunter sent an e-mail to Mr Calvert. It included the following:

> "I would however, make a number of observations on the comments you make in your letter. First, it is our understanding from Scotland Yard that the only reason that they were investigating these allegations was on the basis of the Sunday Times own contact with Scotland Yard and that no independent complaint has been made. If you therefore decide to publish these unfounded allegations that you seemingly intent to hold onto, we are sure this issue will prove of significance in terms of any future libel proceedings that individuals affected by your allegations bring against The Sunday Times".

31. On 3 May Mr Hunter's solicitors wrote a letter adding to what they had said in the e-mail, and stating that Mr Hunter had himself written to Scotland Yard saying he would be happy to co-operate with their enquiries. The letter stated :

> "In terms of any investigation by Scotland Yard that was triggered by your own enquiries and the decision of [the Claimant] to report your attempted contact with his brother to his superiors, we confirm that our client has had no contact from Scotland Yard".

32. Also on Wednesday 3 May Mr Calvert contacted Mr Maskell at the MPS Press Office. He asked: "Did the MPS begin the investigation following allegations received from The Sunday Times or was it ongoing already?" Mr Maskell replied that he was unable to expand on the brief press lines he had previously supplied and so was unable to answer this question. Mr Maskell asked if the reporter was willing to speak to DCI Crump about the information which Mr Calvert had and the allegations he had made, and Mr Calvert said he was. He also identified Michael Gillard as the main person working on the story.

33. On 4 May Mr Calvert replied to Mr Hunter's solicitors:

> "… It is however incorrect to state that Scotland Yard's investigation into these matters was "triggered" by our enquiries. We are not the complainants in this matter"

34. On 4 May solicitors for Mr Hunter wrote again to The Sunday Times. At the end of that letter they added:

> "Finally, in relation to the Scotland Yard investigation, we are fully aware from our own conversations that a complaint had been made in February 2006, but they had not decided whether it warranted investigation until The Sunday Times took up the issue last week. We have little doubt that the investigation will be concluded swiftly and that DS Flood will be cleared of the unfounded allegations that you are seeking to perpetuate".

35. On Tuesday 9 May 2006 Michael Gillard and Mr Calvert attended a meeting with DCI Crump, DS Low and a Detective Inspector. DCI Crump informed the journalists that the Claimant's home had been searched on Friday 5 May, and that the Claimant

had denied the allegation, but that he had been removed from the Extradition Unit. Michael Gillard recorded in his note that he and Mr Calvert had made it clear that they were not the complainants. DCI Crump said that the journalists' inquiries at the Press Office had probably "forced their hand". Michael Gillard's note records that DCI Crump said that the Investigation Command ("IC") of DPS was only brought in on Friday 5 May as a result of the Claimant going to the Department of Public Affairs (that is the Press Office). DCI Crump confirmed that IDG had received "intelligence, not a complaint" from a source who DCI Crump identified to the journalists, but who the journalists have not identified to this court (his or her name is redacted in Michael Gillard's note). DCI Crump said that he did not know what IDG had done with the intelligence when they got it. He said it was possible that the allegation was not considered a priority, or that there could be political reasons he knew nothing about. He said there are sterile corridors between IDG and his team at the IC. He said that the Claimant and Mr Hunter had said they were willing to co-operate with the inquiry.

36. Michael Gillard in his statement says that when he spoke of the allegations made in February to the IDG, he had the impression that DCI Crump was either not completely in the loop or was trying to mislead him. But Mr Rampton submits that the statement by DCI Crump that intelligence had been received is confirmation that there had been a meeting between the ISC Insider and IDG, as Michael Gillard's sources had told him.

37. Other matters that Michael Gillard considered significant in relation to whether or not the allegations merited further investigation, or publicity, by him are discussed below.

38. Michael Gillard wrote the following at the end of his witness statement to explain why he decided to write the article:

> "114. The story was motivated by two public interest factors. Firstly, the nature of the allegations made by the ISC Insider to the DPS in February 2006. Secondly, trying to understand what the DPS had been doing about it for several months given the obvious internal sensitivities concerning any allegation of police corruption and the political sensitivities around one involving the controversial oligarch Boris Berezovsky. The unexplained Home Office u-turn on granting him political asylum occurred in roughly the same period that corrupt payments were allegedly made to the claimant.
> 115. I decided to name the claimant in the story for the following reasons (1) the Met had confirmed he was under investigation and (2) Other possible witnesses might not have come forward with information had I not named him. (3) I suspected that the DPS was not properly investigating the matter and believed that if the matter was brought into the open it might help to ensure that they did so. (4) The claimant was part of a reasonably small squad and if he was not named it would leave the newspaper open to complaints from others in the squad that the article referred to them … (5) the claimant was already aware of the investigation, so was his family and his colleagues in the extradition squad".

39. Having heard Michael Gillard give evidence, I have no doubt what his dominant motivation was for doing what he did. He did what he did because he was 'trying to understand what the DPS had been doing about' the allegations made by the ISC Insider in February, and because he 'suspected that the DPS was not properly investigating the matter and believed that if the matter was brought into the open it might help to ensure that they did so.'

40. Given what Michael Gillard states about his motivation, it might be thought that on 27 April the article that Michael Gillard was expecting to write was one that would have been about the failure of MPS to investigate the allegations of the ISC Insider in the period of about two months starting February and ending on 27 April. The article that was actually written, and which was published about five weeks later, on 2 June 2006, was about an investigation which the police were in fact conducting. The article makes no suggestion that there had been any failure to investigate.

41. This has not led me to doubt that Michael Gillard's motives were what he states they were. In his mind, writing about the investigation that was in fact taking place was a means of keeping up pressure on MPS to investigate properly. The motive which Michael Gillard attributes to MPS for saying that the investigation was into allegations made by The Sunday Times is that they had indeed failed to investigate the allegations made in February 2006 by the ISC Insider, and, as he put it in his statement:

> "… trying to make us the complainant could be a device by [MPS] to avoid having to address its failures to develop the intelligence it had received back in February."

MICHAEL GILLARD'S OWN INVESTIGATION

42. The following account is taken from the evidence of Michael Gillard, and Mr Gillard, unless otherwise stated.

43. ISC had been run by former MPS police officers. The chairman was a lawyer, Stephen Curtis, until his death in a helicopter crash on 3 March 2004. There followed serious internal divisions within ISC. Michael Gillard started to hear of these in December 2005. They coincided with a number of related events. The inquest into the death of Mr Curtis and others who died in the crash began at the end of October 2005. There was an escalation in the legal battles between President Putin and Russia on the one hand, and various Russians living in England. There were two circles of Russians living in England. The first were associated with Yukos, including Mr Khodorkovsky, and the second were associated with Mr Berezovsky.

44. Michael Gillard's first heard a suggestion of a corrupt relationship between Mr Hunter and the Claimant at about this time. He first heard from Source A. He describes Source A as a person he had known for over six years 'who is well connected in the interface between private security companies and the police'. The person had worked in this world for over fifteen years. Michael Gillard states that Source A did not work for ISC.

45. On 19 December 2005 Michael Gillard met Source A. They first discussed two unrelated stories. Source A then referred to ISC, saying it had two remaining partners,

Mr Hunter and Nigel Brown. Mr Brown is also a former police officer, and he is named in para [19] of the article. That paragraph also refers to Mr Hunter and Mr Brown having fallen out. Source A told Michael Gillard that he had heard that Mr Hunter was about to be arrested because he had someone in the extradition squad of MPS to whom he had been paying money for information over the years. He said that the information was about variations in bail conditions, and other matters to do with extradition and asylum of Mr Berezovsky and another Russian. Source A said that the policeman supplying the information was either the Claimant or his brother. He then mentioned highly sensitive information relating to a person's health ("the sensitive information") and which involved expenses which the Claimant bore personally. Source A said that the implication of Mr Hunter and the Claimant being arrested for corruption would be big for Mr Berezovsky and Mr Khodorkovsky.

46. Michael Gillard suspected at the time that Source A was getting the information from someone who did work for ISC. Source A later confirmed that this was so.

47. On 22 December 2005 Michael Gillard met Source C. He had known Source C since the late 1990s. He described Source C as well connected in the private security world for over twenty years. Source C did work for ISC, and told Michael Gillard that Mr Khodorkovsky, had provided 'seed money' to Mr Curtis to set up ISC.

48. In January 2006 Michael Gillard started his own research on ISC, Mr Hunter and the Claimant. Michael Gillard was aware that the Claimant was a member of the Extradition Squad after 2001. Michael Gillard also had, from his previous researches, a copy of a statement that the Claimant had given to MPS on 10 April 2002 relating to an internal police matter unrelated to ISC. This was plainly a confidential document which he had obtained. The statement was written by the Claimant, but Michael Gillard interpreted it at the time in a way that led him to draw a number of inferences from it, which were adverse to the Claimant. He also gave evidence about this, but none of these matters were put to the Claimant in cross-examination, on the footing that they were all irrelevant to the issue, which had to be judged at the time of the print publication.

49. Michael Gillard also inferred from the expenses relating to the sensitive information, which is referred to in that witness statement, that the Claimant was in need of money. In early 2006 Michael Gillard learned from his contacts that the Claimant and Mr Hunter were long-standing and close friends. He concluded that all of these matters 'could have made him vulnerable to a corrupt approach'.

50. On 6 January 2006 Michael Gillard met Source A for a second time. On this occasion Source A told him of an incident which provided an illustration of the kind of information which might be of interest to ISC's clients, and which the Claimant might have. This is the only example of such information which Michael Gillard gave in evidence. A Russian who was wanted in Russia on fraud and murder charges wanted to fly from Israel to the UK non-stop. Mr Hunter had arranged an aircraft which would have to refuel during that journey. The client refused to board it because he was fearful of being arrested when the plane refuelled. On the same occasion Source A told Michael Gillard that there were cash payments made from Mr Hunter to the Claimant and that 'DS Faulkner [was] said to be doing the investigation'.

51. On 30 January 2006 Michael Gillard met Source A for a third time. Michael Gillard wanted more information about what Source A had said on 6 January. Michael Gillard describes the conversation as difficult, because Source A did not want to reveal that he or she had been involved in passing any information to the DPS. Following promises of anonymity and other assurances from Michael Gillard, Source A told Michael Gillard that a person known to both Source A and Michael Gillard, namely Source B, had been in contact with the DPS. Michael Gillard stated that "This was done at Source A's request and on behalf of an ISC Insider". Source A named the ISC Insider to Michael Gillard as the person who had concerns about the Claimant's relationship with Mr Hunter, and who had provided to Source A the information so far passed to Michael Gillard on that topic.

52. Michael Gillard was engaged on other matters at this time. He asked Mr Gillard to assist him. He gave the ISC Insider's name to Mr Gillard, and they decided that Mr Gillard would speak to his contacts.

53. On 27 February Michael Gillard contacted Source B by phone to try to corroborate what Source A had told Michael Gillard about how the DPS had been approached on behalf of the ISC Insider. Michael Gillard had known Source B since the late 1990s. Source B had access to the intelligence side of the DPS. Source B told Michael Gillard that Source B had met someone from the DPS to explain that Source A wanted to introduce the ISC Insider.

54. On 3 March 2006 Michael Gillard met Source B. Source B explained that he or she had had a number of discussions with a DPS officer about setting up a meeting with the DPS and the ISC Insider, to be attended by Source A. On the advice of the officer it was decided that Source A should send a summary of the information that the ISC Insider wanted to impart. Source A typed the Note, a one page document containing information from the ISC Insider and gave it to Source B. By arrangement with the DPS officer Source B delivered it to the DPS in January 2006. Source B informed Michael Gillard that the Note stated that Mr Hunter worked for Mr Berezovsky, that the Claimant was on the Extradition Squad, and that Mr Hunter paid him cash to meet his personal expenses. Source B told Michael Gillard that the Claimant's code name was 'Noah'. Source B told Michael Gillard that he had a meeting with two officers from the SMU of the DPS at Frimley. One of the officers was named Gary. During the meeting Source B phoned Source A to arrange the follow up meeting.

55. On 5 March 2006 Michael Gillard telephoned Source B to check that he had correctly understood what they had discussed on 3 March. Michael Gillard states that at the end of the meeting at Frimley one of the SMU officers asked Source B if he or she wanted to talk about a high profile matter that the DPS were investigating (the description of the matter in question is redacted) and that Source B declined. Source B later told Michael Gillard that that meeting had been on 12 January. Michael Gillard concluded that Source A and Source B had no first hand information about the matters alleged, but Source B was acting as an intermediary for Source A, who in turn was acting as an intermediary for the ISC Insider.

56. Mr Gillard made contact with one of the individuals who Michael Gillard had named to him as having information about alleged corruption. That person told Mr Gillard that he or she knew both the Claimant and Mr Hunter personally as well as the ISC Insider. Mr Gillard arranged to meet the ISC Insider.

57. During March and April 2006 Mr Gillard had a series of meetings and telephone conversations with the ISC Insider. Mr Gillard made clear he was seeking information on behalf of The Sunday Times. The ISC Insider did not want to go on the record, and Mr Gillard agreed to that person being a confidential source. The ISC Insider admitted going to the police and providing detailed information about the alleged corrupt relationship between Mr Hunter and the Claimant and about ISC and its Russian clients. The ISC Insider subsequently made available to Mr Gillard a CD-ROM containing ISC internal accounts information. This referred to 'Noah', whom the ISC Insider said he believed to be the Claimant. The same CD-ROM had been given to the police. The ISC Insider indicated frustration at the reluctance of the police officers at their meeting to take additional material, in particular Mr Hunter's mobile phone, which contained all of the Claimant's telephone numbers. The ISC Insider also remarked to Mr Gillard on the failure of the police to make contact again following the meeting in February.

58. In March 2006 Mr Gillard provided Michael Gillard with copies of documents from the CD-ROM and discussed with him their significance. On the basis of the information provided to him by the ISC Insider, Mr Gillard prepared a memorandum for Michael Gillard ("the Memorandum").

59. The Memorandum covers eight pages. It includes the following:

> "[Page 1] aware of payment to Flood ISC management accounts Evidence of payments to 'Noah' for 2002-2003. Believes but does not know 'Noah' codename for Flood. Atkinson codename for Boris Berezovsky in ISC accounts.' Noah' payments related to 'Atkinson' Noah' payments made out of KH's [Mr Hunter's] suspense account. Suspense account used to park items not immediately assignable to particular client or expense…
>
> [Page 2] KH used to brag about 'my man at the Yard'. Talked about how 'my man' would be in court and agree to bail… talked openly about 'paying brown envelopes' to 'may man at the Yard' [The ISC Insider] interviewed by SY [Scotland Yard] in February at hotel in south London. 'Andy' – no full name.
> Gave CD showing Noah payments. Offered KH phone with Flood number in memory – refused.' First I've heard of it' was response to whether there was an investigation into KH and Flood.
> 'Andy' denied any knowledge of Faulkner. More interested in PNC checks on cars! Reluctant to accept information. 'I told them everything I knew' heard nothing back since meeting"
>
> [Page.4] After Curtis died in March 2004 KH began to take over ISC. Made easier as NB [Mr Brown] in Israel. Growing boardroom tension led to pressure on NB to leave.
>
> Because of rows ISC effectively ceased to exist in October 2005"

60. On 8 March Michael Gillard spoke to Source A. He requested a copy of the Note. Source A told Michael Gillard that he or she had introduced the ISC Insider to SMU detectives and they had held a meeting which lasted an hour. Source A said that the ISC Insider had offered Mr Hunter's mobile phone and the detectives refused it. Source A felt that they were not interested in the information and said that they had not been in touch since then. Michael Gillard's note of the conversation of 8 March records that Source A referred to a reason given by the detectives for not accepting the phone 'Property act' or something.

61. On 13 March Source A sent to Michael Gillard a copy of the Note. The Note includes:

> "One of Hunter's clients is Boris Berezovsky … The Russians regularly up-date information on the warrants and details of the emendations are transmitted to all the extradition desks around the world Hunter has a long term detective friend called Flood (possibly Gary) who either works at, or has contacts at the extradition department. Flood provides Hunter with the information as it arrives. Hunter pays Flood in cash. Flood apparently uses, or has used the money in the past for [the sensitive information]…It is not clear whether Berezovsky is aware of how Hunter obtains the information… If President Putin discovers this information it is likely to cause a Diplomatic incident…"

62. Mr Rampton submits that a comparison of the Note with the Mr Gillard's note of his conversations with the ISC Insider shows remarkable consistency. I observe that there is also an inconsistency. The Note is categorical in saying "Flood provides Hunter with the information as it arrives. Hunter pays Flood in cash". Mr Gillard's note records the ISC Insider saying that he "believes but does not know 'Noah' codename for Flood".

63. Further, as Mr Price put to Mr Gillard, there is nothing in his notes concerning what it was suggested that the Claimant was being paid for. Mr Gillard said that he did not ask the ISC Insider if he saw confidential information. In his experience of Russians, they are happy to corrupt Government officials. He accepted there was no direct knowledge of what the Claimant was alleged to have given. Nevertheless, Mr Gillard considered from his own experience and knowledge that there would have been information that would have been of interest to someone to disclose. He accepted that the use of cash for payments could be legitimate for ISC, for example persons working lawfully in Russia to obtain information. The Claimant in his statement said that there was no useful information he had that he could have passed on. Mr Gillard accepted that, and accepted that Mr Berezovsky's warrant was issued with bail attached. He said that the ISC Insider did not state that there was confidential information. Michael Gillard said that his understanding was that the ISC Insider did not say to Mr Gillard that he had seen any information which had come from the Extradition Unit. The CD-ROM was searched for the purposes of disclosure by TNL in the course of the trial. No document relating to extradition was found on it. The Claimant said any information he did have was in the public domain. Mr Berezovsky was arrested by appointment made through his solicitors. He did mention the procedure of provisional arrest, which is rarely used. When it is used it is in cases where the warrant is issued in respect of a person who is thought to be at risk of

leaving the jurisdiction to avoid arrest. That echoes the example given by Michael Gillard of the Russian who feared arrest if his plane from Israel to the UK had to land on the way to refuel. There was no evidence that such situations might have applied to Mr Berezovsky or any friend of his or other person for whom he was concerned.

64. Mr Gillard also said that he knew that the ISC Insider had issues with Mr Hunter, or what might be called 'an axe to grind'. But he added that sources often are in that position. He was not aware of Sources A and B working together with the ISC Insider. As far as he was concerned, he had gone looking for the ISC Insider, and had difficulty in persuading him to entrust Mr Gillard with the information. Mr Gillard thought that the reason why the police were not doing anything about the allegations was that this was a sensitive area, and was the type of enquiry which was not going to be at the top of the list. The allegation that Mr Hunter bragged about having a man at the Yard was not a topic on which he was asked questions in the e-mails and letters on and after 27 and 28 April. I should add that in evidence Mr Hunter denied it without challenge.

65. On 14 March 2006 Michael Gillard made researches with a view to finding out where the Claimant lived, but was unsuccessful. At about this time he also did research on Mr Berezovsky. He found that on 24 March 2003 the Extradition Unit arrested Mr Berezovsky, following a request from Moscow, and that Mr Berezovksy was released on bail. Three days before the arrest the Home Office had rejected his application for asylum, which he had originally made in October 2001. The extradition hearing was adjourned, and on 10 September 2003 the Home Office informed Mr Berezovsky that he had been granted asylum. A newspaper report of the extradition hearing mentioned the Claimant as the officer in the case.

66. On 15 March 2006 Michael Gillard met Source C. After discussing other matters, Source C said that if Mr Hunter was paying a police officer that would be hard to prove. Source C suggested Michael Gillard might go to see if the Claimant attended a race meeting at Cheltenham together with Mr Hunter. Michael Gillard went to the race meeting, but did not see Mr Hunter or the Claimant.

67. It was shortly after this that Michael Gillard received the print outs from the CD-ROM from Mr Gillard. These documents included ledgers of ISC on Sage accountancy software. These showed that in the ten months before Mr Berezovsky's asylum application was granted in September 2003, two companies associated with him (both of them named in the article) had paid to ISC almost £600,000. The details of the payments recorded 'Intelligence and Information' and 'Monitoring'. One operation was referred to as 'Atkinson'. One of the print-outs bears the general heading 'ISC Global (UK) Ltd Nominal Activity' and gives the name of the account as 'Keith Hunter Suspense A/c'. There are a number of payments recorded on and between 16 January 2003 and 1 April 2003. The Details recorded include the word 'Noah', for example, 'Noah re: Mr Atkinson' and 'Noah (1 of 5)'. These total £20,000. The ISC Insider had told Mr Gillard that Atkinson was a reference to Mr Berezovsky, and Source C had said the same.

68. Michael Gillard regarded it as significant that the period during which these payments were made was also a period during which the Claimant was at the Extradition Unit. He referred to three circles of information which coincided in time: (1) payments by Mr Berezovsky to ISC; (2) payments recorded from ISC to 'Noah'; and (3) the

Claimant working at the Extradition Unit. Michael Gillard then wrote the following in his statement: "From all the above it appeared that there was no cogent reason to discontinue our investigation into [the Claimant], the extradition squad, payments by his friend Keith Hunter for information relating to ISC's client Boris Berezovsky. Furthermore I was aware from my knowledge of the specialist squads at [MPS] that the Claimant was likely to have confidential information at his fingertips".

69. On 22 March Michael Gillard met with Source C. He believes that it was at this meeting he was given a copy of a one page memorandum addressed to Mr Hunter and to Mr Brown from Nick Hudson, ISC's chief financial manager regarding 'Taxation issues' ("the Hudson memo"). Source C said to Michael Gillard that someone at ISC had tipped off Mr Hunter during the Christmas 2005 period that he and the company were being looked at by the media.

70. The Hudson memo is undated. It starts with the words 'Keith you asked me to list my concerns regarding the tax treatment of certain financial transactions'. The memo goes on to express concerns about cash payments made by ISC as follows: "However legitimate these may be they will inevitably attract attention in any tax inspection or audit". It contains further warnings of the dangers of making payments in cash. There is nothing in the document to link it to any particular period or payment, whether relevant to this action, or at all. There is a mention of the possibility of a 'disgruntled ex-employee' using records of cash transactions as a means of furthering a claim or 'simply to create trouble'.

71. Michael Gillard then refers in his statement to the political situation at the time, in particular Anglo-Russian relations, and states:

> "Having considered all these elements of the story I started to consider the possibility that [MPS] was ignoring the intelligence it had received from the ISC Insider for political, diplomatic or other reasons".

72. On 19 April Michael Gillard met with Mr Calvert to discuss the story (they had previously discussed it on 28 February). It was agreed that Michael Gillard would progress the story.

73. The main events that followed are set out above at paras 21 to 29.

74. Michael Gillard considered that the responses made on behalf of Mr Hunter added weight to his view of the seriousness of the allegations. On 27 April Mr Calvert had sent an e-mail to Mr Hunter in terms similar to those quoted at para 25 above, except that the sentence corresponding to the last sentence quoted above is categorical. The introductory words "We understand that" are omitted. It reads: "Noah has been identified to the police as" the Claimant. In a conversation with Jack Irvine that afternoon Mr Calvert asked if Mr Hunter recognised anything like operation Noah. Mr Irvine replied that "he checked his files and there's none of that".

75. On all of this material Mr Rampton submits that it was reasonable for the journalists to believe that the investigation had not been prompted by their own actions.

76. On 28 April Mr Hunter's solicitors sent a four page reply to the e-mail of 27 April addressing each question, and denying the allegations. In that letter the solicitors wrote "neither Mr Hunter nor his companies have a suspense account". Michael Gillard considered that answer to be significantly inconsistent with the documents he held. The solicitors also wrote that "Noah is a project name that was used by Mr Hunter's companies in relation to a client matter". Michael Gillard considered that answer was significantly inconsistent with what Mr Irvine had said on the telephone, and that on his view of the documents, Noah could not be an operation. Mr Rampton submits that the obvious conclusion to draw was that Mr Hunter probably had something to hide

77. On 28 April Mr Calvert sent another e-mail to Mr Hunter and Mr Irvine, asking questions, including about Mr Hunter's relationship with the Claimant. Mr Hunter's solicitors stated that they had been friends for twenty five years. On 2 May Mr Calvert wrote to Mr Hunter's solicitors asking on what terms he would be prepared to be interviewed. It was in response to that letter of 2 May that on the same day Mr Hunter's solicitors wrote the e-mail quoted in part in para 30 above and the letter of the next day.

78. There were matters raised on behalf of Mr Hunter which Michael Gillard discounted. Mr Irvine said that he was aware that Mr Brown "had been mixing it for [Mr Hunter] for a couple of years" (meaning spreading falsehoods). He said Mr Hunter and Mr Brown had fallen out (as Michael Gillard was already aware), and that Mr Brown had been making wild allegations, and was a very bitter man. He said

> ".. we do know that Brown has been feeding out an incredible amount of horseshit and that hence the reference to the word malice in it …….Try and check out this Nigel Brown guy because we do know that he has been pouring a lot of poison. He is a very bitter man apparently."

79. The e-mail of 2 May from Mr Hunter's solicitors went on:

> "Secondly, both myself and my clients are fully aware of the allegations that you make. What my firm was requesting is for The Sunday Times to demonstrate the basis for the allegations, other than the malicious and uncorroborated statements of former business associates. It is now clear from your letter that you have no such evidence, which again makes it somewhat difficult to understand why The Sunday Times seems so intent on accepting what it has been told by another individual when the allegations have and continue to be denied so vehemently by my client and DS Flood. Whilst, I cannot begin to understand what would motivate The Sunday Times to adopt such a position, the fact you still confirm your intention to report the allegation and the investigation that has resulted from your own actions seems to show that you are prepared to act maliciously against my client."

80. Michael Gillard also considered and discounted representations made on behalf of Mr Berezovsky. His solicitors had written that the allegations made no sense because the

extradition unit would have no confidential information of any value to Mr Berezovsky in the conduct of the defence of the extradition proceedings. Michael Gillard discounted this response because he considered that MPS would be in the best position to know whether there was information which the Claimant could have passed to Mr Hunter, and if there were none then MPS would have dismissed the allegations as obviously ill founded. Instead, as DCI Crump informed them on 9 May, the Claimant had been removed from his post.

81. Michael Gillard records in his statement that after he had visited the offices of ISC in April 2006 'a former ISC employee came forward to explain that there had been a major shredding operation at the company'.

THE DOCUMENTS PRODUCED BY MPS

82. One document produced by MPS is a report dated 22 April 2008 in response to a request from TNL for disclosure of documents by DPS. It is signed by John Levett, A/Detective Chief Superintendent, Head of Intelligence, from the office in Putney. He states:

> "In February 2006 two officers from DPS met with two individuals who wished to pass information to DPS in confidence. The meeting took place at an hotel in London. [The Claimant] was discussed and the officers made a full record of this, and this is held within the command".

83. On 1 May 2009 the Directorate of Legal Services of MPS wrote a detailed letter in answer to requests made on behalf of TNL. The letter included the following:

> "We can inform you that at the meeting in February 2006 intelligence was received, but, as with all such intelligence, it needed to be developed bearing in mind that much of the intelligence received in relation to Police Officers/Police Staff can be proved to be false or malicious. That process had not been completed and no SIO had been appointed prior to contact by The Times in late April 2006".

84. Other documents produced by MPS are the notes made by DCI Crump upon his appointment as Senior Investigating Officer dated 28 April 2006, and the Report of his investigation dated 2 December 2006. In the Report DCI Crump states that it relates to an investigation into allegations made by The Sunday Times in April 2006, namely that a corrupt relationship existed between Mr Hunter and the Claimant. DCI Crump's notes are to the same effect.

85. Under the heading "Background to incident" the Report sets out Mr Calvert's email to Ruth Shulver of 28th April 2006,and says:

> "Upon receipt of this message, Ruth Shulver from the Directorate of Public Affairs contacted the DPS and an investigation commenced".

86. According to the Report, searches yielded a number of documents. Those apparently regarded as important included ones derived from searches of the offices and computer of Mr Hunter, and from ISC's bankers. The Claimant, Mr Hunter and others were interviewed.

87. One of the others interviewed was Mr Brown. He stated in interview that he had no knowledge of any project or person named Noah with regard to ISC. He alleged that Noah was likely to be a story made up by Mr Hunter in order to make money from his Russian clients, but admitted that he had no evidence to support this allegation.

88. There is no reference in the Report to information communicated to MPS in February 2006. But in so far as any information communicated to MPS in February was in the form of documents emanating from ISC's offices, and from its bankers, then the same or similar information may have been obtained from ISC when DCI Crump searched those offices as part of his enquiry. For example, the Report refers to documents relating to Atkinson, and states that a number of cheques made out to cash in respect of project Noah were obtained from ISC's bankers. At a meeting at the IPCC on 12 September 2006 attended by DCI Crump and DS Low, DS Low stated that

> "there are various accounts relating to client/job payments. There are entries relating to Noah showing payments of 2-3 thousand pounds".

89. It is not clear that DCI Crump had the same information or documents as those obtained by Michael Gillard. The reason for this is as follows. At the meeting with Michael Gillard and Mr Calvert on 9 May 2006 DCI Crump and two other officers asked the journalists what they, the journalists, could help the police with. Michael Gillard gave some information, including that in the months before Mr Berezovsky was granted asylum there were payments totalling £20,000 to Noah and that it was possible that Mr Hunter provided money for the Claimant's expenses in relation to the sensitive information. Michael Gillard's note of the meeting ends: "We gave them no documents and said The Sunday Times had none". On 18 August 2006 DCI Crump again asked TNL to provide to him all documentary evidence it may hold. Mr Brett, the Legal Manager of TNL replied that "TNL … has no documents relating to your investigation into DS Flood". Michael Gillard's explanation for the answers given to those requests is that the documents were held by himself, and he is a freelance journalist.

90. A copy of the application for a search warrant in respect of the Claimant's home and other premises was among the documents subsequently disclosed by IPCC. It is dated 3 May 2006 and signed by an officer other than DCI Crump or DS Low. The only basis given in writing to the judge for granting the warrant is "Information … received from Mr Calvert of The Sunday Times Investigation Unit…"

91. There is some inconsistency in the evidence as to the date on which the search warrant was obtained and executed. In his Report DCI Crump states it was on Friday 28 April. At a meeting with Michael Gillard and Mr Calvert on 9 May he said it was

executed on Friday 5 May. Nothing turns on the date, but the date on the application for the warrant, and what DCI Crump said on 9 May, seem to me to be more likely to have been 5 May than the date of 28 April given in the Report.

92. DCI Crump's notes dated and timed 28 April 2006 between about 3pm and 4pm contain references to Michael Gillards' investigations, follows:

> "Overview
> Situation: Some intelligence and information has been received which indicates that a serving Police Officer [the Claimant] is having a corrupt relationship with ex MPS officer Keith Hunter, who now runs a private security company. The basis of the allegations is that [the Claimant] monitors extradition requests/warrants for several high profile Russian individuals residing in the UK. If and when one comes in he advises Hunter and seeks to deflect the request. For this Hunter pays him. An investigation by the Sunday Times has established the above and they are planning to print this Sunday 30 April. Having been provided with this information today – 28/04/06, we are now planning a reaction investigation….
>
> Factors: The key factor around this investigation is that [the Claimant] is aware of it already and in all likelihood Hunter as well. Another factor which may impact is that the story is likely to break in The Sunday Times this weekend...
>
> Necessity: The allegation is a serious one … The facts will become known in the public domain. It is necessary for the DPS to investigate the allegations to either prove them … or to exonerate the officer which may be the result of a malicious allegation.
>
> Options: At this stage, because the 'cat is effectively out of the bag' we are limited to what we can do. We are restricted to a reactive investigation based on intelligence and information. At this stage we have NO concrete evidence.
>
> Risks: … The Sunday Times is already seeking information on when the MPS became aware of these allegations and what they have done to date! … there is also the possible risk to any informant linked to this investigation.
>
> Decision: No arrest at this time Reason: All we have is an allegation and some background intelligence and information which has not been verified".

93. No one from the MPS was called to give evidence. Michael Gillard does not accept that the notes and Report of DCI Crump, or by implication the application for the warrant (although he was not specifically asked about this document), contain a truthful statement about the investigation. He maintains that the investigation by MPS conducted between 28 April and up to (and beyond) the date the article was published

was into allegations made at the meeting in February 2006, and begun before 27 April.

94. TNL have not attempted to prove that MPS, in particular DCI Crump, were lying (as Michael Gillard alleged in his evidence) when they attributed the investigation to the allegations made on 27 April by The Sunday Times. But Mr Rampton poured scorn on the suggestion by the Claimant that what DCI Crump said about the origin of his investigation was the truth. Michael Gillard and Mr Calvert said they did not believe that the police would start such an investigation on the unsupported allegations of a newspaper. They had never known that to happen. Mr Calvert stated, and Mr Rampton submitted, that a search warrant would not be granted on such a basis. Mr Price replied to this submission by referring to the copy of the application for the search warrant, which appears to show that it was granted on that basis.

95. The burden of proving the defence of qualified privilege lies on TNL. If their defence depends upon proof that there was in the period 27 April to 2 June 2006 an investigation into allegations made by the ISC Insider to MPS (as opposed to allegations made by the journalists), then they have failed to discharge the burden of proving that. Mr Rampton does not accept that TNL's defence does depend upon that. He submits that TNL's defence depends only on what the journalist knew and did.

96. I also find that IDG did receive intelligence relating to the Claimant before the approaches by The Sunday Times on 26 April, but that the Investigation Command was not brought in until 28 April. I considered above what the evidence is as to the nature of the intelligence that the IDG received, and the date it received it. All that evidence comes from Michael Gillard's investigations with his own sources, and none of it from MPS. There is no material before me upon which I could make any finding that IDG, or any other department of MPS, probably conducted any investigation into the intelligence received from the source who approached them. In my judgment they probably did not.

97. This comes very close to, and may be the same as, the view that Michael Gillard himself had formed by mid April 2006. Although he stated that he 'suspected that the DPS was not properly investigating the matter', what I understand he believed was that by mid April the DPS was not investigating at all. Hence his perception that the matter should be brought into the open 'to ensure that they did'. Michael Gillard changed his mind after 27 April. The responses he received on 28 April from MPS led him to understand that there was then an ongoing investigation. He did not believe the information passed on to him by Mr Hunter's solicitors, namely that the investigation then being conducted was into the journalists' own allegations. So he believed the ongoing investigation was the one which he now thought had started, or ought to have started, in February.

THE EVIDENCE FOR THE CLAIMANT

98. Mr Price made the following submissions. Although this is a trial of a preliminary issue only, it cannot be conducted without regard to the actual context in which the issues arose. Moreover, at the trial Michael Gillard in particular gave evidence in detail about adverse views which he had formed about the Claimant and Mr Hunter. While the court must not trespass on the matters relevant only to justification, it would not be fair that this judgment should contain nothing from the Claimant's side

by way of evidence. A libel action is brought for the purpose of vindicating a Claimant's reputation. Moreover, much of the material was not only unchallenged, but it is in fact truly common ground. I shall return to the issue of relevance below.

99. The Claimant's unchallenged evidence, which I accept, includes the following. Although Michael Gillard did not know this at the time, the circumstances in which the MPS Press Office called Michael Gillard were as follows. On the evening of 26 April Mr Hunter called the Claimant and informed him that two men claiming to be journalists had been to his brother's house, wanting to know where he lived, and that that was all that Mr Hunter knew. Mr Hunter made the call because at the time there was a disagreement between the Claimant and his brother, but both were friends of Mr Hunter. Mr Hunter gave the Claimant the name of Mr Calvert.

100. The Claimant was concerned about his own security, in particular because his work had recently been in relation to terrorists. He telephoned his line manager, who told him to inform the Commander with overall responsibility for the Extradition Unit. The Claimant told the Commander he did not know what the approach was about. The next morning the Commander informed the Claimant that he had asked the Press Office to find out what it was about.

101. Late in the afternoon of 27 April 2006 the MPS Press Office forwarded to the Claimant the e-mail of that date addressed to him by Mr Calvert and he was shocked and dismayed at the allegations it contained. When DCI Crump attended his home to execute the search warrant, he served on the Claimant a Form 163 and informed the Claimant of the allegations which had been made by The Sunday Times and that they (DCI Crump and DS Low) were required to investigate those allegations. He describes the impact of the subsequent events upon himself and his wife, both the impact upon their reputations, and upon their feelings. Towards the end of his statement he adds:

> "It is an occupational hazard for a police officer that complaints will be made. Many of these are malicious and many absurd. I would add that I do not recall ever being the subject of any investigation or complaint via the service of Form 163 throughout my unblemished service. My integrity has never been in doubt, and in 2005 I received my long service and good conduct medal from the Commissioner".

102. It is apparent from what Mr Irvine said at the time (para 76 above), that Mr Hunter immediately suspected that Mr Brown was the ISC Insider. In his second witness statement he gives numerous reasons for maintaining that view. He also identifies who he believes to be Sources A B and C. He states that each of Mr Brown and those who he identifies as A and B had issues with him and his business, and an axe to grind against him. As to Source C, he says that he was not in the same category, but there had also been a fall out between them. As already noted, I am not asked to make findings of fact as to the identities of the sources. But the evidence does establish that Mr Hunter was in dispute with former colleagues, and that whether the sources were these individuals or others, Michael Gillard and Mr Gillard were probably correct to have identified, as they did, that their sources had interests of their own to pursue that were adverse to Mr Hunter.

103. The Claimant joined the police force in 1983. In 1988 he was selected to be a detective. In 1990 he became a sergeant and in 2001 he started work in the Extradition Unit.

104. During his career he has received numerous commendations. Some of these are the following:

i) March 1986 Deputy Assistant Commissioner's Commendation for diligence and detective ability in a racial attack involving arson;

ii) 1991 Chief Superintendent's Commendation for leadership and detective ability for results achieved whilst in charge of Wimbledon Burglary Squad;

iii) September 1999 Central Criminal Court Commendation for investigative ability and case preparation in a complex murder investigation involving 4 defendants;

iv) May 2000 Assistant Commissioner's Commendation for leadership and detective ability in high profile murder investigation;

v) January 2005 director of FBI's Commendation for international co-operation in locating and arrest of Walsh Thrasher, wanted by FBI;

vi) January 2007 letter of thanks and appreciation from head of Home Office Judicial co-operation unit for the "highly efficient and professional manner" in the planning of four co-ordinated arrests of Rwandan war criminals;

vii) 7 January 2007 thank you letter from Commander Wilkinson in work undertaken involving ninety suspected Albanian murderers in the UK;

viii) 8 June 2007 letter of thanks and appreciation from Prosecutor in Italy for planning and arrests of two suspected terrorists;

ix) November 2007 letter of commendation from Chief Constable of West Yorkshire in organising and assistance given in the return to the UK of a man wanted for the murder of a police officer;

x) 10 August 2008 letter of thanks and praise for professionalism and the arrest and subsequent evidence given at the trial of a man wanted in the USA for the murder of his wife and infant child.

105. The Claimant is acknowledged as the leading expert in extradition in the police service. He is the author of the MPS response to Article 95 of the Schengen Information Systems. He contributed to the ACPO Memorandum of Understanding on Article 95 sent out to all constabularies. He has given numerous presentations, participated in Home Office working parties and other public work of that kind. At the Extradition Unit he started as a Detective Sergeant in charge of a team of three Detective Constables. That was one of three teams of the same size.

106. The Claimant has known Mr Hunter for very many years, their families are good friends and they share an interest in racing. Mr Hunter was originally a friend of the Claimant's brother, with whom he has also remained friendly. He was aware of ISC

and of its business. They discussed the difficulties Mr Hunter had had with his former business partner Mr Brown, but they never discussed matters which were confidential to the Claimant's work.

107. Under the Extradition Act 1989 the involvement of the Extradition Unit started after the warrant had been issued by a judge. It is the duty of the Claimant and his colleagues to find and arrest the person named. That is commonly done by appointment. Warrants are sometimes issued with bail attached as happened in the case of Mr Berezovsky. If that is not the case, then a bail application will commonly be made at the first appearance. That is often the end of the involvement of the police unless there are further requirements from the court or the Crown Prosecution Service.

108. Under the Extradition Act 2003 the procedures are different but the involvement of the police is no greater. Under both Acts there is a procedure known as Provisional Arrest. The requesting state applies for a provisional warrant on the basis that the suspect is believed to be at risk of leaving the jurisdiction. The role of the police is to identify the person in question, to identify that the legal criteria are satisfied and to seek the provisional warrant. A judge has to be satisfied that there is the necessary urgency. Interpol contacts the Extradition Unit directly and the Home Office has no involvement until the arrest has taken place. The person concerned is bailed and remanded in custody after arrest. The requesting state has sixty days to satisfy the court in this jurisdiction. This procedure is rarely used, because if the papers are not in order for any reason, the person concerned is discharged and the process will merely have served to alert him or her.

109. Mr Berezovsky was arrested under the 1989 Act. As commonly happens, the court clerk contacted the Claimant to say that the court was to issue the warrant with bail attached, and to ask questions on suitable bail conditions. While the police make suggestions it is the court that imposes the conditions. The conditions in the case of Mr Berezovsky were ones which apply to the overwhelming majority of bail applications. Once the person concerned has appeared in court proceedings are open and in the public domain. In the case of Mr Berezovsky the claimant did not know about the warrant for his arrest until he received the call from the Court clerk about a week before his arrest. The arrest took place within two or three days of the issue of the warrant. The arrest was by arrangement with his solicitors.

110. On the night of 28 April 2006 the Claimant had been on duty in Wales. He arrived back after performing other work on the 26th April at about 6pm. He then received the call from Mr Hunter to which I have already referred and the matter proceeded as I have described.

111. Sometime previously he had arranged to take Friday 28 April off to spend the day with his wife. During that day he called Mr Hunter to ask what the matter was all about and Mr Hunter gave him details of his business dispute with Mr Brown. He was concerned about the allegations, which he states are untrue, and sought the advice of a representative of the Police Federation.

112. The search of the Claimant's home under the warrant was as described above. DCI Crump had told the Claimant that he was to be removed from the Extradition Unit. He states that this hit him very hard, coming as it did out of the blue and because of

his real passion for his work. That decision had been taken by his superior in the unit. As already described he had informed his superior as soon as he had found out about the allegation. The search lasted for about two hours. During the search he spoke to his superiors in the Extradition Unit who informed him that he should not come into work. Items removed included two mobile phones, two or three diaries (including his wife's personal diary because it had in it the contact details of Mr and Mrs Hunter) his personal computer, his laptop, his notepad, his memory card and other items.

113. The Claimant was off work with ill health when the article was published on 2 June 2006. He had no warning that it was to be published. He was informed of it that day and when he read it he said he felt horrified and sick to his stomach. To be accused of taking bribes is about as bad as it could get. He had spent years establishing a reputation and building trust and relationships not only with his colleagues in the police service, but also with the CPS the Home Office, counsel and others. He felt particularly aggrieved that The Times represented that he had been accused of taking bribes in circumstances where the only accusations made against him were by the Times themselves.

114. He states that in the police service there is a general attitude of "no smoke without fire". He has often felt that he has had to defend himself in conversations with other detectives and explain that he was completely exonerated following the police investigation and that he is suing The Times.

115. His statement includes other matters which are relevant only to any further proceedings which may take place in this action.

116. In his first witness statement Mr Hunter also speaks of the friendship which had existed for so long between the Claimant, the Claimant's brother and Mr Hunter. Mr Hunter and the Claimant's brother joined the MPS cadets together in 1976. Mr Hunter has never worked with the Claimant or with his brother directly or indirectly during their years in the MPS. As a former police officer he enjoys many other genuine friendships with currently serving and retired police officers.

117. Mr Hunter met Mr Brown in about 1998 when they were both working independently. After that they both started carrying out more work with Mr Curtis, a solicitor, at whose suggestion Mr Hunter and Mr Brown started ISC. That was in October 2000. Mr Curtis was chairman and would be able to introduce clients. These included Russian individuals and corporations and other institutions. In the summer of 2002 Mr Brown left for Israel at short notice due to personal problems. He continued to work for ISC in Israel. Mr Hunter and Mr Brown did not get on well in their business relationship. After Mr Curtis died in 2004 his position was taken by Mr Hume-Kendal. The business expanded but in around February 2005 Mr Hunter told Mr Hume-Kendal that he and Mr Brown could not continue to work together. The business was divided during the period February to October 2005, with agreement being signed on 3 October 2005. The business was divided into three between Mr Hunter, Mr Brown and Mr Curtis's estate. Mr Hunter subsequently bought out the interest of the estate. Mr Brown was not happy with the agreement and became bitter.

118. ISC had a diverse client portfolio comprising of banks, law firms and accountancy firms, large corporations and high net-worth individuals. It employed a number of persons. Mr Hunter denies the allegation that he has paid payment to the Claimant

whether directly or indirectly or to any other person engaged in law enforcement in the UK. He denies that he ever discussed confidential matters relating to clients with the claimant or with anyone else. ISC did receive approximately £500,000 from Bowyer Consultants and Tower Management. Both companies were invoiced in connection with "Project Atkinson".

119. The services provided were security consultancy (assessing the physical and technical risk to the client, his business and family): electronic counter measures (sweeps) of homes and offices; intelligence gathering by Russian based sources referred to as Project Noah; and general investigations including surveillance, anti surveillance and equipment purchases. The term "monitoring" is used to describe the activity of Russian based sources when Project Noah. This was an all embracing information gathering project. The intelligence gathered related to investigative activities conducted by Russian Prosecutor General's office. There were other matters involved as well. Neither that project nor other projects to which he refers and which were mentioned at the trial, included any extradition issues whatsoever.

120. As to the "suspense account", Mr Hunter states that he was unaware that such an account existed until the allegations were about to be put to him in the course of the interview with DS Low as part of his investigation. His financial director informed him that the account was "a posting station" for payments which, at the time when they were entered there, were unallocated to a particular project. It was a ledger rather than an account. In 2002 and 2003 ISC was a fairly small outfit with a limited system. Cash payments are a regular and legitimate part of ISC's business. None of the money referred to in these proceedings was paid to the Claimant or used for any illegal purposes. Mr Hunter's witness statements include description in detail of the differences that arose between himself and the individuals who he subsequently identified as sources.

121. During the trial Michael Gillard made a number of adverse references to matters which had been investigated while Mr Hunter was a serving police officer. Mr Hunter explains these and the fact that he was exonerated following an investigation on the basis that there had been no evidence against him. He produced his certificate to the effect that his service to retirement had been exemplary. None of Michael Gillard's statements to his discredit were put by Mr Rampton to Mr Hunter for him to comment upon.

THE LAW

Reynolds public interest privilege

122. In *Reynolds v Times Newspapers Ltd* [2001] AC 127 the House of Lords reconsidered the weight which the law accords to protection of reputation and freedom of the press, and redressed the balance in favour of greater freedom to publish matters of genuine public interest: *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359 paras 35 and 38.

123. Mr Rampton submits that in *Jameel* Lord Hoffman summarised *Reynolds* as requiring that the article as a whole should be on a matter of public interest (at [48]), that the inclusion of the defamatory statement should be part of the story and should make a real contribution to it (at [51]), and that the steps taken to gather and publish the

information should have been responsible and fair (at [53]). In regard to this last requirement, the following summary in *Bonnick* was expressly approved by Lords Hoffman and Scott in *Jameel* (at [57] and [136]):

> "Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interest of those whose reputations are involved. It can be regarded as the price journalists pay in return for the privilege."

124. As Lord Bingham said in *Jameel* at para 33:

> "Weight should ordinarily be given to the professional judgment of an editor or journalist in the absence of some indication that it was made in a casual, cavalier, slipshod or careless manner".

125. The Convention rights in issue here are Art 8 and Art 10. They read as follows:

> Article 8:
>
> "1. Everyone has the right to respect for his private … 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 … for the protection of disorder or crime, … or for the protection of the rights and freedoms of others."
>
> Article 10
>
> "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 …
>
> "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 national security, … or public safety, for the prevention of disorder or crime, … for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

126. The question whether the subject matter of the article was a matter of public interest depends upon the effect of the article as a whole, and not upon the effect of the particular defamatory statement which is complained of, which, unless it has no contribution to make to the overall effect of the article, should not be isolated for separate consideration: *Jameel* (at [48] and [51]).

127. The question whether the defamatory statement is true or not is irrelevant; it is a "neutral circumstance" (*Jameel* per Lord Hoffman at [62])

128. The question whether or not it is responsible in this sense for a journalist to name a person such as the Claimant is to be decided in the light of guidance given by the House of Lords since *Reynolds*.

129. In *Re S (A Child)(Identification: Restriction on Publication)* [2005] 1 AC 593 Lord Steyn said at para 34:

> "…..it is important to bear in mind that from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer."

130. Similar statements have been made in *In re BBC* [2009] 3 WLR 142 para 25 – 26 by Lord Hope of Craighead and 65-66 by Lord Brown of Eaton-under-Heywood.

131. There is no dispute between the parties that the conduct of police officers in general and police corruption in particular, is a matter of interest to the community. So that in principle the first test in *Reynolds* is satisfied in this case, so far as the subject matter of the article is concerned.

132. Mr Price does not dissent from Mr Ramptons's statement of the law, so far as it goes. He stresses that what is required is that the steps taken both to gather and to publish the information should have been both responsible and fair. He emphasises that if the publication complained of has passed the public interest test then, in the words of Lord Hoffmann at paras 52 and 54 of *Jameel*:

> "… the inquiry then shifts to whether the steps taken to gather and publish the information were responsible and fair… The question in each case is whether the defendant behaved fairly and responsibly in gathering and publishing the information"

133. He also cites the words of Lady Hale at paras 149, who draws a distinction as follows:

> "the publisher must have taken the care that a responsible publisher would take to verify the information published ... The requirements in 'reportage' cases, where the publisher is simply reporting what others have said, may be rather different."

134. Lord Hoffmann also refers to reportage at para 62. Mr Price submits that in the present case the allegations are reporting what others have said (namely what the ISC Insider has said), and so the naming of the Claimant must be justified, if at all, on the grounds applicable to such cases. But, he submits, reportage is not available where the accuser is not named: *Roberts v Gable* [2008] QB 502 paras 53 and 61. Mr Price notes that Mr Rampton has not attempted to justify the publication on that basis.

135. In my judgment there is a difficulty for Mr Price on this submission. The House of Lords did not consider in *Jameel* that there needed to be any consideration of the information which led the Saudi Authority to put the companies on their list for monitoring, but only of the information that they were on the list. All that was required in *Jameel* was verification of the making of the accusation, and the Saudi Authority's response to it, not verification of the information made to the Saudi Authority, and which led to the monitoring: see para 59. So the House of Lords did not consider that the defence should fail because it did not meet the conditions necessary for the application of the principles relating to reportage.

136. Mr Price made a more radical submission. He referred to the passage in *Reynolds* at p205F where Lord Nicholls concluded by saying "Any lingering doubts should be resolved in favour of publication". The new guidance, given by the House of Lords since *Reynolds* was decided, namely in *Re S,* governs how the court should hold a fair balance between freedom of expression on matters of public concern and the reputations of individuals. That case was decided in October 2004.

137. In *Re S* the House of Lords was concerned (as it subsequently was in *In re BBC*), with whether the court should permit the name of an accused in criminal proceedings to be reported. The principles at stake were the private life of the individual accused, and his family, on the one hand, and freedom to report proceedings in court on the other hand. The issue did not arise in the context of defamation, because under the law of defamation, if the name could be published, then the publication would be on an occasion of privilege. So the protection of reputation had to be put in place at an earlier stage, if at all, by prohibiting publication.

138. The balance between protection of reputation and freedom of expression requires the same approach in whatever legal context it arises. As Lord Hope and Lord Brown of Eaton-under-Heywood said in *In BBC* at paras 8 and 54, the court is a public authority for the purposes of s.6 (1) of the Human Rights Act 1998, and must act compatibly with the Convention rights. He went on to say this:

> "**16** The BBC claim to assert this right on behalf of the public. Their position is that the information that they wish to broadcast is information which the public has a right to receive. Section 12(4) of the 1998 Act states that the court must have particular regard to the importance of that Convention right and, among other things, to the extent to which it is or would be in the public interest for the material to be published. As Sedley LJ said in *Douglas v Hello! Ltd* [2001] QB 967, para 136, the court must also bear in mind when it is applying that test that the qualifications in article 10(2) are as relevant as the right set out in article 10(1). The phrase "for the protection of the reputation or rights of others" is the qualification that is in

> point in this case. Millar for the BBC submits that it is in the public interest that a programme that identifies D in relation to the rape in the context of the removal of the double jeopardy rule should be broadcast. There are two questions, then, that must be answered. Would disclosure of D's identity in such a programme engage his article 8 Convention right? If so, does his article 8 Convention right outweigh the right of freedom of expression under article 10 which the BBC wish to assert, bearing in mind the qualification in article 10(2)?
>
> **17** As in *Campbell v MGN Ltd* [2004] 2 AC 457, these arguments involve the familiar competition between freedom of expression and respect for an individual's privacy. In that case, Lord Nicholls of Birkenhead said, at para 12:
>
> "Both are vitally important rights. Neither has precedence over the other. The importance of freedom of expression has been stressed often and eloquently, the importance of privacy less so. But it, too, lies at the heart of liberty in a modern state. A proper degree of privacy is essential for the well being and development of an individual."
>
> As Lord Hoffmann said, at para 55, there is no question of automatic priority. Nor is there a presumption in favour of one or the other. The question is rather as to the extent to which it is necessary to qualify the one right to protect the underlying value that the other seeks to protect. The outcome is determined principally by considerations of proportionality: *Douglas v Hello! Ltd* [2001] QB 967, para 137, per Sedley LJ".

139. Lord Brown expressed it this way at para 55:

> "Lord Steyn … described, at para 17 [of *Re S*], what he meant by "the ultimate balancing test" (as to "the interplay between articles 8 and 10"), in four propositions derived from *Campbell v MGN Ltd* [2004] 2 AC 457:
>
> "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 cases 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.""

140. Lord Brown went to say at para 69:

> "… to my mind D's best argument for asserting a continuing article 8 right to anonymity is that suggested by my noble and learned friend, Lord Hope of Craighead, at para 22 of his opinion. I agree with Lord Hope that the presumption of

> innocence is of relevance … under article 8 in so far as it bears on D's reputation."

141. The reference to Article 8 bearing on a person's reputation reflects a further important development in the law since *Reynolds*, namely the recognition that reputation is a Convention right within Article 8, at least in some cases. That came in *Cumpana and Mazare v Romania (Application no. 33348/96)*, 17 December 2004; (2005) 41 EHRR 14, para 91, and subsequent Strasbourg case law. More recent cases include *Karako v Hungary* 28 April 2009 No 39311/05, para 22-23, and those referred to in the Partly concurring Opinion of Judge Jociene, including *Pfeifer v Austria* 15 November 2007, No 12556/03, para 35. I shall adopt the same assumption as that adopted by the Court of Appeal in *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462; [2005] QB 993 para 68, namely that a person's right to protect his or her reputation, at least in a case such as the present, is amongst the rights guaranteed by Art 8.

142. The recognition of reputation as an Article 8 right, and the consequential necessity of applying to defamation cases the ultimate balancing test from *Re S*, had not occurred, even by the time *Jameel* was tried at first instance in late 2003 (see [2007] 1 AC p362H). In consequence, neither *Campbell* nor *Re S* was cited in *Jameel*. There is no reason to suppose that it would have made any difference to the outcome of *Jameel* (or for that matter any of the other *Reynolds* cases that have come before the courts) if *Re S* had been cited. But there will be cases where following the course enjoined in that case will or may make a difference to the fate of a *Reynolds* defence. However, the approach of the House of Lords in *Jameel* is fully consistent with *Re S*. Once it is understood that the court must perform the "the ultimate balancing test", it follows that the failure of a journalist to satisfy one of Lord Nicholls ten tests cannot of itself be fatal to his defence.

143. In *In re BBC* Lord Hope, after concluding that Art 8 was engaged in that case, set out the tests that then had to be applied in para 23:

> **"23** The question then is whether publication of the facts that the BBC wish to publish in the exercise of their right of freedom of expression under article 10 can be justified under article 8(2). The tests that must be applied are well settled. They are whether publication of the material pursues a legitimate aim, and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to privacy. Any restriction of the right of freedom of expression must be subjected to very close scrutiny. But so too must any restriction on the right to privacy. The protection of private life has to be balanced against the freedom of expression guaranteed by article 10: *Von Hannover v Germany* 40 EHRR 1, para 58. One must start from the position that neither article 8 nor article 10 has any pre-eminence over the other. The values that each right seeks to protect are equally important. The question is how far, as article 8(2) puts it, it is "necessary" for the one to be qualified in order to protect the values that the other seeks to protect".

144. There is little dispute that the publication by TNL of the words complained of in the present case is in pursuit of a legitimate aim. Although Mr Price's points go to this issue, they are best seen in my view as directed to proportionality. When he came to the issue of proportionality Lord Hope said:

> "**27** There remains the question of proportionality. As against the public's right to receive information there is D's right to be protected against publication of details of his private life. But the weight that is to be given to his right has to be judged against the potential for harm if publication does take place. …
>
> **28** There is a risk, as Lord Pannick has pointed out, of D's being tried by the media. That, of course, is to be deprecated. If this happens it will add to the effects on his personality that will flow inevitably from the mention of his name in the broadcast. …"

145. The criteria in *Reynolds* were set out by Lord Nicholls as follows at p204-5:

> "The elasticity of the common law principle enables interference with freedom of speech to be confined to what is necessary in the circumstances of the case. This elasticity enables the court to give appropriate weight, in today's conditions, to the importance of freedom of expression by the media on all matters of public concern.
>
> Depending on the circumstances, the matters to be taken into account include the following. The comments are illustrative only. 1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed, if the allegation is not true. 2. The nature of the information, and the extent to which the subject matter is a matter of public concern. 3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories. 4. The steps taken to verify the information. 5. The status of the information. The allegation may have already been the subject of an investigation which commands respect. 6. The urgency of the matter. News is often a perishable commodity. 7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary. 8. Whether the article contained the gist of the plaintiff's side of the story. 9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact. 10. The circumstances of the publication, including the timing.
>
> This list is not exhaustive. The weight to be given to these and any other relevant factors will vary from case to case. Any disputes of primary fact will be a matter for the jury, if there is

> one. The decision on whether, having regard to the admitted or proved facts, the publication was subject to qualified privilege is a matter for the judge. This is the established practice and seems sound. A balancing operation is better carried out by a judge in a reasoned judgment than by a jury. Over time, a valuable corpus of case law will be built up.
>
> In general, a newspaper's unwillingness to disclose the identity of its sources should not weigh against it. Further, it should always be remembered that journalists act without the benefit of the clear light of hindsight. Matters which are obvious in retrospect may have been far from clear in the heat of the moment. Above all, the court should have particular regard to the importance of freedom of expression. The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion. Any lingering doubts should be resolved in favour of publication."

146. In my judgment Mr Price is correct when he submits that the last sentence cannot stand as the law today, in the light of the subsequent statements of the House of Lords in *Re S* and *In re BBC*. The law now requires the court, to consider the ten circumstances referred to by Lord Nicholls, in accordance with the guidance in those cases. The reference in item 1 to the individual being harmed includes, of course, a reference to what is now recognised as interference with the individual's Article 8 right to reputation. And other points, for example 7 and 8, are particularly relevant to the question of fairness and the proportionality of any interference with an Article 8 right.

147. Lord Nicholls explained in some depth the two values at stake. He said at p200-2001:

> "… there is no need to elaborate on the importance of the role discharged by the media in the expression and communication of information and comment on political matters. It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment. In this regard it should be kept in mind that one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally.
>
> Reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being:

> whom to employ or work for, whom to promote, whom to do business with or to vote for. Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely. In the political field, in order to make an informed, choice, the electorate needs to be able to identify the good as well as the bad. Consistently with these considerations, human rights conventions recognise that freedom of expression is not an absolute right. Its exercise may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the reputations of others.
>
> The crux of this appeal, therefore, lies in identifying the restrictions which are fairly and reasonably necessary for the protection of reputation".

148. What has changed is that the House of Lords has since recognised that neither freedom of expression nor reputation has any presumptive priority, and that the approach laid down in *Re S* must be followed. The formulation of Lord Hope in *In re BBC* para 23 of the tests to be applied may be adapted to libel. They then serve as a summary of what Lord Nicholls set out in more detail in his ten non-exhaustive factors. The tests would then be as follows:

> "They are whether publication of the material pursues a legitimate aim, and whether the benefits that will be achieved by its publication are proportionate to the harm that may be done by the interference with the right to reputation".

149. The result is that the factors identified by Lord Nicholls have to be considered separately, both as they relate to freedom of expression, and as they relate to the right to reputation. So, for example, Lord Nicholls states that "the more serious the charge, the more the public is misinformed and the individual harmed". That is focussing on the right to reputation. But as he also said, investigative journalism is part of the vital role of the press. Investigative journalism tends to result in serious allegations. The seriousness of the allegation may also support the journalist's contention that there is a public interest in the making of the allegation. A recent example may be certain allegations that MPs have been claiming as expenses money spent for private purposes.

Jameel

150. Given its importance as the most recent and authoritative statement of the law in relation to *Reynolds* public interest privilege, it is important to bear in mind what the *Jameel* case was about, and how it resembles, and is to be distinguished from, the present case. As summarised by Lord Bingham:

> "4 The gist of the article … was that the Saudi Arabian Monetary Authority, the kingdom's central bank, was, at the request of United States law enforcement agencies, monitoring bank accounts associated with some of the country's most prominent businessmen in a bid to prevent them from being used, wittingly or unwittingly, for the funnelling of funds to terrorist organisations. This information was attributed to "US officials and Saudis familiar with the issue". In the second paragraph a number of companies and individuals were named, among them "the Abdullatif Jamil Group of companies" who, it was stated later in the article, "couldn't be reached for comment"
>
> **5** The jury in due course found that the article referred to was defamatory of both respondents. They may have understood the article to mean that there were reasonable grounds to suspect the involvement of the respondents, or alternatively that there were reasonable grounds to investigate the involvement of the respondents, in the witting or unwitting funnelling of funds to terrorist organisations. For present purposes it is immaterial which defamatory meaning the jury gave the passage complained of, neither of which the newspaper sought to justify….
>
> 6 … Thus there were questions about whether, and to what extent, the kingdom was co-operating with the United States authorities in cutting off funds to terrorist organisations. This was, without doubt, a matter of high international importance, a very appropriate matter for report by a serious newspaper. But it was a difficult matter to investigate and report since information was not freely available in the kingdom and the Saudi authorities, even if co-operating closely with those of the United States, might be embarrassed if that fact were to become generally known".

151. In the present case the meanings complained of are in a similar range: reasonable grounds to suspect, or reasonable grounds to investigate, the Claimant being involved in corruption. But the meaning may be less serious in *Jameel*, because the article included the words 'wittingly or unwittingly', which could not be said in the present case.

152. Another similarity is that the Wall Street Journal was reporting an investigation by an investigatory authority, in that case the Saudi Arabian Monetary Authority, and in the present case the police.

153. But an important difference between that case and the present case is that in *Jameel* the allegation that there was any investigation at all was dependent upon the reliability of the sources in that case. That became one of the main issues in the case. By contrast in the present case there has never been any doubt that by the time of the publication on 2 June 2006 there was an investigation into the Claimant. MPS had made a press announcement to that effect. So the sources whose existence and

reliability were in question in *Jameel* have no equivalent in the present case. The source for the existence of the investigation in the present case is the investigating authority itself, MPS. There is no mention in the speeches in the House of Lords of any consideration of the existence or reliability of the sources of the information or allegation being investigated by the Saudi Authority. There could not have been. It is clear that the journalist in *Jameel* had no access at all to any source as to why the Saudi Authority was investigating any of the companies on the list disclosed by the journalist.

Submissions on the Reynolds criteria

154. The parties' submissions are as follows.

Points 1 and 2. The seriousness of the allegations and the nature of the information

155. Mr Rampton submits that the article does not convey a meaning at the upper end of the scale of gravity. In other words, it is not suggested that The Times has said that the Claimant is in fact guilty of corruption. The article must be read a whole, and not just the title, which as he put it 'gilds the lily', that is it overstates the substance of the article itself.

156. Mr Price submits that the allegation, relating as it does to corruption, is as serious as it can be for a police officer. The strength of the case against him is presented as powerful. Naming the Claimant, or even identifying the Extradition Unit, added nothing to the story, or not enough to justify doing so. Mr Price submits that there is no public interest in reporting an investigation at the stage at which The Times reported it. He enlarges on this submission, and it is addressed separately below.

157. Mr Price further submits that the quality of the information was poor in the sense that the most that the ISC Insider was able to say was that the Claimant could be Noah, but he did not know whether he was or not, and he did not know of any information that might have come from the Extradition Unit. Further Mr Price submits that Michael Gillard should have appreciated that the police had a low opinion of the quality of the information, since that would explain why they had not progressed the investigation.

158. Mr Rampton responds that there was in fact an investigation by the police, so they must have regarded the quality of the information as sufficient for them to commence such an investigation.

Point 3. The sources of the information

159. Both parties address this point on the footing that it refers to the information Michael Gillard alleged was being investigated, not the source of the fact that there was an investigation. The reason for this is that while the MPS was the source for the fact that there was an investigation, MPS had not announced anything else. So the source for the information in the article about what they were investigating could only be the Sources A, B and C, and the ISC Insider.

160. Mr Rampton submits that Michael Gillard understood that his source (the ISC Insider) had given to the police the same information. The source provided documentary

evidence which he had given to DPS, namely the Note. He was in a position to know about the underlying matters and to understand internal ISC documents.

161. Mr Price submits that the sources obviously had an interest of their own (an axe to grind) and no direct knowledge either that ISC had received information from the Extradition Unit, or that any payment had been made by ISC to the Claimant. Michael Gillard and Mr Gillard did not deny that the sources had their own interests to pursue, but only remarked that this was commonly the case with sources.

Point 4. Verification

162. Mr Rampton submits that Michael Gillard had investigated all that he could. He had verified with Sources A and B that information had been given to DPS. He had verified with Mr Berezovksy's representatives that he had been a client of ISC. The ISC accounting document showed cash withdrawals for payments to Noah. The journalists understood the MPS press statement of 28 April 2006 to refer to an investigation that had started before they had raised the matter. They had reason not to accept the statements from Mr Hunter's representatives that the police investigation was prompted only by their raising the questions that they had.

163. Mr Price submits that the journalists do not pretend to have attempted verification of the accusation (as opposed to verification of the making of the accusation, and the alleged police response to it). So, he submits, this case can be defended, if at all, as one of reportage, but not otherwise. A defence of neutral reporting, where it applies, relieves the journalist of the obligation to verify – indeed it makes verification otiose, since it would involve the journalist in abandoning neutrality (as Simon Brown LJ points out in *Al Fagih v HH Saudi Research and Marketing* [2002] EMLR 13 para.50). If, on the other hand, verification was required, it would, by virtue of the repetition rule, have to be of the truth of the ISC insider's reported "accusation".

164. Mr Price submits that the journalists could and should have checked to find out if there was any confidential information that the Claimant could have passed to ISC. Since the Claimant's unchallenged evidence is that he did not have any such information that would have shown the poor quality of the information received from the sources. Mr Rampton responded that the journalists did not need to check this. They had been informed by the police on 9 May that an investigation was in progress, following a search of the Claimant's home. The police were best placed to know if the Claimant had any confidential information, and if it were clear that he had none, then they would not have carried forward the investigation as they did.

Point 5. The status of the information

165. Mr Rampton refers to Michael Gillard's evidence that the allegation against the Claimant was not just a rumour, or just an allegation. The ISC Insider had gone to great lengths to give it to the DPS.

166. Mr Price submits that the information has no status at all. It is just an allegation that was being investigated.

Point 6. Urgency

167. Mr Rampton does not suggest there was any urgency in making the publication that it did. But TNL waited until 2 June before making it, following the representations made in response to the questions raised on 28 April.

168. Mr Price submits that there was no reason not to await the outcome of the investigation.

Points 7 and 8. Comment sought from the Claimant and the gist of his side of the story

169. Mr Rampton submits that TNL sought comments from the Claimant (and others concerned) and published the denials that the Claimant made, as well as denials from Mr Hunter, which added weight to those of the Claimant. The article also included their statements that they were willing to co-operate with the police. Mr Rampton submits that whatever the reason (and he made no criticism of the Claimant in relation to this), the journalists had done what they could to put the allegations to the Claimant personally for his comments.

170. Mr Price submits that it is unfair to ask for a comment from a person in the position of the Claimant, namely one who is reported to be the subject of an investigation into an allegation of corruption. It interferes with his right to silence in the criminal investigation and so engages his Convention rights under Art 6. It follows that while the article does contain his denials, it does not contain details which the Claimant might have been free to disclose if he had not been the subject of a criminal investigation.

171. Mr Price submits that there was further information given by Mr Hunter which should, in fairness, have been included in the article. The article should have reproduced Mr Hunters' statement that the investigation had been triggered by the questions raised and allegations made by the journalists.

Point 9. The tone of the article

172. Mr Rampton submits that this was factual, as in *Jameel*.

173. Mr Price submits that whatever its form, the article seriously overstates the value and quality of basis for the ISC Insider's allegation, and omits matters which could have been added to show the strength of the Claimant's denials.

Point 10. The circumstances of the publication

174. Mr Rampton submits that the article was published only after months of enquiries, which included looking into the backgrounds of the individuals concerned. The publication was not by Michael Gillard alone, who was himself an experienced

investigative journalist, but also by Mr Calvert, and by the editorial team of TNL, a newspaper with great experience of investigative journalism.

175. Mr Price submits again that, at the stage which the police investigation had reached in February, and on 2 June, the public interest was respectively, against a parallel investigation by journalists, and against publication at any time before the outcome of the police investigation. Once the outcome of the investigation was made known, TNL did not publish that outcome as a matter of public interest. All they did was to seek to use the prospect of such a publication (which never took place) as a bargaining counter in their negotiations with the Claimant.

Qualified privilege on reports of investigations

176. Some of Mr Price's submissions mentioned above need to be considered in more detail. He submitted that it could not be in the public interest for the press to be conducting an investigation in parallel with an investigation by the police, and for the press to disclose matters which the police would not and could not disclose.

177. There was an argument in *Jameel* which has some similarity to a submission made by Mr Price, and it was rejected. In *Jameel* Lord Scott said this at para 142:

> "**142** Finally the judge appears to have regarded it as reprehensible or, at least, inconsistent with "responsible journalism" for the "Wall Street Journal Europe" to have published a story disclosing the names on a list that the United States authorities had undertaken to keep confidential. Coupled with this is the denial by SAMA and the Saudi banks that the list existed: see para 54 of the judgment. The judge said, at para 58:
>
> "where there was an inter-governmental agreement not to reveal the names of those being investigated in the fight against terror, cogent grounds are required to show why the public interest called for that agreement to be breached."
>
> I would, for my part, answer that point in two ways. First the importance of the story was not the identity of the names on the list but that there *was* such a list, evidencing the highly important and significant co-operation between the United States and the Saudi authorities in the fight against terror. The names gave credibility to the story. Second, I know of no government that discloses information to which sensitivity may attach otherwise than with great reluctance. Subject to D notices and the like, it is no part of the duty of the press to co-operate with any government, let alone foreign governments, whether friendly or not, in order to keep from the public information of public interest the disclosure of which cannot be said to be damaging to national interests."

178. As to the dangers of parallel investigation, Mr Price cited two examples from the evidence. First, there was Michael Gillard's own evidence that following the

journalists' visit to Mr Hunter's office on 27 April, there had been extensive shredding of documents. Second, there were the notes of DCI Crump made on 28 April, to the effect that as a result of the enquiries and questions the journalists made and raised on 26 to 28 April, the Claimant and Mr Hunter were aware of the investigation, which limited the effectiveness of what DCI Crump's investigation could achieve.

179. As to the unfairness of the parallel investigation, and publication before the outcome of the police investigation was known, Mr Price made these submissions. First, as already noted, he made submissions based on the Claimant's Article 6 rights and his inability to defend himself against the press allegation while at the same time facing a police investigation. Secondly Mr Price referred to a long line of authorities on duty/interest qualified privilege at common law (that is cases preceding the development of *Reynolds* public interest privilege). Thirdly, he submitted that the police are subject to limits imposed by law as to what they can reveal about a suspect, and it would be wrong if the media were not subject to a similar restriction. Related to this is his submission that the defence of TNL can succeed, if at all, only on the footing that it is reportage.

180. Mr Price accepts that as a general proposition the public interest in the exposure of police misconduct is well-established. The fact that the police are investigating a possible crime is also a matter of public interest, and it will sometimes be in the public interest to publish that fact: obvious examples are the police investigation of cash-for-honours, and now the investigation into possibly fraudulent claims by MPs for expenses. But he submits that there is no public interest in publishing the complaints, accusations, or hearsay statements made privately to the police (often under protection of absolute privilege), or the documents and other evidence handed in to the police. Most accusations against police officers are false or malicious, as noted above. Publication of such accusations is opposed to the values of a democratic society, and is more akin to the values of McCarthyism, or of societies in which people may be ruined by anonymous denunciations to the police. TNL insists that the *accuser* must be assured of anonymity, even if malicious, but then argues that the accused must be exposed in the national media, with every detail of the accusation and evidence that the press can discover, under the protection of privilege. Further, Mr Price draws an analogy with reports of court proceedings in public, which attract absolute or qualified privilege, by reason of the public interest in such proceedings. It cannot be argued from the undoubted public interest in court proceedings, that media publication of, for example, witness statements or affidavits not yet put in evidence in open court is in the public interest: see *Stern v Piper* [1997] 1 QB 123. The affidavit which the defendant published in the *Stern* case was in effect the accusation against him by his accuser, which is essentially what *The Times* has published in the present case. Such a publication is clearly not privileged.

181. I accept that there is force in these submissions. But it seems to me that the anomaly, if such it is, that Mr Price draws attention to is a consequence of *Reynolds* and *Jameel*. In my judgment it is a point that cannot be viewed on its own, but must be considered as part of the ultimate balancing test, which I address below.

182. The short answer to the other points raised by Mr Price seems to me to be that if they were well founded, then they would have been as much an answer to the Wall Street Journal's defence in *Jameel* as to TNL's defence in the present case. But I would add

the following observations, which lead me to the conclusion that none of these arguments is sound.

183. The law provides for interference with the course of justice, or contempt of court. If newsgathering interferes with a police investigation, then there are sanctions that the law imposes, and even, in rare cases the possibility of an injunction, as occurred in *ex p HTV Cymru (Wales) Ltd* [2002] EMLR 11. In that case Aikens J granted an injunction to restrain the media from interviewing witnesses during a criminal trial. A general rule that it is against the public interest for the media to engage in investigative journalism on a matter which is, or (in the media's view) should be, the subject of a police investigation must be far too wide.

184. Mr Price submits that the journalists misled the police on two occasions. First they asserted in the conversation with Ruth Shulver, and in the e-mail on 27 April to MPS, to be put to the Claimant, that "Scotland Yard received information early this year alleging that Mr Hunter paid you for information…". This was an overstatement, in that the most the ISC Insider had said was that Noah could be the Claimant, and the ISC Insider did not know about any information. Second, on 9 May the journalists misled DCI Crump by misleading him, or at least failing to respond candidly to his request for the documents which Michael Gillard in fact had. On both occasions the journalists were obstructing the investigation.

185. It is possible that there may be particular cases where the public interest in there being no interference with a police investigation is so great that a *Reynolds* public interest defence would fail on the facts of the case in question. I make no comment on that, one way or the other. But if that is so, this is not such a case. First, there is no evidence that the journalists did in fact interfere with the course of justice, or the police investigation. Michael Gillard's evidence, which I accept, is that he considered that possibility early in 2006 and believed the information given to him, to the effect that Mr Hunter was already aware of the media's interest. Second, there is no evidence on which I could find that Mr Hunter did destroy any evidence following the visit of the journalists to his office in April. Mr Hunter denied it, and it was not put to him by Mr Rampton in cross-examination. Further, as Michael Gillard stated, there are channels of communication between the police and editors of responsible newspapers, such as The Times and The Sunday Times. If there is a danger of interference with an investigation, or with matters relating to the national interest or national security, editors may be so advised by the public authority concerned, and when so advised they generally respond as requested. That consideration is mentioned in *Jameel* also at para 86: if the US Treasury had indicated that the information should not be published, the Wall Street Journal would probably not have done so. Michael Gillard said that neither he nor his editor received any such suggestion in the present case.

186. The fact that a person is the subject to a police investigation may well put him at a disadvantage when asked by a journalist for comments on a proposed story about the investigation. In the present case there is no criticism of the journalists on the basis that they failed to take sufficient trouble to obtain the Claimant's comments. And there is no criticism of the fact that the Claimant chose to respond by reporting the journalists' approach to his superiors as soon as it occurred.

187. In my judgment it cannot be a general principle that a journalist is obliged to desist from asking for comments of a person when they find out that he is subject to a police investigation. Here the article sets out the fact that the Claimant is subject to a police investigation. That is what the story is about. The readers can therefore judge for themselves the significance, or otherwise, of there being no greater comment from the Claimant than is in fact set out in the article. Further, in *Jameel* (para 84) it was held to be important that all that the claimant in that case could have said, if he had been asked, would have been that he knew no reason why anyone would want to monitor his accounts. So he too was at the disadvantage of not being able to give a comment that would balance the allegations against him. If Mr Price's submissions on this point were correct, they would have been available to the claimant in *Jameel*, and could, in any event, hardly have escaped the notice of the judges before whom that case came at its various stages.

188. Mr Price relies on what he refers to as to a consistent stream of authority which denies privilege to reports of *ex parte* accusations, or interim stages of official inquiries. The line of authority stems from *Purcell v Sowler* (1877) 2 CPD 215, which concerned a report in a Manchester newspaper of proceedings at a meeting of the board of guardians for a local poor-law union, in fact held in public, though the CA considered that it would have been better held in private, at which *ex parte* charges of neglect were made against the plaintiff, the medical officer of a union workhouse. Cockburn CJ said [p.218] that "it is impossible to doubt that the administration of the poor-law is a matter of national concern". But that, plainly, was by no means enough to give rise to privilege. Mellish LJ gave the reason for denying privilege at p.221:

> "Although [the board of guardians] admit the public on an occasion when ex parte charges are made against a public officer, which may affect his character and injure his private rights, it is most material that there should be no further publication; there is no reason why the charges should be made public before the person charged has been told of the charges, and has had the opportunity of meeting them …….
>
> Such a communication as the present ought to be confined in the first instance to those whose duty it is to investigate the charges….
>
> I do not mean to say that the matter was not of such public interest as that comments would not be privileged if the facts had been ascertained …… But that is a very different thing from publishing ex parte statements, which not only are not proved but turn out to be unfounded in fact."

189. Another cases cited is *De Buse v McCarthy* [1942]1 KB 156, but that is very different. The publication was by a public authority. There the words sued on were not a report by a newspaper, but an announcement by a local authority convening a meeting of the council to consider the report of a committee regarding loss of petrol from one of the council depots. The notice included a complete copy of the committee report, which summarised the evidence which it had heard, and recommended that the employees, who were named, should be transferred to other positions [pp.157-8, and foot of p.164]. *De Buse v McCarthy* is an illustration of the principle discussed in *Wood v Chief Constable of West Midlands* [2005] EMLR 20 and *R v Chief Constable of North Wales ex p. Thorpe* [1999] QB 396. In *Thorpe* the Court of Appeal held that police should not generally disclose information that came into their possession relating to a

member of the public except for the purpose of, and to the extent necessary for, the performance of their public duty. (These cases may explain why the police were not as candid as Michael Gillard thought they ought to have been in response to his enquiries). These cases would now fall to be considered not under *Reynolds* public interest privilege, but under the Human Rights Act 1998 ("HRA") s.6(1) and Article 8 directly, or, if applicable, under the Data Protection Act 1998 (the 1998 Act): see *Clift v Slough BC* [2009] EWHC 1550 (QB). In any event, where *Reynolds* public interest privilege is the defence, the most that these cases show is that the reputation right of a claimant under Article 8 is of great importance and must be taken into consideration. The cases cannot be taken as going further than that. Other cases cited included *Henry v BBC* [2005] EWHC 2787 (QB) and *Miller v Associated Newspapers* [2004] EMLR 33. But as Mr Price accepts, these must be read subject to the subsequent case of *Jameel*. On that basis, I do not find them of assistance.

190. Further Mr Price submits that in this case TNL's position is circular, in that the article is a report of an investigation precipitated by the journalists' own allegations. There are a number of observations to be made of this submission. First, on 9 May 2006, long before the publication on 2 June 2006, the journalists had been informed by the police that a search warrant had been executed at the Claimant's home. That requires the grant of a warrant by a judge. The journalists' evidence was that they were surprised at the suggestion, and did not believe, that the questions they raised and the allegations they put should have had led to the issue of a search warrant. I accept that they were reasonably entitled to be of that state of mind. They did not have to accept the statements of Mr Hunter's solicitors that it was they who had started the investigation. They checked with MPS, but were given no further clarification.

191. Second, in any event, whatever precipitated the investigation, including the search warrant, the fact was that by 2 June a police investigation was in progress. Even if it had been precipitated by the journalists, that would not have been a reason why they should not report it (assuming other conditions necessary for reliance on a *Reynolds* public interest defence were fulfilled). This is not a case which is circular in the sense that TNL were simply reporting that they had made allegations to the police. They were not reporting that at all. What they were reporting was that there was an investigation by the police. The police do not automatically investigate every allegation that is made to them. They decide what to investigate and what not to investigate. So there is a very important difference between what the journalists may have alleged to the police, and the fact that the police were carrying out an investigation (even if that investigation may have resulted from what the journalists alleged).

192. Whether there were strong, or reasonable, grounds to suspect the Claimant of corruption, or grounds which objectively justified a police investigation into the Claimant is a different point. That is the point that arises on the defence of justification. I make no findings about that point.

The relevance of facts not known to the journalist

193. Mr Rampton submits that facts not known to the journalist are relevant only to allowing evidence to be adduced to show that sources were unlikely to have told a journalist what that journalist says they told him: *Jameel v Wall Street Journal*

(Europe) Sprl [2004] EMLR 6 at [31]-[32]; *GKR Karate (UK) Ltd v Yorkshire Post* [2000] 1 WLR 2571 at 2578F-2579A, where May LJ said:

> "… the existence or otherwise of qualified privilege is to be judged in all the circumstances at the time of the publication. It is not necessary or relevant to determine whether the publication was true or not. None of Lord Nicholls's 10 considerations require such a determination and some of them (for example number 8) positively suggest otherwise. Nor is it necessary or relevant to speculate (for the purposes, for instance, of considerations 3, 4 or 7) what further information the publisher might have received if he had made more extensive inquiries. The question is rather whether, in all the circumstances, the public was entitled to know the particular information without the publisher making further such inquiries. The reliability of the source of the information is a relevant consideration, but that, in my view, is to be judged by how objectively it should have appeared to the defendant at the time. It is to be considered in conjunction with the inquiries which the defendant made at the time relevant to the reliability of the source. If the defendant made careful inquiries which, judged objectively, reasonably justified a conclusion that the source was apparently reliable, that will be a positive (though not determinative) indication in favour of the occasion being privileged. If the defendant made no, or only perfunctory, inquiries, a conclusion that the source was apparently reliable will be less likely. In neither instance is a subsequent investigation at trial into the actual reliability of the source relevant".

194. Mr Price submits that evidence of matters the journalist did not know may be relevant to the question whether he "made careful inquiries which, judged objectively, reasonably justified a conclusion". And the conclusion to which such evidence is relevant is not just the reliability of a source, in the sense of whether the source was telling the truth, but may include the reliability of the information. For example, in this case Mr Price submits that the journalists did not enquire whether the Claimant had any confidential information which might have been of interest to ISC's clients, and he criticised that as a failure on their part.

195. Moreover, Mr Price submits that there are particular problems where, as here, the journalist maintains the anonymity of his sources. As Lord Nicholls pointed out in *Reynolds* at p201:

> "If a newspaper is understandably unwilling to disclose its sources, a plaintiff can be deprived of the material necessary to prove, or even allege, that the newspaper acted recklessly in publishing as it did without further verification."

196. If the journalist does not disclose his source, it may be very difficult for the court to assess whether the enquiries made by the journalist were, judged objectively, sufficiently careful inquiries which reasonably justified a conclusion. This is not the

same as investigating what further information the publisher might have received if he had made more extensive inquiries. It may be that a journalist has made all the enquiries that were possible. It does not follow that those enquiries reasonably justified the conclusion which the journalist reached.

197. In the event, I have reached the conclusions I have reached in relation to the print publication on the basis of the evidence for TNL, and have drawn on the evidence for the Claimant only in so far as it was uncontroversial, save in one important respect. The evidence of the Claimant is relevant in my judgment to the assessment that has to be made as to whether the interference with the Claimant's right to reputation under Article 8 was proportionate. The test there is whether the interference was proportionate, not whether the journalists believed it to be so.

198. However, in my judgment the evidence of the Claimant and Mr Hunter, and the information in the documents obtained from the IPCC is all relevant to the website publication, and as to what relief is to be granted in relation to that in the future, if any. This is discussed below.

THE BALANCING EXERCISE

199. I turn therefore to consider the weight to be attached to the rights to be balanced in this case. I do so on the basis that I do not need to consider further point 4 (the steps taken to verify the information), and points 6 to 9 (urgency, whether comment sought from the Claimant, whether the article contained the gist of the Claimant's side of the story, and the tone of the article). On all of these points I accept Mr Rampton's submission and find that no criticism can be made of what the journalists did.

Freedom Of Expression

200. In favour of freedom of expression in this case are, in my judgment, the following main points. First, the question whether there is corruption of public officials, in particular corruption of police officers by wealthy foreigners resident in England, is a matter of high public interest. It is similarly a matter of public interest that allegations of such corruption may not be being investigated in a timely fashion by the police. As Lord Nicholls said, a newspaper is entitled to raise queries or call for investigation. It was in pursuit of a legitimate aim that TNL published the article, with a view to attempting to ensure that an investigation took place, or that it took place in a timely fashion.

201. If it was to be published at all, then 2 June was not too early to publish. There would be no point requiring a journalist to await the outcome of a police investigation in circumstances where his purpose in publishing is to ensure that a timely police investigation takes place.

202. Second, if the article was to be published at all, in my judgment it was within the range of editorial judgments open to TNL to publish it in the form they did. The naming of the Claimant had the legitimate aims claimed for it by Michael Gillard,

namely of adding to the credibility of the story, preventing suspicion from falling on other officers in the Extradition Unit and attracting potential witnesses. Weight should in this case be given to the professional judgment of the editor and the journalists. There is no indication that the decision to publish the article in the form it was published on 2 June was made in a casual, cavalier, slipshod or careless manner.

203. Third, while the basis for the allegation was weak, in that there was no evidence that the Claimant was Noah, or that any confidential information had been received by ISC, nevertheless, as early as 9 May, and up to the time of publication on 2 June, the police had confirmed that they had had sufficient evidence to obtain a search warrant and to carry out an investigation.

204. The fact that the journalists have not disclosed their sources in this case is of little significance. The fact that payments were made in cash to Noah was soundly based on the documents. It has not been suggested that the journalists ought to have doubted the authenticity of these. If the sources had claimed to give oral evidence that the Claimant was Noah, or that ISC had received confidential information, then their reliability would have been very much in issue. But they did not, and so it was not. Knowing their identity would not have strengthened or weakened the case. The background to the case, as known to the journalists, included that there had been a parting of the ways between those involved in ISC following the death of Mr Curtis. The journalists were aware that their sources might be pursuing their own interests.

205. I remind myself in particular of Lord Nicholl's admonition that, is particularly apt in the case of journalists and a defendant with the experience of those involved in the present case:

> "The press discharges vital functions as a bloodhound as well as a watchdog. The court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion."

206. The fact that I take account of these factors is not be interpreted as an endorsement by me of the decision to publish. It is not for the court to express a view on the wisdom of the publishers. I do no more than say that these factors are ones which it was within the editorial judgment of the very experienced publishers and journalists in this case to take.

The Claimant's Reputation

207. The right to reputation is not just of interest to the individual whose reputation is damaged. The public importance of reputation, in particular the reputation of a public official, is a matter of public importance. This was explained in general terms by Lord Nicholls in *Reynolds* in the passage from p 201 cited above. The passage bears repetition, because the Claimant's unchallenged evidence is that it applies specifically to himself in this case:

> "Once besmirched by an unfounded allegation in a national newspaper, a reputation can be damaged for ever, especially if there is no opportunity to vindicate one's reputation. When this

> happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good. It is in the public interest that the reputation of public figures should not be debased falsely."

208. In this case the Extradition Unit was deprived of the Claimant's valuable services for many months, to the prejudice of the public service. It is of obvious advantage to a potential corrupter to know that if he can manipulate the media he can remove, or credibly threaten to remove, an honest public servant from his position.

209. It is necessary to distinguish the harm done by the publication on 2 June 2006 from the events that occurred on and between 27 April and 2 June. It was during that period that the Claimant was first removed from the Extradition Unit and suffered much of the injury to his feelings. But he has not sued on the publication of a libel by TNL to MPS on 27 or 28 April. He has sued on the publication on 2 June 2006 and thereafter.

210. In the present case, without trespassing impermissibly on to the issue of justification which is still to be tried, I can take the following into account. While the information was sufficient to enable MPS to obtain a search warrant, it was not a strong case, on the basis of what was known to the journalists. There was no evidence known to the journalists that the Claimant had received payments from ISC, and none that he had disclosed confidential information. The ISC Insider had specifically said, as reported in the article at para [5], that "Noah could be a reference to an officer in the extradition unit", not that Noah was in fact a reference to him. So far as known to the journalists, the allegations were based on the facts that the Claimant served in a Unit which might have had information of use to ISC's clients, and that he enjoyed a close friendship with Mr Hunter, and that in his own personal circumstances he might have been thought to be a potential target for corruption if Mr Hunter was that way inclined. There was no evidence that Mr Hunter was so inclined, but his clients were individuals about whom much adverse information has been published.

211. In addition, I remind myself that the Claimant and his wife suffered severe injury to their feelings, which even affected their health, although I must only take into consideration the injury suffered as a result of the publication on 2 June 2006. The greater part of the injury to their feelings was suffered on 28 April 2006.

212. I have not overlooked the points made to the effect that there has been no subsequent publication of the outcome of the investigation in which no evidence was found to support the allegation. But I do not consider that a subsequent failure to publish matters which vindicate the reputation of the Claimant can affect the question whether the publication itself is protected by *Reynolds* public interest privilege. These matters may, however, assume a different relevance in relation to the subsequent website publications.

213. Many criticisms have been levelled at the journalists on behalf of the Claimant. They should not have assumed that if the police were taking time to investigate (between February and 28 April before they announced an investigation), that there was no good reason for that. Even if the reasons were related to matters of international diplomacy, that does not mean that they were insufficient. Just because a police

officer has the misfortune to have to incur personal expenditure on private matters, and just because he has remained friends with a former police officer who is now engaged in a business with wealthy clients who might be interested in confidential information, is not a sufficient reason for suspecting a police officer of corruption.

214. I do not endorse these criticisms, but neither do I say they are unfounded. They are matters which go to the quality of the editorial judgment, but do not take the case outside the range of editorial judgment which the court is required to respect.

Striking the Balance

215. In my judgment, the real issue in the present case in relation to the print publication comes down to whether the journalism was responsible in the sense of whether the publication of the article, as and when it was published, was fair to the Claimant, that is to say, whether it was a proportionate interference with his right to reputation given the legitimate aim in pursuit of which the publication was made.

216. Having considered carefully these points in particular, but also all the other matters referred to in this judgment, and having regard to the clear guidance given by the House of Lords, first in *Reynolds* and more recently in *Jameel*, I conclude that the publication on 2 June 2006 was a proportionate interference with the Claimant's right to his reputation, given the legitimate aim in pursuit of which the publication was made. I uphold the defence of qualified privilege in respect of the publication in The Times newspaper of 2 June 2006. The story was about a police investigation into an allegation that an officer in the extradition unit had been corrupted by a former police officer now working on behalf of very wealthy and controversial Russians living in England. That was a story of high public interest. The purpose of publishing the story was to ensure that that investigation was carried out promptly. That too was a matter of public interest.

217. This is not to say that the judgment of TNL was a good judgment in the circumstances, but only that it was within the range of permissible editorial judgments which the court is required to respect. It is not the function of the court to express views on whether it was a good judgment or not, and I do not do so.

218. The naming of the Claimant was within the range of judgments open to TNL in this case, partly because it gave the story the interest referred to by Lord Steyn in *Re S* at para 34 cited above, but more importantly because not naming the Claimant would not have saved his reputation entirely. Rather it would have spread the damage to reputation to all the officers in the extradition unit.

219. If and in so far as the Claimant's complaint is that there should never have been the investigation at all, given the evidence available, then that is a complaint which is not related to the publication of the article on 2 June 2006 or on the website.

THE WEBSITE PUBLICATION

220. As already noted, the claim is brought, not only in respect of the print version, but also in respect of the website version of the article. There are before the court two versions of the website printed out. The first was printed out by TNL. It is undated and bears at its top the following in capital letters:

> "Warning this article is subject to legal dispute. It should not be relied on or repeated".

221. The second version was printed off the internet during the trial on 13 July by the Claimant's lawyers. It is the result of a search for the words "Gary Flood" using an internet search engine. The second item in the list of results is:

> "Detective accused of taking bribes from Russian Exiles
>
> …. Being identified as Detective Sergeant Gary Flood. His home and office were raided… the relationship between Sergeant Flood and a former Scotland Yard Detective… operate with the enquiry. Sergeant Flood has not been suspended but his lawyer… Michael Gillard 02 June 2006 The Times".

222. A click on that link brings up the article as set out at the start of this judgment. In addition to the words set out in this judgment there are immediately after the name Michael Gillard and the first paragraph of the text the following words, and no more:

> "[this article is subject to a legal complaint]"

223. The difference between these two versions has not been explained in evidence. But TNL have not disputed that the version printed out by the Claimant's lawyers is correct. I take it to be the version as it is currently available, whether or not it was available in that form at the time of the issue of proceedings.

224. The internet is not a complete resource. It contains what people post on it. The Report is not posted on the internet, so far as the evidence before me discloses.

225. Mr Price submits that where a defendant defends a website publication on the basis of *Reynolds* public interest privilege, he must do so by reference to the circumstances as they existed at the time of the website publication complained of, and he cannot simply rely upon the circumstances which prevailed at the time of the original publication, that is to say the circumstances at the time when the words were first published in any form.

226. This was considered and decided upon by the Court of Appeal in *Loutchansky v TNL Ltd (Nos 2-5)* [2002] QB 783 at paragraphs 77 to 79 (upheld in Strasbourg in its judgment of 10 March 2009: *Times Newspapers Ltd (Nos 1 & 2) v UK (Applications 3002/03 and 23676/03)*). In that case the Defendant added the following rider to the website article there complained of:

> "This article is subject to High Court libel litigation between Grigori Loutchansky and Times Newspapers. It should not be reproduced or relied on without reference to Times Newspapers Legal Department."

227. At para 17 of the judgment it is recorded that the trial judge had held that "the defendants had no reasonable grounds to contend that [after a certain date] they remained under a duty to publish these articles over the Internet, nor could they

sustain a separate argument for a special "archive" privilege" (the reference to "archive privilege" is explained in the citation from para 71, set out at para 230 below).

228. The question whether the so called single publication rule applied in relation to *Reynolds* privilege was considered and decided in the judgment of the Court delivered by Lord Phillips of Worth Matravers MR at para 79:

> "A subsidiary reason given by the judge for striking out the defence was that the defendants had repeatedly republished on the Internet defamatory material that was the subject of a defamation action in which they were not seeking to justify the truth of the allegations without publishing any qualification to draw to the reader's attention the fact that the truth of the articles was hotly contested. The judge considered that the republication of back numbers of "The Times" on the Internet was made in materially different circumstances from those obtaining at the time of the publication of the original hard copy versions in September and October 1999. We agree. The failure to attach any qualifications to the articles published over the period of a year on "The Times" website could not possibly be described as responsible journalism. We do not believe that it can be convincingly argued that the defendants had a *Reynolds* duty to publish those articles in that way without qualification. It follows that we consider that the judge was right to strike out the qualified privilege defence in the second action although not for the primary reason that he gave for so doing. For these reasons the Internet single publication appeal is also dismissed."

229. The Internet single publication appeal in *Loutchansky* had arisen first on a different point. It had arisen out of an interlocutory order by which Gray J refused permission to the defendants to re-amend their defence in one of the actions to contend that "as a matter of law the only actionable publication of a newspaper article on the internet is that which occurs when the article is first posted on the internet", and so that the publication sued upon in that case was outside the one year limitation period. The judge had rejected that submission on the authority of *Duke of Brunswick v Harmer* (1849) 14 QB 185 and *Berezovsky v Michaels* [2000] 1 WLR 1004. The defendants submitted that he was wrong to do so. See *Loutchansky* paras 15-16.

230. The defendants argued that, in relation to a book, the limitation period would in practice never expire if the single publication rule did not apply, and that this would be an unjustifiable restriction on a writer's freedom of expression, contrary to Article 10: *Loutchansky* para 65-71. The argument included in particular:

> "71 Maintaining an archive of past press publications was a valuable public service. If a newspaper defendant which maintained a website of back numbers was to be indefinitely vulnerable to claims in defamation for years and even decades after the initial hard copy and Internet publication, such a rule was bound to have an effect on the preparedness of the media

> to maintain such websites, and thus to limit freedom of expression".

231. The judgment continues as follows:

> "72 In answer to these submissions Mr Browne started by emphasising that the principle in the *Duke of Brunswick* case 14 QB 185 that every publication of a libel gives rise to a separate cause of action is a well established principle of English law that was recognised by the House of Lords in *Berezovsky v Michaels* [2000] 1 WLR 1004. He submitted that this principle was not at odds with the Human Rights Convention. Article 10 recognised that the right of freedom of expression could properly be restricted "for the protection of the reputation or rights of others". The rule in the *Duke of Brunswick* case was part of the system of English law that balanced the right of freedom of expression against the entitlement to protection of one's reputation. If the defendants were exposed to liability in the second action they had only themselves to blame for persisting in retaining the offending articles on their website without qualifying these in any way."

232. The Court upheld the submissions for the claimant:

> "73 … In our judgment the crucial question in relation to this part of the appeal is whether the defendants have made good their assertion that the rule in the *Duke of Brunswick* case is in conflict with article 10 of the Human Rights Convention because it has a chilling effect upon the freedom of expression that goes beyond what is necessary and proportionate in a democratic society for the protection of the reputation of others. 74. We do not accept that the rule in the *Duke of Brunswick* case imposes a restriction on the readiness to maintain and provide access to archives that amounts to a disproportionate restriction on freedom of expression. We accept that the maintenance of archives, whether in hard copy or on the Internet, has a social utility, but consider that the maintenance of archives is a comparatively insignificant aspect of freedom of expression. Archive material is stale news and its publication cannot rank in importance with the dissemination of contemporary material. Nor do we believe that the law of defamation need inhibit the responsible maintenance of archives. Where it is known that archive material is or may be defamatory, the attachment of an appropriate notice warning against treating it as the truth will normally remove any sting from the material.
>
> 75 Turning to the defendants' wider argument, it is true that to permit an action to be based on a fresh dissemination of an article published long ago is at odds with some of the reasons for the introduction of a 12-month limitation period for

> defamation. But the scale of such publication and any resulting damage is likely to be modest compared with that of the original publication. In the present case, as the judge observed, the action based on the Internet publication is subsidiary to the main action.
>
> 76 The change in the law of defamation for which the defendants contend is a radical one. In our judgment they have failed to make out their case that such a change is required. The Internet single publication appeal is therefore dismissed."

233. Whether or not the scale of a website publication, and any resulting damage, is likely to be modest compared with that of the original publication, will depend on the facts of each case. But the judgment in *Loutchansky* was delivered eight years ago, in 2001. Since then the use of the internet, and in particular of internet search engines has increased. What has also increased is the amount of material on the internet. In 2001 there were relatively few years of back numbers of newspapers available on the internet. Since then each year's publications have been added. In most cases, as time passes, the original print publication will become increasingly difficult to access, and would be forgotten. But the website publication will remain, and in some cases (where the fame of a person has increased) it may even be viewed with increasing frequency. So a person's reputation may be "damaged forever" in the words of Lord Nicholls in *Reynolds* at p201 cited in para 207 above. As I remarked in another case, quoting from an article by a well known media lawyer, what is to be found on the internet may become like a tattoo (*Clarke (t/a Elumina Iberica UK) v Bain & Anor* [2008] EWHC 2636 (QB) para 55). Some actual and prospective employers, and teachers, make checks on people by carrying out internet searches. An old defamatory publication may permanently blight a person's prospects. This may be so, even in those cases where the allegation has been authoritatively refuted, but the refutation is either not on the internet, or, where it is on the internet, its authority is not apparent, or is not credited, on the footing that there is no smoke without fire.

234. Michael Gillard's evidence was in itself an illustration of the dangers of the view that there is no smoke without fire. In his evidence in this case he demonstrated at length his view that past allegations against serving or former police officers, even if rejected in proceedings in which these were investigated, remained relevant to his assessment of that police officer. I cannot give detailed examples of these matters without giving unjustifiable currency to defamatory allegations for which there is no evidence, but which were advanced under the protection of privilege which witnesses enjoy in court proceedings, and which the individuals concerned did not have an opportunity to comment upon.

235. *Loutchansky* was, of course, before *Jameel*, but I see nothing in *Jameel* that casts doubt on this part of the judgment in *Loutchansky*, and Mr Rampton did not submit that there was anything. On the contrary, at the time Mr Browne was making his submissions in *Loutchansky*, he could base them only on the qualification of Article 10, namely that freedom of expression could be restricted "for the protection of the reputation or rights of others". The same argument today, assuming the recognition of reputation as an Aricle 8 right, is, if anything, stronger, since what is to be balanced is no longer a Convention right (Art 10) against a non-Convention right (reputation), but two Convention rights.

236. Mr Rampton submits that the qualifications which appear on the website, in whichever form they appear, make clear who the complainant is, namely that it is the Claimant. I do not agree. The reader might well understand that the complainant is Mr Berezovsky, or one of the other Russians mentioned in the article, or Mr Hunter. There is nothing to state that it is the Claimant.

237. Further Mr Rampton submits that TNL can rely on the fact that it offered to publish the outcome of the Report, but this was rejected outright. He relies on the exchange of correspondence that took place in September, as follows.

238. On 14 September 2007 Mr Brett, Legal Manager of TNL, wrote that TNL had been notified the previous week by DPS that the investigation into the Claimant had been concluded and "there was insufficient evidence to proceed with any criminal prosecution or internal police disciplinary process". The letter includes an offer to publish what is called "a News in Brief item which would run along the following lines". There then followed a draft consisting of three sentences. The first two sentences summarised the gist of the allegations made in the article complained of. The third read:

> "The Metropolitan Police's Directorate of Professional Standards has now concluded its investigation into [the Claimant] and found there is insufficient evidence to proceed with any criminal prosecution and [the Claimant] will not be subject to any disciplinary process".

239. On 24 September 2007 solicitors for the Claimant responded that this added insult to injury, explaining:

> "The investigation did not find 'there was insufficient evidence to proceed with any criminal prosecution'. There was no evidence, and, as a result, 'no formal disciplinary proceedings will be taken against' our client".

240. Solicitors for the Claimant drafted their own form of Apology. That did not follow the words of the Report either, and was not acceptable to TNL.

241. On 28 September 2007 Mr Brett wrote that there were a number of important witnesses who DCI Crump's team were unable to speak to, including the ISC Insider, and that TNL would have to approach those witnesses if the parties could not resolve the matter in accordance with proposals that he then set out. The letter stated that if the Claimant really did want what he called "a follow up report" to appear in the paper (in the same terms as he had previously offered), the Claimant only had to say so. Mr Brett added:

> "But please be under no illusions that your client's counsel … cannot then in any way hold it against [TNL] for not publishing a follow up report when this matter goes to trial and we rely, not only on a plea of justification but also on a *Reynolds* qualified privilege defence".

242. The wording put forward by TNL is different from that in the Report itself ("unable to find *any* evidence" – see para 4 above). The communication to TNL referred to by Mr Brett, which is the source for his wording ("*insufficient* evidence"), is a letter dated 4 September 2007 from DPS to TNL in which DCI Crump wrote:

> "Having considered all of the available information, I am of the opinion now that there is insufficient evidence to proceed with any criminal prosecution. I am also of the view that insufficient evidence exists to mount any internal police disciplinary process".

243. At this stage nothing turns on the difference between the parties on what was to be published, because in the event TNL did not publish any form of words along those lines. It may become relevant in relation to the form of any relief to be granted in due course.

244. Each party was entitled to reject the form of words tendered by the other in correspondence. The parties to a dispute are not obliged to settle it, and may choose to litigate. But the risk in relation to the *Reynolds* public interest defence lay on TNL, and not on the Claimant. It is for a defendant to make good his defence. It may well be good practice to seek to agree a form of follow-up publication in a case such as this. But if there is no agreement, then the publisher must take his own course, and then defend it if he can at trial. He cannot offer the claimant a form of words which the claimant refuses to accept, and then rely on that refusal to relieve him of the obligation of acting responsibly and fairly, at least when the claimant's refusal is reasonable, as it was here.

245. The upshot is that in relation to the website, TNL has not put forward anything to show that the continued website publication, without any updating or correction, met the requirements of responsible journalism as time went by. It is true that the Claim Form was issued on 31 May 2007, and technically does not complain of website publications in and after September 2007. But no point is taken on that technicality. Mr Rampton relied on the correspondence referred to above.

246. Some of the factors that applied in relation to the print publication on 2 June 2006 apply to the website publications since then. But there have been significant developments since then. After September 2007 TNL knew that there had been an investigation which had been completed, and the outcome of it. The status of the information had therefore changed for the worse (*Reynolds* Factor 5). On 5 November 2008 TNL obtained copies of documents from IPCC, as set out above. No evidence adverse to the Claimant's case has come to light from any of the further investigations to which Mr Brett was referring in his letter of 14 September 2007. TNL can no longer state that the website publication includes a fair representation of the Claimant's case (*Reynolds* Factor 8). His case now includes the favourable outcome to the investigation.

247. Nor can TNL rely on any of the public interest factors which they relied on in relation to the print publication (*Reynolds* Factor 2). And Mr Rampton has not advanced any other. As already mentioned, one of the principal points of public interest advanced for the print publication was that Michael Gillard's purpose was to call for an investigation, and, when he learnt that there was one, to ensure that it proceeded in a

timely fashion. That purpose had been fulfilled to TNL's knowledge by 14 September 2007, and The Times has not continued to call for an investigation, or otherwise explain the continuing public interest in the website publications.

248. A further factor is that the plea of justification is limited, as set out above. It may or may not succeed. Even if it succeeds, that would be consistent with the Claimant being entirely innocent. The most recent circumstance to have changed since the original print publication is that the Claimant and Mr Hunter have given the evidence I have summarised above, and that they were asked no questions at all. This will be relevant to any relief to be granted, and any further complaint the Claimant may make as to future publication on the website. But it also goes to the care that a responsible publisher should take to verify the information published (see Lady Hale's words in *Jameel* para 149). TNL do not challenge the Claimant's evidence, but neither do they act as a responsible publisher would act when faced with such evidence. TNL have been aware of the Claimant's case, and his evidence, prior to trial in the usual way, but have shown no response to it, such as would be appropriate to such unchallenged evidence.

249. I reach the same conclusion in this case as the Court of Appeal reached in *Loutchansky* at para 79. The failure to remove the article from the website, or to attach to the articles published on The Times website a suitable qualification, cannot possibly be described as responsible journalism. It is not in the public interest that there should continue to be recorded on the internet the questions as to the Claimant's honesty which were raised in 2006, and it is not fair to him. It is not in the public interest for the reasons given by Lord Nicholls in *Reynolds* at p201 cited in para 207 above.

250. In the form in which this judgment was circulated in draft I had included in the second sentence of the previous paragraph the words "over the period since at least September 2007". In other words I found that the defence of qualified privilege failed from at least September 2007. And I added that I had not been asked to, and have not, made a finding as to the precise date from which it fails. Following circulation of the draft, TNL asked for clarification of the date from which the defence failed, and I permitted both parties to make further submissions, and to put before me letters exchanged between the parties which had been omitted from the trial bundle.

251. Mr Price's primary submission was that it was clear from the draft judgment that I had rejected the defence of qualified privilege in relation to the website publications from their commencement, on the same day as the print publications. That is not correct. It was not my intention to find that that the website publications were unprotected from their commencement. Such a finding would be inconsistent with my finding that the print publication was protected by qualified privilege. Since the website publication commenced on the same date as the print publications, on any view for at least some period of time the factors that led me to uphold the defence of qualified privilege in relation to the print publication must apply with equal force to the website publication.

252. The reason why I was unable to make a precise finding as to the date from which the defence of qualified privilege failed was related to the way the parties had advanced their cases. TNL had made no separate case in respect of the website publications. Their case on the print and website publications was the same. They advanced no

alternative case in the event that I might find (as I have) that the print publication was protected by qualified privilege, but at least from some subsequent date the website publications were not. For his part the Claimant had referred to a number of different dates upon which, on his case, the facts relevant to qualified privilege changed materially. In the Particulars of Claim he had pleaded that TNL had continued to publish the article online despite the contents of two letters, one dated 18 July 2006 and the other dated 22 December 2006. In his amended Reply the Claimant alleged that the TNL had no continuing duty (within the meaning of *Reynolds*) to publish the words complained of without a suitable update. In the Reply he identifies (amongst other later dates which are irrelevant) the dates of 18 July 2006 and 5 September 2007. He does not, in the Reply plead the intermediate date of 22 December 2006, but I attach no significance to that omission. However, the letters dated on and between 16 July 2006 and 4 September 2007 were not in the trial bundles, and I was not taken to them at the hearing.

253. The letter of 16 July 2006 is a letter before action. It sets out over two pages the allegations about which the Claimant complains, and the Claimant's denials. It is to be recalled that in the article at paras [8] and [9] TNL recorded the Claimant's denials of the allegations. In my judgment the letter of 16 July 2006 does not contain anything of substance which ought to have led TNL to update their website at that point. The Claimant also complains that the article did not report that the investigation was into allegations made by TNL. I do not accept that that is a complaint that affects the issue of qualified privilege, for the reasons set out in para 191 above.

254. In the letter of 22 December 2006 the Claimant's solicitors wrote informing TNL, amongst other matters, that:

> "… as of 20 December our client has been authorised to return to his original duties as the investigation has concluded that there is no evidence to support any allegations of wrong doing on the part of our client, whether as alleged by yourselves or otherwise and he has been totally exonerated".

255. On 11 January 2007 TNL stated that they did not accept that the investigation had been concluded, although TNL accepted that the Claimant had recently returned to the Extradition Squad. TNL asked to see "the conclusions [of the investigation] and any recommendations made" and a copy of the official form supporting the Claimant's statement. They received no response. The fact that TNL accepted the Claimant had returned to work was an important development, because the article stated that he had been moved temporarily from his post, albeit not suspended (paras [2] and [9]). However, I do not consider that it is so significant that I could find that a failure to update the website in response to the letter of 22 December 2006 means that TNL fell below the standard of responsible journalism or was unfair to the Claimant.

256. The Claim Form was served on 31 May 2007, and on 1 August 2007 the Claimant's solicitors explained their letter of 22 December 2006. They said that they had seen no point in replying to TNL's letter of 11 January. They stated that they anticipated receipt of the official form (known as form 163A) imminently. On 31 August 2007, following further correspondence from TNL, the Claimant's solicitors stated that they had been able to say what they did on 22 December, namely that the investigation had been concluded, and that there was no evidence to suggest any wrongdoing by the

Claimant, because that is what he had been told by his superiors, and because that was supported by the fact that he was returned to his original duties without restrictions. On 5 September 2007 the Claimant was issued with form 163A, which stated that there would be no formal disciplinary proceedings. The Claimant does not know why the form was not issued before that date. The Claimant's solicitors sent a copy to TNL. The form is headed "Notification of Result of Investigation … referring to Investigation into allegations made by the Sunday Times". TNL responded on 14 September referring to the notification made to TNL on 4 September, as set out in para 242 above.

257. In my judgment, as from receipt of the letter of 4 September, which would normally have been on 5 September 2007, responsible journalism required that TNL publish an update to their website. None was published, and I do not have to consider in what terms it should have been. Accordingly, the defence of qualified privilege fails in respect of subsequent publications.

258. There was a further point advanced by Mr Price which I do not accept. He submitted that the website publications were not responsible journalism because it was clear at some point, and in particular after the disclosure of documents by IPCC, that the MPS investigation on which the article complained of had reported had in fact been caused by the Defendant. The conclusion does not follow. As I have found in relation to the print publication, the fact that the investigation may have been precipitated by the journalists is not a reason why they should not have the benefit of *Reynolds* public interest if they report on the investigation. It might well be otherwise if what they were reporting was their own allegations made to the police on 27 and 28 April 2006. But that was not what the article reports on.

259. Although in this judgment, I have adopted the assumption that a person's right to protect his or her reputation, at least in a case such as the present, is amongst the rights guaranteed by Art 8, it would have made no difference if I had not adopted that assumption. The assumption favours the Claimant. In relation to the print publication, the assumption has not enabled him to succeed, and so he would be no better off without the assumption. In the case of the website publication, I would have reached the same conclusion even if I had not adopted the assumption.

260. In summary, for the website publications sued on, I find that the defence of qualified privilege succeeds in respect of publications made up to 5 September 2007. It fails in respect of publications made as from 5 September 2007.

THE FUTURE OF THIS ACTION

261. What I have decided determines the preliminary issue that was ordered to be tried. What is to follow from my decision on this point must be considered in the light of further argument, whether before me, or after the trial of the remainder of the issues in the action. On distribution of this judgment in draft I will invites submissions as to what directions or orders should be made.

262. In considering what these should be, much may depend upon what are the remaining issues in the action. There is a limited plea of justification as set out in para 7 above. It is a matter for further submission whether or not any order consequential upon my

decision can or should be made before determination of the issues on the plea of justification.

CONCLUSION

263. The defence of qualified privilege succeeds in respect of the print publication and website publications made up to 5 September 2007. It fails in respect of the website publication made after 5 September 2007.