Neutral Citation Number: [2011] EWHC 781 (QB)

Case No: HQ10X02332

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/04/2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

MARK LEWIS	**Claimant**
- and -	
(1) COMMISSIONER OF POLICE OF THE METROPOLIS	
(2) BARONESS BUSCOMBE	
(3) PRESS COMPLAINTS COMMISSION	**Defendants**

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- -

Desmond Browne QC and **William Bennett** (instructed by **Taylor Hampton Solicitors LLP**) for Mr Lewis
Jacob Dean (instructed by **Metropolitan Police Legal Services**) for the **MPS**

Hearing dates: 3 & 4 March 2011

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Approved Judgment

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

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THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat: :

1. There are a number of applications by the parties to this libel action including (1) the First Defendant's ("MPS") application for a ruling on meaning, that is to say (a) a ruling as to what the words actually meant, pursuant to the Senior Courts Act 1981 s.69(4) ("the 1981 Act"), alternatively (b) pursuant to CPR 53 PD 4.1 as to what they are capable of meaning; (2) the Claimant's ("Mr Lewis") application for permission to amend the Particulars of Claim; (3) Mr Lewis's application for permission to amend his Reply; (4) the MPS's application for summary judgment in his favour on the defence of qualified privilege; and (5) the MPS's application that the claim be struck out as an abuse of the process of the court. The MPS's application notice is dated 5 January 2011 and Mr Lewis's application notice is dated 16 February 2011.

2. Mr Lewis's application notice also asks the court to make an order that the action be tried with a jury pursuant to s.69(3) of the 1981 Act. It is common ground that this application is made after the expiry of the 28 day time limit following service of the Defence prescribed by CPR 26.11 for the making of such an application. At the start of the hearing both parties indicated that they thought it inappropriate for the court to consider that application at this stage.

3. However, MPS's application for a ruling on meaning is a novel one. Section 69(4) of the 1981 Act empowers the court to order that different questions of fact arising in any action be tried by different modes of trial. So although there has been no order in this case under s.69(3) of the 1981 Act as to the mode of trial (that is by a judge with a jury or by a judge alone), and although both parties are at present in agreement that this might be a case in which the court should order trial with a jury, nevertheless the issue of meaning should be decided by judge alone and decided at this stage in this hearing.

4. The alternative application of MPS for a ruling on meaning pursuant to CPR 53PD 4.1 is conventional. That would be a ruling on the more limited basis, namely as to whether the words complained of are capable of having the meaning attributed to them in the Particulars of Claim, or any meaning defamatory of Mr Lewis.

5. I did not feel able to approach this novel application under s.69(4) without first considering whether, under my case management powers, I ought to require the parties to make their submissions as to the mode of trial of the whole action under s.69(3). The parties accordingly made their submissions. Having heard those submissions I decided that they had been right all along in not asking the court to determine the mode of trial of the whole action at this stage. But following submissions on that point and on s.69(4), I also decided that since I was unable to determine the mode of trial of the whole action under s.69(3), I ought not at this stage to make an order under s.69(4) that the issue of meaning should be tried by judge alone. Accordingly the only ruling on meaning that I was willing to entertain was one under Part 53PD para 4.1.

6. I informed the parties of those two decisions at the end of the argument and said that I would give my reasons later. These are they. This judgment also contains my decisions, with reasons, on the other applications, in respect of which I did not announce my decision at the hearing.

The facts giving rise to this action

7. The words complained of in this action were contained in a two-line email dated 11 November 2009. The email was written by a lawyer in the Directorate of Legal Services of MPS. It is addressed to Mr Toulmin. He is the Director of the Press Complaints Commission ("the PCC"). The Second Defendant ("Lady Buscombe") is the Chair of the PCC. The PCC is, as is well known, funded by newspaper publishers and has a Code of Practice, and a system of dealing with complaints and alleged breaches of the Code. It describes itself as follows on its website:

> "The PCC is an independent self-regulatory body which deals with complaints about the editorial content of newspapers and magazines (and their websites)."

8. The subject matter of the exchange of emails arose out of the illegal interception of mobile phone voicemails by Mr Clive Goodman (the Royal Editor of the News of the World newspaper) and Mr Glen Mulcaire (a Security Consultant) and the subsequent proceedings relating to that before the Culture Media and Sport Committee ("the Committee"). The News of the World is published by News Group Newspapers Ltd ("NGN").

9. Mr Lewis is a solicitor. He is a consultant to the firm of Taylor Hampton Solicitors LLP. The solicitors in that firm are among the small number well known to this court as practitioners in the field of media law. Mr Lewis had acted as solicitor to Mr Gordon Taylor and Ms Joanne Armstrong, the Professional Footballers' Association's Chief Executive and Legal Adviser, and another client. His clients had brought an action against NGN in regard to the interception of mobile telephone messages by employees and/or agents of NGN.

10. The background to the events leading up to the publication of the words complained of include the following, which is taken from the response of the MPS to the Committee dated July 2009:

> "1. In December 2005, concerns were reported to the MPS … by members of the Royal Household at Clarence House, relating to the illegal tapping of mobile phones. As a result, the MPS launched a criminal investigation and this identified the involvement of two men, namely Clive Goodman … and Glen Mulcaire …
>
> 3. The MPS investigation found that these two men had the ability to illegally intercept mobile phone voice mails. They obtained private voicemail numbers and security codes and used that information to gain access to voicemail messages left on a number of mobile phones. It is important to note that this is a difficult offence to prove evidentially …

4. Their potential targets may have run into hundreds of people, but the investigation showed from an evidential viewpoint, that they only used the tactic against a far smaller number of individuals.

5. The MPS first contacted the Crown Prosecution Service (CPS) on 20 April 2006 seeking guidance about this investigation, when an investigation strategy was agreed.

6. On 8 August 2006 both Clive Goodman and Glen Mulcaire were arrested and both made no comment interviews. On 9 August 2006 Goodman and Mulcaire were charged with conspiracy to intercept communications, contrary to section 1(1) of the Criminal Law Act 1977, and eight substantive offences of unlawful interception of communications, contrary to section 1(1) of Regulation of Investigatory Powers Act 2000. The charges related to accessing voice messages left on the mobile phones of members of the Royal Household. The two were bailed to appear at the City of London Magistrates' Court on 16 August 2006 when they were sent to the Central Criminal Court for trial.

7. During searches police seized vast amounts of material, some of which was used in evidence. It is reasonable to expect some of the material, although classed as personal data, was in their legitimate possession, due to their respective jobs. It is not necessarily correct to assume that their possession of all this material was for the purposes of interception alone and it is not known what their intention was or how they intended to use it …

11. … There was a focus on the potential victims where the evidence was strongest, where there was integrity in the data, corroboration was available and where any charges would be representative of the potential pool of victims. The willingness of the victims to give evidence was also taken into account. Any other approach would have made the case unmanageable and potentially much more difficult to prove. This is an approach that is adopted routinely in cases where there are a large number of potential offences.

12. Adopting this approach, five further counts were added to the indictment against Mulcaire alone based on his unlawful interception of voicemail messages left for Max Clifford, Andrew Skylet, Gordon Taylor, Simon Hughes and Elle Macpherson…

> 14. … Goodman and Mulcaire appeared at the Central Criminal Court on 29 November 2006 before Mr Justice Gross. When they did appear at court, Goodman and Mulcaire both pleaded guilty to one count of conspiracy to intercept communications – the voicemail messages left for members of the Royal Household. Mulcaire alone pleaded guilty to the five further substantive counts in respect of Max Clifford, Andrew Skylet, Gordon Taylor, Simon Hughes and Elle Macpherson. Hence, in total eight individuals were identified as having had their telephones illegally intercepted.
>
> 15. Anyone who had been approached as a potential witness for the criminal prosecution was advised and informed that they had been the subject of illegal interception. Thereafter during the course of the investigation police led on informing anyone who they believed fell into the category of Government, Military, Police or Royal Household, if we had reason to believe that the suspects had attempted to ring their voicemail…
>
> 17. On 26 January 2007 sentencing took place. Goodman was sentenced to four months' imprisonment and Mulcaire to a total of six months' imprisonment, with a confiscation order made against him in the sum of £12,300…
>
> 19. There has been much speculation about potential criminal involvement of other journalists in this case. Whilst it is true to say that other journalists' names appeared in the material seized by Police, there was insufficient evidence to support any criminal conspiracy on their part.
>
> 20. Due to renewed publicity in this case in the Guardian newspaper, the MPS Commissioner asked Assistant Commissioner John Yates to establish the facts around the original investigation into the unlawful tapping of mobile phones by Clive Goodman and Glen Mulcaire and any wider issues in the reporting by the Guardian. Assistant Commissioner Yates was not involved in the original case and clearly came at this with an independent mind. He released a press statement on 9 July 2009 and considered that no further investigation was required as from the publicity, no new evidence had come to light … ."

11. In 2007 the PCC conducted an investigation into the affair. It published a report. This included the statement that:

> "No evidence has emerged … of a conspiracy at the newspaper going beyond Messrs Goodman and Mulcaire to subvert the law or the PCC's Code of Practice. There is no evidence to challenge Mr Myer's assertion that: Goodman had deceived his employer in order to obtain cash to pay Mulcaire; that he had concealed the identity of the source of information of royal stories; and that no-one else at the News of the World knew that Messrs Goodman and Mulcaire were tapping phone messages for stories".

12. On 8 and 9 July 2009 The Guardian published articles claiming to reveal "details of suppressed evidence". It included the following:

> "The suppressed legal cases are linked to the jailing in January 2007 of a News of the World reporter, Clive Goodman, for hacking into the mobile phones of three royal staff, an offence under the Regulation of Investigatory Powers Act. At the time, News International said it knew of no other journalist who was involved in hacking phones and that Goodman had acted without their knowledge.
>
> But one senior source at the Met told the Guardian that during the Goodman inquiry, officers found evidence of News Group staff using private investigators who hacked into "thousands" of mobile phones. Another source with direct knowledge of the police findings put the figure at "two or three thousand" mobiles."

13. On 11 July 2009 there was published in the News of the World an article attributed to Mr Andy Hayman. He was by then retired, but he had been Assistant Commissioner of the MPS and had headed the inquiry into the conduct of suspects associated with the News of the World. In that newspaper article he is represented as associating himself with the suspects he had formerly been investigating: the article refers to "our journalistic conduct". He wrote that there was a thorough police investigation and added:

> "This should have been the end of the matter but recent revelations by the Guardian have reignited the whole affair casting doubt on police actions… the Guardian has said it understands that the police file shows between 2,000 and 3,000 individuals had their mobile phones hacked into, far more than was ever officially admitted during the investigation… yet, my recollection is different. As I recall the list of those targeted, which was put together from records kept by Mr Mulcaire, rant to several hundred names. Of these, there was a small number – perhaps a handful – where there was evidence they had actually been tampered with".

14. The Guardian article was followed by the re-opening of the Committee's hearings of their inquiry into press standards and privacy.

15. On 2 September 2009 the witnesses who gave evidence to the Committee included Assistant Commissioner John Yates, Detective Chief Superintendent Philip Williams and Mr Lewis.

16. The Chairman said to Mr Yates at Q1902 that there appeared to be some confusion as to how many people, in respect of whom there was evidence that their phones might have been hacked into, were notified of that fact. Mr Yates gave a reply which included the following. He said he had been concerned as to whether any had fallen through the net and that "There may have been a handful of people potentially…"

17. Mr Farrelly MP asked Mr Williams at Q1982 whether he had a feel for how many people's phones were actually hacked into. Mr Williams said that the police did not know.

18. What Mr Lewis said to the Committee is printed in the public record of that day, 2 September 2009, under "Q2069". It included the following:

> " … I applied for evidence from the Information Commissioner, and they consented, evidence from the CPS, and that was not a problem either, and evidence from the Metropolitan Police. When it came to the Metropolitan Police, the person who attended at the court was Detective Sergeant Mark Maberly. I can mention that because it was an open court, there were court hearings, and Detective Sergeant Mark Maberly said to me, 'You are not having everything but we will give you enough on Taylor to hang them'. Those were his words, 'to hang them'. So he quite clearly knew at that time that there was sufficient evidence about my client, and I only had one client at that time, Mr Taylor, to hang the News of the World about that client. He also mentioned a number of people whose phones had been hacked. Whether that was an aside, whether that leads me into the threat of the injunction that the News of the World have made against me, or through their lawyers have made against me, the reservation of that right, that they had said that there was evidence about, or they had found there something like 6,000 people who were involved. It was not clear to me whether that was 6,000 phones which had been hacked, or 6,000 people including the people who had left the messages."

19. Following the article in the Guardian, the PCC also set in motion an inquiry with a view to seeing whether they had been misled by the News of the World in 2007 when that paper had said that the hacking activities had been confined to Mr Mulcaire and Mr Goodman.

20. On 30 September 2009 Mr Toulmin e-mailed to Mr Maberly (who was by then Detective Inspector) asking for his help. The letter included the following:

> "You may be aware that the Press Complaints Commission is one of a number of agencies that has been looking into the allegations made in the Guardian about phone message tapping

> at the News of the World. During a recent appearance before the House of Commons Select Committee on Culture, Media and Sport, Gordon Taylor's lawyer – Mark Lewis – said he had bumped into you during a court hearing and that you had said that 6,000 people were involved in the practice.
>
> We also noted that John Yates and Andy Hayman have both said that only a handful of people were involved. I wonder whether you are in a position to give us any evidence about the extent of the phone message tapping – given that one of the areas we are looking at is whether the News of the World misled us during a 2007 inquiry during which they said that the activities were confined to Glen Mulcaire and Clive Goodman."

21. It may have been incorrect on the part of Mr Toulmin to say that Mr Yates had said there was only a handful of people involved, but that does not matter for present purposes. It was what he asked MPS that matters.

22. The PCC issued a report dated 7 November 2009 which included the following paragraphs:

> "11.1 The Committee also heard evidence from Gordon Taylor's lawyer, Mark Lewis, who said that a Detective Sergeant from the Metropolitan Police called Mark Maberly had told him that files in the Goodman case showed that 6,000 people were involved in the phone message hacking, although he did not know whether that meant that figure referred to 6,000 people those phones had been hacked or 6,000 people in total. Following this evidence, the PCC attempted to contact Mr Maberly by post, e-mail and telephone in order to see whether he was in a position to provide the Commission with any further information. For whatever reason, no response was forthcoming…
>
> 13.3 … having reviewed the matter the Commission could not help but conclude that the Guardian's stories did not quite live up to the dramatic billing they were initially given. Perhaps this was because …. there was significant evidence to the contrary from the police …"

23. On 9 November 2009 MPS replied to the email of 30 September. The reply came from a lawyer at the Directorate of Legal Services of MPS. It was in the form of a letter as follows:

> "Re: News of the World's Phone Tapping Inquiry
>
> I represent the Commissioner of Police in the above matter and have been provided with a copy of your email to DI Mark Maberly dated 30 September 2009.

> I have taken instructions in relation to comments DI Maberly is said to have made to Mark Lewis. DI Maberly has been wrongly quoted as stating that 6,000 people were involved in the unlawful practice. There was discussion about the extent of the telephone voicemail interception identified during the police investigation which led to the conviction of Mr Mulcaire and Mr Goodman, when Assistant Commissioner John Yates and Detective Chief Superintendent Philip Williams gave evidence to the Culture, Media and Sports Committee on 2 September 2009. May I refer you to the transcript of that Session … ."

24. On 11 November 2009 at 15.18 Mr Toulmin sent an email to the lawyer at the Directorate of Legal Services seeking clarification, as follows:

> "Thank you for your letter of 9 November. You may have seen that we have already published a report into the matter of whether we were misled by the News of the World in 2007 when we conducted a previous inquiry.
>
> The information in your letter is interesting, but would not at first sight appear materially to affect the Commission's finding. However, it may be important to update our public records with this information at some point. I take it that the thrust of your letter is that we should rely on what Asst Commissioner Yates and DCS Williams told the Select Committee, and that the suggestion that DI Mark Maberly claimed 6,000 people were involved in the unlawful practice is wrong … ."

25. It is the lawyer's reply to that email on the same day at 16.10 which contains the words complained of, as follows:

> "Your understanding is correct that DI Maberly has been wrongly quoted, and that you should rely on what Assistant Commissioner Yates and DCS Williams told the Select Committee … ."

26. Much of this background is set out in summary form in the Particulars of Claim as the context within which the words complained of were published.

27. It is pleaded that Mr Lewis's evidence was broadcast live via Parliament's website and is still published on that website. It is pleaded that his evidence became widely known to journalists and to those who were interested in the affair.

The meaning complained of against the MPS

28. The meaning attributed to the words complained of by Mr Lewis is:

> "The Claimant lied to the Parliamentary Select Committee about what he had been told by Detective Inspector Maberly."

29. This is pleaded as a natural and ordinary meaning and in the alternative as an innuendo meaning. In so far as it is pleaded as an innuendo meaning the particulars are as follows:

> "The context in which the words complained of were published was provided by those communications set out … above [the emails and letters of 30 September, 9 November and 11 November]. Given that it had been stated in the correspondence that the MPS case was that there had been a handful of interceptions, the only explanation for [Mr Lewis]'s allegation that he had been told by the MPS that 6,000 persons had been involved in phone hacking was that he had invented that figure".

Why I do not decide the mode of trial in this judgment

30. CPR Part 26.11 provides:

> "Trial with a jury
>
> 26.11 An application for a claim to be tried with a jury must be made within 28 days of service of the defence."

31. This rule does not say what is to happen when there is more than one defendant and more than one defence to be served on different dates. In the present case the Particulars of Claim are dated 21 June 2010, and the Defence of MPS was served on 17 August 2010. But no Defence was served by the other two Defendants. Instead a settlement was reached and set out in a Tomlin Order dated 25 November 2010. A Statement in Open Court was read the next day. But nothing turns on what might be the difficulty in applying CPR r26.11 to cases where defences are ordered to be served on different dates, since on any view no application was made for the claim to be tried with a jury within 28 days of any possibly relevant date.

32. The result of this is that the right to trial by jury accorded by s.69(1) was no longer applicable, and the decision came to be governed by s.69(3). This provides:

> "An action to be tried in the Queen's Bench Division which does not by virtue of subsection (1) fall to be tried with a jury shall be tried without a jury unless the court in its discretion orders it to be tried with a jury".

33. It so happens that, the week before this matter came before me, I had heard applications in another libel action which required me to consider the proper exercise of the Court's discretion under s.69(3) of the 1981 Act. That case is *Cook v Telegraph Media Group Ltd* [2011] EWHC 763 (QB) (29 March 2011) *("Cook")*. By the time the present case came on for hearing I had made the decisions I had to make in *Cook*, and substantially completed the drafting of the judgment. However, the argument in the present case assisted me in revising that draft, in so far as some of the reasoning was concerned (although it did not affect the result I had decided upon). In order to avoid unnecessary repetition I shall refer in this judgment to passages in the judgment in *Cook*.

34. The effect of s.69(3) is that the discretion is now very rarely exercised in favour of ordering trial by jury, for reasons explained by May LJ in *Times Newspapers Ltd v Armstrong* [2006] EWCA Civ 519, [2006] 1 WLR 2462 at para 15. The very substantial case management benefits that may accrue from ordering trial by judge alone are further discussed in my judgment in *Cook*.

35. However, there remain circumstances in which trial with a jury will generally be ordered as a matter of discretion, in particular where the state, or a public authority, is a defendant, as is the case here. See *Cook* at paras 90 and following.

36. However, even if trial with a jury is to be preferred where the state or a public authority is a party, it may nevertheless be against the interests of justice to order such a trial. Mr Browne accepts that that may be the case here if the trial would involve a prolonged examination of documents that could not conveniently be made with a jury. It was because the scope of the trial of the present action is as yet uncertain that Mr Browne and Mr Dean had agreed, rightly as I ultimately found, that it was too soon to decide on the mode of trial in this case.

37. There is support for this approach by analogy with the statutory provisions relating to inquests. In *Paul v Deputy Coroner of the Queen's Household* [2007] EWHC 408 (Admin); [2008] 3 QB 172 the Divisional Court said at para 42

> "the logical approach is for a coroner first to determine the scope of the inquest and only then to make a decision on the relevance and applicability of sections 8(3) and (4).

38. The provisions of the Coroners Act 1988 are rather different from s.69 of the 1981 Act, but there is a discretionary power in s.8(4) as follows:

> "If it appears to a coroner, either before he proceeds to hold an inquest or in the course of an inquest begun without a jury, that there is any reason for summoning a jury, he may proceed to summon a jury in the manner required by subsection (2) above".

39. However, if, in every case where there was a discretion, the court were required to determine the scope of the action before deciding on the mode of trial, then the case management benefits of trial by judge alone would be largely lost before the decision was ever made. So it is only because, in the present case, the defendant is the MPS, and because my provisional view is therefore that there is likely to be a strong argument in favour of trial with a jury, that I considered it right not to make the decision as to mode of trial at this stage. The main reason for deferring the decision is to consider whether, in spite of that strong argument, there will be some other stronger argument tending the other way, such as, perhaps, the need for a prolonged examination of documents which cannot conveniently be made with a jury. In most cases, if the benefit of the court having a discretion is to be achieved, then the decision will need to be made at the earliest possible stage in the action, and it will not be practical to wait until the court knows the scope of the action.

40. There are other arguments advanced by Mr Dean as to why there should not be be trial with a jury. These are specific to the procedural history of this case, such as delay

and the like. I shall leave these arguments to be considered when the issue has to be decided.

The application for a ruling on meaning under s.69(4)

41. In the light of the reasons set out above, I turn to consider s.69(4). I do not doubt that as a matter of construction it is open to the court to order the issue of meaning to be tried by judge alone, even in a case where there is a right to trial by jury under s.69(1), or where the court has ordered the other issues to be tried with a jury under s.69(3).

42. However, I say nothing about the interplay between s.69(1) and s.69(4) in this context, because in the present case s.69(1) does not apply for reasons stated above.

43. Mr Dean's submissions as to reasons why the issue of meaning should in any event be tried by judge alone (whether or not the remaining issues are tried with a jury) are largely based on case management consideration discussed in *Armstrong* and in *Cook*. It is not necessary for me to set these out in detail. I accept that they are powerful arguments in favour of my making an order for trial of the issue of meaning by a judge alone.

44. The fact that Mr Dean's application is a novel one makes it none the worse. It is an imaginative and original submission which it is tempting to accept.

45. However, meaning is a central issue in most libel actions, and it is a central issue in this action (that is why so many case management benefits could accrue from an early decision). If the court were to decide, when the time for that decision arises, that in principle this is a case for trial with a jury, because the MPS is the defendant, then I think that the same reasoning would probably apply to the decision whether meaning should be tried with a jury. While in logic there is no inconsistency, in practice it would be difficult to reconcile the decision to try the issue of meaning with a judge alone, and other issues in this case with a jury. Moreover, a decision now to try the issue of meaning with a judge alone would itself materially influence any future decision as to whether other issues should be tried with a judge alone or with a jury.

46. For these reasons, and with some regret at the loss of the case management benefits, I do not think that it is in the interests of justice that I order the issue of meaning to be tried by judge alone.

The application for a ruling on meaning under CPR 53 PD 4.1

47. An application under CPR 53 PD 4.1 is for an order by which the court determines (1) whether the statement complained of is capable of having any meaning attributed to it in a statement of case (in this case the meaning attributed to it in the Particulars of Claim); (2) whether it is capable of being defamatory of the claimant; and (3) whether it is capable of bearing any other meaning defamatory of the claimant.

48. The principles to be applied on such an application are very well established and have most recently been set out in *Jeynes v News Magazines Ltd* [2008] EWCA Civ 130 at para [14] and other cases familiar to the court. Mr Dean has set out citations from four such cases in his skeleton argument and I do not need to lengthen this judgment by reproducing them here.

49. In a case where there is a very limited readership, such as the publication here to Mr Toulmin, the focus is on the hypothetical reader in the position of Mr Toulmin. The qualities of the hypothetical reader are more readily definable than is the case with a very wide readership, such as a newspaper, which is read by many different types of people in many different circumstances. A person holding office with the PCC could be expected to read with more than usual care an e-mail from the MPS which relates to a matter on which the PCC has issued a report. This is the more so because the e-mail in question was a response to a request for clarification of an earlier communication. It is common ground that the immediately preceding exchange of communications (starting on 30 September) is a particularly relevant part of the context, as is pleaded in the Particulars of Claim. And the writer is described as a lawyer, and so a person who can be expected to use words with care and precision. In these circumstances it seems to me that there is room for allowing for a greater degree of analysis on the part of the hypothetical reader than would be allowable in relation to a publication in different circumstances.

50. The words complained of are set out at para 25 above, and the meanings attributed to them are set out at paras 28 and 29 above.

51. Mr Dean focuses attention on the words "DI Maberly has been wrongly quoted". He does not dispute that these are capable of referring to Mr Lewis, but he submits that they imply nothing about dishonesty or lies. He submits that only a person avid for scandal would understand there to be an allegation of dishonesty, and that is not reasonable. There are obvious alternative explanations: persons can honestly disagree about what they have said to one another on an occasion in the past, especially an occasion nearly two years in the past. It is common ground that the conversation was brief and informal, and when Mr Lewis gave evidence to the Committee he made it clear his recollection was not precise, and that his understanding of what he was being told was unclear. Even if the words complained of can be understood as alleging a fault on the part of Mr Lewis, it does not have to be, and cannot be, understood as a fault involving lying.

52. Mr Browne reminds me that a ruling of this kind must be "an exercise in generosity and not in parsimony" (*Berezovsky v Forbes* [2001] EWCA Civ 1251 [2001] EMLR 45 at para 16.

53. Mr Browne also introduces what seems to be a novel argument in this context. He asks me to have regard to what Lady Buscombe said in response to the words complained of. Before considering that argument, I shall consider first what view I take without taking into account what Lady Buscombe said.

54. Mr Browne submits that taking into account the context, including the communications starting on 30 September, the reasonable reader could understand that the suggestion being made was that Mr Lewis lied. An allegation that a solicitor has misled Parliament is on any view very serious. The writer expressly stated in her letter of 9 November that she had "taken instructions" in terms quoted in para 23 above. In the e-mail complained of the writer repeats what she had said on 9 November, that "DI Maberly has been wrongly quoted". But there is no qualification to suggest misunderstanding or mishearing as being the explanation. And the reader may reasonably wonder why she referred at all to DI Maberly being quoted (thereby referring to Mr Lewis), when all DI Maberly had been asked by Mr Toulmin on 30

September was the extent of the phone message tapping. Mr Toulmin had not asked who (if anyone) was responsible for any discrepancy there may have been in the figures.

55. In my judgment Mr Browne's submission is to be preferred. The words complained of are capable of being understood in the meaning attributed to them by Mr Lewis. Whether that is what they meant is another question, and will be determined at the trial. The words are also capable of bearing a defamatory meaning less serious than that he lied.

Admissibility of evidence as to meaning

56. Mr Browne's novel argument is that Mr Lewis "is entitled to call evidence of witnesses to state the meaning in which they understood the words" complained of. But as the argument developed, I understood that that is not the only evidence on meaning that Mr Lewis claims to be entitled to call. He claims to be entitled to call evidence as to what Lady Buscombe said at the time in response to the words complained of. For this purpose it would be possible to call Lady Buscombe, but it would not be necessary. What she said is in documentary form and is not in dispute. If it were in dispute, it could be proved by other witnesses who heard what she said (for example at a Conference referred to below). There would be no need to call her. A similar argument appears to have been addressed to the Court of Appeal, but not resolved, in *Baturina v Times Newspapers Ltd* [2011] EWCA Civ 308, as Sedley LJ noted in para [56]. The judgment in that case was handed down on 23 March 2011 while this judgment was in preparation.

57. What Lady Buscombe said on 15 November is set out below, in writing at para 75, and orally in answer to a question at para 76. In particular she stated that she had drawn the matter to the attention of the Chairman of the Select Committee because "Any suggestion that Parliament has been misled is of course extremely serious". Mr Browne submits that it would not have been an extremely serious matter requiring the Chairman to be notified, if it was innocent. So the meanings that Mr Lewis attributes to each of those remarks by Lady Buscombe in his statement of case against Lady Buscombe and PCC is that "Mr Lewis lied to the Parliamentary Select Committee". In her Statement in Open Court she did not accept that that was what her words meant, and if the evidence were to be adduced at this trial, I assume that MPS would also deny that that is what her words meant.

58. Moreover, one of the amendments for which permission is sought is to include Lady Buscombe as one of the original publishees of the e-mail of 11 November. I did not understand this part of the application to be resisted, or capable of being resisted, and so the evidence of Lady Buscombe's response (if allowed) will be evidence of the response of a publishee, and not just of someone in the position of a publishee.

59. As will appear later, if permission is given for the amendments to the Particulars of Claim as sought by Mr Lewis, this evidence will be before the court in any event. If so, the judge will have to direct himself or the jury as to what (if any) relevance these remarks made on 15 November have to the meaning of the e-mail of 11 November. But at this stage I will approach the argument on the basis of the Particulars of Claim as they stand, and so will assume that whether or not the evidence of what Lady Buscombe said is to be before the court will depend upon this ruling. I also note that,

if there had been no settlement with Lady Buscombe and PCC, and the trial had proceeded against all three defendants, then what Lady Buscombe had written and said would have been in evidence, since that constituted the words complained of as against them.

60. As Lord Bridge said in *Charleston v. News Group Newspapers Ltd* [1995] 2 A.C. 70:

> "It is well settled … that, save in the case of a legal innuendo dependent on extrinsic facts known to certain readers, no evidence is admissible as to the sense in which readers understood an allegedly defamatory publication."

61. Although an innuendo is pleaded here (as set out in para 29 above), the facts pleaded do not include what Lady Buscombe said on 15 November after she had read the words complained of. That is because, although what she said is an extrinsic fact, it cannot be said to be a fact known to the hypothetical reader in the position of Mr Toulmin on 11 November at the time he received the e-mail containing the words complained of.

62. It appears that this question has never before been raised in relation to meaning. The nearest case is *Garbett v Hazel Watson & Viney* [1943] 2 All ER 359. It is referred to by Gatley on Libel and Slander 11th ed in relation to damages at para 34.52 footnote 216, but not in the section on meaning and evidence.

63. In that case the defendants had published in a magazine a picture of the plaintiff carrying on his business as an out door photographer, and talking to a lady. On the opposite page they published a picture of a naked woman. The caption running under both pictures was that "For another shilling Madam you can have something like this". The meaning the plaintiff attributed to the totality of this publication was that he showed indecent pictures to his lady customers, or in other ways dealt in indecent pictures. It being during the war, the trial was by judge alone. The Judge found for the plaintiff. The defendant appealed, apparently arguing against the meaning attributed to the publication by the plaintiff and found by the Judge. In evidence the plaintiff had stated that the immediate result of the publication complained of was that he was shunned by those who knew him, and that instead of calling him by his Christian name (Sydney), as they had before, they called him "Smutty". Counsel for the defendant (Mr Diplock as he then was) argued in the Court of Appeal that the evidence that the plaintiff was addressed as "Smutty" was inadmissible, that is inadmissible as to meaning. The Court rejected that argument, Scott LJ saying: "It was admissible because it was evidence of the measure of damage done".

64. It is to be noted that the evidence of how the friends reacted was not given by the friends, but by the plaintiff. The Court of Appeal does not in terms say that the reaction of the friends was relevant to meaning, but it is hard to distinguish relevance to meaning from relevance to damages in a case such as that.

65. In defamation the principles applicable to determining meaning are very close to the principles applicable to determining reference, that is whether the words complained of refer to a claimant. There is support for Mr Browne's submission in the cases cited by the editors of Gatley at para 34.20. In *Hayward v Thompson* [1982] QB 47 such evidence appears to have been called without objection, consistently with the

nineteenth century cases cited in that paragraph. Lord Denning MR summarised it at p60:

> "Many read the article. In England Sir Peter Scott did so. He said that the words "One is a wealthy benefactor of the Liberal party" conveyed to him Mr. Jack Hayward. They did likewise to a Mrs. Cowper who gave evidence. In the Bahamas Mr. Hayward's daughter and son-in-law read it and thought it referred to him. But the most telling evidence came from Mr. Hayward himself. He said that in the Bahamas, after the article, the telephone never stopped ringing, day or night, either at home or at the office. He set it out in a contemporary letter from the Bahamas: "The telephone has hardly stopped ringing since I returned and reporters from virtually every newspaper have been on the line." The most striking incident was that:…"

66. Mr Dean submits that these principles do not apply to determination of meaning. But as Mr Browne points out, he also, in his skeleton argument (para 45), set out the terms of the Statement in Open Court made by Lady Buscombe in which she said that she had "never suggested and does not believe that Mr Lewis misled the Select Committee". And Mr Browne submits that if the trial judge or jury are told of that, then they must also be told of the interview on Radio 4 (referred to below) in which Mr Browne submits she retracted that, saying she did not know whether he had misled the Select Committee or not. Mr Dean replied that he would only rely on the Statement in Open Court in the event that the evidence of what Lady Buscombe wrote and said were admitted.

67. I note that the Statement in Open Court is likely to be before the trial court in any event on the issue of damages.

68. In my judgment the present case is similar to *Garbett*, in that Mr Lewis could rely on the reaction of Lady Buscombe in a submission on damages, and thus rely on it as relevant to meaning also. What Lady Buscombe said and wrote is evidence that Mr Lewis's reputation in the eyes of Lady Buscombe was significantly lowered, and that is so whether or not she understood the MPS to be accusing him of lying. If the approach in *Garbett* appears pragmatic, then there is a corresponding difficulty in identifying to what issue evidence adduced by a defendant is relevant. That works in favour of defendants who have failed to prove justification. The defendant can still rely on such facts as he has proved to reduce damages. See Gatley para 35.14. At para 35.47 the editors express this principle in these terms:

> "The jury may be entitled to take into account, in mitigation of damages, evidence which has been properly admitted as relevant to some other issue arising in the case".

69. Consistency would require that the same apply to evidence in aggravation of damages. The loss of reputation in the estimation of a person as prominent in the field of newspaper publishing as Lady Buscombe could be argued to be particularly significant for a solicitor practising in that field of the law.

70. A jury could be directed to put that out of their minds when deciding the meaning of the different words complained of as against the MPS. But that seems somewhat artificial. And the judge could direct himself or the jury to consider whether Lady Buscombe's interpretation of the words in the 11 November e-mail was an unreasonable meaning, and that if they found that it was, then it is not a meaning which the hypothetical reasonable reader would attribute to the words complained of against the MPS.

71. For these reasons, I would allow evidence as to Lady Buscombe's response (in the words she wrote and spoke about the Select Committee having been misled) to be before the court on the issue of the meaning of the words complained of against the MPS, even if that evidence was not before the court on any other issue. I would take that view with more confidence if that evidence were before the court on another issue, such as damages.

72. On the assumption that that evidence were to be admitted, then I would take the same view as I have already expressed on the meaning of the words complained of (para 55 above), but I would consider that this additional evidence provided additional support for that view.

Application for permission to amend the Particulars of Claim

73. The claim against the MPS as it stands at present is a claim in respect of the publication of the e-mail dated 11 November 2009 timed at 16.10. It is thus a claim in respect of a publication to a single publishee.

74. The original claim against Lady Buscombe and the PCC is in respect of the following publications:

    i) A written statement dated 15 November 2009 issued by Lady Buscombe and published by her and the PCC by (a) distribution at the Annual Conference of the Society of Editors; (b) by being read out by Lady Buscombe at the Conference; (c) by being put on the PCC's website from that day forward; and (d) by distribution to other media so far unidentified.

    ii) Words spoken at the conference by Lady Buscombe in answer to questions from journalists.

75. The first set of words complained of included the following:

> "… Last week the PCC published a report following allegations we were misled by the News of the World during an inquiry we conducted in 2007 into how the phone message hacking situation involving Glen Mulcaire and Clive Goodman could have arisen.
>
> Having reviewed all the information available, we concluded that we were not materially misled. … But new evidence has come to light.

> Those of you who are familiar with the case will recall the significance that was attached to the apparent evidence of a then Detective Sergeant from [the MPS] called Mark Maberly. It was he who was alleged to have said that around six thousand people had their phone messages hacked or intercepted.
>
> The allegation was made in oral evidence to the Select Committee on Culture Media and Sport and has also been published in the press. It was also repeated just last Monday in some coverage questioning our report.
>
> Since the publication of our report last Monday, the PCC has heard from Detective Inspector [as he now is] Maberly through lawyers for [the MPS].
>
> This letter says that Mr Maberly has in fact been wrongly quoted on the six thousand figure. The reliable evidence we were told in an e-mail confirming the contents of the letter, is that given by Assistant Commissioner John Yates to the Select Committee, who referred to only "a handful" of people being potential victims.
>
> In light of this, I am doing two things. Firstly I am of course putting this new evidence to my colleagues in the Press Complaints Commission, because they will want to update our report to take account of this development.
>
> Second, I have just spoken to the Chairman of the Select Committee on Culture Media and Sport, John Whittingdale, to draw this to his attention. Any suggestion that a Parliamentary Inquiry has been misled is of course a very serious matter".

76. The second set of words complained of were spoken in answer to a question from a journalist. Lady Buscombe said:

> "Maberly has been wrongly quoted in saying that six thousand people were involved. He didn't say it. He is said to have said it".

77. Although Mr Lewis is not named, he pleads that a substantial number of those who read or listened to these words complained of would have known that he was the person referred to as having given evidence to the effect that six thousand persons were involved in telephone hacking. For the purposes of this application that is not in dispute.

78. Each of these two sets of words complained of are said by Mr Lewis to have the same meaning namely:

> "The Claimant lied to the Parliamentary Select Committee about what he had been told by Detective Inspector Maberly".

79. In so far as the words were spoken, the claim is of course in slander. There is a plea that they were calculated to cause harm to Mr Lewis in his profession as a solicitor. In litigation it is crucial that a solicitor's statement of truth is accepted at face value.

80. In addition to claiming in respect of the libel and slanders written and spoken by Lady Buscombe, Mr Lewis claimed against her and the PCC in respect of republications. There are a number of these, and I shall not lengthen this already long judgment by setting out the terms of each re-publication. They include the following:

> 1) An article written by the Press Association's chief political correspondent which is published from 15 November 2009 onwards on the Society of Editors website (in which Mr Lewis was identified by name as the person who had given evidence as to what DI Maberly had told him).
>
> 2) An article headed Report by Alexander Fletcher and Adam Thorn also published on the same website from 15 November 2009
>
> 3) A report in the Independent Newspaper on 16 November 2009 and available on his website "Parliamentary Inquiry Misled on Phone Hacks"
>
> 4) The publication of a copy of the statement made at the Conference which was published on the Press Gazette website on and after 16 November 2009 together with a separate report headed "Buscombe Police Lawyers Deny Six Thousand Phones Hacked".

81. The claim against Lady Buscombe and the PCC has been settled. One of the terms of settlement included the making of a Statement In Open Court on 26 November 2010. That included the following:

> "Following publication of the statements [made at the Conference on 15 November] Mr Lewis expressed concern that Baroness Buscombe's words would be understood to mean that he had lied to the Parliamentary Select Committee about what he had been told by Detective Inspector Maberly and the statement was therefore, defamatory of him. In light of Mr Lewis's concern, the Press Complaints Commission clarified that the statement did not accuse him of any wrong doing in a statement made by the Director which was subsequently published in The Guardian. In addition, in its response to the Parliamentary Select Committee, the Commission included the following paragraph:
>
> "Finally on this subject the Commission wishes to take this opportunity to correct the record. Your report says that the Chairman of the PCC issued a statement in November in 2009 which may have suggested that Gordon Taylor's lawyer Mr

> Lewis misled the Committee. This is not the case, as the PCC made publicly clear at the time. Baroness Buscombe has never suggested – and does not believe – that Mr Lewis misled the Select Committee and her statement which made no reference to Mr Lewis was not intended as a criticism of him or the evidence which he gave to the Select Committee. Baroness Buscombe regrets that her statement may have been misunderstood and this may have been of concern to Mr Lewis. Baroness Buscombe and the Commission therefore wish to make the position entirely clear.
>
> The paragraph was also appended to Baroness Buscombe's statement on the Commission website.
>
> Despite these measures, Mr Lewis has remained that the clarification provided by the Commission has not reached a sufficiently wide audience.
>
> [Lady Buscombe and the PCC] appear before you today to confirm that the statement was not intended as a criticism of Mr Lewis or the evidence which he gave to the Select Committee"…
>
> The Commission and Baroness Buscombe regret that the statement may have been misunderstood and that this has caused concern to Mr Lewis. They make this Statement in Open Court to ensure that the position is entirely clear".

82. It was a further term of the settlement which was incorporated in a Tomlin Order dated 25 November 2010 that:

> "In full and final settlement of Mr Lewis's claim, [Lady Buscombe and the PCC] shall pay the sum of £20,000 by way of libel damages to Mr Lewis…".

83. Lady Buscombe and the PCC also submitted to an order to pay Mr Lewis's costs of the proceedings, to be assessed if not agreed.

84. That settlement was originally agreed to be confidential, but in the light of its obvious relevance to the further progress of the action against the MPS, the parties agreed to waive that confidentiality.

85. The application for permission to amend the Particulars of Claim is an application to rely, in aggravation of damages against the MPS, upon all the publications which were pleaded against Lady Buscombe and PCC, whether those publications were in libel or in slander, and including all the publications relied on in aggravation of damages in respect of the claims against Lady Buscombe and PCC.

86. It is pleaded that the terms of Mr Toulmin's e-mail to DI Maberly of 30 September 2009, were such that he and the MPS must have realised that it was very likely the PCC would make that evidence public. It is pleaded that, in his e-mail of 11

November 2009, Mr Toulmin stated that it might be important for the PCC to update their public records for these and other reasons. So the MPS knew that its response to Mr Toulmin's question would inevitably be published, not merely to Mr Toulmin, but to members and officers of the PCC concerned with the previous PCC report, including Lady Buscombe. Further the MPS knew, so it is pleaded, that it was very likely or probable, or that there was a significant risk, that the PCC would make a public statement confirming the information and that any such public statement would inevitably attract much public attention and be repeated in the media. So it is said that the MPS knew and intended, and/or foresaw or could have foreseen and/or it was objectively reasonably foreseeable that Mr Toulmin would re-publish the MPS response within the PCC, that the PCC would re-publish the same, and that the media would inevitably carry the reports of any such statement by the PCC, given the enormous and legitimate public interest in the phone hacking scandal.

87. Mr Dean submits, amongst other things, that the damages, costs and Statement In Open Court represent full vindication to Mr Lewis in respect of the claim he made against Lady Buscombe and the PCC. Thus permission should be refused on that ground (amongst others).

88. Mr Browne, on the other hand, submits that the settlement was a compromise which does not afford full vindication, and that the terms of the Statement in Open Court are not to be accepted at face value. Quite apart from the wording of the Statement, he refers to an event which has occurred subsequently, namely an interview on Radio 4 with Steve Hewlett on 2 February 2011. In this the interviewer referred to the statement which she had made on 15 November to the Society of Editors. There was the following exchange in the Radio 4 interview:

> "LADY BUSCOMBE: the truth is that I made a statement which I thought was absolutely the right thing to do at the time and –
>
> STEVE HEWLETT which turned out to be wrong
>
> LADY BUSCOMBE: - we don't know yet whether it's wrong, we have no idea…".

89. That exchange is not amongst the allegations which it is sought to introduce into this action by way of amendment.

90. I shall deal first with the proposed amendment to plead publication, not merely to Mr Toulmin, but to members and officers of the PCC concerned with the previous PCC report, including Lady Buscombe.

91. No submissions were addressed to me by Mr Dean specifically in relation to that paragraph. He objected on general grounds of the delay before this application for permission to amend was made. The delay is fifteen months after the words complained of were published, and nearly eight months after the claim form was issued. He noted that no explanation has been given for the lateness.

92. Notwithstanding these submissions, I can see no real ground for refusing permission for this limited amendment. The effect is to increase the number of publishees relied

on by Mr Lewis from one to at least two, namely Lady Buscombe, and perhaps a small number of others. I shall therefore grant permission for what is at present paragraph 48.1.2 (a).

93. The test for liability for re-publication can be taken from the judgment of Laws LJ in *McManus v Beckham* [2002] 1 WLR 2982 at paragraphs 42 to 43 as follows:

> "The root question is whether D, who has slandered C, should justly be held responsible for damage which has been occasioned, or directly occasioned, by further publication by X. It will not however, in my judgment, be enough to show that D's slander is a cause of X's further publication: for such a cause might exist although D could have no reason to know of it; and then to hold D responsible would not be just. This is why the old formula "natural and probable cause" is inapt even as a figurative description of the relationship that needs to be shown between D slander and the further publication if D is to be held liable for the latter. It must rather be demonstrated that D foresaw that the further publication would probably take place, or that D (or a reasonable person in D's position) should have so foreseen and that in consequence increased damage to C would ensue".

94. Mr Dean submits that the only way that Mr Lewis can attempt to pass that test is by reliance on the words of Mr Toulmin's on 9 November "it may be important to update our public records at some point". That, he says, was not enough to make it foreseeable that Lady Buscombe would do what she did. He accepts that there is plainly some force to Mr Lewis's contention that Lady Buscombe knew and intended her speech would be reported in the media. But he says that was a combative public statement which the MPS could not have foreseen.

95. Further he submits that the account given by Lady Buscombe in her words is different from, and goes further than, the words used by the MPS in the e-mail complained of. This is the other way round from the *McManus* case. In the *McManus* case the re-publication was of something less than the original publication. Here Mr Dean submits that the suggested re-publication is of something greater than the original publication. The MPS had not suggested that the Parliamentary Committee had been misled.

96. In relation to the press reports in The Independent, The Press Gazette and the other articles on the Society of Editors website, Mr Dean recognises that there is a case that Lady Buscombe knew and intended that there would be re-publication of what she said. But he submits, that, once again, the difference between what is contained in these other republications, and what the MPS had said in the original words complained of, is so great that it does not really amount to re-publication at all.

97. However, it seems to me that Mr Dean's strongest point is his argument based on proportionality and case management grounds. First there is the point already mentioned, that Mr Lewis has received the benefit of a Statement in Open Court and substantial damages. It is well known that the main purpose of libel proceedings is not the recovery of damages for past loss (important though that might be), but the

prevention of future loss by the vindication of the claimant's reputation. Mr Lewis has received vindication already from Lady Buscombe and the PCC, and, if he were to succeed against the MPS he would obtain vindication from a judgment in his favour. Allowing the amendment proposed would so greatly lengthen the trial, and complicate the issues for the court, that the potential benefit to Mr Lewis in terms of increased damages (which could not be a very high additional sum in the light of the £20,000 he has already received) would be wholly disproportionate to the time that the trial of so many issues would take and the cost that would be incurred in the trial.

98. I also take into account Mr Dean's submission based on the well known difficulties in courts dealing with re-publication. A defendant is entitled to plead to these, and the jury (if there is one) must be separately directed upon them. See *Collins Stewart Ltd v Financial Times Ltd* [2005] EWHC 262 paras [15], [26] and [27]. The £20,000 is relevant by reason of Section 12 of the Defamation Act 1952, which requires that there be no double recovery.

99. Mr Browne submits that the *McManus* test is arguably passed, which is all that is necessary at this stage. He notes that the MPS placed no restriction on the use to which the information it gave could be put. It was unreal to suggest that the MPS believed that its response would be limited to Mr Toulmin or even to Lady Buscombe.

100. I would not refuse permission to amend on the ground that Mr Lewis's proposed pleading fails to pass the *McManus* test. In my judgment the case does not rest on the words of Mr Toulmin that "it may be important to update our public records at some point". There had already been a great deal of publicity about this police investigation, including in the form of a report from the PCC. I accept that Mr Lewis would have a real prospect of persuading a court that the MPS foresaw that the further publication in the form of the words written and spoken by Lady Buscombe at the Conference, or something similar, would take place, or that a reasonable person in the position of the MPS should have so foreseen, and that in consequence increased damage to Mr Lewis would ensue.

101. I do not overlook the argument of Mr Dean about the difference, as he submits, between the meaning of the original words complained of and the meaning of the words written and spoken by Lady Buscombe, and the further difference, as he submits it is, with the meanings of the other press reports and articles relied on as re-publication. However, whether each of these publications did or did not have different meanings, and if so whether the differences are sufficiently great to take the words of Lady Buscombe, or any of the other of the articles and press reports relied on, outside the scope of the *McManus* foreseeability test is not something which I ought to attempt to determine at this stage. It is not sufficiently clear to me that the difference in meaning or meanings is as great as Mr Dean submits it is, that I should preclude Mr Lewis from arguing the proposed amendment on that ground, and pursuing it to trial.

102. However, I am impressed by Mr Dean's argument based on proportionality and case management, at least to a point. For the reasons he advances, I accept that to introduce into this trial, at this stage, so many alleged re-publications in aggravation of damages would be disproportionate.

103. The next question, therefore, is whether I should, on these grounds, refuse permission for all the re-publications sought to be relied on, or only for some, and if so which. If

a line needs to be drawn, there is a clear candidate for such a line, namely the distinction between the words written and spoken by Lady Buscombe herself, whether or not published on 15 November, or on the website, and all articles and press reports which were consequential upon what Lady Buscombe said or wrote on 15 November.

104. In my judgment if a line were drawn at that point, so as to exclude everything other than words written or spoken by Lady Buscombe, the problems of case management would be so diminished as not by themselves to justify refusal of the proposed amendment limited in that way. In my judgment I ought in the interest of justice to grant permission limited in that way. It would appear artificial to a jury, and even to a judge, to try this action on the basis of publication only to Mr Toulmin, Lady Buscombe and their colleagues in the PCC.

105. Indeed, that point is the foundation of a further point raised by Mr Dean on behalf of the MPS. He submits that it would be so artificial that the whole claim should be struck out as an abuse of the process of the court. He relies on *Jameel v Dow Jones* [2005] QB 946 at paragraph 55. He submits that even if Mr Lewis acted reasonably in initiating proceedings against the MPS, that is not a reason why he should be entitled to continue these proceedings if he has, through means other than a finding against that Defendant, achieved the only permissible objective of vindication. See *Hays Plc v Hartley* [2010] EWHC 1068 para 45.

106. In response to this Mr Browne submits that the vindication, such as it is (and he says it is not much) that has been obtained against Lady Buscombe, is not to be compared with vindication such as Mr Lewis would obtain if he succeeds in the action against the MPS. The crucial difference is, as Lady Buscombe candidly said in her Radio 4 interview, that she does not know the true position. True vindication can only come by testing the stories of Mr Lewis on the one hand, against the evidence of Mr Maberly (if he is put forward as a witness) on the other.

107. In my judgment this claim against the MPS was not an abuse of process when it was started, and the MPS did not suggest it was. It has not become an abuse of process for Mr Lewis to continue it, as submitted by Mr Dean, for the reasons advanced by Mr Browne. If it is to proceed, justice requires that the trial be not confined to the publications to the immediate recipients of the e-mail containing the words complained of, but that the tribunal, whether judge or jury, be able to consider also whether the MPS, if they are held liable at all, should be liable not only for the words complained of in the e-mail, but also for the words written and spoken by Lady Buscombe.

108. For these reasons I would allow the amendment on the limited basis I have explained (excluding press reports and articles not written or spoken by Lady Buscombe).

109. Having reached that conclusion I also decline to strike out the proceedings as an abuse of the process of the court. I do not need to consider that part of Mr Dean's application further.

Qualified Privilege

110. The Defence at para 24 is pleads:

> "The words complained of were published on an occasion of qualified privilege.
>
> 24.1 The unlawful interception of telephone messages by Mulcaire, for journalistic or other purposes, was a matter of the highest public interest.
>
> 24.2 The MPS had conducted a detailed investigation into such interception in 2006, leading to the conviction of Mulcaire and Goodman.
>
> 24.3 The PCC, the body charged with regulation of the British Press, had conducted an investigation into such interception in 2007.
>
> 24.4 The select committee conducting an investigation into matters including such interception throughout 2009, and had heard evidence from serving police officers and Mr Lewis.
>
> 24.5 The PCC was, at the time of Mr Toulmin's e mail of 30 September 2009, conducting a further investigation into the issue.
>
> 24.6 The email from Mr Toulmin expressly asked DI Maberly for his "help" in resolving in what he believed to be a discrepancy between the evidence given by the claimant to the select committee and that given by AC Yates which was relevant to the PCC's investigation.
>
> 24.7 On 9 November 2009 the PCC published its second report. That report complained, at para 11.1, of the fact that DI Maberly had not yet responded to Mr Toulmin's request.
>
> 24.8 The words complained of were published in a response to a further request from Mr Toulmin dated 11 November 2009, which stressed the importance of the issue and asked for a response within 24 hours.
>
> 25. In the circumstances outlined above (and elsewhere in the particulars of claim and this defence) the MPS had a clear idea of his public duty to respond to the request of its officer for assistance by the PCC. The PCC had a corresponding and legitimate interest in receiving the answer to its request for information".

111. In the Reply Mr Lewis pleads to this in paragraphs 5 to 12. While most of what is pleaded in the Defence in this respect is not in dispute, it is in dispute that the investigation by the MPS was detailed, and that the investigation by the PCC was still continuing at the time of the publication of the words complained of.

112. More particularly, in relation to para 24.6 of the Defence, it is pleaded:

> "The e-mail from Mr Toulmin did not ask whether the six thousand statement had been made or not. It asked the MPS to provide it with "any evidence about the extent of the phone tapping message". Thus the words complained of constituted a volunteered statement regarding an issue upon which no request for information had been made by Mr Toulmin. Furthermore, the words complained of were not relevant to the question which had been asked by Mr Toulmin".

113. In other words, what Mr Lewis is there contending is that the question was the extent of the phone message tapping, that is whether some six thousand people were involved, or whether it was only a handful. Mr Toulmin was concerned to know whether the PCC had been misled by the News of the World. He was not concerned to find out whether anyone was at fault for mentioning inconsistent figures, and he was not, by his question, asking anything about Mr Lewis at all. The request could have been fully answered without referring to Mr Lewis having wrongly quoted DI Maberly.

114. In paragraph 12 of the Reply this case is expanded. It is submitted that the MPS had a duty not to publish the words complained of (that is any words referring to or naming Mr Lewis). Reference is made to the fact that, as a public authority, the MPS has no Article 10 rights, whereas Mr Lewis has an Article 8 right, namely to his reputation.

115. I recall that the application before me in relation to qualified privilege is an application by MPS for summary judgment. It is an ambitious application and in my view it cannot succeed.

116. The law in relation to qualified privilege as it applies to publications made by a public authority is difficult and is developing. See for example *Clift v Slough Borough Council* [2010] EWCA Civ 1171. It is fact sensitive. There is no suggestion that there is what is sometimes referred to as an "existing relationship" between MPS and the PCC (as discussed in *Kearns v General Council of the Bar* [2003] 1 WLR 1357). Of course, the fact that MPS is a public authority does not mean that it has no right to give appropriate responses when asked for information. For example, in *Clift* it was accepted that the local authority was pursuing the legitimate aim of protecting the rights of its own employees (see para [65]).

117. Mr Browne also advanced other arguments as to why Mr Lewis had a realistic prospect of defeating the defence of qualified privilege, but it is not necessary for me to address these in this judgment.

118. This application by MPS for summary judgment on its defence of qualified privilege therefore fails.

Malice – Amendment to the Reply.

119. Mr Lewis applies for permission to amend his Reply to extend the plea of malice. There are some proposed amendments to the Reply which are not in dispute and for which I therefore give permission without further explanation. There is also part of the proposed amendment in relation to malice which is not in dispute, and likewise I give permission for that without further elaboration.

120. The proposed amendments to the Reply which are contested have been the subject of a number of re-drafts, some of them reflecting points made in correspondence. The gist of the plea, in so far as it is contentious, is that it alleges malice on the part of an unidentified group of officers referred to as "senior investigating officers". In paragraph 15 of the draft they are said to be senior MPS officers involved in the hacking investigations from whom, it is to be inferred, the writer of the words complained of must have taken instructions before she wrote those words.

121. A number of particulars are set out in paragraphs 16 and paragraphs 17.1 to 17.7, following which it is pleaded as follows:

> "17.8 In the premises it is to be inferred that the motivation of the senior investigating officers from whom [the writer] took instructions was the improper one of repudiating Mr Lewis's account of what he had been told by D I Maberly in order to protect the MPS from criticism in relation to the competence of AC Hayman's investigation, and not withstanding that they knew from the material seized from Mr Goodman and Mr Mulcaire that the number of persons affected by hacking was vastly more than a handful and was likely to run into thousands. Paragraphs 48.2 to 48.5 of the Amended Particulars of Claim are repeated. Accordingly the senior investigating officers knew that it was the overwhelming likelihood that DI Maberly had referred to thousands of potential victims of telephone hacking since that was consistent with the documentary evidence in their possession, but they nevertheless gave the PCC to understand that it was only a very small number and hence in context or by innuendo Mr Lewis was lying in his account of his conversation with DI Maberly. In doing so they lacked an honest belief in what they said and/or were utterly indifferent to the truth of what they said".

122. The Particulars of Claim at paras 48.2 to 48.5 (48.1 to 48.4 as originally pleaded) have not been the subject of any application to strike out. It is pleaded by Mr Lewis that, during the MPS's investigation, the MPS had seen documents which indicated the numbers of potential victims of phone hacking on behalf of the News of the World was substantial, running into thousands, which far exceeded any number that could be called "a handful". It is pleaded that, to that extent it is more likely that Mr Maberly had referred to thousands rather than to "a handful". Presumably this argument is advanced on the assumption that he said anything at all. It is pleaded that the senior officers responsible for the investigation who, it is to be inferred had been, had been consulted by the writer of the words complained of, knew this.

123. These allegations are repeated in paragraph 17 of the draft amendment to the Reply. Further particulars in the draft are as follows:

> "17.1 Mr Goodman was the Royal correspondent of the News of the World, and confined himself to stories concerning members of the Royal Family. Part of the indictment to which Mulcaire alone pleaded guilty listed five victims (Max Clifford, Skylet Andrew, Gordon Taylor, Simon Hughes MP and Elle

McPherson). Since these were not members of the Royal Family, it was obvious that the beneficiaries of the information gathered were journalists other than Mr Goodman. Indeed Mr Justice Gross said, when sentencing Mulcaire on 26 January 2007 in relation to those five victims that he had not dealt with Mr Goodman but with others at News International.

17.2 Amongst the document seized was a contract dated 4 February 2005, whereby Mr Mulcaire using the pseudonym Paul Williams had entered into a contract with News of the World journalist called Gregg Miskiw to pay a minimum of £7,000 for a story concerning Mr Gordon Taylor… based on information provided by Mr Mulcaire. The MPS did not interview Mr Miskiw.

17.3 MPS also seized an e-mail dated 29 June 2005 from News of the World reporter Ross Hindley, to Mr Mulcaire, stating: "this is the transcript for Neville", and attaching thirty five voicemail messages including, including thirteen in which the recipient was Mr Taylor. Neville Thurlbeck was the Chief Reporter of the News of the World and was credited together with Mr Goodman as the co-author of the story in the paper dated 9 April 2006 which recounted verbatim a joke left on Prince Harry's voicemail by Prince William. The MPS had evidence and suspected that Mulcaire and Goodman had accessed the Prince's own mobile telephone messages. However, at no stage did the MPS or Yates check how many Nevilles there were working at the News of the World at the time. Nor did they interview Mr Miskow, Mr Thurlbeck or Mr Hindley.

17.4 The documents seized by the MPS from Mr Mulcaire included hundreds of unstructured handwritten sheets revealing research by him into very many people in the public eye. These included members of the Royal Household, Members of Parliament, military staff, sports stars, celebrities and journalists. Similar personal data was also found by the MPS on electronic material seized from Mr Mulcaire. Although it is accepted that some of the names and numbers revealed in the documents seized may have been legitimately held by Mr Mulcaire, the number of potential targets was self evidently very considerable. Indeed the precise numbers were as follows:

(a) total number of names in the seized material was 4,332

(b) the total number of mobile phone numbers was 2,978

(c) a total of 91 PIN codes recorded

17.5 Amongst other documents in the MPS's possession were records showing expense payments to Mr Goodman authorised

> by the News of the World's Managing Editor, Stuart Kuttner. The MPS did not interview Mr Kuttner or question him as to the reason as to the payment.
>
> 17.6 As the MPS well knew, Mr Mulcaire did not keep his hacking techniques to himself. The MPS seized a tape recording of Mr Mulcaire teaching a journalist apparently called "Ryle" how to carry out the technique of hacking known as "double – screwing".
>
> 17.7 In their evidence to the Select Committee, AC Yates and DS Williams sought to defend the thoroughness of the MPS investigation, and minimise the number of those affected by hacking. As the senior investigating officers (including AC Yates) well appreciated Mr Lewis's account of what he had been told by DI Maberly necessarily supported the hypothesis that the MPS investigation in 2006 had been grossly inadequate".

124. Thus the only named individual against whom malice is alleged on this basis, amongst those referred to as "senior investigating officers", is Mr Yates. However, the plea depends entirely on the strength of the suggested inference that the writer of the words complained of must have obtained the authority of Mr Yates, or any other allegedly malicious investigating officer, before writing the words that she did.

125. Mr Browne submits, and for present purposes it can be assumed to be correct, that, following *Horrocks v Lowe* [1975] AC 135, a plea of qualified privilege can be defeated on the principle known in law as "malice" in two situations:

i) where the defendant did not believe what he said was true or was indifferent to the truth; and

ii) where the defendant's dominant motive in publishing was improper (in the sense of not being related to the duty or interest which founds the existing privilege).

126. As Mr Dean correctly points out, what Lord Diplock said (in relation to the second of the two alternatives relied on by Mr Browne) in that case at page 151 includes:

> "It is only where [the defendant's] desire to comply with relevant duty or protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that express malice can properly be found".

127. For the purposes of considering the plea of malice I have, of course, to assume that the defence of qualified privilege has in principle succeeded subject only to the plea of malice. If it had not, then malice would not arise for decision. On this footing it must be assumed that the MPS were performing a duty when writing the words complained of. On this assumption I can see nothing in the passages of the draft Reply which I have set out above, and which are in dispute, which makes it more likely than not that desire on the part of the senior investigating officers to comply

with the presumed relevant duty, or to protect the relevant interest, played no significant part in their motives for authorising the publication of the words complained of.

128. Accordingly, the proposed plea of malice can be permitted, if at all, only on the footing that it raises a probability that there were such officers, and that they, or at least one of them, did not believe that the words complained of were true (in the meaning found by the jury), or were indifferent to the truth.

129. It is common ground that a plea of malice is a very serious one, and is the equivalent of an accusation of dishonesty. In *Telnikoff v Matusevitch* [1991] 1 QB 102 at 120 the Court of Appeal approved the following test:

> "In order to enable the [claimant] to have the question of malice submitted to the jury, it is necessary that the evidence should raise a probability of malice and be more consistent with its existence than with its non-existence. … Each particular instance of alleged malice must be carefully analysed, and, if the result is to leave the mind in doubt, then that piece of evidence is valueless as an instance of malice whether it stands alone or is combined with a number of similar instances. *Turner v MGN* [1950] 1 All ER 449, 455B, in the words of Lord Porter."

130. Mr Dean criticises the argument on which the contested particulars are based. He submits that there is an insufficient factual basis pleaded from which it can be said to be more probable than not that Mr Yates, or any other senior investigating officer, knew that the number of persons affected by the hacking was likely to run into the thousands, that there is insufficient material pleaded to suggest that the specific number of 6,000 was a number which such officers knew to be true, and that, if the court is to go down this route of drawing inferences, one factor that has to be taken into consideration is that the senior officers in question might properly have relied on and believed the word of Mr Maberly,

131. In my judgment the particulars pleaded to support the allegation of malice, which I repeat is an allegation of dishonesty, against Mr Yates and/or against any other unnamed senior officer do not, whether individually or taken together, raise a probability that, if such officer in fact approved the words complained of, then he did not believe that they were true or was indifferent to whether they were true or false.

132. For these reasons, the application to amend the Reply is refused in so far as it is in dispute.

Conclusion

133. For these reasons:

i) I decline to order under s.69(4) that the issue of meaning against the MPS be tried by judge alone (para 46);

ii) The words complained of as against the MPS are capable of bearing the meaning attributed to them by Mr Lewis (para 55);

iii) The evidence of Lady Buscombe's response to the words complained of in her written and spoken remarks on 15 November is admissible on the issue of the meaning of the words complained of against the MPS for the purposes of the application before me (whether they are to be admitted at the trial will be a matter for the trial judge) (para 71);

iv) Permission is granted to Mr Lewis to amend the Particulars of Claim in the form of para 48.1.2 of the draft (para 92) and to the limited extent set out in para 108;

v) The action will not be struck out as an abuse of process (para 109)

vi) I decline to give summary judgment on the defence of qualified privilege in favour of the MPS (para 118)

vii) The application to amend the Reply is refused in so far as it is in dispute (para 132)