Neutral Citation Number: [2011] EWHC 3269 (QB)

Case No: HQ10X03031
HQ10X03032
HQ10X03033

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

(1) Matthew Cooper (2) Imaginatik Plc	**Claimants**
- and -	
Mark Turrell	**Defendant**

Jonathan Barnes (instructed by **Marriott Harrison**) for the **Claimant**
The Defendant did not attend and was not represented
Hearing dates: 24 November 2011

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.

.....

THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. Mr Turrell is the defendant to each of these three related actions. He was a founder of the Second Claimant ("the Company"). Until 4 June 2010 he was a director and the Chief Executive Officer of the Company. He is, or was until recently, a major shareholder. The Company is a public company listed on the Alternative Investment Market ("AIM") in London. These proceedings have been brought in respect of the conduct of Mr Turrell in response to the termination of his position with the Company on 4 June 2010, including his conduct during meetings held on that date.

2. Mr Cooper is the Executive Chairman and a director of the Company. The three actions were commenced by three claim forms each issued on 9 August 2010. The first action ("number 3031") is a claim by Mr Cooper against Mr Turrell for relief arising out of the misuse of private information and/or breach of confidence, including an injunction, delivery up and damages. The information concerning Mr Cooper is private information relating to his health. It is set out in the Confidential Schedule to the Particulars of Claim. It was obtained by Mr Turrell by means of the unauthorised and secret audio recording made by him of a conversation between Mr Cooper and Mr Shawn Taylor. Mr Taylor is also a director of the Company.

3. In the first action ("number 3031") Mr Cooper sues for misuse of private information. At about 10.30am on 4 June 2010 Mr Cooper and Mr Taylor had informed Mr Turrell that his employment with the Company was terminated with immediate effect. That was the first meeting that morning. During the afternoon of 4 June 2010 a second meeting took place between Mr Cooper and Mr Taylor on the one hand and Mr Turrell on the other. The meeting took place in the presence of solicitors advising the Company, Mr Charles and Mr Cordran. At a time when Mr Turrell was absent from the room during one or the other of these meetings, and at a time when the solicitors were also absent, Mr Cooper communicated to Mr Taylor the private information concerning himself which is set out in the Confidential Schedule. Mr Turrell made the secret audio recording of conversations which included this private conversation between Mr Cooper and Mr Taylor.

4. In the third action ("number 3033") the Company sues Mr Turrell for breach of confidence, claiming an injunction, delivery up and damages. The claim arises from the same audio recording, insofar as it was made of the conversation between the Directors of the Company while they were discussing the affairs of the Company and taking advice from the Company's solicitors.

5. In the second action ("number 3032") Mr Cooper and the Company are both claimants. They claim damages for libels published on ten occasions. The first was on 10 June 2010 in the form of a message recorded by Mr Turrell on the voicemail of the Company's solicitor (there is an alternative claim in slander). The second to eighth publications complained of are a series of e-mails sent by Mr Turrell between 11 June and 9 July. The ninth and tenth words complained of are internet postings made by Mr Turrell on 28 July on the website www.advfn.com.

6. The meanings attributed by Mr Cooper and the Company to the voicemail recorded on 10 June are:

> "1. The First Claimant is medically unfit to perform, and therefore incapable of fulfilling his functions and duties as a Company Director, including as a director of the Second Claimant.
>
> 2. The First Claimant was similarly unfit and incapable when he was recruited by the Second Claimant as a director, but although he was under a duty to disclose this to the Second Claimant, including to the Defendant, he failed to do so and so knowingly deceived both the Second Claimant and the Defendant.
>
> 3. Both the First and Second Claimants have knowingly and therefore dishonestly breached legal and regulatory duties that they are under to disclose the First Claimant's (supposed) medical condition to the AIM market and its regulator".

7. Similar meanings are attributed to the other words complained of. In addition, there are other defamatory meanings attributed by the Claimants to the publications complained of. In respect of the third publication complained of, an email with letter attachment dated 7 July 2010, one of the meanings attributed to it by the Claimants is:

> "The Second Claimant, at the direction of the First Claimant ... 2. terminated the Defendant's employment dishonestly in circumstances of duress, misrepresentation and blackmail warranting a police criminal investigation".

8. Another meaning attributed by the Claimants to the words complained of, in particular to the seventh publication by e-mail on 9 July 2010, includes:

> "2. The First Claimant has in the context of the Defendant's departure from the Second Claimant behaved dishonestly, and may well have passed insider trading information illegally to Octopus Investments Limited ("Octopus") (another company of which Mr Cooper is a director)".

9. In this libel action the Claimants also allege dishonesty on the part of Mr Turrell. They allege it in the Particulars of Claim para 28, in support of a claim in aggravated damages, and again in the Reply in a plea of malice in response to various defences of qualified privilege. They allege that Mr Turrell has made many deliberate false statements including the allegation of blackmail, and that he did so pursuant to an illegitimate campaign to disable the Company in the operation of its business by forcing the removal of its Board of Directors, including the removal of Mr Cooper as Executive Chairman.

10. Following a number of other orders made in these actions, on 21 June 2011 Sharp J made an order in each of the three actions that judgment be entered for the Claimants for damages to be assessed, and for other remedies including costs to be considered. That order was made in default of compliance with earlier orders which Sharp J had made.

11. 24 October 2011 was the dated fixed for the hearing of the claims for the damages to be assessed and for other remedies to be considered. The Claimants consented to an adjournment of that hearing in order to allow Mr Turrell to be present. However, he applied again for another adjournment and that application was dismissed by Sharp J on 17 November 2011.

12. Accordingly this is the hearing ordered to be held to assess damages and consider other relief. And it proceeds in Mr Turrell's absence.

13. Mr Turrell has submitted a document headed "Letter to the Court – 23 November 2011". In it he states that he will not be present at this hearing, giving as a reason that he is unable to travel to the UK due to lack of a valid passport which he says is being renewed. In that letter he asks the court to strike out all the claims, although this is too late given that Sharp J has already entered judgment against him. I treated that letter as an application for a further adjournment, which I refused, because there was no evidence submitted by Mr Turrell to support his statement that he was unable to travel to the UK.

14. On 20 October 2010 Mr Turrell had served Defences of his own drafting in each action. They also included counterclaims. These were struck out by an order dated 1 December 2010.

15. On 14 January 2011 Mr Turrell then served fresh defences in each action settled on this occasion by counsel. He admits that he made the audio recording of the conversations at a time when he was not in the room.

16. The transcript of the voicemail left on 10 June 2010 is no more than about six lines. The e-mail of 11 June 2010 was addressed to Mr Griffiths of Arbuthnot Securities Limited, the Company's AIM market nominated advisor ("NOMAD") and to Mr Marshall, a former chairman of the Company.

17. The e-mail of 7 July 2010 was also addressed to Mr Griffiths. It was copied to Mr Taylor, Mr Wainwright, another director, and Mr Moorland, also a director of the Company, and to the two solicitors Mr Charles and Mr Cordran.

18. The e-mail of 8 July 2010 was addressed to AIM Regulation it reads:

> "I would like to bring to the attention serious issues at [the Company]. This might sound unusual as I am 48% shareholder and formerly the CEO and Executive Director. However, the circumstances are highly unusual and there is written evidence of huge lapses in corporate governance on the part of the current Directors, with minimal to "negligent" (my word) oversight and guidance from the company's NOMAD. The company is continuing to misinform the market on price-sensitive information for example
>
> This is an urgent and serious issue. I am working with the police on the criminal aspects of the situation.

> I have further information that supports the directors' breach of duty on multiple ongoing occasions. I can be reached at this e-mail or my mobile is …
>
> This is, I repeat, a highly unusual situation, one where the various rules and safeguards have all failed. I am turning to the AIM team to help protect all investors in this company and the reputation of the market".

19. The letter attached to the e-mails of 7 and 8 July included the following:

> "More importantly, I have also filed a Police Report due to the unwarranted demands – with menaces made by the Board and its lawyers on 4 June. The Metropolitan Police is currently investigating the case of Blackmail (Theft Act 1968 Section 21) concerning Mat Cooper, Shawn Taylor and Simon Charles, with the support of Andrew Wainwright, Paul Morland and Bob Cordran. I am assisting the Police with their investigation, including providing the audio and transcript of events that took place…..
>
> Separate to these measures the Company maintains that the separation agreement is in force. Having taken independent legal advice, I dispute that the agreement is in force and reject the Separation Agreement, a fact made clear to the Company's lawyers. The agreement was presented and agreed under duress, based on misrepresentation, and signed without independent representation. ….
>
> However, given the serious nature of the Police Investigation, and that I as a past employee and director, and a major share holder in the firm am in dispute with the Company, I cannot see how the Board can continue to operate as they are doing.
>
> In the best interests of the Company and all of its shareholders, and to comply with corporate governance procedures, I propose the following:
>
> (1) The current Board immediately appoints a new Independent Director as chairman
>
> (2) The current Board members are suspended, pending a review of their activities by the new Director or resign
>
> (3) Blackmail is a serious criminal offence. In my role as shareholder, controlling 48% of the voting stock, I have no confidence that the Board and its members are behaving properly and maintaining even minimum standards of corporate governance. The transcript alone

> indicates that the directors have breached their fiduciary and statutory duties on several accounts in addition to having given grounds for the active criminal investigation.
>
> I made the Company aware in writing via e-mail in conversations and by voicemail, that I have been in dispute regarding the situation of my termination. It appears that the Company has decided that this information is not meaningful to shareholders, but I believe this to be incorrect, the absence of any news on this matter, I believe is likely to constitute price-sensitive information, and in this specific case as an investor in [the Company] I believe that serious omissions have been made in communicating properly to the market.
>
> These issues require an urgent and immediate response. I do not have confidence in the Company performing its duties given the breaches of their fiduciary duties as directors. I am therefore directly informing concerned parties of this letter and giving the Company notice that a lack of response, or a response that does not address these issues properly and fairly will be passed on to the relevant authorities."

20. On 9 July Mr Turrell sent an e-mail to Mr Power and Mr Rogerson of Octopus as follows:

> "I am writing to make you aware of the situation regarding my departure, and the current behaviour of the Directors of [the Company]. I am also making you aware of information that I believe is important for shareholders to know given that the Company has seen fit not to communicate with the market.
>
> I am aware that you are in close communication with Matt Cooper the Company's current Executive Chairman an Octopus' own non-executive chairman. I am also aware that you were an insider regarding the events that took place on 4 June (I believe you were on the phone to Matt at the time). You may not be aware of any of the circumstances around the issue and so I am copying you on two letters that have been sent to the company and other authorities.
>
> There is a huge body of evidence that Matt Cooper has acted dishonestly in this situation and he may well have done so with your own firm.
>
> I am also concerned that Octopus sold shares during the time this action was being planned... It is unlikely that Octopus was not formally aware of the action and any trade as an insider would be considered suspicious.

> I am copying Simon as Simon had provided an original reference for Matt joining our Board. As one CO to another I now realise how important the trustworthiness of the board truly is.
>
> This is a very unfortunate bad situation for all the shareholders yourselves included... there were plans in place to accelerate growth in the firm – it was in retrospect very hard to manage the company with four knives stabbing me in the back".

21. On 28 July 2010 Mr Turrell published at advfn.com:

> "Yup, so the fact that it was not mutual, the filing for constructive dismissal, police report for blackmail for the events on 4 June, potential insider – like trades from Octopus investments the week before this happened when their non-executive chairman was driving this, the huge legal fees racked up (more than the IPO), the fact that they will loose an honestly conducted vote... Yup as an investor I would perhaps be tempted to agree with the Company and it's broker of the Year, Nomad Arbuthnot, that there is nothing material here.
>
> On the other hand promoting someone internally to a position... they already had... that is a spellbinding piece of news that investors must know immediately. Who cares about legal expenses run awry, liabilities in tribunal, honest disclosure of current events.
>
> This is not in the interests of all shareholders - this is disgraceful behaviour towards investors".

22. Advfn.com is a website that hosts financial information, data, reports and user contributions. Its central services are available to subscribers only. Its subscribers are typically important and influential participants in the UK and world financial markets including those in which Mr Cooper is employed and on which the Company is listed. The Claimants plead that, and that the words posted on 28 July 2010 were read by individuals who themselves made postings using five identification names. It is the Claimants' case that it is to be inferred that the posting was read by a further substantial but unquantifiable and unidentifiable readership.

23. Later on 28 July Mr Turrell published on advfn.com a further posting relating to Mr Cooper's health as he falsely alleged it to be. The posting concluded:

> "I believe this medical state is material and discloseable. Purely on historic grounds, leaving out any current potential condition".

24. On 13 August 2010, subsequent to the events which are pleaded in the Particulars of Claim, Mr Turrell uploaded the audio recording to his word press webpage both in audio form and in the form of a 65 page transcript. On the same day, and on 16 August 2010, he posted links on twitter. The introductory text posted reads:

> "As you will read in the transcript, and listen in the audio, the discussions were not meant to be listened in on. They do however, reveal all kinds of plans that would demonstrate them to be unfit directors and open the Company to numerous law suits for damages".

25. On 20 May 2011 Mr Turrell e-mailed Mr Cooper and others the following threats:

> "This letter is to inform you that I have ceased to be a resident of the United Kingdom as of last month. At this time I do not have a forwarding address, and I no longer have a residence in the UK…
>
> I look forward to your wasteful attempts of burning through [the Company] shareholder money. And I will look forward to sharing the correspondence in this long and ridiculous case on the internet from outside the jurisdiction of the United Kingdom. …
>
> It might also be worth considering, from the company's perspective and from MH's perspective, the likelihood of having any claim for any costs ever recovered, including costs of continuing my action. I am sure the public, and particularly those investors in Octopus Investments who I will be targeting as part of my campaign – will be fascinated to read – on the internet – about the practices of the supposed great and the good".

26. In her order of 24 May 2011 Sharp J included the following injunction:

> "Material posted on the internet
>
> It is ordered that the Defendant must by 4pm on 26 May 2011 remove from his [Wordpress internet address] his posting of transcripts of meetings recorded by him on 4 June 2010 and it is further ordered that he must not until trial or further order in the meantime post any similar material that forms the subject matter of the claims in Actions HQ10X03031 and/or HQ10X03033 on the internet or otherwise disclose the same to any party save to any solicitors who may be appointed by him to conduct his defence of the said actions".

27. In the same order Sharp J ordered Mr Turrell to provide in writing an address for service in accordance with CPR. Part 6.23(2)(c)(ii). She ordered that the Defences in each action be struck out if he failed to do this by 30 May 2011, with no further order of the court to such effect being required. He did fail and that is why the Defences are struck out.

THE ISSUES AND THE EVIDENCE

28. Mr Barnes summarises the issues substantially in the following terms:

> "1. In the first and third actions were the admitted disclosures by Mr Turrell in breach of the rights in privacy and confidentiality of Mr Cooper and the Company, and if so what should be the remedies?
>
> 2. In relation to the defamation action what should the remedies be having regard to the meaning of each of the words complained of and the extent of their publication on the internet"?

29. The Claimants attended court with the witnesses with a view to proving their entitlement to the relief by way of damages, injunctions and the other orders that they claimed. As is common in such cases, they chose not to rely on the presumption of falsity in the defamation action, but to prove their cases by evidence.

30. All the following witnesses were available to be cross-examined by Mr Turrell, if he had attended either in person or by a legal representative. In the event, only Mr Cooper gave oral evidence.

31. In addition to Mr Cooper the witnesses were Mr Paul Morland, non-executive director of the Company, Mr Taylor, Chief Financial Officer of the Company, Mr Andrew Wainwright Chief Technical Officer, Mr Geoffrey Carss, former Director, Mr Charles, Mr Cordran, both solicitors, and Mr Allan Wainwright, shareholder and father of Mr Andrew Wainwright. Their statements were verified in accordance with CPR Part 22, and thus could be taken as evidence. I accepted them as the evidence in chief of the witnesses.

32. There is submitted on behalf of the Claimants a Table of each publication complained of. It is not necessary to set out in this judgment each of the publications complained of, and to do so would unduly lengthen it. The Table sets out in relation to each of the ten publications complained of in the Particulars of Claim: the publishee in respect of the internet publications (only the known publishees could be identified); the type of publication; the date; the words complained of; and the meanings attributed by the Claimants to the words complained of in the Particulars of Claim.

33. In deciding at the trial of a libel action the meaning of the publications complained of, the court adopts the same test as it applies in deciding what meaning such words are capable of bearing. That test was most recently set out by Sir Anthony Clarke MR in *Jeynes v News Magazines Limited* [2008] EWCA Civ 130 at para 14 as follows:

> "The legal principles relevant to meaning ... may be summarised in this way: (1) The governing principle is reasonableness. (2) The hypothetical reasonable reader is not naïve but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available. (3) Over-elaborate analysis is best avoided. (4) The intention of the publisher is irrelevant. (5) The article must be read as a whole,

> and any "bane and antidote" taken together. (6) The hypothetical reader is taken to be representative of those who would read the publication in question. (7) In delimiting the range of permissible defamatory meanings, the court should rule out any meaning which, "can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation…".... (8) It follows that "it is not enough to say that by some person or another the words might be understood in a defamatory sense".

34. It is not the function of the court simply to either reject or accept the meaning put forward by the claimant. The court must reach its own conclusion. Having considered the matter I decided that in this case the meanings attributed to the words complained of by the Claimants are the meanings which those words in fact bear.

35. Evidence as to the extent of the Internet publication is given by Mr Taylor in his witness statement dated 21 July 2011. He states, as cannot be disputed in the light of the documents:

> "1. On 13 August 2010 Mr Turrell made a posting at his Wordpress site which had embedded in it both the audio recording and the transcript of the meetings on 4 June already referred to
>
> 2. On 13 August Mr Turrell posted on Twitter a link to his Wordpress posting
>
> 3. On 14 August Mr Turrell posted on Twitter 'Google has cached Surreal Journey (and he inserted a link to that) – will reveal more information – will find a place to host – any ideas?'".

This contained a link to the Wordpress posting.

> 4. On 16 August Mr Turrell again made a posting on Twitter with a link to his Wordpress blog on two separate occasions that day.

36. In a witness statement dated 12 October 2011 he has given further evidence of publication. On 9, 19 and 23 August Mr Turrell posted links on Twitter to the Wordpress blog. It had been temporarily suspended following a complaint made by the Company's solicitors. Other postings were made which did not include embedded links or repetition of the words complained of, but did contain allegations of incompetence and the like. Two were on 3 and 8 August, another on 17 August. There were 3 on 27 September and one on 29 September 2011.

THE EVIDENCE OF MR COOPER

37. Mr Cooper became non-executive chairman of the Company on 9 October 2009. At that time Mr Turrell was Director and the Chief Executive Officer. Mr Cooper is in his mid forties, he is an American national living in the UK. He has lived here since

early 1998. He has a Bachelor Degree in Chemistry from Princeton University. He works with businesses in a wide variety of sectors including financial services, technology and software, social networking recruitment and food. Most of his work is with UK companies that do most of their business in the UK. He has also worked with one US and one Dutch company. His professional interest lies in helping companies become successful by helping to develop talented entrepreneurs into efficient, successful and well rounded CEOs. He is Director and Chairman of Octopus. He holds positions with ten companies in that group. He has also held directorships, or been trustee or held positions of similar status with numerous other companies or institutions, a number of which are household names.

38. So far as material, he describes his medical history as follows. In about the Autumn of 2004, while training for a 260 kilometre bike race through France, he began to experience symptoms which were misdiagnosed as depression. He was treated with medication which did cause him to suffer genuine depression. He voluntarily attended hospital where he stayed for some weeks. The misdiagnosis was discovered at that point. Throughout this period he kept those for whom he was working informed, and continued to fulfil all of his duties. He made a complete recovery.

39. On 14 November 2007 he published his account of what had happened in an article in the Guardian Newspaper. He had also been interviewed on BBC Newsnight. He had decided to do this in a bid to remove some of the stigma associated with mental illness. To that extent his health is in the public domain, but only to that extent. The Guardian article remains accessible on the internet. Mr Cooper was not suffering from any mental health problems when he joined the Company and he did not raise the matter or discuss it with anyone.

40. In the period October 2009 to May 2010 Mr Cooper became aware of problems suffered by the Company, and he formed the view that Mr Turrell was not conducting the Company's business appropriately. The Board, the Company and Mr Cooper agreed that Mr Turrell should be removed from his role.

41. Mr Cooper describes the events of 4 June in some detail in his witness statement. There were a series of meetings involving Mr Turrell and others. The bulk of the discussions in the absence of Mr Turrell concerned the Company's affairs and how best to place it following his departure. These discussions were informed from time to time by contributions from Mr Charles and Mr Cordran, who gave legal advice. These meetings were confidential and not intended to be heard by Mr Turrell. At one point when the two solicitors were both out of the room, as was Mr Turrell, Mr Cooper spoke privately to Mr Taylor. He informed Mr Taylor that he had in the period of about 2 ½ weeks preceding that date suffered certain symptoms. He described the misdiagnosis in 2004 and the effect it had had. He told Mr Taylor that he thought Mr Taylor ought to know about the recent symptoms. Mr Taylor is recorded as saying "Well thank you for telling me. And I promise I won't tell anybody". Mr Cooper responded "Well, and if it becomes such an issue that doing anything I will let you know". That part of the conversation covers about a page of the transcript, if that.

42. Mr Cooper and Mr Taylor and the solicitors were, of course, unaware that a recording was being made secretly of their conversation. They became aware shortly afterwards by the voicemail and the other publications which are complained of in the

proceedings. More seriously, the medical condition which Mr Turrell attributed to Mr Cooper was not one that he was suffering from, or which he had discussed with Mr Taylor, but something very much more serious, namely a brain tumour. There was no basis for this allegation, nor for any allegation that he was unfit to act as a director, or had failed to make a disclosure which he ought to have made. Mr Cooper was very upset by these personal attacks and instructed solicitors to write requiring Mr Turrell to desist, which they did.

43. For a short time commencing sometime after 4 June 2010 Mr Turrell was represented by solicitors Mischon de Reya. A meeting was held between solicitors for both parties on 2 July 2010. Mr Cooper became aware of the internet and twitter postings described by Mr Taylor in his witness statements (and also described by Mr Cooper). He felt compelled to, and did, make a formal announcement as to his true state of health both to the Board of the Company and to its workforce. He did this in the Winchester office with a video link to the Company's Boston office. He also had to discuss his health with several of the Company's clients, who had learnt of the publications made by Mr Turrell. He would not voluntarily have made so many disclosures to so many people about his health but for feeling obliged to do so as a result of the allegations by Mr Turrell. Mr Turrell had made him feel extremely uncomfortable and vulnerable.

44. At no time has any illness referred to by Mr Turrell affected Mr Cooper's ability to carry out his duties to any company whether on the earlier occasion in 2004 or in 2010 or later. He has not to his knowledge acted in breach of any of his fiduciary or other duties whether to the Company or any duties of disclosure to any body. He has acted throughout on professional advice. He has not made any false claim about his health.

45. He called Mr Rogerson and Mr Power of Octopus to explain the situation to them. He has had a good working relationship with them for many years. He informed them of the true position and, with their agreement, notified all staff of that company.

46. Mr Turrell left the Company on terms agreed in a Separation Agreement. There is no truth in the allegations he subsequently made that he signed the agreement under duress, or that he was the victim of blackmail. Mr Cooper has received calls and letters which indicate that people are aware of Mr Turrell's allegations. The effect they have had on the management of the Company is highly disruptive. Two clients threatened to leave the Company, but refrained from doing so only after management had devoted time to rescuing the situation. He believes it likely that would be employees will be less likely to accept employment from the Company. He gives a specific example of a sales consultant who declined to commit himself for longer than a six month contract.

47. Mr Cooper believes it is likely that the publications complained of will have, and probably have had, an effect on his own career. He obtains new appointments following approaches made to him by others, including head hunters. It is impossible to know how many have refrained from approaching him who otherwise would have done so. He has continually had to worry about his career since June 2010. The positions which he is engaged for are ones which commonly come to an end for different reasons, such as that companies are sold and new management appointed. He needs new appointments to continue his career.

48. Although he is aware that many of the Company's clients know of the allegations made by Mr Turrell, because he and Mr Taylor have spent time reassuring those clients, he has chosen not to approach them for evidence in this case.

49. In a second witness statement dated 22 November 2011 Mr Cooper refers to the numerous additional publications referred to in the second witness statement of Mr Taylor and to emails to Mr Rogerson at Octopus on 29 October and 1 November 2011. The impact of these and similar communications upon Octopus is such that Mr Cooper is worried as to how long he will be able to continue to work for Octopus, if Mr Turrell's campaign continues as he threatens that it will.

50. Mr Cooper also states that Mr Turrell claims to have transferred all of his shares in the Company to his wife, and that the Company's registrar has confirmed that this transaction has taken place.

51. In his oral evidence Mr Cooper confirmed that it was completely false to suggest that he had suffered from a tumour or from any incapacitating illness as described by Mr Turrell. He states that the effect upon him of Mr Turrell's campaign is one that he feels every day. He states that in the last year he has been offered fewer directorships than in similar periods in the past, and that on the latest occasion in which he was interviewed for a position the question of his mental health was raised. He states that people ask him that question all the time. He feels like a punchbag. Constant accusations about his integrity and health from Mr Turrell over so many months have left him feeling helpless. He has not missed a day at work and he has not missed a meeting.

52. I have no doubt that Mr Cooper was telling the truth and the defamatory meanings which I have held that the words complained of bear are all false.

THE WITNESS STATEMENTS

53. Mr Morland signed a witness statement dated 26 July 2011. Mr Morland learnt about the health of Mr Cooper as a result of the publications of Mr Turrell and he discussed it with his colleagues. He does not consider that Mr Cooper is any less effective as a director, and considers that the allegations of dishonesty and inability to work or take other responsibilities are complete nonsense.

54. Mr Andrew Wainwright in his witness statement states that he was aware of Mr Cooper's article in the Guardian before Mr Cooper was appointed by the Company. He discussed it with colleagues in the Company. He had carried out his own search on the Internet. He did not consider that it was an issue for the Company or that it would affect his performance at work. He has found Mr Cooper to be completely honest and trustworthy and a man of the upmost integrity.

55. Mr Wainwright has received quite a lot of feedback regarding the various postings by Mr Turrell on Twitter and on investment websites, and emails that Mr Turrell has sent. Some feedback has come from customers (including some he names), some from employees, and some from external third parties. Customers who spoke to Mr Wainwright were alarmed by the accusations. The majority of the Company's customers did not speak to him about the postings. There was an extremely high rate of customer turnover following the departure from the Company of Mr Turrell. It is

impossible to say what is the reason for that. But customer retention is now so much better that it leads Mr Wainwright to believe that the publications by Mr Turrell were a factor. The Company's employees became concerned about the content of the postings on advfn.com, the effect they might have on the future of the Company and therefore on their jobs. On at least one occasion Mr Wainwright was aware of a potential new employee who rejected a job offer citing uncertainty about "the Mark situation" as one of the reasons for doing so.

56. Mr Carss was employed by the Company from January 2007 to December 2009. He was initially employed to manage the Company's European business, but his responsibilities were expanded to involve managing all interactions with prospective customers, and other matters. From 15 May 2009 to 9 December 2009 he was a director of the Company. After leaving the Company he became employed as a director and Vice President of Sales and Marketing at Element 8 Limited. He has been in this role since January 2010. In early 2009 Mr Carss attended a meeting with representatives of Octopus who are potential investors in the Company. It was in this way that Mr Cooper's name came to be suggested as a prospective chairman of the Company.

57. Mr Carss conducted his own internet search in relation to Mr Cooper and found the article published in the Guardian of 14 November 2007. He decided to inform Mr Turrell who was the CEO of the Company. Mr Turrell informed Mr Carss that he had seen the article and was fully aware of its contents. He said that it was not any longer relevant. Mr Carss discussed it with colleagues at the Company in addition to Mr Turrell. One of them was Mr Wainwright and another was Mr Taylor.

58. He has been informed that Mr Turrell denies knowing about this matter. He states that he has no hesitation in stating that Mr Turrell's denial is untrue.

59. Mr Carss states that his impression of Mr Cooper was of a person who was very frank and very honest, and there was no evidence or incident which caused him to question Mr Cooper's integrity, honesty or ability to carry out his duties in any way.

60. On 4 October 2011 Mr Carss made a second witness statement. On 5 August 2011 Mr Turrell had sent an e-mail to Element 8 Limited's general enquiries e-mail address, from which it was forwarded to Mr Carss and other directors of that company. Mr Turrell had said in the e-mail that the first witness statement of Mr Carss in this action was "entirely untrue" and that he was "quite comfortable lying in the High Court". Mr Turrell had put forward reasons why he said that the search of the internet through Google in the manner described by Mr Carss could not have produced the search results that he claimed for it. Mr Carss explains why Mr Turrell could be in no position to say this, because of the changes made in the algorithms by Google.

61. Mr Carss states that he checks Mr Turrell's Wordpress blog and Twitter profile from time to time, because he is still a shareholder in the Company and is concerned about damage to its reputation. He has also had forwarded to him by a business contact a link to Mr Turrell's Wordpress blog.

62. Mr Carss was angry at being called a liar and felt that Mr Turrell was using bullying tactics. Mr Carss stands by the evidence he gave in his first witness statement. Whist

he is aware of the proceedings he could take, he reluctantly decided he should not take any further action against Mr Turrell at this stage.

63. Mr Charles made a witness statement on 21 July 2011. He is a partner in Marriott Harrison, the solicitors for the Claimants, and specialises in company and corporate finance law. He is the head of the firm's practice. He is the client relationship partner in the firm for the Company, and has been since the company began instructing his firm in 2006. Mr Cordran is a partner in the firm who specialises in employment law. It was because they were asked to advise on the termination of the employment of Mr Turrell that both partners were involved.

64. Mr Charles describes the events of 4 June 2010. He states that the meetings which took place in the absence of Mr Turrell, and which were surreptitiously recorded by him, were confidential meetings at which he and Mr Cordran gave legal advice subject to legal professional privilege. The advice concerned the options available to the Company in the circumstances.

65. Negotiations took place between Mr Turrell and representatives of the Company on a form of Separation Agreement which had been prepared by Mr Cordran in advance of the day's meetings. Mr Turrell requested some amendments to the terms, which were incorporated and agreed. Mr Charles suggested that Mr Turrell take independent legal advice and indicated that there were a number of solicitors in the vicinity with whom he could put Mr Turrell in touch if he wished. Mr Turrell replied that he was happy to carry on and he had to leave shortly to catch a flight. The Separation Agreement as amended was signed by both parties at about 4 pm. The following Wednesday 9 June, Mr Charles sent an email to Mr Turrell attaching the Separation Agreement, and again offered to put him in touch with an independent solicitor.

66. On the same day Mr Turrell sent Mr Charles an e-mail with a link to the Guardian Newspaper from November 2007. Mr Charles replied asking if there was an ongoing issue for the business. Mr Turrell ignored the question.

67. Mr Charles gave evidence as to the publications by Mr Turrell complained of in the Particulars of Claim, and of which he was aware. Mr Charles attended with Mr Cordran at the meeting on 2 July with solicitors for Mr Turrell. On 7 July Mr Charles became aware of Mr Turrell's allegation that he had been blackmailed. Mr Turrell informed him that he had shared the transcript of the audio recording with the Metropolitan Police. Mr Charles has heard nothing from the police about it. Nor has anyone else to his knowledge.

68. Mr Cordran made a witness statement dated 21 July 2011. Although in different terms, it is substantially to the same effect as the statement of Mr Charles. He contacted Mishcon de Reya on 7 July and was informed by that firm that they no longer acted for Mr Turrell.

69. Mr Allan Wainwright is a company director, but not of the Company. He invested in the Company in December 2005. He reads the financial pages of the press and Internet sites to monitor his investments. In addition to the publications already referred to, he exhibits a print out from another investors website www.iii.co.uk. It contains postings attributed to Mr Turrell on a number of dates all of them critical of the company and the proceedings that it has taken against him.

DOCUMENTS SUBMITTED BY Mr TURRELL

70. Although Mr Turrell was neither present nor represented, I have considered his Defences dated 14 January 2011, and the document headed "Letter to the Court – 23 November 2011".

71. In the Defences Mr Turrell neither admits nor denies that the conversations which he recorded were private. He puts the Claimants to proof that they were. As to the matters set out in the Confidential Schedule, Mr Turrell denies that they were private. His case is that what was said by Mr Cooper at the meeting is no more than he had already made public in November 2007 in the Guardian article, and in subsequent public statements. As to this Mr Cooper states that what he is recorded as saying in June 2010 relates to a different time, and is not the same as what he disclosed in the earlier public statements referred to by Mr Turrell.

72. In relation to the information which the Company claims to be confidential, Mr Turrell's pleaded defence is that the claim lacks the particularity that is necessary in a claim for breach of confidence. In its Reply the Company responded to this point by attaching the transcript made by Mr Turrell as a Confidential Schedule identifying the information referred to.

73. Mr Barnes submits that the information is the contents of the audio recording, which gives all the particularity required. It is confined to a meeting in which the directors of the Company discussed the affairs of the Company with each other and with the Company's solicitors, for the purpose of obtaining legal advice, which is also recorded. The main subject of the discussion is what the Company should do in the circumstances where the employment of Mr Turrell had just been terminated.

74. In his Defence to claim no 3032 Mr Turrell admits publication on www.advfn.com to a number of publishees not exceeding 30. As to the voicemail, he contends that it is not a libel, but only a slander, and as such actionable only on proof of special damage, or in accordance with the Defamation Act 1952 s.3, neither of which is pleaded by the Claimants. The Claimants contend that the recording is in permanent form, as that expression is used in the law of defamation, and so that it is a libel.

75. The Defences also include pleas of justification (or truth) and qualified privilege. In support of the plea of qualified privilege Mr Turrell pleaded that he was not aware of Mr Cooper's health difficulties (that is the difficulties in 2004) when he was appointed chairman of the Company, and that Mr Turrell was concerned as to Mr Cooper's fitness to perform his duties to the Company. In the Reply the Claimants plead that he was aware, and refer to the matters which are the subject of the witness statements adduced before me in evidence, and in particular to the evidence of Mr Carss, that Mr Turrell did not think that that matter was relevant at the time of Mr Cooper's appointment.

76. It is further pleaded in the Reply that Mr Turrell knew that what he published was false, in that he knew that Mr Cooper's medical history did not render him unfit to perform his duties to the Company. Further, Mr Turrell knew that it was untrue to say that Mr Cooper had suffered from a brain tumour, and it was dishonest to allege that he had. Mr Turrell's claims to have been the victim of duress and blackmail were also dishonest.

77. The "Letter to the Court – 23 November 2011" is not verified by a statement of truth. In it Mr Turrell puts forward contentions similar to those in the Defences, which were verified by a statement of truth. Mr Turrell continues to deny that he knew of Mr Cooper's medical history at the time of his appointment. He puts forward arguments as to why he says the witnesses for the Claimants are not telling the truth. He claims to produce print outs from the Company's laptop which he says he has retained. But he has not produced the laptop for inspection by the Claimants. He professes to be "deeply angered" by the court's refusal to grant an adjournment to enable him to attend the hearing. But he puts forward nothing by way of evidence to support his claim that he is unable to travel to the UK.

FINDINGS ON THE DEFENCES ADVANCED BY MR TURRELL

78. In my judgment the recording of defamatory words on a voicemail is plainly a libel, for the reasons given in Gatley on Libel and Slander 11th ed para 3.8 (text to notes 85 to 91) and cited by Mr Barnes.

79. Mr Cooper is plainly correct about the evidence before me as to the alleged defence of public domain. That defence is without merit.

80. In my judgment that information claimed by the Company to be confidential is plainly confidential, and it is adequately particularised by reference to it being the contents of the audio recording.

81. In my judgment, the defences of qualified privilege are equally without merit. Further, since I accept the evidence of the witnesses brought to court by the Claimants, I find that Mr Turrell knew that his allegations were false, and so was malicious in the sense required to defeat a plea of qualified privilege.

82. So in my judgment the Claimants have proved both falsity and malice by the evidence that they have adduced before the court.

83. I do not believe the statements made by Mr Turrell in his "Letter to the Court – 23 November 2011". I prefer the evidence of the witnesses for the Claimants. They attended court and made themselves available for cross-examination. Their evidence is detailed and credible.

INJUNCTION

84. The Claimants have proved their claims in privacy, confidentiality and libel. They are entitled to injunctive relief as they would be after a full trial.

85. Mr Barnes has made a number of submissions, and referred me to evidence, relevant to the grant of injunctive relief in this case. The fact that Mr Turrell is abroad is a matter the Claimants have brought to my attention in this connection.

86. Mr Turrell was subject to the jurisdiction of this court when the proceedings were commenced. He has in fact obeyed an interim injunction granted in this case. He removed content from the Internet (that is the audio transcript on his Wordpress blog), and did not replace it, in compliance with the order of Sharp J dated 24 May 2011. He has not adduced evidence that he has no assets in this jurisdiction, or that an

injunction would not be enforceable against him. See for example *Hospital for Sick Children (Board of Governors) v Walt Disney Productions Inc* [1968] 1 Ch 52, 71C-D and 77D-E. If an injunction is granted, third parties within the jurisdiction can be notified of it, and will be likely to refrain from publications of the same or similar information, by which they would expose themselves to claims similar to those the Claimants make against Mr Turrell. On the contrary, the solicitors for the Claimants have produced information obtained from Companies House showing that Orcasci Ltd is a company registered in England of which Mr Turrell is director and a shareholder.

87. For the reasons the Claimants give, the fact that Mr Turrell is abroad is no answer to the Claimants' application for an injunction in this case, and there are good reasons to grant an injunction.

88. The Claimants accept that an injunction should contain a proviso similar to that in *Babanaft International Co v Bassatne* [1990] Ch 13, in accordance with the Practice Guidance on Interim Non-Disclosure Orders issued by the Master of the Rolls on 1 August 2011 (explaining that an injunction does not affect anyone outside the jurisdiction other than the defendant and others who are subject to the jurisdiction of the court or as are specified in the order itself).

DELIVERY UP

89. The Claimants also ask for an order for delivery up of the original, and all copies and transcripts, of the audio recording made by Mr Turrell. This includes copies which are within his control but in the possession of any other firm or person to whom he may have sent them.

DAMAGES

90. The Claimants claim damages in each of the three actions. In the Reply in action 3031 Mr Cooper added further material in support of this claim, including the conduct of Mr Turrell after the issue of proceedings. He relied on the posting on the Internet after the issue of proceedings of entries linked to the audio recording and the transcript of it. He relied upon the offensive character of some of the matters pleaded in the first draft of the Defence which was abandoned or struck out on about 20 October 2011, and upon the publications of 12 and 16 November 2011.

91. In the libel action Mr Cooper also claims aggravated damages. In the Particulars of Claim Mr Cooper advanced this part of his claim on the ground that the publication of the words complained of was part of an illegitimate campaign to disable the Company in the operation of its business, by forcing his removal from its Board of Directors and from his position of Executive Chairman. In the Reply in the libel action 3032 Mr Cooper relied on the same matters as in his Reply in the privacy action no 3031.

92. On the amount to be award for damages for misuse of private information, Mr Barnes refers to the awards made in *Campbell v MGN* [2002] EMLR (£2500 damages for distress plus £1000 aggravated damages), *Archer v Williams* [2003] EMLR 38 (£2500), *McKennit v Ash* [2006] EMLR 10 (£5000) and *Mosley v News Group Newspapers Ltd* [2008] EMLR 20 (£60,000).

93. However, he submits that the damages awarded in this case should be very significantly greater than those awarded in the cases before *Mosley*. He refers to *Mosley* itself and to a number of settlements which are reported to have been reached at figures of between £20,000 and £37,500: see *The Law of Privacy and the Media* 2nd ed (OUP) para 13.115. In *Mosley* at para 229 Eady J directed himself to take into account awards in defamation cases, and referred also to *Gleaner Company Ltd v Abrahams* [2004] 1 AC 628. Since *John v MGN Ltd* [1997] QB 586 general damages in libel have been limited to a ceiling at that date of £200,000, following a comparison with personal injury damages. However, in *Gleaner* at para 53 the Privy Council noted that damages in libel were different: "The damages often serve not only as compensation but also as an effective and necessary deterrent."

94. As to the Company's claim in breach of confidence, Mr Barnes notes that in the absence of special damage, it is not clear that damages can be awarded at all: *Halsbury's Laws of England* 4th ed, 2003, Vol 8(1) reissue para 494. He submits that at least a modest award should be made. That seems to me to be consistent with the law expressed in Snell's Equity 32nd ed para 9-017.

95. In cases of libel claimants, whether they be an individual or a corporation, they need not prove actual damage. The law presumes that claimants must have suffered damage and it is not necessary for claimants to adduce evidence showing actual pecuniary loss. Where there has been a serious libel corporations are entitled to substantial damages. See: *English and Scottish Co-operative Properties Mortgage and Investment Society Limited v Odhams Press Limited* [1940] 1 KB 440, 456, 458, 461-2.

96. One factor relevant to the assessment of damages is the extent of publication. Another is the seriousness of the libel. A related factor is the relationship of the publishees to the claimant.

97. Publication to a relatively small number of persons who are already in a business or professional relationship with a claimant may be as serious as, or more serious than, a wider publication to persons who are not, and are unlikely to contemplate being, in such a relationship. In *Houston v Smith* unreported December 16 1993 (Gatley on Libel and Slander 11th ed para A3.3) the Court of Appeal reduced an award to £50,000. The case was one of slander alleging sexual harassment. But the important point for present purposes is that the publishees were a small number of individuals with whom there was an existing professional relationship. They were the patients in the claimant doctor's waiting room. While those damages must have included a substantial sum in respect of injury to feeling, the figure also has to be viewed in the light of inflation in the last 18 years.

98. The purpose of general damages such as are awarded in libel actions is to compensate the claimant for the damage suffered as a result of the defamatory publication. This generally includes reparation to the harm to the claimant's reputation. Damages must be sufficient to vindicate the claimant's reputation. A symbolic award will not achieve this. Damages for libel take into account that it is impossible for a claimant to know how extensively the libel has spread. Vindication includes the ability at some future date, if the libel resurfaces, to show by reference to a substantial award that it has been decisively rejected by the court.

99. Where the assessment of damages differs, depending on whether the claimant is an individual or a corporation, is that individuals may also recover injury to feelings, notwithstanding that such injury is not a constituent of the cause of action. Corporations, having no feelings, cannot recover damages for humiliation or distress or other injury to feelings.

100. In assessing the damages for the Company I take into account both the libel and the breach of confidence. The claims are closely related, and the award of separate figures may appear arbitrary. This is not to say that I regard the breach of confidence as of little importance. On the contrary, it is a serious breach, the more so because it involves information plainly the subject of legal professional privilege. The meanings that I have found the words complained of bear are very serious. And publication was directed at those who do business with, or are otherwise concerned about, the business of the Company. It is clear from the number of times that the matter has been raised by clients and prospective employees with the witnesses whose evidence I have summarised that, as is to be expected, however wide (or limited) the initial publications may have been, the information published has been re-published widely amongst those interested in the affairs of the Company. In these circumstances there is little point in attempting to estimate the numbers who might have seen the words complained of on advfn.com or Mr Turrell's Wordpress blog. However they came to hear of it, I find that large numbers of people did come to hear of it. There has been substantial publication.

101. I award a figure of £30,000 damages to the Company for libel and £10,000 for breach of confidence.

102. The factors set out in para 100 above apply also to Mr Cooper. However, in the case of Mr Cooper the misuse of his private information is a material factor to be considered separately. Damages for defamation are a remedy to vindicate a claimant's reputation from the damage done by the publication of false statements. Damages for misuse of private information are to compensate for the damage, and injury to feelings and distress, caused by the publication of information which may be either true or false. In the present case the information was in part true (what Mr Cooper had disclosed to Mr Taylor) and in part false, namely that he was unfit to fulfil his responsibilities to the Company, and that this was on account of his suffering from a brain tumour.

103. Moreover the fact that the subject of the words complained of in libel is medical information means that both claims are at a high level of seriousness. In addition, there are the aggravating factors that Mr Turrell knew that what he was publishing was false, that he had adopted a campaign against Mr Cooper, and that he has aimed his publications at those whose good opinion is most important to Mr Cooper. The publications are clearly motivated by Mr Turrell's desire for revenge against Mr Cooper for Mr Cooper's action in terminating Mr Turrell's employment. The fact that Mr Cooper was carrying out his duties to the Company, which is a public company, is itself a seriously aggravating factor. Those with responsibilities to the public must feel an added sense of grievance if they are faced with such a reaction when carrying out those duties.

104. Campaigns of libel and misuse of private information on the Internet are becoming an increasingly common form of wrongdoing. The value of the Internet and of search

engines is that people using them do so because they believe that they will find true information, or at least that those who publish the information believe that it is true.

105. In the judgment that I have been preparing at the same time as this one, *Law Society and others v Kordowski* [2011] EWHC 3185 (QB) I have set out under the heading Public Interest the reasons why it is in the public interest that those who knowingly publish false and harmful information on the internet should be prevented from doing so. Those reasons are relevant to damages, in so far as damages have a deterrent element in them.

106. I accept the submission of Mr Barnes that, at least in the present case, the measure of damages in *Mosley* is a more appropriate guide to take than the damages in the earlier cases. The widespread dissemination on the Internet of the publication complained of by Mr Mosley was an important factor in the damages in his case. In the present case the deliberate dissemination of falsehood is an additional element, while the extent of publication is less extensive than in *Mosley*.

107. I shall award £50,000 to Mr Cooper as damages for libel and an additional £30,000 for damages for misuse of private information. Since damages for libel include compensation for distress, I must avoid double counting. If I had been awarding damages for misuse of private information alone, I would have awarded £40,000 for that.

CONCLUSION

108. For the reasons given above, judgment will be entered in favour of Mr Cooper in the sum of £30,000 in respect of action number 3031, and £50,000 in respect of action number 3032. Judgment will be entered in favour of the Company in the sum of £30,000 in action number 3032 and £10,000 in action number 3033.

109. I will hear further submissions on the form of the perpetual injunction and other relief.

110. The preparation of this judgment has been greatly facilitated by the care and attention devoted to the preparation of the case by Mr Barnes and the solicitors, to whom I am much indebted.