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Case No: HQ14D03651

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/04/2016

Before :

MR JUSTICE NICOL

- -

Between :

David Axon	**Claimant**
- and -	
Ministry of Defence	**Defendant**

-and-

News Group Newspapers Ltd	**Third Party**

- -
- -

Hugh Tomlinson QC and Sara Mansoori (instructed by **Carter Ruck**) for the **Claimant**
Christina Michalos and Tom Cleaver (instructed by **Government Legal Department**) for the **Defendant**
Antony White QC and Catrin Evans QC (instructed by **Wiggin LLP**) for the **Third Party**

Hearing dates: 1st - 4th March 2016

- -

Approved Judgment

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

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MR JUSTICE NICOL

Mr Justice Nicol :

Introduction

1. This was the trial of an action for misuse of private information and/or breach of confidence. In 2004 the Claimant was the Commanding Officer of a Royal Navy frigate, HMS Somerset ('the Ship'). Complaints were made that he had bullied junior officers on the Ship. An Equal Opportunities Investigation ('the EOI') was conducted which upheld the complaints. The Ship, which was returning from deployment in the Gulf, called in at Gibraltar. On 10th December 2004 the Claimant was instructed to return to London and hand over temporary responsibility to his Executive Officer. He was given the opportunity to comment on why he should not be permanently relieved of his command. In a letter of 13th December 2004 he accepted that his position as Commanding Officer had become untenable as a result of the EOI report and he did not oppose his removal. On 14th December 2004 the *Sun* newspaper published a story under the headline 'Mutiny on Gulf Warship: "Bully" Captain is kicked off'. On 15th December 2004 the Claimant was formally removed from his command. He was given a further opportunity to comment on other administrative action which might be taken in consequence of the EOI report. On 15th December 2004 the *Sun* published a second article under the headline 'Crew Tell of Abuse: Two Officers Made Claims'. On 17th December 2004 the *Sun* published a third article under the headline 'Mutiny Skipper Sacked: Navy Warship Captain Guilty of Bullying'. I have referred to the articles by the *Sun*, but there was considerable coverage in other sections of the media after the first *Sun* article.

2. Subsequently, the Claimant was reassigned to a shore based appointment. On 17th January 2005 Admiral Sir Jonathan Band, the Commander-in-Chief Fleet, formally expressed his severe displeasure at the Claimant's conduct and administered a censure. The censure would remain on the Claimant's service record for 5 years.

3. The Claimant resigned his commission and retired from the Royal Navy in June 2007.

4. In 2013 News Group Newspapers Ltd ('NGN'), the publisher of the *Sun*, disclosed that it had had a source within the Ministry of Defence ('MOD') who had been providing information for some 8 years and who had, over that time, received a total of about £100,000. Her name was Bettina Jordan-Barber. On 21st December 2004 she had been paid £5,000 for what was identified in a schedule of payments as two stories: 'Mutiny on Gulf Warship & Blackwatch soldier'. The Claimant was informed by the police on 16th April 2013 that Ms Jordan-Barber had behaved in this manner. Both Ms Jordan-Barber and John Kay (a *Sun* reporter under whose byline the stories of 14th December, 15th December and 17th December had been published) were prosecuted for conspiracy to commit misconduct in public office. Ms Jordan-Barber pleaded guilty and, in January 2015, was sentenced by Saunders J. to 12 months imprisonment. Mr Kay pleaded not guilty. He was acquitted by a jury in March 2015.

5. The Claim Form was issued in September 2014. The Claimant's case is that he had a reasonable expectation of privacy and/or confidentiality in connection with the following information:

    a. The fact that members of his crew had complained about his conduct ('the fact of complaints');

b. The fact that an EOI had been carried out into his conduct ('the fact of the EOI');

c. The fact that he had been ordered to leave the Ship whilst it was in Gibraltar and to return to the UK ('the fact of the Claimant's removal from his Ship');

d. The outcome of the EOI, the fact that he was re-appointed and the fact and nature of any possible further administrative sanction against him ('the fact of the outcome of the EOI').

6. The Claimant says that I should infer that Ms Jordan-Barber disclosed all of this information to the *Sun* and that she intended that it should be published. It is his case that this was actionable interference with his reasonable expectation of privacy and/or confidentiality and/or his rights under Article 8 of the European Convention on Human Rights ('ECHR') for which the MOD is vicariously liable.

7. The Claimant did not, and has not, also sued NGN as a second defendant. However, the MOD has joined NGN as a Third Party (i.e. pursuant to proceedings under CPR Part 20). The MOD denies liability to the Claimant but says that, if it is liable to him, NGN is liable for the same damage and should indemnify it pursuant to the Civil Liability (Contribution) Act 1978 for any damages which it is required to pay the Claimant. NGN joins with the Defendant in denying that the MOD is liable to the Claimant. However, if the MOD is liable, NGN disputes that it, too, is liable to the Claimant. If it is liable, NGN says, in the further alternative, it is not for the 'same damage' and therefore is not liable to indemnify the MOD. The trial which I heard was of these third party proceedings as well as the claim by the Claimant against the Defendant.

The factual background in more detail

8. The Claimant joined the Royal Navy and had reached the rank of Commander when, in June 2003, he was appointed to be Commanding Officer of HMS Somerset, which is a Type 23 frigate with a crew of about 185. In about May 2004 Somerset was deployed to the Gulf for a 6 month operational tour off the coast of Iraq.

9. Towards the end of this deployment complaints of bullying by the Claimant reached Commodore James Fanshawe, the Commander of the Devonport Flotilla and the Claimant's immediate superior officer. Commodore Fanshawe in turn consulted with Rear Admiral David Snelson who was then the Chief of Staff (Warfare) based at Fleet Headquarters in Portsmouth. Rear Admiral Snelson decided to commission an EOI which he asked Captain Adrian Bell and Commander Richard Morris to conduct.

10. Captain Bell, Commander Morris, Commodore Fanshawe and the Ship's Executive Officer (who had been recalled from leave) joined the Ship while it was on its way back from the Gulf and in Civitavecchia, Italy. Captain Bell and Commander Morris interviewed 24 witnesses (including the Claimant and the two complainants). They prepared their report which was dated 6th December 2004. The report's conclusion was as follows:

> '[36] Commander Axon has bullied officers under his command. Despite his verbal admissions he does not appear to accept this and nor does he appear capable of reform in the short to medium term. The current command team

cannot function together coherently and nor could it sustain a further period of operations similar in intensity to that it has just conducted. Many of the more senior members of the Wardroom feel that their professional relationship with the Commanding Officer has been fatally compromised by their realisation and subsequent declaration that the behaviour of the Commanding Officer has fallen woefully short of the standards expected and that therefore they can no longer work for him for any period outside of the very short term.

[37] The investigation has formed the view that Commander Axon's position on board HMS Somerset is untenable for all the reasons above.'

11. The EOI found that the Claimant's bullying behaviour had continued, largely unchecked, for most of 2004.

12. On 10th December 2004 Rear Admiral Snelson wrote to the Claimant. After referring to the report (which he enclosed with his letter), he said,

'[3] I endorse the Report's findings and conclusions: As an immediate result, I intend to make an application to the Naval Secretary to remove you from your appointment. I will consider what other administrative action may be appropriate, in due course.

[4] Before I do so, I invite you to make any representations you might have. Any representations, or a statement to the effect that you do not wish to make any representations, should reach my office by 1000 on 14 December 2004.

[5] Furthermore, you are directed to delegate command to your Executive Officer from the time of your arrival alongside in Gibraltar until further notice. Immediately thereafter, you are to leave the ship until the Naval Secretary has made a decision on my application. …'

13. On the same day (i.e. 10th December 2004) Jan Swatridge of the Fleet Secretariat wrote a Loose Minute to the Permanent Secretary of the Under Secretary of State ('the Loose Minute'). This said,

'<u>Potential removal from Command appointment – CO HMS Somerset</u>

<u>Issue</u>

1. That, following an Equal Opportunities Investigation into allegations of bullying, the CO HMS Somerset has been ordered to delegate command and return to UK on leave.

<u>Recommendation</u>

2. The Minister is invited to note:

- That administrative action has been initiated which may result in the CO being formally relieved of Command.

- The Defensive Media Lines in place in case this issue becomes public.

- That, because the CO's name is available in a number of publications and the ship's own website, if the media ask for confirmation we will confirm the name.

Timing

3. Immediate. The intention to remove the CO has been kept on "close hold" for overall duty of care reasons while Somerset was making the transit from a port visit to Rome onwards to Gibraltar, where she arrived this morning.

Background

4. Following allegations against the CO of HMS Somerset (Cdr DB Axon) of the repeated bullying of a number of subordinates, COS Warfare (COS (W)) CINCFLEET directed an Equal Opportunities Investigation (EOI). The EOI received testimony that the CO has consistently bullied officers under command and that his position in command has probably become untenable. COS (W) supported those findings and authorised the return to UK of the CO at the earliest opportunity.

5. On Somerset's arrival in Gibraltar on the morning of 10 December, the CO was handed a letter from COS (W) directing him to delegate command to the Executive Officer and to return immediately to UK on leave. Before further action is take[n] to formally relieve him of his command the CO is, quite properly, allowed to make representations. The letter invites him to make any representations by 14 Dec 04. The letter also indicates that COS (W) will consider whether other administrative action is appropriate in due course.

Presentational Issues

6. It is very unusual for a CO to be removed from his ship. The story is likely to reach the media from families or crew of Somerset. Attached Lines to Take and Statement will be used if this removal from command becomes public/media knowledge.

7. D. News have been consulted over the naming of Cdr. Axon. It will be a simple matter for the press to discover his name which will be in the public domain in a number of publications and is on HMS Somerset's website and available to the public. Because of this the strong advice is that we should confirm his name to the media if asked to do so. Cdr. Axon will be offered a "media minder" to support him.'

14. The Loose Minute was accompanied by a Defensive News Brief. This included the following:

'Background – not for release

Following allegations against the CO of HMS Somerset of repeated bullying of a number of subordinates, COS Warfare (COS(W)) CINCFLEET directed an Equal Opportunities Investigation….

Statement

It is stressed that the RN is an Equal Opportunities employer, and is proud of its record in that field. The Service takes all such matters very seriously and acts swiftly to resolve issues of this nature when they are reported. Can confirm that, as a result of an Equal Opportunities Investigation (EOI), instigated following a complaint from a junior officer, the Commanding Officer of HMS Somerset, has been recalled to the UK.

At this point no decision on the CO's future has been made. He has been invited to comment on the findings so far. It is not, however, considered appropriate that he should remain on the ship at present, and he has delegated temporary command to his Executive Officer, who will bring the ship back to UK.

IF THE MEDIA ASK FOR CONFIRMATION OF THE CO'S NAME [CDR DB AXON] WE WILL CONFIRM IT AS IT IS ALREADY IN THE PUBLIC DOMAIN – HMS SOMERSET'S WEBSITE (WHICH IS AVAILABLE TO THE PUBLIC ON THE INTERNET) AND OTHER PUBLICATIONS.

Q and A

Q. is it true that the CO of HMS Somerset has been dismissed from his ship for bullying?

A. Can confirm that CO of HMS Somerset has been ordered to return to UK on leave as a result of an Equal Opportunities investigation. Not prepared to give details of the allegations or investigations at this stage as the Administrative Investigation continues. Cannot release any further details.

…

Q. Is this a disciplinary case, will X face Court Martial?

A. At present this matter is being handled administratively and is still under investigation.

Q. Is this not a weak response by the RN, considering the seriousness of the offence(s)?

A. There are allegations that the CO's behaviour has fallen below the standards the Royal Navy requires of its Commanding Officers. As a consequence he has been ordered to return to UK on leave. That is not a weak response….'

15. The Claimant wrote, as I have said, to Rear Admiral Snelson on 13th December 2004. He said that the recent events had been a devastating blow for him. He then added,

'I do accept, however, that the recent investigation into complaints about my management style, and associated speculation amongst the Ship's Company, have rendered my position aboard very difficult. In the circumstances, and with the best interests of the Service, and specifically HMS Somerset, firmly in mind, I do not seek to oppose your application for my removal from appointment.'

16. NGN has provided a draft of the article which was published by the *Sun* on 14th December. It was prepared sometime on 13th December. If Ms Jordan-Barber was the source for the story, she must have provided the information on or before that date.

17. Rear Admiral Snelson wrote to the Naval Secretary on 14th December 2004. He noted in particular that the EOI had found that officers had been subjected to verbal abuse often in front of subordinates. The Executive Officer in particular had been subjected to indefensible pressure which had induced failure in him. The bullying had occurred through most of 2004 and resulted in a climate of fear which in turn had resulted in a degree of dysfunctionality and a paralysis in terms of leadership and responsibility among the officers. Rear Admiral Snelson added,

> 'Commander Axon's behaviour has severely compromised the management and leadership in an important Fleet unit to the point where I am convinced that it cannot be repaired. In adopting his chosen management style and choosing to disregard the Service's policy on bullying, he has adversely affected the lives of those he was entrusted to command and compromised the effectiveness of his senior management and warfare team. As a result, his position as a Commanding Officer is untenable.'

18. The Naval Secretary was Rear Admiral Wilkinson. On 15th December 2004 he approved Rear Admiral Snelson's application for the Claimant's removal from his command. Rear Admiral Wilkinson said,

> 'Commander Axon's bullying management style has been in flagrant breach of the Service's EO policy. It has damaged his subordinates, undermining their professional effectiveness and, with that, compromised the operational effectiveness of the ship. These professional and personal failings have rendered Commander Axon's position as CO untenable; there is no prospect of him recovering the situation in Somerset and I therefore authorise his landing from the ship with immediate effect.'

19. The same day Rear Admiral Snelson wrote to the Claimant saying,

> 'the fact, and possible extent, of your bullying indicates your conduct has fallen substantially below that expected of a Commanding Officer. In so far as it amounts to a serious breach of the Royal Navy's Equal Opportunities Policy, I consider it to be gross misconduct.'

20. The Claimant was told that he had until 7th January to make any further representations before a decision was taken as to whether any administrative action would be taken. I agree with the MOD and NGN that, from the context, this must have been administrative action other than removal from his command since that decision had already been taken.

21. The *Sun* had published its articles on 14th and 15th December and there had been considerable media coverage of the story elsewhere as well. On 16th December 2004, the MOD issued a statement which said,

> 'The Royal Navy can confirm that, following an equal opportunities investigation into bullying and harassment, the decision has been made to remove Commander David Axon permanently from command of HMS Somerset.
>
> Commander Axon has duly been informed that he will be appointed a non-command appointment ashore, with immediate effect.
>
> It would be inappropriate to comment on the specifics of this case, and to do so would be to ignore the rights of privacy and confidentiality of all those concerned.
>
> However, this reappointment decision has been taken on the basis that Cdr Axon's leadership and management style have been found to have fallen significantly short of the exemplary standards the Royal Navy requires of its commanding officers, with the result that the indispensable bond of trust and respect between a commanding officer and the ship's company had been irrevocably damaged in this instance.
>
> It is nevertheless important to emphasise that, while administrative action has been taken to remove Cdr Axon from command, the investigation into his conduct has not identified any evidence of mutinous behaviour, insubordination, disobedience or any other breaches of service law among the ship's company of HMS Somerset.
>
> The Royal Navy demands the highest standards of behaviour and skills of those entrusted to be commanding officers of its warships, and the decision to remove Cdr Axon from command has been taken with that in mind, and only after the most careful consideration.'

22. The Claimant wrote to Rear Admiral Snelson on 4th January 2005. The outcome was a letter from Admiral Sir Jonathan Band of 17th January 2005, which I mentioned above. He said,

> '[2] I have taken into account your statement that it was never your intention to upset, belittle or abuse any of your officers and understand that your motivation was the safety of your ship in an operational environment, I also accept that the ship completed a successful deployment in terms of operational output. Finally, I am extremely sympathetic regarding the unwelcome media intrusion that you and your family have suffered as a result of this matter.
>
> [3] Nevertheless, your conduct was clearly in breach of the Service's Equal Opportunities Policy in that you bullied some of your officers. Furthermore, I do not accept that your overall leadership and management style was necessary to achieve the operational aim. Indeed the Equal Opportunities investigation, apart from confirming specific cases of bullying, also revealed that your general approach to your officers stifled their initiative, undermined their professional effectiveness and damaged their sense of personal worth. It is my belief that it was simply the loyalty of your wardroom to the ship's mission, the command and the Service, as well as fear, that led them to support you as long as they did.

> [4] There is absolutely no doubt in my mind that your general leadership and management style and bullying behaviour led to an irretrievable situation with the wardroom. If you had not been removed from command, the moral component of the fighting power of your ship in terms of the relationship between you and your officers, which was under considerable strain, would have broken down completely.
>
> [5] In sum, you have been found to be a bully, and your general performance in terms of leadership and management of your officers has been found to have fallen substantially below that which you know I advocate and expect of my commanding officers. For these reasons you have incurred my SEVERE DISPLEASURE.
>
> [6] This censure will be recorded in both your appointing and official records.'

23. It is convenient at this stage to refer to the role of Ms Jordan-Barber in the MOD. In 2004 she worked in PJHQ J9 Pol/Ops for Iraq. That needs to be translated. 'PJHQ' was the Permanent Joint Headquarters based in Northwood, Middlesex. 'Joint' in this context means that PJHQ covered all the Armed Services: Army, Navy, Royal Air Force and Royal Marines. PJHQ was established to provide an enduring focus for the management of the UK's overseas operations. The J9 Division comprised about 25 members and was based in Northwood. Within J9 there were three sections for Policy and Operations (hence 'Pol/Ops') in different geographic areas: Iraq and the Gulf, Afghanistan and the Permanent Joint Operating Bases ('PJOBS'). One of these PJOBS was Gibraltar. Ms Jordan-Barber was in the Iraq Pol/Ops team. This consisted of about 4-5 individuals. It was led by Geoff Dean. In addition to the three Pol/Ops teams, J9 also had a legal section and a media operations section.

24. In 2004 the civil servant in overall control of J9 was Will Jessett. He described the work of the division in his witness statement and evidence. The J9 Pol/Ops Iraq team had two main responsibilities. It fed down to those conducting military operations in Iraq political policy and guidance from the MOD. Secondly, the team briefed ministers, other senior staff and the Defence Ministry Press Office on operational matters within Iraq and responded to Parliamentary inquiries. In order to do this, they had to investigate and establish facts from military personnel and forward based civil servants who were in that region and then provide oral and written briefings. Ms Jordan-Barber's role included assisting in drafting and submitting advice to the MOD on 'lines to take' in relation to particular operations. However, it did not include liaising with, or briefing, the media. It was the responsibility of the Press Office to interact with the media.

25. J9's Media Team consisted of 3-4 members. Ms Jordan-Barber was not one of them. They were housed in a separate office in Northwood. Their role was to organise media visits to the war zones in the Middle East and Afghanistan and assist the Pol/Ops teams on the presentational aspects of ministerial submissions and briefings to the Press Office.

26. I have referred above to the Loose Minute of 10th December 2004. This had been prepared by Jan Swatridge who was not part of the J9 Division. It was sent to a number of addressees apart from the Permanent Secretary. However, none of the addressees was in J9. When HMS Somerset had been on deployment in the Gulf it

would have been in a Joint Operating area and, during that period, PJHQ would have taken responsibility for its command. However, after Somerset left the Gulf and arrived in the Mediterranean, responsibility for it would have reverted to the Navy. Thus, at the time that the Loose Minute was written, PJHQ would have had no immediate need to receive it. However, Mr Jessett accepted that, because Gibraltar was one of the Permanent Joint Operating Bases, the part of PJ9 which dealt with PJOBs (not Ms Jordan-Barber's section) might have been sent the Loose Minute for information.

27. The allegations of conspiracy to commit misconduct in public office by Ms Jordan-Barber covered, as I have said, a very lengthy period and a large number of stories. NGN provided a schedule of some 65 such stories for which she had been paid. In the course of the criminal proceedings against her, Ms Jordan-Barber commented on them individually. One entry in the NGN schedule was for 'Mutiny on Gulf warship & Blackwatch soldier'. For this she was paid £5,000 which was the largest single sum she ever received from the *Sun*. Ms Jordan-Barber said in relation to this entry, '[She] does not remember knowing about this story and does not think she spoke to JK [John Kay] about it.' Subsequently in correspondence, solicitors on behalf of NGN accepted that the sum of £5,000 was paid for information about the Claimant in connection with the story about the Equal Opportunities Investigation.

Evidence

28. The Claimant gave evidence on his own behalf. He also called his wife, Gail Axon.

29. The Defendant called (i) Will Jessett who, as I have said, was the head of J9 at the relevant time; (ii) Clare Cameron who, in 2004, worked in the same Pol/Ops Iraq team within J9 as Ms Jordan-Barber; (iii) Jo McKeegan-Brown who, in 2004, was the head of the J9 Pol/Ops team for the PJOBS; (iv) Ken Johnston, the Deputy Head of Media Operations in J9 Media team at the time; (v) Garret Martin, who also in the autumn of 2004 worked in the J9 Pol/Ops Iraq team with Ms Jordan-Barber; (vi) Peter Davis, the current head of J9 and (vii) Geoff Dean, in 2004 the head of the J9 Pol/Ops Iraq team and Ms Jordan-Barber's immediate line manager.

30. The following witness statements served on the Defendant's behalf were agreed: (i) first and second statements of Rear Admiral David Snelson (now retired), Chief of Staff (Warfare) in 2004; (ii) Commodore Michael Farrage, now the officer responsible for deciding complaints submitted by Naval personnel; (iii) Commodore Richard Morris who, together with Captain Bell, carried out the EOI; (iv) Darragh McElroy, currently the Chief Communications Officer for Personnel and Policy in the MOD; (v) Simon Lynch, a lawyer in the Government Legal Department who produced certain documents; (vi) Adrian Cassar, who acted as the Claimant's career manager; (vii) Robert Brown, Deputy Assistant Chief of Staff Promotions, Royal Navy.

31. In addition, I had the witness statement of Commodore Bob Sanguinetti (Retired) which, though not agreed, was admissible hearsay because the witness was not available for the trial.

32. NGN called no witnesses and provided no witness statements.

33. There was a reasonably substantial amount of documentary evidence.

The parties' identification of the issues for decision

34. There was consensus among the parties that the following issues were raised:

    a. Did the Claimant have a reasonable expectation of confidence and / or privacy in the relevant information at the relevant time?

    b. Did Ms Jordan-Barber disclose the Claimant's information to John Kay of the *Sun*?

    c. Did the disclosure of this information by Ms Jordan-Barber constitute a breach of confidence and/or misuse of private information and/or a breach of Article 8 of the ECHR?

    d. Is the MOD vicariously liable for the acts of Ms Jordan-Barber?

    e. Was any damage suffered by the Claimant caused as a result of the disclosure of the Claimant's information by Ms Jordan-Barber?

    f. Is the claim statute barred under the Limitation Act 1980?

    g. Can the Claimant rely on Article 8 to the extent any of the damage is loss of reputation which is a foreseeable consequence of his own actions?

    h. Is the Claimant's claim for damage to reputation an abuse of process?

    i. What is the appropriate quantum of damages?

The claim in misuse of private information: the law

35. Misuse of private information is now clearly recognised as an actionable wrong. It developed out of the remedies which the law would grant for breach of confidence, but its development was given particular emphasis by the incorporation into English law of Article 8 of the ECHR by the Human Rights Act 1998. The development of the action for misuse of private information was described by the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457. Lord Nicholls noted the respect which Article 8(1) required to be afforded to a person's private and family life. In many contexts, that had to be balanced against the right to freedom of expression which Article 10 of the ECHR also conferred. Lord Nicholls said that there were two distinct questions which had to be asked. The first was whether the information in question engaged Article 8 at all by being within the sphere of the complainant's private or family life. The second question (which only needed addressing if the complainant succeeded at the first stage) was whether the interference with private or family life was justified. At [21] Lord Nicholls said,

> 'Accordingly, in deciding what was the ambit of an individual's "private life" in particular circumstances courts need to be on their guard against using as a touchstone a test which brings into account considerations which should more properly be considered at the later stage of proportionality. Essentially the

> touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy.'

36. The phrase 'a reasonable expectation of privacy' has indeed become the common way of encapsulating Lord Nicholls first question and was recently approved by a majority of the Supreme Court in *In Re JR38* [2015] 3 WLR 155.

37. In *Campbell* Lord Hoffman and Lord Nicholls dissented on the facts, but there was no disagreement as to the principles which should be applied. At [51] Lord Hoffman contrasted the basis of the claim for misuse of private information with the approach adopted to breach of confidence. He said,

> '… the new approach takes a different view of the underlying value which the law protects. Instead of the cause of action being based upon a duty of good faith applicable to confidential personal information and trade secrets alike, it focuses upon the protection of human autonomy and dignity – the right to control the dissemination of information about one's private life and the right to esteem and respect of other people.'

38. In *Murray v Express Newspapers Ltd* [2009] Ch 481 Sir Anthony Clarke MR giving the judgment of the Court said at [36],

> '… the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher.'

39. The idea that Lord Hoffman articulated in *Campbell* of this tort protecting an individual's personal autonomy was picked up by Laws LJ in *R (Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR 123 CA at [21] where he said,

> 'The notion of personal autonomy of every individual marches with the presumption of liberty enjoyed in a free polity: a presumption which consists in the principle that every interference with the freedom of the individual stands in need of objective justification. Applied to the myriad instances recognised in the Article 8 jurisprudence, this presumption means that, subject to the qualifications I shall shortly describe, an individual's personal autonomy makes him – should make him – master of all those facts about his own identity, such as his name, health, sexuality, ethnicity, his own image, of which the cases speak; and also of the "zone of interaction" (the *Von Hannover* case 40 EHRR 1, para 50) between himself and others. He is the presumed owner of those aspects of his own self; his control of them can only be loosened, abrogated, if the state shows an objective justification for doing so.'

40. Laws LJ dissented in *Wood* on whether the interference was justified in terms of Article 8(2), but Dyson LJ (at [64] and Lord Collins at [96] agreed with his analysis

of Article 8(1) which was also described as 'impressive' by Lord Toulson in *In re JR38* [2015] 3 WLR 155 at [86].

41. As I have said, the development of this tort has owed much to Article 8 of the ECHR. 'Private life' for the purposes of Article 8 does not necessarily exclude business or professional activities - see e.g. *Niemietz v Germany* (1992) 16 EHRR 97 at [29]-[31]. However, this does not mean that the notion of 'private life' is limitless. As the European Court of Human Rights said in *Friend v UK; Countryside Alliance v UK* (2010) 50 EHRR SE6,

> '[41]…A broad concept of construction of Article 8 does not mean, however, that it protects every activity a person might seek to engage in with other human beings in order to establish and develop such relationships. It will not, for example, protect interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the action or inaction of a State and a person's private life. ….
>
> [42] …There is however, nothing in the Court's established case-law which suggests that the scope of private life extends to activities which are of an essentially public nature. In this respect, the Court also considers that Lord Rodger, in referring to *Von Hannover,* was correct to draw a distinction between carrying out an activity for personal fulfilment and carrying out the same activity for a public purpose, where one cannot be said to be acting for personal fulfilment alone.'

42. The reference to Lord Rodger was to his speech in the House of Lords decision in the English case which preceded the Strasbourg decision – *R (Countryside Alliance) v Attorney-General* [2008] 1 AC 719. This had been a challenge to the ban on the hunting of wild mammals with dogs in the Hunting Act 2004 on a number of grounds, among which was the claim that the ban constituted an improper interference with the Claimant's rights under Article 8 of the ECHR. The argument failed because the House of Lords did not accept that hunting with hounds was part of the Claimants' private lives. Lord Rodger considered the case of *Von Hannover v Germany* (2004) 40 EHRR 1 in which the Strasbourg Court had upheld the complaint of Princess Caroline of Monaco that her rights under Article 8 had been violated by the publication of photographs of her taken in public. At [107] Lord Rodger said,

> 'Princess Caroline succeeded in her claim for protection of her private life because she was riding or cycling or playing tennis simply for her own enjoyment – for the development of her personality, to put it in formal terms. So, even though she was doing these things in a "public context" they fell within the scope of her "private life": *Von Hannover,* 40 EHRR 1,23, [50]. In my view the position would have been different if, say, she and her tennis partner had been taking part in a charity tennis tournament where spectators would come to watch them. Even if taking part had given them great pleasure, they would no longer have been doing it for their own fulfilment alone. They would have stepped outside the sphere of their private life in order to pursue a public purpose. The mere fact that a diva may develop her personality singing at Covent Garden does not mean that singing there is part of her private life. On the contrary, she is putting on a performance for the public - and getting well paid for it. Similarly, at a humbler level, if the amateur choir were giving a concert, or the organist playing for the

> pleasure of those in the hall or church, or the skater were performing for the spectators at the rink, in my view the individuals would no longer simply be pursuing the development of their personality. They would have left the sphere in which they would be entitled to the protection of article 8.'

43. In part the challenge to the Hunting Act failed because hunting with hounds was a public spectacle and for that reason was outside the scope of Article 8. The Claimants relied as well on the impact which the Act had on the employment of the professional huntsmen, but, as Lord Bingham commented at [15(4)], even on that basis, the claimants' complaints were far removed from the values which Article 8 exists to protect.

44. In *R (on the application of Prescott) v General Council of the Bar* [2015] EWHC 1919 (Admin) Hickinbottom J. picked up on this part of the *Countryside Alliance* decision. He said,

> 'These astute observations consequently make clear that, although Article 8 might be relevant in some circumstances beyond the traditional scope of private life, it is not generally applicable across the whole gamut of business and professional affairs and they advise caution when reliance is placed on private life in the context of a business or professional context.'

At [77] he concluded that,

> '… respect for private life does not arise in the context of setting of requirements as to competence for entry into (and continuance in) a particular profession.'

45. Similarly in *Yeo v Times Newspapers Ltd* [2015] EWHC 3375 (QB) Warby J had to consider a claim for libel by Tim Yeo. One matter that had to be resolved was whether this libel claim engaged the Claimant's rights under Article 8. The Judge said that it did not. At [147] he said,

> 'The claimant was a serving MP and a Committee chair. The articles related wholly and exclusively to his conduct in those public roles, and not in any way to his private or personal life. I do not consider that the nature of the information is such as to engage Article 8…In summary, this was disclosure that related to his public roles, not his private life.'

46. A further constraint on the scope of Article 8 was mentioned in *Axel Springer AG v Germany* (2012) 55 EHRR 6 where the Court said at [83],

> 'The Court has held, moreover, that Article 8 cannot be relied on to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence.'

47. A similar point was made by Lord Toulson and Lord Hodge in *In Re JR38* [2015] 3 WLR 155 when they said at [100],

> 'When the authorities speak of a protected zone of interaction between a person and others, they are not referring to interaction in the form of public riot. That is not the kind of activity which article 8 exists to protect. In this respect the case is

> on all fours with *Kinloch v H.M. Advocate* [2013] 2 AC 93. Lord Hope DPSC's words at [21] are equally applicable to the appellant "The criminal nature of what he was doing, if that was what it was found to be, was not an aspect of his private life he was entitled to keep private."'

48. In the same case, Lord Clarke also said at [109],

> 'the concept of reasonable expectation is a broad objective concept and that the court is not concerned with the subjective expectation of the person concerned whether the person concerned is a child or an adult.'

49. Lord Toulson and Lord Hodge likewise said at [98],

> 'The reasonable or legitimate expectation test is an objective test. It is to be applied broadly taking account of all the circumstances of the case (as Sir Anthony Clarke said in *Murray's* case) and having regard to underlying value or values to be protected.'

Reasonable expectation of privacy: the parties' contentions

The Claimant

50. The Claimant acknowledged that the role of the Commanding Officer of a Royal Navy warship had public features. Particularly when on operations or in a foreign port, the Commanding Officer would be the public face of the ship. The identity of the Commanding Officer was also a public fact. At the relevant time, the ship's website identified the Claimant as its Commanding Officer and gave brief details about him. The Claimant did not dispute that the facts that he had been required first temporarily to hand over to another officer and then his removal from the command of HMS Somerset were public matters. However, Mr Tomlinson QC, for the Claimant, maintained that the reasons for his removal were matters in which the Claimant had a reasonable expectation of privacy.

51. The bullying of junior officers had been harmful in part because it had sometimes occurred in the presence of others. The EOI had referred to these events as having taken place 'in public', but in context that meant no more than 'in the presence of others' and never more than a very few others. These were not 'public' as opposed to 'private' events in the sense of the distinction drawn for the purposes of Article 8. The public did not have a right of access to the Ship and the public, in this more general sense, were not present when the bullying occurred.

52. In his evidence, the Claimant had accepted that he had bullied junior officers. He had accepted that bullying was abhorrent and shameful. He deeply regretted this conduct (even though he said he had been unaware at the time of the effect his behaviour was having). However, this conduct was not criminal. Nor had he ever been accused of an offence against naval discipline. The Queen's Regulations for the Royal Navy regulation 3804(1) says that administrative censures are not punishments. Had the Claimant been charged with a disciplinary offence, he would have faced a court martial which would have been conducted in public. That was not the case: the EOI had been conducted as part of an administrative process within the Royal Navy where his procedural rights were very much less than at a court martial.

53. The EOI was intended to remain confidential and private. The Defence Council Instructions 12th April 2002: 'Naval Service Equal Opportunities Policy and Action Plan 2002' ('the DCI') provided at [30],

> 'Care should be taken to provide the complainant reassurance and clear advice as to the way ahead, and to respect the confidentiality of all information obtained.'

At [34] the DCI added,

> 'Whether or not a complaint is upheld, care is to be taken to ensure that victimization does not occur…Complainants must not be made to feel that they have been discriminated against by any action taken during the investigation of the complaint, or subsequently if the complaint is upheld. Care must always be taken to ensure that the careers and reputations of those involved (complainant and respondent) are not unjustly or avoidably affected.'

54. Consistently with the private character of the EOI, the relevant documents were all marked 'Restricted – Staff'. That was the case with the letter of 29th November 2004 appointing Captain Bell and Commander Morris to carry out the EOI, the EOI report; the Loose Minute; the letter from Rear Admiral Snelson to the Claimant of 10th December 2004; the Claimant's letter to Rear Admiral Snelson of 13th December 2004; and Rear Admiral Snelson's letter of 14th December 2004 seeking the Claimant's removal from his appointment. Mr Tomlinson did not suggest that the MOD was estopped from now arguing that the Claimant had no reasonable expectation of privacy in the proceedings, but the way in which these documents were marked was, he submitted, powerful evidence in support of the Claimant's case.

55. Furthermore, the Loose Minute showed that it was predicted that the fact of the Claimant's removal from his Ship might become public from information provided by the crew of Somerset. In that event, the Loose Minute advised, the identity of the Claimant (as the Commanding Officer who had been removed from his Ship) would be confirmed, but even in those circumstances, the MOD anticipated not releasing further information about the nature of the EOI and, in particular, not confirming that it had involved allegations of bullying. Mr Tomlinson submitted that this also showed that, despite the unusual step of removing a commanding officer, the MOD expected the reasons for that measure to remain private. That, too, he argued, was powerful supporting evidence for the proposition that, viewed objectively, there was a reasonable expectation of privacy in those reasons not being made public.

56. In cross examination by Mr White, the Claimant had accepted that his bullying of junior officers had been shameful and abhorrent and he agreed that he could not have expected such conduct to be kept secret, but, as Lord Clarke had said in *In Re JR38,* the issue is not what the Claimant subjectively expected: the issue is whether, viewed objectively, the Claimant had a reasonable expectation of privacy.

57. After the Claimant was removed from his Ship, he received a censure from Admiral Sir Jonathan Band. That would have remained on the Claimant's service record for 5 years, but it would then have been expunged. Part of the reason for maintaining the confidentiality of these administrative processes was to allow for rehabilitation of the person concerned after an appropriate period. Publicity precluded that possibility.

This was another reason why the Claimant had a reasonable expectation of privacy in the reasons for the action taken against him.

58. Looking at the circumstances which *Murray* said were to be taken into account in deciding whether there was a reasonable expectation of privacy, it was relevant that the Claimant did not consent to the disclosure and would not have done so if asked. It was also relevant that the disclosure by Ms Jordan-Barber was a misconduct in public office and a criminal act. She was paid £5,000 for the story.

59. It was particularly important in this case to recall Lord Nicholls' warning in *Campbell* not to confuse the present question (whether there was a reasonable expectation of privacy) with the issue as to whether any interference was justified in the public interest. The distinction was important in the present context, firstly because, as a public authority, the MOD did not have any rights under Article 10 of the ECHR. This was not, therefore, the type of case (unlike many others) where the Court had to strike a balance between competing claims under Article 8 and Article 10. Furthermore, in response to a request for further information, the MOD had confirmed that it was not its case that the information should have been disclosed.

The Defendant and Third Party

60. Ms Michalos, for the Defendant, and Mr White QC, for NGN, submitted that this claim concerned the Claimant's performance of a very public role. The Commanding Officer of a warship represented the UK. His identity was publicly known and any change in who performed that role would also be publicly known.

61. The EOI involved the presence on the Ship of three very senior officers and the recall of the Ship's Executive Officer from leave. Those were unusual events and it was inevitable that they would have been the subject of discussion among the Ship's crew. During the conduct of the EOI, some officers were interviewed, but the nature of the allegations may not have been generally known. However, once the investigation had been completed and once the Claimant was removed from his Command, the position was different. As Rear Admiral Snelson put it in his agreed witness statement, 'However, once he was removed the matter was *de facto* a public matter.' In his view, it would thereafter have been acceptable for those officers who had been bullied to have told their parents what happened to them and why. The ship's company had phone and internet access and, accordingly, it was very likely that the news would have broken very quickly.

62. Commodore Farrage observed in his agreed witness statement that the removal of the Commanding Officer of a ship while it was on deployment was very rare and the crew would inevitably know of it. Since changes in appointment are normally publicised months in advance, it would have been apparent in this case that the Claimant had been removed from his command. Commodore Farrage adds,

> 'Thus any unexpected and unplanned departure of the CO will be readily identified as out of the ordinary within the ship. I cannot envisage any situation of a CO being removed from command for bullying members of his ship's company that the ship's company would not discuss, both between themselves on board the ship, and more widely with their families and their friends and colleagues within the Naval Service.'

He concludes,

> 'In this case the investigation into the Claimant's behaviour and his removal from command were situations created by his own conduct. As a matter of fact, for the reasons given above, once the Claimant was removed from HMS Somerset this was essentially in the public domain.'

63. In the present case, it was also significant that the Claimant's conduct, while not criminal or a disciplinary offence, had imperilled the operational effectiveness of his Ship. As the Claimant had accepted in cross examination, this was a matter of grave seriousness.

Reasonable expectation of privacy: discussion

64. In my judgment the Claimant did not have a reasonable expectation of privacy in the information on which he relies. My reasons are as follows:

    a. This case concerns the Claimant's role in a very public position. That does not mean that there is nothing about his performance in that role which would attract a reasonable expectation of privacy, but it sets an important context.

    b. Mr Tomlinson accepted that there could be no reasonable expectation of privacy in the Claimant's removal from his command. I understood him to accept that 'removal' meant more than simply a change of command or appointment. Even if my understanding was not correct, the agreed evidence of Commodore Farrage meant that conclusion must follow. Normal changes in command are trailed a long time in advance. That was not what had had happened here. The inevitable inference was that this change of command had been imposed. The Claimant's removal in that sense was, as Commodore Farrage said, a public fact.

    c. It is true that, as of 14th December 2004, the Claimant had not been relieved of his command. That only occurred on 15th December. However, in my view that is not material. As of 14th December (i) the Claimant had been instructed to leave his Ship and delegate command to his Executive Officer; (ii) he had been asked to provide any representations as to why Rear Admiral Snelson should not apply for his removal from command; (iii) he had responded by saying that he accepted his position as Commanding Officer was untenable. In those circumstances it was inevitable that Rear Admiral Snelson would apply for the Claimant's removal from command and highly likely that the application would be granted (as indeed it was); (iv) whether some further administrative action was to be taken against the Claimant had still to be decided, but, as the Claimant agreed in the course of his evidence, removal from command was the most important sanction.

    d. Mr Tomlinson emphasised that the Claimant had not committed any criminal or disciplinary offence. That is true, but Rear Admiral Snelson characterised the Claimant's behaviour as 'gross misconduct' in his letter of 15th December 2004. In addition, the seriousness of its consequences was very grave. The EOI report said that 'the current command team cannot function together coherently and nor could it sustain a further period of operations similar in

intensity to that it has just conducted.' Rear Admiral Snelson said in his letter of 14th December 2004

> 'Cdr Axon's behaviour has severely compromised the management and leadership in an important Fleet unit to the point where I am convinced that it cannot be repaired. In adopting his chosen management style and choosing to disregard the Service's policy on bullying, he has adversely affected the lives of those entrusted to his command and compromised the effectiveness of his senior management and warfare team.'

In his witness statement for these proceedings, Rear Admiral Snelson said that the Claimant's behaviour had 'undermined the fighting effectiveness of his ship.' That, too had been the opinion of Rear Admiral Wilkinson in his decision to remove the Claimant from his command.

Sir Jonathan Band likewise concluded in his letter of 17th January 2005,

> 'If you had not been removed from command, the moral component of the fighting power of your ship in terms of the relationship between you and your officers, which was under considerable strain, would have broken down completely.'

e. Misconduct is not just relevant to the balancing of interests under Articles 8 and 10 (Lord Nicholls' second question in *Campbell*) but is also material as to whether the Claimant has a reasonable expectation of privacy in information about that conduct – see *Axel Springer, In Re JR38* and *Kinloch.*

f. I was not impressed with the analogy which Mr Tomlinson sought to draw with a private employee's reasonable expectation of privacy in the reasons for his employer's disciplinary action. In my view it is significant that the Claimant was discharging a very public function, was in charge of a warship, and had, by his offensive conduct, imperilled the fighting effectiveness of his ship. With those features, there is not a ready comparison with private employment.

g. Rear Admiral Snelson in his agreed witness statement emphasised how unusual this case was. He said,

> 'An Equal Opportunities Investigation into a ship's commander during deployment is extremely unusual and I cannot recall a similar case. Withdrawal from command of ship's command during deployment is also highly unusual. Although I cannot say that there has never been other cases of withdrawal of command during a deployment I personally cannot recall another occasion where this has happened during my 37 years of service.'

The unusual character of the case is relevant in two respects. First, it further illustrates how seriously the Navy regarded the Claimant's misconduct. Secondly, it lends force to the argument that this unusual event was bound to become (as Rear Admiral Snelson himself said) a public fact.

h. The Claimant distinguished the procedure which had been followed in the EOI and that which would have taken place had there been a court martial. In the latter case, he argued, there would have been a greater opportunity for him to test the evidence against him. In the EOI he did have the opportunity to put his case in writing and in interview, but the procedural protections were reduced. For this reason as well, he argued, the privacy and confidentiality of the process was important.

The difficulty with this argument is that, at least by the time he gave oral evidence, the Claimant accepted that he had bullied his officers. This was behaviour which had continued for about a year. His acceptance in oral evidence was unequivocal. His position earlier was perhaps different. The EOI report noted of him

> 'there seems to be little recognition by him that his behaviour has and continues to constitute bullying…Commander Axon bullied officers under his command. Despite his verbal admissions he does not appear to accept this and nor does he appear capable of reform in the short to medium term.'

His letter of 13th December 2004 accepted that 'the recent investigations into complaints about my management style, and associated speculation amongst the Ship's company have made my position aboard very difficult.' In his letter of 4th January 2005 and in his first witness statement for these proceedings, he spoke of his management style as being 'robust'. In cross examination he agreed that it was not acceptable to use phrases such as 'robust management style' to excuse behaviour that was tantamount to bullying. He agreed in evidence that to describe a management style as 'robust' was a classic cloak for bullying.

However, since he does now accept that he bullied his junior officers, it is difficult to see why the absence of the opportunity to test that proposition in a court martial should count in his favour in deciding whether he had a reasonable expectation of privacy. A court martial would, I recognise, have been a public affair and for that reason there could not possibly have been a reasonable expectation that the allegations would have remained private. It is relevant that the EOI was conducted in private, but it is not conclusive. In particular, I accept the proposition put forward by Ms Michalos and Mr White that there was an important distinction to be drawn between the stage when the EOI was being conducted, on the one hand, and, on the other, the stage when the Report had been completed and its conclusions accepted by Rear Admiral Snelson who had commissioned it.

i. Those who complained of the Claimant's bullying knew that they had been interviewed by Captain Bell and Commander Morris in connection with the EOI report. They were told in letters from Rear Admiral Snelson on 14th December 2004 that their complaints had been upheld. However, even before then, it would not have been difficult for them to infer from the Claimant's sudden departure from the Ship on 10th December 2004 that the EOI had been critical of him. In those circumstances, the Claimant can hardly have had a reasonable expectation that the complainants would have kept quiet about his behaviour towards them. As Rear Admiral Snelson said, after the Claimant's

removal from the Ship it would have been quite acceptable for these officers to have told their parents what had happened to them and why. Commander Morris made the same point in his (agreed) witness statement.

j. In his cross examination, the Claimant accepted that he could not have expected that his abhorrent and shameful conduct as a bully should be kept secret. As I have explained, it is not necessary to show a subjective expectation of privacy: the test, as Lord Clarke said in *In Re JR38,* is wholly objective. The Claimant's answer is not therefore conclusive against his case, but in my judgment, it does reflect the objective reality of the position.

k. I can, and do, take into account the security markings which the Navy personnel put on the correspondence and other documents concerning the EOI. These were documents to do with personnel matters and it is not surprising that the standard operating procedure should have been to mark them in this way. However, I have to consider the particular circumstances and (as *Murray* emphasises) all the circumstances of the case. The security markings do not, as Mr Tomlinson accepted, estop the MOD from arguing that the Claimant did not in fact have a reasonable expectation of privacy in the information on which he relies. They do not lead me to a different conclusion.

l. Mr Tomlinson relied as well on the Loose Minute. That contemplated that the instruction to the Claimant to return to the UK might attract publicity. It was accepted that the Claimant would need to be named (if the press asked), but it was not expected to reveal further details. In particular, the MOD did not expect to confirm that there had been allegations of bullying 'as the administrative investigation continues'. When this was written (10th December 2004) it was not known whether the Claimant would make representations as to why Rear Admiral Snelson should not seek the Claimant's permanent removal from HMS Somerset. By 13th December, things had moved on. The Claimant had not opposed his removal and, while the application had still to be formally made and a decision taken, it was highly likely that that would be the outcome. In his second witness statement (which was also agreed) Rear Admiral Snelson said that he was absolutely clear that his decision to apply to permanently remove the Claimant was made well in advance of the media coverage. Even after the Claimant's removal there was the further issue as to what other administrative action might be necessary, but I agree with the Defendant and Third Party that removal from command was the most significant consequence of the EOI. Furthermore, for the reasons that I have already given, the reasons for the Claimant's removal from command were likely to become publicly known.

m. As I have noted, the Defence Council Instructions say that 'care needs to be taken that the careers and reputations of those involved (complainant and respondent) are not unjustly or avoidably affected.' I recognise that this applies to the Claimant (as the respondent of the complaints of bullying). I recognise as well that the Instruction applies even if the complaint is upheld. That said, the Instruction is intended to apply to a wide range of cases. The case that I am dealing with is one where the complaint was upheld, the respondent to those complaints had been required temporarily to delegate command and where it was highly likely that he would be removed from his

command. In those circumstances, it was the removal from command which would have adversely affected the Claimant's reputation and career. In his witness statement (also agreed) Captain Robert Brown said that a Promotion Board's assessment of an officer for promotion would not take account of media reports on the Claimant (while they would, of course, take account of the official censure for the time that it remained on the Claimant's record). In his evidence the Claimant accepted that removal from command was the most salutary sanction and that this was likely to have serious implications for his career regardless of any publicity. In these circumstances, I do not consider that the DCI significantly bolsters the Claimant's case that he had a reasonable expectation of privacy.

Nor do I accept that publicity had to be avoided to allow for the possibility of the Claimant's rehabilitation. The Claimant alleged that he had been advised by his Royal Navy mentor (Captain Sanguinetti) in about 2006 that he should decline to accept a grade of A- in his annual performance review. The Claimant said he was told that these grades were limited and could be more usefully given to someone who had a realistic chance of promotion whereas he was an embarrassment to the Navy who had to be managed. Captain Sanguinetti provided a witness statement in which he denied giving the Claimant any such advice, but he was not available to give evidence orally and be cross examined. The Claimant's wife, Gail Axon, recalled how the Claimant had reported this conversation to her. It is not necessary for me to resolve this difference in the evidence. I have no doubt that the Claimant's prospects of promotion had been diminished in the short to medium term. That was inevitable given the removal from his command and the censure he had received. I do not accept that the press publicity meant that his promotion prospects were undermined in the longer term. Captain Brown's evidence was that a Promotion Board would pay no heed to media reports. For the 5 years that the censure would remain on his personnel file, it would, no doubt, affect his promotion prospects. Thereafter it would lapse. The agreed evidence of Adrian Cassar who held the post of Commander (Warfare) Career Manager between 2006 – 2008 was also that, while the Claimant's misconduct would have impacted on his career, the reporting of it would not have. I do not accept the argument that the press publicity meant that, after the censure had lapsed, a Promotion Board would have been improperly affected by it.

n. The MOD press statement of 16th December 2004 does not assist the Claimant. It is true that it said that 'it would be inappropriate to comment on the specifics of the case and do so would be to ignore the rights of privacy and confidentiality of all those concerned.' However, the press release itself essentially confirmed each of the matters which the Claimant says constituted his private information. The 'specifics of the case' must have been a reference to details over and above these, as to which there is no evidence that they were disclosed and about which the Claimant does not complain.

o. For the purpose of examining whether the Claimant had a reasonable expectation of privacy in the information in question, I shall assume that the source of the *Sun*'s information for this story was Ms Jordan-Barber. She pleaded guilty to conspiracy to commit misconduct in public office. For her to

have been guilty, it was not necessary that she have committed an offence in relation to every one of the 65 stories in NGN's schedule, but I shall also assume that she did commit misconduct in public office in relation to this story. NGN has admitted that she was paid £5,000 for the story. All of that shows that her action was wrongful. *Murray* makes clear that those are elements to take into account in deciding whether there was a reasonable expectation of privacy (as is the unwillingness of the Claimant to consent to the disclosure). However, when set against the other features of the case to which I have referred, these matters do not lead me to conclude that the Claimant did have a reasonable expectation of privacy in the information.

Did Ms Jordan-Barber owe the Claimant a duty of confidence?

65. To some extent there is an overlap between the claims for misuse of private information and for breach of confidence. Where there is such an overlap, the critical question is the same: did the claimant have a reasonable expectation of privacy in the information in question? I have answered that adversely to the Claimant.

66. To the extent that breach of confidence continues to have a separate existence, it is incumbent on the Claimant to show that he was owed a duty of confidence by the wrongdoer.

67. Mr Tomlinson explained that the Claimant's sole complaint is in relation to the behaviour of Ms Jordan-Barber. His claim is brought against the MOD because, he says, they are vicariously liable for her torts. The Claimant does not allege that any other civil servant within the MOD wronged him. Nor does he allege any breach of duty by the MOD directly.

68. In my judgment, the Claimant cannot maintain a distinct claim for breach of confidence because he cannot show that Ms Jordan-Barber owed him any duty to keep any material confidential. She had a security clearance known as Developed Vetting. I have no doubt that she owed a duty to preserve the confidentiality of information which she received in the course of her work and which she was not authorised to disclose to outsiders. However, that was a duty which she owed to either the Crown or the Ministry of Defence. It was not a duty which she owed to the Claimant. As Ms Michalos submitted, if the MOD had chosen itself to reveal any of the categories of information on which the Claimant relies, it would have been entitled to do so and the Claimant could not have prevented such disclosure.

69. *Fraser v Evans* [1969] 1 QB 349 CA was an example of a claim which failed on the same ground. The Plaintiff was a public relations consultant for the Greek government. He sought an injunction to prevent publication of one of his reports by the *Sunday Times.* The claim failed because any confidence was owed, not to him, but to the Greek government.

70. Mr Tomlinson commented that the law had moved on since that case. Certainly, the tort of misuse of private information has since developed and, in that context, it is not necessary for the claimant to show that the defendant owed him a duty of confidence. However, I am presently considering whether the claimant's claim in confidence can succeed even though he did not have a reasonable expectation of privacy. In that

context, *Fraser v Evans* remains sound law as Tugendhat J. recently held in *Abbey v Gilligan* [2013] EMLR 12 at [40].

71. It follows that the claim for breach of confidence provides no help for the Claimant.

Article 8 of the ECHR

72. As I have already noted, the tort or remedy for misuse of private information developed in part under the impetus of the incorporation of the ECHR into English law. It is the means by which UK law provides a remedy for improper interferences with a person's private life which take this form. Mr Tomlinson did not suggest that the Claimant could derive assistance from Article 8 if the Claimant failed to show that he had a reasonable expectation of privacy in the information in question.

73. Article 8 does not therefore assist the Claimant, given my finding in relation to claim for misuse of private information.

Consequence of the findings so far

74. My conclusion that the Claimant did not have a reasonable expectation of privacy in the information in question means that his claim for misuse of private information fails. His claim for breach of confidence (so far as that has a separate existence) fails because Ms Jordan-Barber did not owe him a duty of confidence. The Article 8 claim adds nothing. All of this means that the Claimant's claim as a whole is unsuccessful and must be dismissed.

75. Strictly speaking it is not necessary for me to reach conclusions on any of the other issues. Some cannot be sensibly answered in consequence, but it may be helpful for me to give my views on at least some of the others.

Did Ms Jordan-Barber disclose the Claimant's information to John Kay of the *Sun*?

76. There was no direct evidence as to the *Sun*'s source for these stories, but Mr Tomlinson submitted that the overwhelming inference was that it had been Ms Jordan-Barber. He pointed to the following pieces of evidence:

    a. There was the schedule of payments to Ms Jordan-Barber. They included £5,000 for 'Story – Mutiny on Gulf warship and Blackwatch soldier'. The first *Sun* story on 14th December had had the headline 'Mutiny on Gulf Warship'. The date of the payment was 21st December 2004 just 7 days after that first story was published and subsequent to the second and third stories.

    b. The £5,000 payment in the schedule referred to two stories, one of which ('Blackwatch soldier') had nothing to do with the Claimant. However, NGN's solicitors had accepted in correspondence that the *Sun* had paid Ms Jordan-Barber £5,000 for information about the Claimant and, in a later letter, that the payment had been for 'this story'. That was the largest single payment which the *Sun* made to her.

    c. Although Ms Jordan-Barber's J9 Pol/Ops Iraq team had nothing further to do with HMS Somerset after it left the Gulf, she worked in an organisation which was very likely to have learned of the Claimant, the EOI and its consequences.

Thus, another of the Pol/Ops teams was responsible for the PJOBS including Gibraltar. For that reason, it might have been informed about what was happening or due to happen to the Claimant on his arrival in Gibraltar. Mr Jessett, the head of J9, recalled discussions with Ms McKeegan-Brown on this subject. She told him that she had had conversations about it with Fleet Command. Ms McKeegan-Brown did not recall talking to Mr Jessett, but she knew Ms Swatridge (the author of the Loose Minute) and she said that Ms Swatridge would certainly have communicated to her that the Claimant was due to be removed from his command when the Ship arrived in Gibraltar. Ms Jordan-Barber worked in a different team, but they were in the same room as J9 Pol/Ops PJOBS. It was apparent from her personnel assessments that Ms Jordan-Barber had some skill in obtaining information that she needed or wanted.

d. Ms Jordan-Barber had very substantial form for providing information to the *Sun* and, specifically to John Kay.

77. Ms Michalos argued that I could not find on the balance of probabilities that it had been Ms Jordan-Barber who had provided the information in which the Claimant said he had a reasonable expectation of privacy.

a. In the comments which Ms Jordan-Barber provided prior to her criminal trial, she said she could not remember knowing about this story and did not think she had spoken to Mr Kay about it.

b. There were many other people who could have leaked the story to the *Sun*. There were those who had been bullied by the Claimant. Some, at least, of the complainants had spoken to their families about what had happened. There were about 200 people aboard HMS Somerset by the time it got to Gibraltar and, when the Commanding Officer was required to return to the UK, gossip would be rife. Any of them could have supplied the information to the *Sun*. The Loose Minute showed that the MOD anticipated that leaks of this kind might occur, as did the statements of Commodore Farrage and Rear Admiral Snelson.

c. Ms Jordan-Barber may not have provided the full details of the information on which the Claimant relied. Instead she may either have tipped off the *Sun* about the story more generally or confirmed information which the *Sun* had got from elsewhere.

d. The story from 14th December had quoted a 'Navy spokesman' suggesting that there was at least one other source.

e. The CPS had provided information that there was no evidence of call data between John Kay and Ms Jordan-Barber between 6th July 2004 and 11th January 2005.

f. Ms Jordan-Barber's own team in J9 had nothing to do with HMS Somerset after it left the Gulf. The only document which could have been seen by J9 was the Loose Minute, but it was not addressed to anyone in PJHQ and none of the witnesses recalled seeing it. The *Sun* article of 15th December referred to

the complainants including a 'young male officer' and a 'young female officer'. The Loose Minute does not refer to the age or gender of the complainants.

g. The payment of £5,000 was referenced to two stories. The other one, regarding the Black Watch soldier had been a substantial story (front page, double page inside story and editorial) about the deaths of three soldiers in a suicide bomb ambush in Iraq.

78. I conclude that it was more likely than not that Ms Jordan-Barber disclosed the information which the Claimant alleges is private. A critical piece of evidence is the admission on behalf of NGN that they had paid her £5,000 for this story about the Claimant. In view of that admission, the reference to a second story in the NGN schedule (the Black Watch soldier story) is of no consequence. I can also infer from the size of the payment that it was for more than a simple tip-off. It is true that others might have leaked the story to the press, but the evidence is that it was Ms Jordan-Barber who was paid for it. I did not find the references in the story to a 'Navy spokesman' to be of significance. There was no evidence from anyone at NGN as to who this might have been (or even any first hand evidence that there was such a spokesman, as opposed to a smokescreen to conceal the *Sun*'s true source). The CPS had no evidence of call data between John Kay and Ms Jordan-Barber during the critical period, but the old aphorism remains sound: the absence of evidence is not evidence of absence. The fact remains that by one means or another, Ms Jordan-Barber communicated information to Mr Kay about this story which the *Sun* considered was worth £5,000. I accept that there is no evidence as to how precisely Ms Jordan-Barber found out about the investigation into the Claimant, but even though it was not of relevance to her specific team, I accept that the information is likely to have been passed to J9 Pol/Ops PJOBS because of the Gibraltar connection and that she is likely to have learned about it because of the close proximity of her Iraq Pol/Ops team with the PJOBS team.

79. On this issue, therefore, I would have found in the Claimant's favour.

Did the disclosure of this information by Ms Jordan-Barber constitute a breach of confidence and/or misuse of private information and/or a breach of Article 8 of the European Convention on Human Rights ('ECHR')?

80. Since the Claimant did not have a reasonable expectation of privacy Ms Jordan-Barber's disclosure to the *Sun* did not constitute misuse of private information. Since Ms Jordan-Barber did not owe the Claimant a duty of confidence, the disclosure did not constitute a breach of confidence at his suit. The disclosure did not involve a breach of Article 8.

Vicarious liability: the law

81. In the course of this trial, the Supreme Court handed down two judgments which restated the law regarding vicarious liability: *Mohamud v WM Morrison Supermarkets plc* [2016] UKSC 11, and *Cox Ministry of Justice* [2016] UKSC 10. They confirmed that vicarious liability requires first a relationship between the wrongdoer and the defendant and secondly a connection between that relationship and the wrongdoer's act or default – see *Mohamud* at [1]. In this case there is no difficulty regarding the

first requirement. Ms Jordan-Barber was employed by the MOD and, by the Crown Proceedings Act 1947 s.2(1), for present purposes the MOD stands in the same relationship to her as an employer.

82. *Mohamud* then requires the Court to consider two matters. First, what was the field of activity entrusted by the employer to the employee, looked at broadly? Second, whether there was a sufficient connection between that field of activity and the wrongful conduct to make it right for the employer to be held liable to the claimant under the principle of social justice? - *Mohamud* at [44]-[45].

83. Ms Jordan-Barber was not acting for the benefit of the MOD in her dealings with the *Sun*. She was pursuing her own interests, including financial reward. Her behaviour was deliberate and criminal. In *Joel v Morison* (1834) 6 C&P 501, 503 172 ER 1338 Baron Parke used the memorable phrase of an employee being 'on a frolic of his own' and not then causing his employer to be vicariously liable. It might be said that Ms Jordan-Barber was on a frolic of her own in her dealings with Mr Kay, but it is very well established that an employer may be vicariously liable notwithstanding that the employee's tort was intentional, prohibited, criminal and committed for the employee's own ends – see for instance *Lloyd v Grace Smith and Co* [1912] AC 716, *Racz v Home Office* [1994] 2 AC 45 and *Lister v Hesley Hall Ltd* [2001] 1 AC 215.

84. In deciding whether there is a close connection between the employee's job and the tort, it may not be sufficient that the employment provided the opportunity for the wrong. In *Lister* Lord Clyde said at [45],

> 'In order to establish a vicarious liability there must be some greater connection between the tortious act of the employee and the circumstances of his employment than the mere opportunity to commit the act provided by the access to the premises which the employment has afforded: *Heasmans v Clarity Cleaning Co. Ltd* [1987] ICR 949.

Lord Millett said at [65],

> 'If the employer's objectives cannot be achieved without a serious risk of the employee committing the kind of wrong which he has in fact committed, the employer ought to be liable. The fact that his employment gave the employee the opportunity to commit the wrong is not enough to make the employer liable. He is liable only if the risk is one which experience shows is inherent in the nature of the business.'

Vicarious liability: the parties' contentions

85. The Amended Particulars of Claim alleged that 'Ms Jordan-Barber's duties covered dealing with media enquiries regarding disciplinary and other personnel matters and she was, therefore, authorized to disclose information concerning such matters to the media.'

86. The evidence, however, did not support that allegation, as Mr Tomlinson accepted. The MOD Press Office in London was responsible for direct dealings with the media. Ms Jordan-Barber was in the J9 Pol/Ops team for Iraq and the Middle East. That was based within the JCHQ in Northwood, Middlesex. Her job involved no direct dealings

with the media at all. In summary, her role in J9 Pol/Ops was to provide policy advice to the military in Iraq and advice on operations in Iraq to the Ministers, the MOD including the Press Office and other government departments.

87. There was a Media team within J9 but (a) Ms Jordan-Barber was not part of that team; (b) its role was to arrange media visits to areas of joint operations (which was not the kind of enterprise that had led to disclosure to the *Sun*); and also to act as liaison between J9 Pol/Ops and the MOD Press Office.

88. All of this was common ground. However, the Claimant submitted that when Ms Jordan-Barber's job was considered broadly (as *Mohamud* required) she could be seen as an 'information dealer'. Part of her role was to gather and analyse information and to provide briefings to Ministers.

89. Mr Tomlinson argued that there was a sufficient connection between the job which Ms Jordan-Barber had been given and her wrongdoing to make it just to impose vicarious liability on the MOD. She was security cleared and given access to classified information as a result. Her job included giving advice on 'lines to take' which itself included advising on what should be disclosed and what remain confidential. She must have obtained the information in the course of, and as a result of, her employment. She acted for her own personal reasons in making this and other disclosures to the *Sun*, but that did not preclude the imposition of vicarious liability as *Lister*, *Racz* and *Mohamud* showed. Furthermore, the imposition of vicarious liability would be an additional stimulus to the MOD to engage in leak inquiries and to ensure that those with access to information of considerable sensitivity did not leak it in the future. There were strong public policy reasons for ensuring that public sector employers took all reasonable steps to preserve the confidential information about their employees. The MOD owed a duty of care to the Claimant as one of its employees and it would be fair, just and reasonable for the MOD to be responsible for the unlawful acts of one of its other employees in the course of her employment.

90. Ms Michalos argued that Ms Jordan-Barber's job, however broadly defined, did not involve dealing with the media. She simply was not an 'information dealer'. The EOI into the Claimant and his removal from his position as Commanding Officer of HMS Somerset had absolutely nothing to do with her job. The MOD positively prohibited communication with the media or the disclosure of information without authorization– see the MOD's Defence Council General Instructions 29th October 2004 Gen 200/2004 – section 1 paragraph 6. It knew nothing of her dealings with the press which had no benefit at all for the Ministry. There was no direct connection between the information which she did have as part of her job and the information concerning the Claimant. There would be far reaching consequences if an employer was simply to be liable because an employee had leaked information which she or he came across during their work.

Vicarious liability: discussion

91. I agree with Ms Michalos that Ms Jordan-Barber's job simply did not involve any direct dealings with the press. She may have contributed to the drafting of briefings to Ministers and the discussion of 'lines to take', but that was significantly different than direct contact with the media. I agree that it was a stretch too far to say that her job required her to act as an 'information dealer'.

92. But the broad approach to the nature of her job cannot stop there. She worked in a security sensitive environment. She had Developed Vetting clearance which allowed her to have access to information up to the Top Secret classification. With this came obligations. Ms Michalos referred to the Defence Council Instruction. Ms Jordan-Barber had signed documentation which reminded her of her obligation to maintain confidentiality in information whose disclosure had not been authorised. For someone who occupied such a sensitive position it is in my judgment appropriate to view her job as including the task to preserve that confidentiality.

93. I have found that Ms Jordan-Barber did disclose the personal information about the Claimant to Mr Kay. It is an obvious inference that she must have learned of that information in the course of her work. I can see no other way that it could have reached her. The Loose Minute was not addressed to anyone in J9, but J9 Pol/Ops PJOBS at least is likely to have been told about it because of their responsibility for Gibraltar and Mr Jessett recalled having some discussion with Ms McKeegan-Brown about the subject. Whether Ms Jordan-Barber learned of the information through gossip around the office or as a result of inquiries of her own would not matter. Either way the obligations of confidentiality would have been the same.

94. Of course, for the purpose of examining this issue, I must assume (contrary to my earlier finding) that Ms Jordan-Barber's disclosure to Mr Kay was actionable at the suit of the Claimant. It is only if she committed a tort against him that any issue of vicarious liability could arise. But if that was the case, there is a clear and obvious connection between that wrong and that part of her job which required her to keep such information confidential.

95. If this was the case, then it would seem to me to be just to require the MOD to assume vicarious responsibility. This is not simply an example of the employment being the opportunity for the wrong to be committed. As part of her work, she needed to have access to security sensitive and confidential information. As part of her work she shared office space with the J9 Pol/Ops PJOBS team and was likely to learn other information in consequence. There is always an inherent risk that those entrusted with such information will abuse the trust reposed in them, but rather than this being a reason why vicarious liability should not be imposed, I think, on the contrary, it is a reason in its favour. True it is that Ms Jordan-Barber's activity did nothing to further the MOD's aims, it was carried on without their knowledge, and it received no encouragement from the MOD. What she did was prohibited. However, those features do not preclude vicarious liability (and Ms Michalos did not suggest they did). Notwithstanding them, if I had held that Ms Jordan-Barber had committed a tort (contrary to my findings), I would have concluded that that hypothetical tort would have been sufficiently closely connected with her job for it to be just for the MOD to be vicariously liable.

Causation of damage

96. The Defendant argues that, if Ms Jordan-Barber misused the Claimant's private information and if the MOD is vicariously responsible for her tort, the Claimant's claim must nonetheless fail because any damage which he suffered was due to the publicity which the *Sun* gave to the story and this is not damage for which Ms Jordan-Barber was responsible.

97. Ms Michalos relied on several different bases for this contention.

    a. She argued that publication of the story by the *Sun* was a *novus actus interveniens* which broke the chain of causation. She relied on *Weld-Blundell v Stephens* [1920] AC 956. In that case the Plaintiff had written a letter which was libellous of two officials of a company in which he was interested. He gave the letter to his partner (the defendant) who negligently left it at the company's offices. The manager, whom the defendant had been visiting found the letter and disclosed it to the two officials. They successfully sued the Plaintiff for libel. In the present claim he sought to recover from the defendant the damages and costs which he had had to pay in the libel action. The House of Lords (by a majority) held that the loss was not recoverable from the defendant. Lord Sumner said at p. 986,

        'In general (apart from special contracts and relations and the maxim *respondeat superior*), even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause…It is hard to steer clear of metaphors. Perhaps one may be forgiven for saying that B snaps the chain of causation; that he is no mere conduit pipe through which consequences flow from A to C, no mere moving part in a transmission gear set in motion by A; that in a word, he insulates A from C.'

    b. Even if Ms Jordan-Barber had not leaked the story as and when she did, the Claimant's removal from his command and the reasons for it were bound to come out. Too many people knew what had occurred and the removal of a Ship's commanding officer was so unusual that this was inevitable.

    c. The MOD would not have been able to restrain publication of the story because it could not show that this would damage the public interest and that was an essential ingredient which the government had to prove in order to restrain publication: see *Attorney-General v Guardian Newspapers Ltd (No.2)* [1990] 1 AC 109. Any claim by the Claimant against the newspaper would have been unsuccessful because any rights of his under Article 8 (and they must be assumed for present purposes) would have to give way to the newspaper's rights under Article 10.

98. Mr White supported the arguments of the MOD.

99. Mr Tomlinson submitted that I should reject these arguments.

    a. It was obvious that Ms Jordan-Barber had intended the *Sun* to publish a story based on the information which she provided. That, after all was the reason they were prepared to pay for her information. At the very least, publication was a natural and probable consequence of her leak which meant that there was no break in the chain of causation.

    b. There was no evidence that information about the reasons for the Claimant's removal would have emerged in any event.

c. Any public interest defence which the *Sun* would have been able to maintain had nothing to do with the liability of Ms Jordan-Barber or the MOD.

100. I agree with Mr Tomlinson that *Weld-Blundell v Stephens* does not help the Defendant. Even if a claimant's loss has been directly caused by a third party rather than the defendant directly, the issue is still whether that loss is too remote to be recoverable. The underlying test for remoteness in tort is whether such loss was reasonably foreseeable or the natural and probable consequence of the wrong (see for instance *Overseas Tank Ship (UK) Ltd v Morts Dock Engineering Co Ltd (The Wagon Mound)* [1961] AC 588 and *Slipper v BBC* [1991] 1 QB 283 CA which both referred to *Weld-Blundell*). Indeed in *Weld-Blundell* itself Lord Sumner distinguished the case of 'persons acting as the defendant meant them to act or acting as the defendant must have foreseen they would' (p.985) and Lord Wrenbury likewise distinguished the case of a third party whom the defendant expressly authorised to repeat a slander or where it could be inferred from the surrounding circumstances that the defendant anticipated and wished that the third party should repeat it (p.999).

101. However, it is wrong to say that there was no evidence that the Claimant's removal and the reasons for it would have become public knowledge even if Ms Jordan-Barber had not leaked it.

a. Rear Admiral Snelson's agreed evidence was that once the Claimant was removed the matter

> 'was *de facto* a public matter. ..After the Claimant's removal from the ship it would have been quite acceptable for [bullied officers] to have told their parents what happened to them and why.'

He said as well,

> 'In my experience while sailors would gossip about an event such as this to other sailors in the Fleet and to their families, it would be rare for them to inform the press. In this particular case it was perhaps more likely that a sailor would contact the press if she or he had been the subject of bullying by the Claimant…Given the unusual nature of the case, my experience of the media, and the ship's company of just under 200 personnel, I did anticipate that the Claimant's removal from the ship would reach the media and be reported, as the ship's company would have had phone and internet access on board and ashore in Gibraltar and at sea on sailing. I note that a similar assessment was made in the Loose Minute of 10 December. This was particularly the case given the public role of a Commanding Officer. Accordingly it was highly likely that the news would break very quickly. However, the news broke more quickly and in greater official detail than I expected.'

b. Commodore Farrage's agreed evidence was to like effect. He said,

> 'I cannot envisage any situation of a CO being removed from command for bullying members of his ship's company that the ship's company would not then discuss, both between themselves on board the ship, and more widely with their families and their friends and colleagues within the Naval

> Service… In this case, the investigation into the Claimant's behaviour and his removal from command were situations created by his own conduct. As a matter of fact, for the reasons given above, once the Claimant was removed from HMS Somerset this was essentially in the public domain.'

c. Rear Admiral Snelson referred to the Loose Minute. This was, of course, prepared before the leak to the *Sun* was known about. It did nonetheless anticipate that news of the Claimant's removal would become public knowledge. His temporary delegation (which was all that had happened on 10th December) was yet to be confirmed. However, it was also anticipated that the MOD spokesperson would be asked whether the Claimant 'had been dismissed from his ship for bullying'. While the brief did not recommend confirming this fact, it showed, as Rear Admiral Snelson said, that the MOD foresaw that this fact might have reached the public.

102. In my judgment, the Defendant (and Third Party) are right to say that, even in the absence of the leak by Ms Jordan-Barber to the *Sun,* the fact of the Claimant's removal from command and the reason for it would have become public knowledge anyway.

103. I also agree that neither the Claimant nor the MOD would have been able to prevent publication (had they learned in advance that this was planned). I have already held that the Claimant cannot show that he had a reasonable expectation of privacy in the information. That would have been fatal to his claim. I would in the alternative have held that the *Sun* would have succeeded in showing that any right of his under Article 8 would have to give way to the *Sun*'s right to publish under Article 10. I accept that (assuming it was known) the means by which the *Sun* came by the information would be a factor against the newspaper, but the other factors to which I have already referred in this judgment would decisively tip the Article 8 / Article 10 balance in NGN's favour. It is not for me to speculate as to why the Claimant has not sued NGN as well as the MOD, but a concern that the publisher's Article 10 right would prevail would have been well-founded.

104. The MOD (unlike the Claimant) would have been able to mount a distinct claim in breach of confidence against Ms Jordan-Barber and (I am prepared to assume) against NGN. However, it, too, would have faced a public interest argument. *Attorney-General v Guardian Newspapers (No.2)* shows that it would have had the burden of showing that disclosure would be contrary to the public interest. In all the circumstances, I do not consider it would have been able to discharge that burden.

105. It follows that I agree with Ms Michalos and Mr White that the Claimant cannot show the necessary causal links between the wrong on which he relies (even if it was otherwise maintainable) and the press publicity which caused the harm for which he seeks compensation.

Limitation

106. Ms Jordan-Barber disclosed information about the Claimant to the *Sun* no later than 13th December 2004. The Claim Form was issued on 4th September 2014. Mr Tomlinson accepted that the claim was a claim in tort. By the Limitation Act 1980 s.2 an action in tort must be brought no later than 6 years from the date on which the

cause of action accrued. The Defendant and Third party argued that the claim was therefore time barred.

107. However, Mr Tomlinson argued that the claim was not statute barred since it was only in 2013 that the Claimant learned that Ms Jordan-Barber had been NGN's source. He argues that the Claimant is entitled in these circumstances to rely on s.32 of the Limitation Act 1980. This says (so far as relevant),

> '(1) … where in the case of any action for which a period of limitation is prescribed by this Act, either –…
>
> …
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant…
>
> The period of limitation shall not begin to run until the plaintiff has discovered the …concealment… or could with reasonable diligence have discovered it.
>
> References in this subsection to the defendant include reference to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty

108. The phrase 'any fact relevant to the plaintiff's right of action' has been considered on a number of occasions. In *Arcadia Group Brands Ltd v Visa Inc* [2015] EWCA Civ 883 Sir Terence Etherton C summarised the principles at [49]

> '(1) a "fact relevant to the plaintiff's right of action" within s.32(1)(b) is a fact without which the cause of action is incomplete; (2) facts which merely improve prospects of success are not facts relevant to the claimant's right of action; (3) facts bearing on a matter which is not a necessary ingredient to the cause of action but which may provide a defence are not facts relevant to the claimant's right of action.'

109. This has been described as the 'statement of claim' test i.e. facts which should be pleaded in the statement (now particulars) of claim – see *Johnson v Chief Constable of Surrey* 'The Times' 7 March 1984 CA Civ Div Transcript [1984] No. 84.

110. Mr Tomlinson argued that this was plainly a case where Ms Jordan-Barber had deliberately committed a breach of duty and, in the circumstances, her identity as the wrongdoer was not likely to be discovered for some time. He argued that it was essential to the Claimant's cause of action that he be able to identify the employee who was the primary wrongdoer. Unless that was pleaded, it would not be possible to plead that the MOD was vicariously responsible for the wrong. Besides, the Claimant obviously could not have sued Ms Jordan-Barber until her identity was revealed in 2013. It would be anomalous if the claim against her was not statute barred, but the claim against her employer was. Mr Tomlinson further argued that s.14(1)(d)

provided specifically that, for the purposes of the Limitation Act 1980 s.11 a person's date of knowledge included, if it was alleged that the act or omission was of a person other the defendant, the identity of that other person. He submitted that this should be applied by analogy when deciding whether the identity of an employee was a fact relevant to the Claimant's right of action for the purposes of s.32.

111. Ms Michalos and Mr White argued that s.14 was part of a specific regime for limitation where the claim was for personal injury. It was an adjunct to s.11 of the 1980 Act and this regime was distinct from that which applied in the present context. It had no value as an analogy. They argued that the precise identity of the employee for whom the defendant was vicariously responsible was not an essential ingredient of the Claimant's cause of action against the MOD. It would have been sufficient for him to plead that it was to be inferred that the person who disclosed the information to the *Sun* (whoever it was) must have been an employee of the MOD. He would have had to provide particulars from which the inference could be drawn and have done so in sufficient detail that they were not vulnerable to a strike out. However, this was exactly what the Claimant himself had understood to be the case. In his witness statement he said 'I did not give serious thought to how such confidential information about the EOI had reached the press. I mistakenly thought that it might have been leaked to the press by someone on board HMS Somerset who was directly involved in the investigation and the Defendant had then substantiated the story and briefed "against" me.' His wife, Gail Axon, said in her witness statement that the Claimant had been deeply upset by the media coverage and by the thought that '(he believed) someone on HMS Somerset had betrayed that confidentiality by talking to the press.' For the purposes of the police investigation into Ms Jordan-Barber, the Claimant had produced a table which showed how a number of features of the *Sun*'s story meant that it must have come from someone with access to MOD information. Even if he had not conducted that degree of analysis in 2004, it showed that 'with reasonable diligence' it could have been discovered from an early stage that the *Sun*'s source was an MOD employee. It was also a common feature of litigation that a claimant was dependent on disclosure or other aspects of the litigation process for proof of certain features of his claim. A claim would not be struck out where that was the case, nor, in those circumstances, would the running of time be postponed by s.32.

112. I agree with Ms Michalos and Mr White that s.14 is of no assistance in this case. The regime for limitation in personal injury claims is different and s.14 is part of that separate regime. There are similar features in s.14A for negligence actions which do not involve personal injury, but that too is immaterial for a claim which is not founded on negligence. I also agree with Ms Michalos and Mr White that the precise identity of the primary wrongdoer is not necessarily a fact relevant to a cause of action based on deliberate wrongdoing. If the claimant can properly plead that the tortfeasor was an employee and was acting in the course of his or her employment that would be sufficient. In *Arcadia* Sir Terence Etherton said at [51],

> 'There are many areas of the law where a cause of action is dependent not simply on the primary facts but rather on whether those primary facts give rise to a particular consequence or inference.'

Thus, if the Claimant was in a position to plead facts from which it could be inferred that the *Sun*'s source was more likely than not to have been an employee of the MOD (for present purposes including the Royal Navy), his claim could not have been struck

out and the running of time would not have been postponed after he could have discovered those facts with reasonable diligence. It is not sufficient to postpone the running of time that the Claimant lacked sufficient information to sue a different defendant (i.e. Ms Jordan-Barber herself).

113. Certainly the reasons for the EOI and the reasons for the actions taken against the Claimant were known originally only to MOD employees. The difficulty with the Defendant and Third Party's argument is that the evidence shows that, once the Claimant had been removed, it would have been acceptable for the officers who had complained of bullying to let their families know (see the agreed statement of Rear Admiral Snelson). Even if (contrary to my earlier conclusion) the Claimant had had a reasonable expectation of privacy in the information and, even if disclosure by a family member would have been wrongful, that would not have been a wrong for which the MOD was vicariously liable. Consequently, until the Claimant knew that Ms Jordan-Barber was the *Sun*'s source he was not in position to plead facts from which it could be inferred that the MOD was vicariously liable.

114. Nor, am I persuaded that on the facts of this case, the Claimant would at an earlier stage have been able to resist a strike out application on the basis that gaps in his case might be made good by disclosure. There is no evidence that, prior to 2013, disclosure by the MOD would have been likely to produce anything useful in identifying the *Sun*'s source. NGN, of course, knew the identity of its source. However, it cannot be said that 'reasonable diligence' would have required the Claimant to seek *Norwich Pharmacal* relief against NGN. The publisher would have been able to rely on Contempt of Court Act 1981 s.10, Article 10 of the ECHR and *Goodwin v UK* (2002) 35 EHRR 18 and resistance on those bases would very likely have been successful.

115. Ms Michalos and Mr White had a different argument. This was that the claim was essentially one for injury to reputation. As such it should be subject to the limitation period for claims in defamation. For these there was a 1 year limitation period – see Limitation Act 1980 s.4A. That could be extended - see s.32A. However, one of the matters which the Court was obliged to take into account was whether the Claimant had acted promptly after learning of the facts giving rise to a claim. In this case, the Claimant had learned of Ms Jordan-Barber's role in April 2013, but had not issued his claim until September 2014 some 17 months later. In those circumstances no extension would be granted.

116. The issue as to whether a claim for misuse of private information is an abuse of process because it is essentially a claim for harm to reputation has been touched on in other cases (see in particular *Hannon and Dufour v MGN* [2014] EWHC 1580 (Ch) and *Gulati v MGN Ltd* [2015] EWHC 1482 (Ch)). The issue is not straightforward and, in view of the conclusions to which I have come, is not necessary to the resolution of the present claims for me to decide it in this case.

Can the Claimant rely on Article 8 to the extent any of the damage is loss of reputation which is a foreseeable consequence of his own actions?

117. I have found that the Claimant did not have a reasonable expectation of privacy. In reaching that conclusion, I have taken into account the nature of the Claimant's conduct and its consequences. In these circumstances, I do not think it useful to try to answer this separate question.

Is the Claimant's claim for damage to reputation an abuse of process?

118. Since I have found that the Claimant's claim does not succeed on the merits, there is no purpose in me considering whether it, or part of it, would otherwise have been an abuse of process.

Quantum

119. This, too, is an issue which does not arise on the findings that I have made.

Overall Conclusion

120. The Claimant did not have a reasonable expectation of privacy in any of the information in issue. Ms Jordan-Barber did not owe him (as opposed to the MOD) a duty of confidence. His claim therefore fails. Since the Defendant is not liable to the Claimant, no question of an indemnity by NGN arises.