Hot Issues in International and Cross Border Vetting

Saturday, February 2, 2019 | 11:30 am to 12:30 pm

Program Description

This workshop will compare and contrast defamation, privacy, copyright and other newsgathering and publication laws around the world. How is the #metoo movement being handled in various jurisdictions? Do you need to consider the GDPR in the newsgathering context? Are there Bartnicki-type protections abroad for receipt of leaked materials and, if so, what is their scope? What is happening with the Right to Be Forgotten and do US publications available outside the US have to respond to takedown requests? How are national security and other laws being used to target or retaliate against reporting, and what risks you should be aware of for your local and international reporters abroad.

Lead Facilitator

Dana Green, Ballard Spahr | Washington, D.C.

Facilitators

- Lynn Carrillo, NBCUniversal | Hialeah, FL
- Lee Rivera Williams, Cable News Network | Atlanta, GA
- Katharine Larsen, Thomson Reuters | New York, NY

Program Materials

1. Hypotheticals
2. *Cambodia Drone Laws*, UAV Systems International
3. Faine Greenwood, *Learn From This Man’s Mistakes: How to travel with a drone without causing an international incident*, Slate (Feb. 23, 2015)
5. Jim Waterson, *Cliff Richard wins £210,000 in damages over BBC privacy case*, The Guardian (July 18, 2018)
7. Sample Proceeding Suppression Order Pursuant to section 17 of the Open Courts Act 2013 (Australia)

8. Mark Pearson, Why the public isn't allowed to know specifics about the George Pell case, The Conversation (Mar. 21, 2018)


11. Judicial College of England & Wales, Reporting Restrictions in the Criminal Courts (May 2016)
CAMBODIA DRONE LAWS

Contents

1. General Cambodia Drone Laws
2. Drone Permits In Cambodia
4. Buying Drones In Cambodia
5. Drone Travel Guide Articles
6. Contact Information For Questions

Drone laws are constantly changing. To stay up to date on the latest drone laws changes, sign up for an account to receive drone law notifications by clicking here.

[https://www.uavsystemsinternational.com/my-account/]
General Cambodia Drone Laws

Drone use is allowed in Cambodia, but there are several drone laws that need to be followed when flying in the country. Operators must ensure that they follow the following drone laws when flying in Cambodia,

- Do not fly your drone over people or large crowds
- Respect others privacy when flying your drone
- Do not fly your drone over airports or in areas where aircraft are operating
- You must fly during daylight hours and only fly in good weather conditions
- Do not fly your drone in sensitive areas including government or military facilities. Use of drones or camera drones in these areas are prohibited
- Drones are banned in Phnom Penh, Angkor Park, or around any historic temples unless you have written permission

Permit Needed For Recreational Drone Use?

×

A drone permit is not required for recreational drone use, unless you wish to fly in Phnom Penh, Angkor Park, or around any historic temples. Please adhere to the above General Cambodia Drone Laws however when flying your drone.

Permit Needed For Commercial Drone Use?

×

A drone permit is not required for commercial drone use, unless you wish to fly in Phnom Penh, Angkor Park, or around any historic temples. Please adhere to the above General Cambodia Drone Laws however when flying your drone.
Bringing Your Drone On Airplanes Guide

For a detailed guide to bringing your drone on airplanes click here (http://www.uavsystemsinternational.com/bringing-your-drone-on-airplanes-guide/). All drones should be brought on carry on luggage if possible. This is because according to the Montreal Convention, airlines are only liable for losses up to ~$1,000 USD. When traveling internationally, theft and lost luggage can be common issues, particularly if your flight has many connections. If your drone is worth more than $1,000 USD and you cannot bring it onto the plane you should consider shipping it with DHL, Fedex, or UPS instead and fully insure the shipment.

You should NOT place drone batteries in your checked baggage. All drone batteries should be placed in a Medium Size Lipo Battery Bag (https://amzn.to/2pANSsW) like the one shown here in the link and brought onto the plane in your carry on bag. Lithium-ion batteries are considered “dangerous goods” by airlines and rules surrounding these batteries on planes are EXTREMELY strict due to multiple incidents of these batteries catching fire. Failure to properly
pack lithium-ion batteries in a bag such as the one shown in the link above can result in the airline seizing them, you getting fined, or being denied boarding.

## Buying Drones In Cambodia

Read all of our Cambodia Drone Laws, and now looking for drones, parts, accessories, or something else? Read our guide for Buying Drones In Cambodia (http://www.uavsystemsinternational.com/drones-sale-cambodia-buying-drones-cambodia/). It includes information on drones for sale in Cambodia, import taxes, payment options, and shipping.

![Cart Icon]

## Drone Travel Guide

Cambodia drone laws are up to date as of July 1, 2018. Please email support@uavsystemsinternational.com, or click "leave a message" at the bottom right of the screen if you have any questions or comments.
DRONE STORE

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Advanced Drones (http://test.uavsystemsinternational.com/product-category/advanced-drones)
Heavy Lift Payload Drones (http://test.uavsystemsinternational.com/product-category/heavy-lift-payload-drones/)
Fixed Wing Long Range Drones (http://test.uavsystemsinternational.com/product-category/fixed-wing-long-range-drones/)
Specialized Drones (http://test.uavsystemsinternational.com/product-category/specialized-drones/)
Drone Parts (http://test.uavsystemsinternational.com/product-category/drone-parts)
Drone Insurance (https://www.uavsystemsinternational.com/drone-insurance/)

USEFUL LINKS

Service & Support (https://www.uavsystemsinternational.com/service-support/)
Contact (https://www.uavsystemsinternational.com/contact/)
Lifetime Drone Care (https://www.uavsystemsinternational.com/lifetime-drone-care/)
Business Services (https://www.uavsystemsinternational.com/business-services/)

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OUR LOCATIONS
Learn From This Man’s Mistakes

How to travel with a drone without causing an international incident.

By Faine Greenwood
FEB 23, 2015 • 1:40 PM

Sunset on Boeung Kak in Cambodia, as photographed from a drone operated by the author.

 Courtesy of Faine Greenwood
It’s the newest travel trend: carting around a portable, camera-bearing drone while on the road. Suitable for selfies, dramatic landscape photos, and other eminently Instagram-able content, backpack-size drones equipped with action cameras are an increasingly common component of vacationers’ luggage.

Cool as those YouTube videos of golden temples and snowy mountains may be, drone travel is a practice that can have outsize consequences if things go wrong. German visitor and video journalist Michael Altenhenne found that out the hard way on Feb. 14, when he flew his DJI Phantom 2 drone close to the strictly guarded Royal Palace in the Cambodian capital of Phnom Penh—apparently disturbing Queen Mother Norodom Monineath Sihanouk, who reportedly was doing her evening exercises behind the palace’s gold-painted walls.

After the queen mother raised the alarm, according to local reports, Altenhenne was apprehended by authorities and his drone confiscated. Annoyed city officials decided by Feb. 16 that drones would henceforth be banned within the Phnom Penh city limits. Only drone flights preapproved by City Hall authorities will be permitted. It’s not clear what the turn-around time for that approval would be, and there’s no indication what criteria will be used to evaluate applications.

Phnom Penh municipal spokesman Long Dimanche denied that the new ban was solely due to the evening disturbance of the queen mother, telling the Cambodia Daily newspaper that the ban would help to protect privacy and to prevent the usage of drones by terrorists. Perhaps, but considering that drones had gone completely unregulated in Cambodia up until the incident, Altenhenne’s ill-fated flight provided a good excuse for authorities to act. Even Dimanche admitted that the incident with the queen mother was “one
reason” the ban was implemented.

It’s not as bad as it could have been. The authoritarian Cambodian government has little love for journalism and humanitarian investigations, and could have easily banned drones across the entire country, as was recently done in increasingly dictatorial Thailand. Drones can still be sold and purchased in Phnom Penh, and drone usage in Cambodia outside of the capital remains legal for now.

But the ban inside Cambodia’s largest and most politically important city is still a major blow for many, including journalists, human rights monitors, filmmakers, and others dependent on drone technology for their work.

In 2013, for example, controversial elections in Cambodia brought thousands of people into the streets in support of the opposition Cambodia National Rescue Party. At the time, journalists and human rights organizations lacked an effective way to conduct head counts of the protesters—a figure that would have been a good way to accurately gauge the scale of the backlash against the ruling Cambodian People’s Party. A drone flyover coupled with a bit of mathematics would have been an easy way to figure this out. But head count by drone won’t happen with the next major protest, either: It’s now almost certain journalists won’t be able to use drones to document political activity in Phnom Penh, as the odds of City Hall permitting this purpose seem rather slim indeed.

Filmmakers, those with small drone businesses, and members of the nascent local maker movement will find their work hampered. Documentary filmmaker Christopher Rompré has resigned himself to finding tall buildings to complete his study of the architecture of Phnom Penh. Meanwhile, journalists and human rights representatives have expressed their own discomfort with the regulations.

And the unpleasant situation can be blamed, at least in part, on the mistake of a single German visitor. Altenhenné’s behavior should serve as a warning to ethical travelers everywhere thinking of bringing their drone on walkabout—because the repercussions of a single mistake, even an innocent one, can
extend to everyone.

“I damaged or harmed nobody, I have not broken any law,” Altenhenne wrote me after I reached out to him via email for comment. He reiterated that he did nothing illegal as the regulation was only introduced after the fact. “However, I regret the impact my action has on other filmmakers or journalists in Cambodia.”

His regret is welcome, but it’s also not enough. As Altenhenne discovered, a foreigner behaving irresponsibly with a drone can find his actions causing unintended consequences for local people, including journalists, photographers, and small businesses that use drone technology to break stories and to make a living. It’s an unfair dynamic: While the visitor (as Altenhenne did) can grumble about a “violation of freedom of expression” and then go home, local people are left to deal with the political fallout. Travelers who care about freedom of speech and the welfare of their local hosts should keep this reality in mind before they decide to fly their drone over unknown territory.

There’s also simple self-preservation. Altenhenne was detained and interrogated for six hours, and then was freed by police without charges, after which he flew to Thailand. But it’s easy to imagine much harsher consequences for errant drone vacationers, from big fines to prison time. Due to the novelty of the technology, many nations have no drone regulations at all and interpret these matters on a case-by-case basis—meaning that it’s hard to predict what might happen if your drone malfunctions, or if you fly over the wrong location.

Take it from me: I’ve flown my own drone many times in Cambodia and Thailand, and I’ve enjoyed sharing, with the Internet and with my friends, the cool photographs I was able to take. But I’ve also made an effort to fly during times of day that are relatively quiet and in places that aren’t too crowded, secure prior permission when I can, and work with local friends and contacts to ensure I’m not flying over something especially politically precarious.

The good news is that what I’ve decided to dub Leave No Trace drone travel is perfectly possible, as long as drone-loving tourists are willing to do some
homework. Reach out to local drone pilots in the country that you plan to visit. It’s easy to find these people via Facebook, Twitter, and the DIY Drones community. They will be the best authorities on what’s legal and what isn’t, and you’ll likely make some new flying friends in the process.

When you do go to fly, don’t go alone: If at all possible, bring a local friend or contact, who can speak the language, interpret the situation, and interact with authorities if you draw unwanted attention. It’s hard to explain yourself while you’re trying to land a drone.

Most importantly, be polite and be compliant: The cool drone video you’re shooting is probably not worth deportation or a jail sentence. If you are told to bring the drone down, don’t argue: Just do it.

Shooting drone footage overseas is incredibly fun and a great way to document travel experiences from an unexplored new perspective. But remember that your mistake may cause serious consequences for your drone-flying counterparts in the country you’re visiting. Be cautious, do some local research first, and be respectful to local authorities. And whatever you do, try to avoid shooting photos of elderly queen mothers.

*Correction, Feb. 24, 2015: This article originally misstated that Altenhenne was deported and relieved of his drone. He was not deported from Cambodia but departed for Thailand after the incident on his own volition. Law enforcement took his drone, but it will be returned to the German Embassy and then to him.* (Return.)
Australian film-maker James Ricketson sentenced to six years' jail in Cambodia

The 69-year-old documentary maker, who was found guilty of espionage, says the spying claims are ‘fanciful and ludicrous’

Jamie Fullerton and Ben Doherty
Thu 30 Aug 2018 23.29 EDT

Australian film-maker James Ricketson has been found guilty of espionage in Cambodia and sentenced to six years in jail.

His family say they are devastated at his conviction and sentence, and have called on the Australian government to pressure Cambodia to release him.

Ricketson, 69, said he had worked as a journalist and video documenter in the south-east Asian country since 1995 and was arrested in June 2017 for flying a drone at a political rally. He has been incarcerated since then, with the guilty verdict given this morning by a three-judge panel in the Cambodian capital Phnom Penh.

Prosecutors said Ricketson used journalism as a front for spying, citing links to former Australian prime minister Malcolm Turnbull and the Cambodian National Rescue party (CNRP).

The CNRP was Cambodian prime minister Hun Sen’s ruling Cambodian People’s party’s (CPP) main political opposition until it was dissolved last November.

The prosecution also accused Ricketson of treason, saying he planned to overthrow Hun and illegally give information to foreign governments.

Prosecutors did not name the states he was alleged to have colluded with despite Ricketson repeatedly asking them to do so during his trial.

Ricketson, who made films about poverty and financially supported poor Cambodians he befriended, called the spy claims “fanciful and ludicrous”. His lawyer, Kong Sam Oun, said: “James has done a lot of good here, nothing to do with spying. It is impossible to be a spy for 22 years.”

Before the verdict was given this morning Ricketson said: “I hope I am free today and I could go home.”

Bim Ricketson, James’ nephew, said his family was devastated. He said his uncle was a part of the Cambodian community and loved the country’s people.
"He goes there regularly and has done for 22 years. Capturing the lives of the poor people there and helping them. And for that to be interpreted somehow as espionage is completely mad."

"There’s no way he is a spy."

Bim Ricketson said the family was relying on the Australian government to pressure Cambodia to release him.

"We are looking for a lot more support moving forward from the new Australian government. We know ... they have their attention on this and that they are working on it but now really is the time for a lot of support to be shown and as much pressure as possible to be brought to it, to find some kind of way out of this.

"We are looking forward to what the government can do to help us at this point. There is a lot I’m sure that can be done and they are in contact with us."

Ricketson’s family said his health had deteriorated badly over 14 months in prison, and “we would be very concerned about his health over six years in those conditions”.

“I don’t know where we go from here,” Ricketson’s brother said.

Speaking from Jakarta, prime minister Scott Morrison said the former foreign minister Julie Bishop had made direct approaches to the Cambodian government, and said the government would remain involved in Ricketson’s case.

“It is best to deal with these things calmly and directly,” Morrison said.

“He can expect to give all the consular and other support from the government you would expect in these circumstances.”

Foreign minister Marise Payne said the Australian government would continue to provide Ricketson full consular assistance during this “particularly stressful time”. She said there were still appeal avenues open to the Australian citizen.

“Mr Ricketson is subject to legal proceedings under Cambodian law and must now consider his response to the court’s decision using the avenues open to him.

“The Australian government will consider what further appropriate support we can provide after that time.”

The Cambodian prime minister, who in July won a landslide victory in an election decried as undemocratic by critics, has orchestrated an intense crackdown on free speech and the media in Cambodia.

In the past two weeks Hun released around 20 political opponents jailed on what critics claimed were political charges, a move that Ricketson’s supporters hoped increased the chances of him being freed.

He has closed newspapers and overseen the jailing of journalists, politicians and social media commenters deemed to threaten government rule.
Human Rights Watch’s deputy Asia director Phil Robertson condemned the Australian government’s “softly-quietly” approach towards Cambodia, and other autocratic regimes in south-east Asia, arguing it was not only morally bankrupt but also entirely ineffective.

“The Australian government just let Cambodia walk all over them by failing to publicly and consistently challenge this ludicrous charade and demand Ricketson’s immediate and unconditional release.”

Robertson said Ricketson’s trial and sentence “exposed everything that’s wrong with the Cambodian judicial system”.

He said court cases in Cambodia were characterised by ridiculously excessive charges, prosecutors with little or no evidence, and judges carrying out political orders from the government rather than ruling based on what happens in court.

“When it comes to a conviction in a Cambodian court, clearly no facts are required. From day one, James Ricketson has been a scapegoat in Hun Sen’s false narrative of a so-called ‘colour revolution’ used as an excuse to crack down on the political opposition and civil society critics.”

The Australian Directors Guild has also called on the Australian government to intervene on Ricketson’s behalf to have him brought home to Australia.

“We call on the new foreign minister, Marise Payne, to contact her counterpart in Cambodia and seek clemency for James and for him to be sent home,” chief executive Kingston Anderson said. “Based on the evidence and what we know of James we do not believe he was spying for anyone.”

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Cliff Richard wins £210,000 in damages over BBC privacy case

Singer sued BBC for invasion of privacy over its coverage of child sexual abuse claims

Cliff Richard arrives at the Rolls Building in London to hear the ruling of his privacy case against the BBC on Wednesday. Photograph: Victoria Jones/PA

Jim Waterson Media editor
Wed 18 Jul 2018 12.42 EDT

Cliff Richard has won his privacy case against the BBC and will be awarded an initial payment of £210,000 in damages, over the broadcaster’s report that the singer was being investigated about historical child sexual assault claims.

In a decision that the BBC warned represented a serious blow to press freedom, Mr Justice Mann awarded Richard £190,000 damages. The singer was awarded a further £20,000 in aggravated damages for the corporation’s decision to nominate its story for the Royal Television Society’s scoop of the year award.
The judgment, handed down in central London on Wednesday morning, came almost four years after the BBC broke the news that South Yorkshire police had searched the singer’s home in relation to the accusation.

The BBC said it would appeal against the decision.

The singer appeared in court to hear the verdict, accompanied by his friends Gloria Hunniford and Paul Gambaccini. Reacting to the judgment afterwards, Richard said: “I’m choked up. I can’t believe it. It’s wonderful news.”

He cried with relief after the ruling was announced. As he left with his legal team, fans gathered outside and sang a refrain of the singer’s hit Congratulations.

Further damages relating to the financial impact on Richard - resulting from cancelled book deals and public appearances - are yet to be assessed but could be substantial.

The ruling will have enormous implications for how the British media reports on ongoing police investigations where no charges have been brought, with newspaper editors and media lawyers saying the ruling was tantamount to new legislation.

The judge was critical of the BBC and the decision to push out the story without a response from the singer in order to scoop rival outlets, adding that its coverage, which included flying a helicopter over the singer’s Berkshire home, had been “somewhat sensationalist”.

But Mann made clear it was the simple decision to factually identify Richard as the individual under investigation - in line with previous standard British journalistic practice - that prompted his decision.

The BBC warned that the judgment created new case law and represented a “dramatic shift” against the ability of journalists to report on police investigations.

Following the ruling, the Conservative MP Anna Soubry, a former journalist, asked Theresa May in the House of Commons whether it was time for the government to consider introducing “Cliff’s Law” banning the naming of criminal suspects by the media until they were charged. The prime minister said it was a difficult issue, since publication of a suspect’s name sometimes encouraged other witnesses to come forward.
The BBC’s director of news, Fran Unsworth, apologised to Richard and said there were elements of its coverage that should have been handled differently. But she warned about the wider consequences of the ruling for press freedom.

“We are sorry for the distress that Sir Cliff has been through,” she said. “We understand the very serious impact that this has had on him.” But, she added, “the judge has ruled that the very naming of Sir Cliff was unlawful. So even had the BBC not used helicopter shots or ran the story with less prominence, the judge would still have found that the story was unlawful, despite ruling that what we broadcast about the search was accurate.”

Unsworth continued: “We don’t believe this is compatible with liberty and press freedoms, something that has been at the heart of this country for generations. For all of these reasons there is a significant principle at stake.”

Richard later told ITV News that senior managers at the BBC had to “carry the can” for running the story.

“If heads roll then maybe it’s because it was deserved ... It’s too big a decision to be made badly. It was nonsense.”

Other news outlets also raised concerns about the impact on their reporting.


Richard’s lawyer, Gideon Benaim, was highly critical of the BBC. He said the singer had never expected after 60 years in the public eye to have his “privacy and reputation tarnished in such a way”.

The BBC had refused to apologise and insisted it had run a public interest story, Benaim added. He said serious questions should be asked about why the organisation had tried so hard to preserve its “exclusive” story.

Unsworth and Jonathan Munro, another senior BBC manager who was also involved in the
Cliff Richard wins £210,000 in damages over BBC privacy case | Media ...

Cliff Richard looks on as his lawyer, Gideon Benaim, reads a statement following the singer’s victory in the high court. Photograph: Victoria Jones/PA

The judge concluded that Richard had privacy rights and the BBC “infringed those rights without a legal justification”.

“It did so in a serious way and also in a somewhat sensationalist way,” he said. “I have rejected the BBC’s case that it was justified in reporting as it did under its rights to freedom of expression and freedom of the press.”

Richard strongly denied the claims that he sexually assaulted a young boy following a Billy Graham rally in Sheffield in 1985, and no charges were brought, prompting the singer to sue the BBC for a “very serious invasion” of his privacy after it flew a helicopter over his home to film police during the raid.

Richard has said he spent £3.4m bringing the privacy case, which the BBC said it had felt obliged to fight because it insisted its coverage was fair and proportionate.

The singer had already settled out of court with South Yorkshire police for £400,000 before the start of the trial, though the judge ruled that the police could be responsible for 35% of any further damages.

The police worked with the BBC and provided the broadcaster with advance knowledge of the raid. This followed an approach by one of the corporation’s journalists, who had learned of the investigation.

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Neutral Citation Number: [2018] EWHC 1837 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 18/07/2018

Before:

MR JUSTICE MANN

Between:

Sir Cliff Richard OBE
- and -
The British Broadcasting Corporation
The Chief Constable of South Yorkshire Police

Claimant

Defendants

Justin Rushbrooke QC and Godwin Busuttil (instructed by Simkins LLP) for the Claimant
Gavin Millar QC and Aidan Eardley (instructed by BBC Litigation Department) for the First Defendant
Jason Beer QC and Adam Wolanski (instructed by DWF LLP) for the Second Defendant

Hearing dates: 12th & 13th, 16th-20th, 23rd-26th April, 8th & 9th May 2018

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.

MR JUSTICE MANN
Mr Justice Mann:

Introduction

1. The claimant, Sir Cliff Richard OBE, is a well known entertainer who has enjoyed a worldwide reputation as such since the late 1950’s and early 1960’s. The first defendant is the publicly funded UK broadcasting organisation. The second defendant represents, as his name suggests, the police force which polices the South Yorkshire area, which I shall call SYP.

2. Until the events of this case Sir Cliff was still pursuing his career even though he was by then in his early 70’s. In 2014, and unknown to him, he became the subject of an investigation by the police in relation to allegations of an historic sex offence. That investigation was, at the time, being conducted by SYP. Mr Daniel Johnson (“Mr Johnson”), a BBC reporter, had found out about the investigation from a confidential source and approached SYP (in the form of a media officer, Miss Carrie Goodwin) about it. That led to a meeting with her and Supt Fenwick of SYP at which he was told about an intended search of Sir Cliff’s English home (which turned out to be in a secure gated complex in Sunningdale, Berkshire) and it was agreed that Mr Johnson would be given advance notice of the search when it had been arranged. The contents of that meeting are hotly contested and form the principal area of disputed fact in this case. The search took place on 14th August 2014 and the BBC immediately gave prominent and extensive television coverage to it, as it was happening and thereafter. The search and the police investigation immediately gained very wide currency, first on the BBC and then, very rapidly, via other media outlets world-wide. Sir Cliff apparently remained under investigation until June 2016 when it was announced that there would be no charges brought against him.

3. In this action Sir Cliff claims that both the BBC and the SYP violated his rights both in privacy and under the Data Protection Act 1998 (“DPA”). He claims substantial damages because his life and finances have been radically affected by what happened. In May 2017 Sir Cliff reached a settlement with SYP who accepted liability, apologised, made a statement in open court accepting liability, paid Sir Cliff damages of £400,000, agreed to pay his costs and paid £300,000 on account of that costs liability.

4. The BBC has continued to resist the claim, which now comes before me. In this trial I am invited to decide questions of liability, general damages, and some limited points about special damages. In addition, there are before me contribution proceedings between the BBC and SYP. SYP claims a contribution from the BBC towards the damages it is liable for, which the BBC resists, and the BBC itself seeks what is in effect an indemnity against any damages it might be liable for. SYP also claims a contribution in relation to its accepted costs liability to Sir Cliff.
5. Mr Justin Rushbrooke QC led for Sir Cliff; Mr Gavin Millar QC led for the BBC; and Mr Jason Beer QC led for SYP.

Witnesses – the claimant

6. The following witnesses gave evidence to me for the claimant, either in person or, in two cases, in unchallenged witness statements.

Sir Cliff Richard

7. He was (obviously) the claimant in this matter. He has a long and well known history in the entertainment (rock ‘n’ roll) industry going back to the late 1950s. He rapidly acquired a high profile and a great public following, which has persisted to this day. He is now 77, but has continued to work, though at a lower pace than when he was a younger man. In the decade to 2014 he released 7 albums and he still makes public appearances. He is also known for his publicly stated Christian beliefs and position, and his participation at various Christian events.

8. Sir Cliff gave evidence of how it was that he came to hear of the search of his property and the police investigation, and the effect that the events of this case had on him. He was a compelling witness, and was not accused of any exaggeration. I accept his evidence in full.

Detective Superintendent Matthew Fenwick

9. At the time of the events in question in this case Detective Superintendent Fenwick (to give him his full title) was the officer (relatively recently appointed) in charge of the public protection unit of SYP. Although he retired in December 2017, and was a civilian at the time he gave his evidence, I shall call him Supt Fenwick in this judgment.

10. Supt Fenwick gave evidence of how it was that SYP came to give the BBC details of the search of Sir Cliff’s property, and to give or confirm other details of the investigation. He was involved almost from the beginning of the BBC’s contact with SYP on the point. I consider him to have been a clear and reliable witness whose evidence was credible and, ultimately, very materially corroborated. At the trial he gave evidence as Sir Cliff’s witness, not as SYP’s witness; he was not examined by SYP at all.

Miss Carrie Goodwin

11. Miss Goodwin is, and at the relevant time was, the head of corporate communications at SYP. Although an employee of SYP, like Supt Fenwick she gave evidence for the claimant (and was not cross-examined by SYP). It was a large part of her job to liaise with the media over police issues, and it was she who had the first contact with Mr Johnson in relation to Sir Cliff. She then continued the contact and relationship
thereafter as events unfolded. She participated in the crucial meeting at which Mr Johnson was promised details of the intended search of Sir Cliff’s property and was therefore an important witness. She gave evidence of all those matters.

12. Having considered carefully how she came over in the witness box, I am satisfied that she was a careful and reliable witness, and an honest one. It is necessary to make that last point because part of the case of the BBC involves allegations that she fabricated notes of meetings and conspired to present a false story to the world when SYP and the BBC came under criticism after the search. Based on my impression of her in the witness box, the probabilities and the rest of the evidence, I find that she was not guilty of such dishonesty.

Mr Philip Hall

13. Mr Hall is the chairman and founder of PHA Media Limited, Sir Cliff’s public relations consultants. He suddenly found out about the search when, on holiday in Spain, he was called out of the blue to be told that the search was in train, and he had to handle the matter at the time and the subsequent PR fall-out. He gave evidence of those matters (and most importantly for present purposes his dealings with the BBC on the day). He was a careful witness whose evidence can generally be accepted.

Miss Gloria Hunniford

14. Miss Hunniford is a television and radio presenter and a close friend of Sir Cliff. Via a short witness statement, on which she was not cross-examined, she gave evidence of her own perception of the effect that the events of this case have had on Sir Cliff. Since her evidence was not challenged I accept it all.

Philip Daval-Bowden

15. Mr Daval-Bowden is a costs lawyer and provided a witness statement dealing with the allocation of legal costs between various post-event legal matters when the effects of the publicity were being dealt with by lawyers. While I think that he may have technically produced, via his witness statement, some of the background documents relevant to some of the special damages points that arose before me, no-one ever referred to his witness statement and I think I can ignore it.

Mr Gideon Benaim

16. Mr Benaim is a partner in Simkins LLP, solicitors who acted for Sir Cliff in relation to his various affairs. He was called in immediately the search became known (though criminal solicitors were also instructed) and he and his firm dealt with the aftermath of the publicity given to the search in terms of dealing with the media and others, as will appear below. He gave evidence of those matters, and of the detail of certain transactions that were taken as sample cases for the purposes of determining some of the special damages points that arose. His credibility was not materially challenged, and I accept his evidence generally.
Mr Neil McLeod
17. Mr McLeod was and is a senior consultant at PHA Media Ltd, Sir Cliff’s PR consultants. He gave brief witness statement evidence of the history of his company’s work for Sir Cliff, of his involvement in the events of 14th August and in subsequent events. He was not cross-examined so his evidence went in unchallenged.

Mr Paul Morris
18. Mr Morris is and was a partner in BCL Solicitors LLP, formerly known as BCL Burton Copeland (“BCL”). His firm was instructed at very short notice to attend at the search and subsequently to act for Sir Cliff in the criminal investigation. He gave short evidence of the former matter. His credibility was not challenged, and I accept all his evidence (which, in truth, does not advance matters much anyway).

Mr Malcolm Smith
19. Mr Smith is, and has for very many years been, Sir Cliff’s business manager. He gave some evidence of the events of 14th August (mainly in cross-examination as opposed to in his witness statement), and the rest of his evidence concerned Sir Cliff’s business arrangements, relevant to the special damages claim, and in particular about the non-publication of a book that Sir Cliff had intended to re-publish. He was a good and credible witness.

Witnesses – the BBC
20. The following witnesses gave evidence to me for the BBC.

Mr Daniel Johnson
21. Mr Johnson was the reporter whose investigations started the whole ball rolling in this case, so his evidence was central to the BBC’s case. He was, at the time, a relatively junior member of the news gathering team, covering the north of England, though he was not without experience. He was, like any responsible reporter, anxious to get knowledge of, and become involved in, big stories, and in my view was anxious to make a bit of a name for himself by getting this story and bringing it home. I do not believe that he is a fundamentally dishonest man, but he was capable of letting his enthusiasm get the better of him in pursuit of what he thought was a good story so that he could twist matters in a way that could be described as dishonest in order to pursue his story. Thus in the present case, as will appear, he was happy for SYP to be under the false impression that he had a story to broadcast and was in a position to broadcast it when that was not true; and he was also prepared to give another false impression to Miss Goodwin, again, as will appear below. That sort of attitude has caused me to consider more carefully than I would have wished his evidence in respect of the main issues in this case on which he gave evidence. In saying that I am in no way characterising him as a generally dishonest man. I am sure he is not. It is just, to repeat myself, that I considered he was capable of letting his enthusiasm for his story get the better of his complete regard for truth on occasions.
Mr Declan Wilson

22. Mr Wilson was in effect Mr Johnson’s superior at the BBC, being the then manager running the BBC’s North of England Bureau. He gave evidence of how it was that Mr Johnson originally came to him with the story, what he was told about what Mr Johnson had been told, what he passed on to his superior (Mr Gary Smith) and (principally in cross-examination) what passed between him and Mr Johnson after the 14th August when he saw Mr Johnson on his (Mr Wilson’s) return from holiday. I found various aspects of his evidence unsatisfactory, which is significant in this case because his evidence as to what Mr Johnson told him about how he dealt with his informant and SYP would, if accepted, be important corroboration of Mr Johnson’s important primary evidence on those points. Mr Wilson’s evidence of his post-search conversation was particularly unsatisfactory. The totality of his evidence needs to be approached with caution.

Gary Smith

23. Mr Smith was the BBC’s UK News Editor. In terms of the command structure, Mr Wilson reported to Mr Smith. Mr Smith received news of the story from Mr Wilson and made arrangements for background research to start. He was responsible for keeping the story alive within the BBC, and in due course briefed Ms Unsworth (see below) about the possible police search. He remained closely in touch with the pursuit and development of the story, arranging for a helicopter to be put up to cover the search, and participated in the final decision to broadcast and name Sir Cliff in the broadcast. He was, in my view, one of the employees of the BBC who became very concerned (I am tempted to use the word “obsessed”) with the merits of scooping their news rivals and that probably affected some of his judgment at the time, and gave rise to a certain defensiveness in relation to his later conduct (in particular his participation in internal BBC email traffic after the search).

24. I consider that Mr Smith was unduly defensive, and to a degree evasive, in much of his evidence, particularly in relation to post-search email traffic. That was probably to try to defend the BBC’s position on what happened at the July 14th meeting, because some of that traffic was significantly inconsistent with the BBC’s case. I regret that I felt I could not always rely on him as a reliable witness.

Miss Bernadette Kitterick

25. Miss Kitterick was a BBC employee tasked with some background research before the search and with contacting Sir Cliff’s representatives for comments on the day of the search. She was apparently precise and careful, though one could detect a wary underlying tone. She ultimately gave her evidence in a straightforward manner and was credible (though, her credibility was not really in issue) and largely reliable.

Mr Jonathan Munro

26. Mr Munro was Head of Newsgathering at the BBC at the time in question. He reported to the Director of News, Mr James Harding whose deputy Ms Unsworth was. Gary Smith reported to him. He first knew of the story when it was “red flagged” internally on or about 31st July, but had little involvement until after the search. He did not take any part in the decision to broadcast and most of his evidence concerned the aftermath.
I thought he was a thoughtful man and a thoughtful witness, although he was overly guarded when the content of certain parts of the BBC’s Defence (on which he signed the statement of truth) were compared with his emails, almost wilfully failing to acknowledge inconsistencies and refusing to acknowledge the plain effect of some of the emails in the case.

Ms Francesca Unsworth

27. Ms Unsworth was an impressively experienced broadcast editor at the time. She had held previous senior posts at the BBC and at the time was deputy to the Director of News at the BBC (Mr James Harding). It was her decision to broadcast taken at about 12.30 on 14th August which led to the broadcast taking place.

28. I considered Ms Unsworth to be a careful, thoughtful and conscientious witness. In my view she was honest in all that she said in the witness box. There is one respect in which I do not accept her evidence, a respect which I consider to be tinged with wishful thinking and a bit of post fact convenient rationalisation, but that does not detract from her honesty. Mr Rushbrooke criticised her for poor recollection of detail in several respects, but I do not consider her failure to recollect some details such as timing to be at all surprising or to reflect on the more positive evidence that she did give. Her evidence was straightforward. Her acts and thinking on the day, like the acts and views of others, were affected by the desire to protect the scoop, though perhaps less than others.

Witnesses – SYP

Mr David Crompton

29. At the time of the events in question Mr Crompton was the Chief Constable of SYP. His most important evidence was of events immediately after Mr Johnson first spoke of the investigation into Sir Cliff with Miss Goodwin. I consider him to have been a reliable witness on all relevant topics.

Miss Lesley Card

30. Miss Card was a media relations officer at SYP who accompanied the police on their search of Sir Cliff’s property. Her evidence was not of great significance and was entirely credible.

Mrs Joanne Beattie

31. At the time of the search Mrs Beattie (then Miss Wright) was a senior media and public relations officer for SYP and gave evidence (via video-link) of certain limited dealings she had in relation to this matter. She was a straightforward and credible witness.
The factual background

32. In what follows any recitation of fact should be taken as a finding of fact by me unless the contrary appears. I shall divide up the facts into convenient portions. There is one main dispute of fact, namely whether and the extent to which the SYP co-operated voluntarily with the BBC in the provision of information, at least in part for its own purposes (the BBC’s case), or whether SYP was in effect pressured into co-operation and the provision of information by an implicit threat that the BBC would publish a story about the investigation into Sir Cliff before SYP was ready to search his premises (SYP’s case, and to an extent Sir Cliff’s case). I shall devote a separate section to findings about that particular dispute, though in this more general narrative I shall make also make findings which are germane to it.

The initiation of the investigation to the search

33. In the period (years) leading up to June 2014 the Metropolitan Police (“MPS”) was conducting various investigations of historic child sex abuse under the umbrella Operation Yewtree. There were several high profile arrests, charges and convictions of public figures. Operation Yewtree became aware of an allegation made against Sir Cliff about an incident in the 1980s, at a Billy Graham evangelist rally in Sheffield, involving an adolescent boy under the age of 16, and Operation Yewtree commenced some sort of investigation of it. Because it was a single incident within a particular police area it was proposed to hand the investigation over to SYP, in whose area the incident allegedly took place. Discussions between the MPS and SYP started in about March 2014 and in May or early June it was decided to hand the investigation over. As head of the public protection section of SYP, Supt Fenwick was briefed on the initial contacts by one of the more junior officers. He himself briefed Assistant Chief Constable Jo Byrne because of the high profile nature of the subject of the investigation.

34. On 9th June Mr Johnson spoke to a confidential source and received a tip-off about the police investigation into Sir Cliff. The source has not been identified, but Mr Johnson’s case is that the source was associated with (but was not part of) Operation Yewtree, though Mr Johnson said he did not know that at the time. About a month later, on about 9th July, he spoke to Miss Goodwin (to whom he was already known) on the telephone and they discussed various matters. She had already been briefed about the Cliff Richard investigation by Supt Fenwick, because she was briefed about all high profile, or potentially high profile, cases within SYP, although at the time she was briefed it was still uncertain whether the investigation would pass to SYP.

35. In the telephone conversation Mr Johnson told her he was aware that SYP was investigating Sir Cliff. There is a dispute as to whether he demonstrated knowledge of further matters about the investigation, or whether he merely indicated his knowledge of Sir Cliff as the subject of the investigation. This goes to the principal disputed factual point which I deal with below. She made a note of the rest of the conversation with Mr Johnson (which concerned other matters) but her note contains no reference to this part of the conversation. She says, and I accept, that she was immediately so concerned
about what Mr Johnson was saying that she stopped taking notes so that she could concentrate on what she was being told.

36. Miss Goodwin then briefed both Supt Fenwick and the Chief Constable about her conversation. As a result of the latter conversation it was decided that there should be a level of cooperation with the BBC. The SYP case is that that was to stop Mr Johnson from publishing a story too early and prejudicing the investigation.

37. On 15th July 2014 a meeting took place between Mr Johnson, Supt Fenwick and Miss Goodwin. The content of that meeting is again disputed, but it is common ground that Mr Johnson was informed of SYP’s intention to search the UK property of Sir Cliff and told that he would be given advance notice of the search. The SYP case is that they felt pressurised into making that offer in order to prevent Mr Johnson publishing a story prior to the search, thereby potentially compromising it. The BBC’s case is that the information was provided voluntarily, and indeed it goes further in that it was said that the BBC was essentially its “messenger” to get information about the investigation into the public domain.

38. The resolution of this dispute of fact turns in part on contemporaneous, or allegedly contemporaneous, notes and emails, together with some further emails and notes which were created immediately after the search, and, as I have already indicated, its resolution will be the subject of a separate section of this judgment where all the material can be drawn together without obscuring the narrative. For the moment it will be useful to continue the narrative in order to provide context for the resolution of that dispute.

39. Not much relevant happened between 15th July and the date of the search which was 14th August. It had been anticipated that the search would take place a week earlier than that, on 7th August, but in the end the later date was chosen. Supt Fenwick was on holiday from the end of 18th July until 6th August and had no involvement in that period. Miss Goodwin continued to deal with PR matters.

40. On 18th July Mr Johnson asked (by email) if arrangements could be made to allow him to speak to the victim of the alleged crime. That would seem to be an ambitious request, and it was rejected. His email demonstrated a concern that other media should not be alerted, and asked when he would be allowed to break the story. He obviously anticipated (and made clear his anticipation) that the BBC would attend at the search site.
41. When Miss Goodwin replied on the same day she said that they needed to “put the brakes” on their plans because the address that the SYP thought was Sir Cliff’s address turned out not to be correct. On 24th July she texted Mr Johnson to say that the matter was on hold while SYP concentrated on a murder manhunt.

42. Meanwhile a certain degree of excitement was being created in the BBC over the prospect of the story. After his meeting with Supt Fenwick and Miss Goodwin, Mr Johnson had updated his editor, Declan Wilson about the story. On the same day as the meeting Mr Wilson wrote to Gary Smith, under the subject line “SIT DOWN WHEN YOU READ THIS”:

“Dan had a meeting with South Yorks Police today.

On August 7th this year South Yorkshire Police plan to go to the house of Cliff Richard the singer in Surrey and arrest him there in connection with historical sex offences against a boy in Yorkshire.

Dan will get an interview ahead of the operation on Aug 6. This is all I have for now.

Something to lift the DQF slog eh!”

43. Mr Smith’s reply was to set out the opening words of one of Sir Cliff’s songs with which he came second in the Eurovision Song Contest in 1968:

“Congratulations. And jubilations. I want the world to know I’m happy as can be.”

Mr Smith disclaimed the idea that this demonstrated his “excitement” or that he was “delighted” at getting the story, but he acknowledged that he was pleased to have got it. I think that “pleased” under-stated his reaction. He also demonstrated an understandable degree of regret that his chosen words have now been given a public airing.

44. A little later on the same day Mr Wilson reported some of the details of the alleged crime to Mr Smith and said that:
“The police considered gripping CR at Wimbledon this year - imagine that!?”

Dan’s source is the SIO who will go on camera the day before under embargo and name CR. I suppose there could still be a defamation risk however we are in an amazing position knowing who the target is direct from the police.

Off record, they want the publicity as they believe there are others.

Sallie is IC on Aug 6 and Suzanne Aug 7 (raid day). I’d really like Dan in Surrey to reward his work on this, it’s bloody cracking.”

45. The police witnesses dispute that there was ever a suggestion of arresting Sir Cliff at Wimbledon. Bearing in mind the fact that Wimbledon had passed by the time of the 15th July discussion and the search was still some way off even at that later date, it is an implausible suggestion. Something about Wimbledon may have been said, but no more than in jest if it was. The BBC witnesses seemed to accept that it was no more than a joke at its highest, though Mr Wilson’s email does not reflect that.

46. In his cross-examination Mr Johnson acknowledged that nothing express was said at the meeting in line with Mr Wilson’s sentence beginning “Off record …”. He said that this was his inference (or more accurately what he thought was one of the possible reasons) for the SYP disclosure, and in effect it reflected no more than his inference. This was not, of course, his email, but it probably reflected what he passed on to Mr Wilson. This suggested motivation was no part of the BBC’s case at the trial.

47. During this period various people at the BBC were tasked with researching and putting together some Cliff Richard-related material in case the story was to be broadcast in due course. However, despite that, there were serious attempts within the BBC to keep the story under wraps and revealed only on a “need to know” basis, as clearly appears from email traffic which I do not need to set out.

48. The original proposed 7th August search date obviously slipped, and the search did not happen on that date. However, the police managed to identify the correct property for the search at a private complex at Sunningdale, Berkshire, and on 7th August 2014 they obtained a search warrant under the Police and Criminal Evidence Act 1984 from
Sheffield Magistrates’ Court. The persons authorised to search were officers of SYP, Thames Valley Police (the force local to Berkshire) and the Metropolitan Police Service. Those authorised to accompany them included police civilian media staff. The plan at that time was to conduct the search on an as yet undecided date the following week. An email of Miss Wright (Mrs Beattie) to Miss Goodwin of 8th August records an intention for Supt Fenwick to make himself available on the day to broadcast a statement should “broadcast media” require one.

49. At some point after 8th August it was determined by the police that the search would take place on 14th August. In accordance with the previous suggestion, it was planned and arranged (by SYP’s media team) for Supt Fenwick to read a statement to the media in due course in connection with the search, when that took place, and such a statement was prepared for him. It did not name Sir Cliff. The BBC knew that a statement would be given on the day of the search, and also knew that Sir Cliff would not be named in it.

50. Mr Johnson was not told about the date of the search until the day before (13th August), which irritated him greatly because the notice was short and he was involved in journalistic business in the north of England on 13th August. This short notice is, in my view, an indication that SYP was not falling over itself to co-operate in this manner, which is inconsistent with the suggestion (made by the BBC) that SYP was motivated by a desire to get publicity for its activities. At 16.32 on that day one of Miss Goodwin’s staff, Joanne Wright, emailed the address to be searched to Mr Johnson in the following terms:

“I do not have a street address but this is an aerial view of the property which is a block of flats:

[URL from the Evening Standard at which the photograph could be found]

From what I have been told by the officers who are down there now there won’t be much to see from the street.”

51. As it happened Mr Johnson had already identified this property, but Miss Wright did not know that. Mr Sillito of the BBC (one of the reporters who reported on the day) also identified that it was a “gated development” and “It’s impossible to get within 100 yards of the flat. He’s also very rarely at the flat.” (email to Ms Kitterick of 23rd July).
52. On 31st July Gary Smith emailed Sara Beck, Mr Munro’s deputy, cc’d to Mr Munro, pointing out (with a bit of regret, because the people involved were trying to keep knowledge of the story within tight bounds) that the story would need to be “red flagged”. This is apparently a system for alerting various higher layers of management to things which might require their attention in due course. The extent to which the BBC sought to control internal knowledge is demonstrated by the fact that some of the people doing the background research did not know why they were doing it.

53.Arrangements were made by the BBC for the attendance of journalists and supporting technicians and equipment at the search property the next day. Because of the seclusion of the property and the lack of visibility from the road, there was an idea within the BBC to use a helicopter to try to get shots of the inside of the estate in which Sir Cliff’s flat was situated and on 17th August a decision was taken to that effect. The BBC had permanent contractual arrangements for the use of a helicopter, and it arranged to have the helicopter available to overfly the property. Contractually, use of the helicopter was shared with ITN, and there was an agreement with ITN that, for a stated fee, the BBC would share all footage on “breaking news” with ITN and also inform ITN of any launch to cover a breaking story as soon as possible. Despite knowing about that agreement, BBC officials (including Mr Gary Smith) decided not to tell ITN and sought to justify that decision with what seem to me to be inadequate points of construction. Mr Gary Smith sought to justify the decision not to inform ITN on the basis that it was not a “breaking news story” within the meaning of the agreement until the BBC started to broadcast it, and therefore the BBC was not under an obligation to inform ITN until that point in time. Until that point the BBC might not have broadcast anything, in which case it would not have been a breaking news story. That agreement is not the subject of this litigation so I do not need to make elaborate findings as to whether this was a breach, but it seems clear enough to me that the event was a “breaking news story” at the latest at the point of time at which the BBC chose to broadcast it, which was about 12.15 pm on that day. Even Mr Smith, who sought to defend his actions in the witness box, described the BBC’s conduct in not informing ITN as “slightly breaking the terms of our deal” (email 13th August 2014). I consider that Mr Smith’s attempts to justify not informing ITN until the time broadcasting commenced as being unjustified legal wishful thinking born of an immensely keen desire to preserve the exclusivity of the story rather than a proper legal assessment of the position; I think it was a piece of sophistry which does him little credit. Mr Rushbrooke described the BBC’s conduct in this respect as “disgraceful”. I do not think that I need to apply that label, but it was hardly commendable.

54. Text exchanges between Miss Goodwin and Miss Card, reveal that the police had been made aware of the intended use of the helicopter.

55. The BBC had ascertained that Sir Cliff was probably at his property in Portugal. As well as arranging coverage in this country, the BBC arranged for a reporting team to travel to the Portuguese property so that some form of coverage could take place there as well (which in due course it did). Arrangements also were made to send a broadcasting team including a reporter to Sir Cliff’s home in Barbados. Some of that
team were probably based on the other side of the Atlantic. In the event, although the team travelled to Barbados, no footage was broadcast and the team returned home. Mr Smith sought to justify these decisions on the footing that the reporters would be available in case Sir Cliff wished to be interviewed on the events. I find it difficult to believe that it was really thought that he would have actually agreed to be interviewed, at least in the timeframes of the reporters’ visits. Mr Rushbrooke suggested that they were sent in order to “doorstep” Sir Cliff. I think that that is much more likely. The BBC decided to add further colour and sensationalism to the story by taking these steps. In the end there were reports from Portugal despite the fact that Sir Cliff was not present at his Portuguese home and therefore not available for interview, which supports the finding that I have just made.

56. The BBC wished to give Sir Cliff what it called a “right of reply”. With that in mind, it ascertained who should be contacted once the search had started, in order to seek his reaction. An email dated 23rd July from David Sillito to Miss Kitterick, who was ultimately tasked with dealing with this point, identified Mr Hall as Sir Cliff’s “crisis PR”, and his publicist as Lisa Davies, in each case with telephone numbers. It also identified the head of his fan club, though she does not seem to have been troubled on the day.

57. Towards the end of 13th August Miss Goodwin briefed Miss Card, who was to be the SYP media representative on the scene, and sent her texts. She gave her Mr Johnson’s number saying:

   “Once you know what time the warrant will start let him know so he doesn’t get there before you. He’s pretty good at working with us.”

To which Miss Card responded saying she would keep him posted.

58. Mr Gary Smith alerted people to the need to have someone available in Sheffield to take an on-camera statement if that is where SYP chose to make it. Then at 18:53 he alerted Mr Munro and his deputy Sara Beck:

   “Just so you know … we think South Yorkshire Police are going to raid Cliff Richard’s house in Berkshire tomorrow morning to arrest him for questioning about an alleged sexual offence in the 80s against a 13 year old boy. (At a Billy Graham rally!)
He will probably not be home (he spends most of his time abroad in Portugal or Barbados).

In which case they’ll search the property, look at computers etc.

They don’t plan to name him. So we will have issues if/when it happens about whether we name him.

[Redacted line - apparently for privilege.]

We have plans in place for reporters, crews, truck, helicopter.

In terms of reporters - Dan Johnson (whose story this is), Sillito and Jane Peel.

Abroad we’re putting plans in place to get to his homes in Portugal and Barbados.

Bernie Kitterick has been researching pictures for some weeks since we got an initial tip that this might happen.”

59. Thereafter Mr Munro was kept briefed during the events of the next day, but he was not involved in the decision to broadcast. He also participated in a discussion about the helicopter. Mr Matthew Shaw, the UK Deployment Editor of the BBC, had pointed out that there was a precedent for sending a helicopter speculatively without telling ITN, to which Mr Munro responded (19:48):

“If we have a nailed on exclusive, it does feel a bit generous giving our main rivals a pretty effective get out of jail free card. All of which may be academic if we can’t name him, obviously.”

To which Mr Smith responded (20:24):

“I agree on that. But on the other hand if its a runner it won’t stay exclusive for long …

…

The money shots will be police going in and out of his flat and loading bags of hard drives or whatever into their vans. We can only get this from the helicopter.

Redhill is only about 5 minutes flying time, so sky will be there pretty sharpish too.”
60. The reference to “money shots” shows the importance attributed by Mr Smith to the helicopter’s participation and the emphasis the story was likely to be given.

The commencement of the search and concurrent events elsewhere

61. There are various relevant strands of the events of the day of the search which make a purely chronological account inappropriate. Those strands are principally: the events on the ground, including contacts between SYP and Mr Johnson; the decision-making process within the BBC; and contacts with Mr Hall, Sir Cliff’s PR consultant, and with Sir Cliff’s lawyers. Every so often it will be useful to pursue elements of those strands in the interests of intelligibility, which will require a departure from a purely chronological overall narrative. The BBC’s actual coverage of the search will be the subject of a separate section.

62. Early on the day of the search the search team, consisting of a number of detectives and Miss Card, had a briefing at Thames Valley police station before making their way to the entrance to the estate on which Sir Cliff had his penthouse. When they arrived the BBC was already outside the property, having been there well in advance of the police (the crews were there by 8:47), expecting the police at about 9.30. At 8.57 Miss Wright emailed Mr Johnson with the text of a statement that the police intended to release if there was no-one at the property. It was substantially in the form ultimately read to camera (see below) and the significant thing about it is that it confirmed that the police did not intend to name Sir Cliff. Mr Johnson forwarded that email to Matthew Shaw and others, and at 9.12 Mr Shaw responded:

“Fran [Unsworth] will sanction the naming of Cliff”.

63. Mr Smith said that this did not necessarily mean that that decision had been taken; it identified the person who would take the decision if and when that decision had to be made. I accept that evidence.

64. The police entered the gates to the estate shortly after 9.35. Messages indicate that the helicopter was given instructions to deploy shortly after that time, and it seems to have been available for the rest of the morning and into the afternoon. Mr Smith ordered that the material be filmed but not broadcast until he had cleared the broadcast.

65. Miss Card had been given Mr Johnson’s mobile telephone number and he apparently had hers. At 10.19 she told him there was no news of SYP’s entry and he texted back
to say they were “holding off” (presumably from reporting) until the police had gained entry.

66. Sir Cliff was not in residence, and there was no-one else in the flat, and it took the police a little time to gain access to the flat itself, which they eventually did at about 10.40 with the assistance of the management company. By this time the helicopter was hovering above. It had already filmed the police walking from their cars to the accommodation block. Prior to that event Mr Johnson had asked Miss Card where they were because they were not visible from the helicopter, and was told the police had parked somewhere surrounded by trees. It was suggested to Miss Goodwin, but not to Miss Card, that Miss Card was saying this in order to assist the BBC to get their camera shots. Miss Goodwin did not accept that, and neither do I. I think that she was merely responding to a text, and not demonstrating a greater degree of co-operation.

67. During this time the helicopter was overhead. It managed to locate the police in their parked cars and recorded the police getting out of their cars, organising themselves for the walk to the building, and filmed them walking there. Apart from the shots showing the last stage of the walk those shots were not broadcast. Mr Rushbrooke invited me to find that these shots demonstrated that the helicopter was over the property (the estate) and not standing off some distance. It is not easy to determine whether that is true or whether an extremely long lens was used. It can be said that the police officers do not appear to have felt the helicopter was close enough (and loud enough) to be a significant intrusion on their attention, because they do not seem to have looked up to it much (or at all). But it is not apparent to me that this point (by which Mr Rushbrooke seemed to set some store) is really all that significant.

68. Shortly after entry (at 10.43) Mr Johnson was informed by Miss Card of the successful entry. She then did not respond to three more requests by Mr Johnson for information (whether Sir Cliff was at home, whether it was the penthouse, and a request to be told when the police were leaving so they could get the helicopter in place for a shot). This was because she had been told by Miss Goodwin not to provide this information.

69. Shortly after 11.37 Supt Fenwick read a statement to camera for the BBC. Since the BBC was the only media outlet that knew about the search it was the only media outlet which received it. He read the following:

“South Yorkshire Police has gained entry to a property in the Sunningdale area of Berkshire.”
Officers are currently searching the property.

A search warrant was granted after police received an allegation of a sexual nature dating back to the 1980s involving a boy who was under the age of 16 at the time.

The owner of the property was not present."

70. This statement was in line with the form which SYP had indicated to the BBC they would be likely to use. As anticipated, it did not name Sir Cliff as the owner of the property searched, or otherwise associate him with the search.

71. The search in the property continued until about 3.30pm when the officers returned to their cars with such material as they wished to take away. They were filmed doing so from the helicopter and some of that footage was ultimately broadcast.

**The involvement of Sir Cliff’s PR representatives**

72. I can now turn to the involvement of Mr Hall, Sir Cliff’s media representative.

73. On 13th August Miss Kitterick was tasked (in advance) with being the liaison point between the BBC and Sir Cliff’s media representatives. This process was an established procedure which BBC employees often referred to as a “right of reply” procedure. A statement would be sought from Sir Cliff, having given him advance warning of an intention to broadcast information about the search of his property and the allegation it was in connection with, in order to allow him an opportunity to respond. That was her own description of the process. Any statement, or the thrust of it, would be included in the broadcast. The plan was to make contact with Sir Cliff’s representatives (Mr Hall) at the earliest opportunity once SYP had gained entry.

74. Once it was confirmed that the police had gained entry, and before 11am, Miss Kitterick called Mr Hall on his mobile (she had been provided with his contact details). He was on holiday in Spain and did not answer. She left a message saying that she was calling about Sir Cliff and asking him to call her back at the earliest possible opportunity. She did not mention the search in her message. Having done so she rang Mr Hall’s office (in England) and left a similar message with Mollie Streek, asking if Mr Hall could urgently return her call.
In a further attempt to make contact, Miss Kitterick emailed Mr Hall at 11:00 am asking him to contact her as a matter of the greatest urgency. Yet again she said nothing about the search. She wanted to communicate that information to him directly. She also texted him at 11:04. By now Simkins, Sir Cliff’s lawyers, had found out about the search and were asking him to contact them.

Meanwhile, at 10:58 Mollie Streek herself emailed Mr Hall telling him that the BBC was very anxious to talk to him and giving him Miss Kitterick’s mobile number so she could call him.

A few minutes later Miss Kitterick called Lisa Davies (Sir Cliff’s publicist) and this time she said that they had information his property was being searched by the police in connection with an allegation of a sexual nature. Ms Davies recommended that Miss Kitterick continue trying Mr Hall. Miss Kitterick followed this up with an email to Ms Davies (which failed twice but got through the third time, at 11:27).

Shortly after 11.15 Mr Hall and Miss Kitterick made contact. Her evidence was that he confirmed that he acted for Sir Cliff and she told him that the BBC was aware that SYP were searching a property in Berkshire which it understood was Sir Cliff’s in connection with an allegation of a sexual nature dating back to the 1980s and the BBC was in a position to broadcast that fact. She wanted to have a statement from Sir Cliff as soon as possible. Mr Hall agreed with that account save that he said no mention was made of an allegation of a sexual nature. Although it probably does not matter, I think that Miss Kitterick is probably right about that.

Mr Hall said he would call Miss Kitterick back, and did not say more. His initial view was that the BBC had had some sort of tip-off, were unsure of the accuracy of what they had got, and were seeking confirmation from him on behalf of Sir Cliff. He was therefore very guarded. If that had been what the BBC was doing then not offering any comment might kill the story. It did not occur to him that the police had briefed the BBC on the search. In his experience it was very rare for the police to do such a thing. He did not think that the BBC were offering a right to reply. Because the BBC gave him time to consider he did not think the matter was all that urgent. I accept his evidence on this.

Mr Hall’s next hour involved his waiting to find out more about what was going on. An email from Mr Shaw (11:27) indicates that the BBC had decided to give Mr Hall until 12:15 to make a decision, but it does not appear that that deadline was communicated to Mr Hall, though Miss Kitterick did chase him for a response once or twice during that hour. Mr Hall sought to engage the assistance of those in his office.
He asked Mr Gregory in his office to find someone to help, and Mr Gregory suggested Neil McLeod. It does not appear that Mr McLeod was able to help much. At 11:51 Mr Gregory emailed Mr Hall saying:

“Wow … wow … wow … will be huge international story?!?"

To which Mr Hall responded at 12:16:

“Sadly so. Based in [sic] very little from what we can gather.”

From that it is apparent that Mr Hall had not been able to get any further useful information by then.

81. However, at 12:24 Miss Kitterick emailed Mr Hall with more. The subject of the email was “South Yorkshire Police” and it said:

“South Yorkshire Police have told the BBC that officers from South Yorkshire Police has gained entry to a property in the Sunningdale area of Berkshire.

Officers are currently searching the property.

A search warrant was granted after police received an allegation of a sexual nature dating back to 1980s involving a boy who was under the age of 16 at the time.

The owner of the property was not present.

Phil we do need a response from you ASAP.

I am on this email and number at all times.
Talk soon"

82. At about the same time (probably just before this email) Mr Hall and Miss Kitterick spoke, and much the same information was conveyed as appeared in the email, except that she told him orally that the police had said the apartment being searched belonged to Sir Cliff, there were a number of police cars at the property and a statement was imminent, and that the BBC would break the story within the hour. Mr Hall reported this to the solicitors (Mr Morris and Mr Benaim) in an email timed at 12.24, recording that the BBC had "just called".

83. Miss Kitterick did not tell Mr Hall that the police were not naming Sir Cliff in their statements, and Mr Hall noticed the absence of a naming reference in the email. He made the point in his own email to Miss Kitterick timed at 12:45:

"You don’t say they mentioned the name of the property owner."

Miss Kitterick responded at 12:47:

"Hi Phil, thanks for emailing me back.

The police have not told us officially that the property is owned by Sir Cliff Richard but BBC News knows the property is owned by Sir Cliff Richard.

My apologies for the calls and emails, but could we have a statement please."

84. Mr Hall declined to respond further because, as far as he was concerned, he was still partially in the dark. At 12:58 he responded:

"Hi Bernadette,
We can’t give you a statement until the police tell us what they are saying. We are waiting on that. I will get back to you asap when we have ut [sic].”

Miss Kitterick responded at 13:00:

“South Yorkshire Police have spoken on camera giving a statement if that is any help.”

85. That was precisely the time that the BBC broke the story on the One O’Clock News. Mr Hall had not had the text of the police statement given 40 minutes earlier, identified as such. Miss Kitterick’s email of 12:24 did not identify the wording as being the wording of that statement (though it closely followed it). Mr Hall still wondered whether the BBC really were going to broadcast (they had been referring to broadcasts all morning) or whether they were trying to extract a confirmation by a form of subterfuge. He was not ready to give a statement, though a drafting process had probably started either in his office or at the solicitors’.

86. What Mr Hall was not told was that the BBC had put a helicopter up to cover the story. He told me, and I accept, that if he had been told that he would have realised the increased seriousness of the BBC’s coverage that that reflected, and would have been straight on to the lawyers to investigate getting an injunction in respect of the “intrusive situation”.

87. Once the matter went public a press statement was prepared and finalised urgently and went out at about 2pm. The statement contained clear and firm denials. Its terms appear below and it was incorporated in subsequent BBC broadcasts.

88. Miss Kitterick had some further contacts with Mr Hall later in the day making requests for an interview with Sir Cliff. Those requests were declined.

The involvement of Sir Cliff’s solicitors

89. I can deal with this shortly because little turns on it in this action.

90. When the police sought entry they contacted Mr Malcolm Smith (Sir Cliff’s business manager) and he in turn contacted Mr Benaim of Messrs Simkins LLP. Mr Smith told Mr Benaim that the police were at the property with a search warrant and that there was
a media presence outside. Because he is not a criminal specialist Mr Benaim contacted BCL Burton Copeland and spoke first to Mr Khan of that firm, and then to Mr Morris. He asked them to travel to the property to find out what was happening.

91. Mr Morris and Mr Khan set off at about 11am and arrived at about 12.15. On the way they tried to get information about what was happening but failed to do so, though Mr Smith had managed to get a copy of the warrant and to email it to the solicitors at 10:59. When they arrived they were denied access to the property for a short time but eventually got access. DI Mayfield of the search team showed them the warrant and at 12.51 Mr Morris was able to report to Mr Benaim what he knew - there was one allegation of an event in 1985, said to have taken place in Sheffield and to involve a boy under the age of 16. It was an Operation Yewtree originating matter which had been passed to SYP. Another potential matter had yet to be substantiated. The police would want to interview Sir Cliff in due course.

92. Mr Benaim also spoke to Mr Hall at about the same time, who added the further information that the BBC intended to break the story “within the hour”. In his witness statement Mr Benaim expressed great surprise that the BBC did not give what he said would have been proper notice of Sir Cliff’s privacy rights to give him an opportunity to protect them, if necessary by seeking an injunction.

The activities within the BBC

93. I have already stated some of the matters which were going on in the BBC itself, and it is now necessary to return to that area of activity in more detail, stepping back a little in time in order to provide some context.

94. As has already appeared, Mr Johnson was on the ground with the full BBC team early in the morning - they were there by the time the police cars arrived and were able to film them going in. Two other reporters were with him. He stayed there all day, doing a number of live broadcasts describing events (see below as to their contents). He was eager to know the outcome of the deliberations going on back at the BBC as to what, if any, coverage would take place, and was very aware that he had an exclusive story which other media (he thought) would want to cover. He was personally very anxious to preserve the “exclusive” for which he was responsible. His first broadcast was for the TV News at One and he continued to report for various BBC broadcasts until the end of the day (both TV and radio). He had no part in the editorial discussions as to what the coverage would be, but he did have a discussion in mid-afternoon with Mr Gary Smith (and Toby Castle, Acting News Editor on the day) about the fact that ITN seemed to be running extra detail that the BBC was not.
95. The two witnesses who gave evidence of how the story came to be run on the day were Gary Smith and Ms Francesca Unsworth.

96. Prior to hearing about the police investigation into Sir Cliff, Mr Smith was aware of the BBC having reported investigations into high profile people in respect of alleged historical sexual offences - Rolf Harris, Max Clifford, Paul Gambaccini and Jimmy Tarbuck. All those investigations were reported before charges were brought, and (as far as he knew) without complaint against the BBC. Reporting such matters involved difficult editorial decisions, and he gave the example of Rolf Harris whose arrest was not reported by the BBC, or the wider media, for months until confirmation was obtained from the police. The way this decision to publish was presented in this case seems to me to have been one which turned on the need to be sure about the accuracy of what was to be published, not questions involving an anxious consideration of privacy rights and freedom of expression (a feature which also seems to have been present in this case).

97. Once Mr Johnson had reported his conversation on 15th July to Declan Wilson (his immediate superior), Mr Wilson reported the matter on to Mr Smith. Mr Smith spoke to others and they set about putting research in place in case the BBC came to be able to report the story. One of those matters was the deputing of Miss Kitterick to do research. He explained through his witness statement that the story fell into the category of “in principle” stories which the BBC would report on as being in the public interest, subject to editorial checks. He considered it to be the BBC’s responsibility as a journalistic organisation to report on such stories because of the considerable debate said to have been going on as to the failings of organisations in allowing certain public figures to have access to young people. There were (unparticularised) editorial discussions as to how the BBC should report investigations and trials.

98. In the case of the Cliff Richard story, Mr Smith, like others around him, was very sensitive to the fact that the BBC had apparently got an “exclusive” and was very anxious to protect that status. To that end he procured that the “red flag” list (the list of forthcoming sensitive matters prepared for the benefit of senior management) should refer to the matter but not in a way which would identify Sir Cliff, in order to keep internal knowledge of it as confined as possible.

99. In the period leading up to 14th August he had briefed Ms Unsworth on the matter, as the deputy to Mr James Harding, Director of News, who was on holiday. Her involvement as a senior person reflected the potential seriousness of the matter. He briefed her again on 13th August when the BBC was told that the search would be going ahead the next day. He also had a conversation (unparticularised) with a BBC lawyer.
100. On the evening of 13th August Mr Smith emailed Mr Munro (Head of Newsgathering) to let him know about the raid and that the police would arrest Sir Cliff if he were present.

101. On the day of the search Mr Smith was at his desk dealing with, and where appropriate discussing, matters as they arose. To an extent he was taking directions from Matthew Shaw, who was the UK Deployment Editor – the person in charge of all the news coming in. It was Mr Shaw who decreed (at 09:41) that Mr Hall was not to be contacted until it was known whether the search team was in and whether Sir Cliff had been arrested or not. Mr Shaw also suggested wording for announcements to Mr Smith, who passed them on to Mr Munro. At 10:57 Mr Smith wrote to Mr Shaw:

“How long do we give Phil Hall to get back to us?

There’s no rush to broadcast - so long as the police don’t plan to release their statement to anyone else yet.

And the longer we hold the more difficult we make it for ITN . . .”

102. This demonstrates the extent to which Mr Smith was keen to be the first to broadcast the story. The reference to ITN is probably a reference to its being difficult for ITN to broadcast the story in their 1:30 news if it broke close to that time.

103. He remained anxious to keep the story exclusive. At 11:51 he wrote to Mr Munro:

“We’re giving phil hall an hour to come back to us. Fran’s coming down for another huddle at the desk at 12:15. Can you come too?

We’ve heard from danny shaw who’s at Scotland yard [sic] on a different story that sky have heard rumours, although still no sign of them in sunningdale”.

104. Four minutes later Mr Matthew Shaw sent an email to Mr Johnson, copied to a number of other people including Ms Unsworth and Mr Smith:

“WE WILL MAKE A DECISION AT 12:15 on when we do the story.”
105. By then Supt Fenwick had made his statement to camera, just to the BBC. Mr Shaw had circulated it, and at 11:57 Mr Smith wrote to Mr Shaw and others (including Ms Unsworth):

“To be clear, this on camera statement is just to the BBC so we’re still holding off publishing till we’ve given Phil Hall time to respond on Cliff”s behalf.”

106. This demonstrates again the extent to which the “exclusive” nature of the story was in Mr Smith’s mind. He was basically saying that since only the BBC knew about the statement, there was no immediate risk of competition, which enabled the BBC to give Mr Hall the opportunity to respond. The suggestion is that if there had been an indication that another news outlet was going to publish, Mr Hall’s time might be truncated, but for the moment they were safe in giving him his time.

107. During this time the reporters and their teams had been waiting outside the front gates, and ever since the helicopter arrived over the scene some time after 10 am it had been filming, but not continuously. The shots were sent down to the local broadcasting van but not immediately sent to the BBC. This was a deliberate instruction. Mr Smith said that the BBC did not want material to be used accidentally, and one of his answers revealed that he did not want too many people to know about the footage, which is another reflection of his desire to prevent a leak of the exclusive story.

108. At about 12:15 Mr Smith participated in a “huddle” in the newsroom, involving several other people including Ms Unsworth. It was decided in that huddle that the story would be broadcast at 1pm. The final decision rested with Ms Unsworth. It seems that the huddle went on for 10 or 15 minutes. Mr Smith could not give any real detail of the content of the huddle, but his witness statement said that the discussion centred around when they felt they could broadcast the story. They also considered how long they needed to wait for Mr Hall to get back to them (at this point Mr Hall had had the police statement read to him and they were waiting for a response - it came about 10 or 15 minutes after the end of the huddle). They also considered whether the story might come out by other means (yet another expression of concern about exclusivity), because of the rumours that Sky might become aware. A further key consideration, according to him, was to see the content of the SYP statement before broadcasting. Missing from his summary of material at this point was any consideration of Sir Cliff’s privacy (or other) rights, though Mr Smith did say that they had been the subject of earlier discussions. He said it was likely they were discussed in the huddle but he could not remember.

109. I turn now to Ms Unsworth. As the most senior editorial member of the newsroom staff, and bearing in mind the seriousness of the story, she was asked to give final
approval of the story. She had heard of the story a little time before the 14th August, and had had a discussion with Mr Smith about it the day before. She says that legal advice was taken. She was brought in principally because it was known that SYP would not be naming Sir Cliff, so the decision by the BBC to name him had to be taken by a senior person. However, it does not appear from her evidence that she gave a lot of thought to it before the events of 14th August.

110. During the course of that day she was copied in on some of the email traffic about the police statement. It is not clear what discussions she had on the day, apart from her participation in the huddle. She was satisfied that the BBC knew enough to be able to make the reporting accurate, and was satisfied as to the source (SYP). She considered that it was “strongly” in the public interest that “the public be informed of police activities being undertaken against individuals and their property”. As far as she was concerned the context was the number of preceding high profile police investigations into historic sexual offences committed by people in British public life. She took the view that the BBC had a responsibility in the public interest to report the investigation whilst being sensitive to the position of Sir Cliff. That included what she considered was a “right of reply” process which they were conducting with Mr Hall. Given that they could not contact Sir Cliff’s representatives until after the search commenced she was satisfied, at 12:15 (the huddle) that by the time of a broadcast at 1pm they would have allowed a reasonable time for Sir Cliff’s representatives to come back with a response.

111. She gave a little evidence of the content of the debate in the huddle in her cross-examination, and her witness statement contained general evidence of her thinking, in line with the above. In the huddle the participants discussed whether to name Sir Cliff (which meant whether to go ahead with the story) and when to broadcast. She explained that by this time the legal risk was diminishing because they had got a lot of confirmation of the facts of the story - the flat was indeed Sir Cliff’s, it was being searched by the police and the search was in respect of a historic sexual allegation. That indicates, again, that the principal concern of the BBC seems to have been factual accuracy and defamation, and not privacy-related concerns. Apparently the lawyers had not flagged that up to her as a specific risk. She regarded such matters as editorial, not legal, and considered what to do by reference to BBC guidelines (to which I refer below).

112. So far as the lack of a response from Mr Hall is concerned, Ms Unsworth’s evidence was that she did not think she was going to get one before publication. Her evidence was that she relied on her experience which told her that often the subject of the investigation chose not to provide a statement until after publication so that it is the journalists themselves that have put the matter in the public domain. She thought that that was happening in the case before her. In this respect I do not accept her evidence. She may have wondered whether she would get a response, and she ought to have realised that Mr Hall had not been clearly given the police statement (as opposed to
something that might have been a paraphrase). I think that the decision to go ahead without giving more time for a statement was driven, as so much in this case, by the need to preserve the scoop and not risk letting another outlet go first with the story.

113. Ms Unsworth decided that the BBC would broadcast the story, and she approved the primary wording of the initial reporting, which was carefully considered. She claimed it had input from the lawyers, but it seems from the limited evidence she gave about it that her principal concern was again defamation. Following on from the huddle she approved the “headline copy”, leaving it to relevant editorial teams to decide how to report for their own respective outputs. She did not take the decision to deploy the helicopter, and did not consider or approve any of the broadcast shots. She did, however, specify that there was to be no live broadcast from the helicopter. When, later in the day there was some limited live footage of the police officers returning to their cars, she considered that that was a mistake. Otherwise she was comfortable with the footage that was broadcast.

114. She was cross-examined about some of her thinking underlying her decision to broadcast, and in particular as to whether she considered privacy rights. The thrust of her evidence, which I accept, was that she did not rationalise the privacy rights side of the matter, and focused more on the public interest in reporting, as to which she was satisfied. She acknowledged that she realised that the reporting would be capable of having a serious impact on Sir Cliff.

The coverage of the search and the statement issued by Sir Cliff

115. In this section I deal with the principal broadcasts of this story and some of the other publicity. There were a large number of TV broadcasts on the BBC alone (the first broadcast being at 1pm on 14th August) on both 14th and 15th August. They tended to be similar. I was not asked to review them all, but I was provided with clips and transcripts of all of them. I set out below the content of the main broadcasts; others during the day and evening tended to follow the content of the preceding ones. The BBC News Channel repeated the story more or less every quarter of an hour during the day. The tone of the BBC broadcasts was consistent - a significant degree of dramatic urgency which it would not be unfair to describe as somewhat sensationalist, an air significantly contributed to by the helicopter coverage. On the BBC News Channel (but not on the main TV news broadcasts) there was a ticker running across the page for many of the broadcasts, touting the story as breaking or the main news. During the 6pm evening TV news almost 4½ minutes were devoted to the story. During the course of the day Sir Cliff released his statement, the terms of which are identified below. In what appears below I also refer briefly to the BBC’s web coverage and the UK print press media. In short, this was a very big story for the media once the BBC broke it, with enormous coverage in this country and across the world.
The BBC coverage

116. The main coverage was as follows.

14 August 2014 -1300, BBC One

117. The police search and investigation into the claimant was presented as the first headline at the top of the broadcast as the BBC’s “top story this lunchtime”, and a short aerial shot of the apartment complex and ground was used, shot from the helicopter. After the headlines the story was presented over just under 2½ minutes. It was said that a search warrant had been granted to the South Yorkshire Police to search the claimant’s home in Sunningdale, Berkshire in connection with an allegation of a sexual nature dating back to the 1980s involving a boy who was under 16 at the time. The news then cut to a pre-recorded report of a reporter, Mr David Sillito. As part of the opening segment, the BBC used aerial footage taken by the BBC helicopter of: (i) the estate on which the flat was situated; (ii) an aerial shot of the apartment building; and (iii) the plain clothes police officer team walking to the claimant’s penthouse apartment. The accompanying narrative summarized again the nature of the investigation. The broadcast of this footage was followed by the pre-recorded statement from Supt Fenwick of the South Yorkshire police which was filmed by the BBC outside the force headquarters that morning. Supt Fenwick’s statement was played twice during this broadcast. In his piece to camera, Supt Fenwick said (as reflected in the drafts referred to above):

“Today I can confirm that South Yorkshire Police have gained entry into a property in the Sunningdale area of Berkshire. Officers are currently searching the property. A search warrant has been granted after the police have received an allegation relating to a sexual nature. The allegation relates to a young boy under the age of 16 years. The owner of the property is not present. Thank you.”

118. A picture of the claimant and another person was shown with the voice over narrating that the claimant was believed to be in Portugal as he was interviewed by a Portuguese radio station earlier in the week. This was followed by footage of the singer meeting Her Majesty the Queen, with a narrator identifying the claimant as “one of Britain’s most successful performers”. It was said that Sir Cliff had so far made no comment on the allegation.

119. Then the broadcast cut live to Mr Johnson outside the property. He summarised the then state of affairs (the search was still continuing) and said:

“… despite our efforts this morning we have not been able to get any response from Cliff Richard or his representatives.”
This was hardly fair. It gave the impression that concerted efforts had been made over a significant period of time, and impliedly suggested that the representatives had had sufficient time to give a statement. Neither of those things was in my view true. The efforts to get a statement had not been going on for that long, and bearing in mind that Sir Cliff was known not to be at the property (and indeed was probably abroad) a proper time had not by then elapsed, bearing in mind the fact that his advisers would have to contact him.

120. The gist of the story, including the reading of the statement by Supt Fenwick, was then repeated at the end of the bulletin.

14 August 2014 -1330, News Channel

121. This story was featured in the 1.30 headlines with similar details to the report above. The broadcast was accompanied by a ticker running along the bottom of the screen stating that Sir Cliff’s property was being searched in connection with an allegation of a sexual nature. As the item was introduced as a headline item the broadcaster’s voice was accompanied by helicopter footage of the actual search in the flat. The footage was an oblique shot from a position rather higher than the penthouse, into the first few feet of Sir Cliff’s penthouse flat on top of the building, showing indistinct furniture and a couple of police officers wearing blue gloves moving about while searching the property. This lasted for about 14 seconds. Because of the angle, camera resolution and reflections on the window one could not see fully into the penthouse, nor was much detail apparent; but it was a shot into the flat. This particular footage was invested by Mr Rushbrooke with a great deal of significance in this case.

122. This footage was followed by Supt Fenwick’s pre-recorded statement (as above). This broadcast also included a report from Mr. Sillito similar to that in the 1pm news (with helicopter footage). Mr. Sillito narrated the footage seen at 1pm of the convoy of police cars entering the property and he confirmed that five cars and eight officers had participated in the search. The 3 clips of helicopter footage played in the 1 pm broadcast (which I have described above) were re-played. Then the programme cut live again to Mr Johnson who said similar things to those said by him at 1pm, but this time saying they had been trying “all morning” to get a response from Sir Cliff or his advisers – again, an overstatement.

14 August 2014, 1401, News Channel

123. At 1401, the BBC news update began with earlier played footage from previous broadcasts (i.e. aerial footage of the property and the surrounding grounds, the convoy of police cars entering the gated complex and of the police officers walking to the apartment). Abridged versions of Mr. Sillito’s report from the 1.30pm broadcast and Supt Fenwick’s pre-recorded statement were also incorporated. The key development reported by the BBC at this time was the claimant’s statement in response to the allegations and police search. The statement was as follows:
“For many months I have been aware of allegations against me of historic impropriety which have been circulating online. The allegations are completely false. Up until now I have chosen not to dignify the false allegations with a response as it would just give them more oxygen. However the police attended my apartment in Berkshire today without notice except it would appear to the press. I am not presently in the UK but it goes without saying that I will co-operate fully should the police wish to speak to me. Beyond stating that today’s allegation is completely false it would not be appropriate to say anything further until the police investigation has concluded.”

124. Mr. Johnson then reported on the progress of the search from outside the property. He confirmed that the search was still ongoing, now for three to four hours, and that while nothing could be seen from the road, that the BBC’s helicopter could confirm that the search was still ongoing. The helicopter footage of the police officers undertaking the search with blue gloves which I described above in relation to the 1330 broadcast was not included. Sir Cliff was reported to be in Portugal, travelling to be with his sister, and Mr Johnson repeated the fact of Sir Cliff’s denial.

14 August 2014 -1433, News Channel

125. No new information was included in this broadcast. It opened with the BBC presenter Julian Worricker recapping the story based on the details reported from earlier broadcasts. The only footage included in this broadcast was the helicopter footage of the police officers wearing blue gloves searching through the apartment (described above as part of the 1330 broadcast). Supt Fenwick’s and the claimant’s statements were also re-played and Sir Cliff’s denial was repeated verbatim.

14 August 2014 -1526, News Channel

126. At this time, the BBC reported that the police officers had concluded their search and were leaving the claimant’s property. Live helicopter footage was shown to viewers of the police officers walking to their parked cars to leave the gated apartment complex. The BBC re-iterated that the claimant was not in the country at this time and re-read parts of his statement.

14 August 2014 -1530, News Channel

127. The BBC headlines at 1530 featured the search as a breaking news story and reported the claimant’s full statement denying the allegation and Supt Fenwick’s statement regarding the investigation during the introductory segment.

128. Mr. Johnson’s report from outside the gated complex was aired. He reported that after five hours of searching the property, the eight police officers appeared to have completed the search and had left the property in a convoy of five unmarked cars. He said that it was unclear if anything had been taken from the property but said that the BBC’s helicopter footage could confirm that the officers in blue gloves had been searching through items in the apartment (the footage of the officers in blue gloves searching the apartment was not replayed). He also reported that the South Yorkshire Police had confirmed that no arrests had been made. He concluded his report with the
claimant’s denial of the allegation, and confirmed that he was currently in Portugal and had said that he would provide his full co-operation to the police.

129. During this broadcast, earlier played footage of the police convoy entering the apartment complex and police officers walking to their parked cars after the search was used. The BBC’s pre-recorded statement from Supt Fenwick was also replayed in full.

**14 August 2014 -1546, News Channel**

130. At this time the presenter reported on additional detail in relation to the investigation which had not been included in previous broadcasts. He said that the BBC understood at the time that the police investigation related to a recent allegation of sexual assault which happened in the 1980s at a Billy Graham event at Bramall Lane, home of Sheffield United Football Club. He confirmed that the police had left the claimant’s apartment. He described his update as ‘a little bit more information there for you courtesy of South Yorkshire Police’. In conclusion, he reiterated the claimant’s denial of the allegations as ‘completely false’. The additional information of the place where the assault had allegedly occurred had first been broadcast by ITN in an earlier news broadcast. When this happened Mr Smith had a conversation with Mr Johnson to verify it before the BBC broadcast it.

**14 August 2014 -1630, News Channel**

131. The headlines included a summary of the allegation against the claimant and reported on the police search of the claimant’s property. A short opening clip of the footage of the police officers entering the gated complex was included followed by aerial footage of the apartment complex and grounds and the police officers wearing blue gloves conducting the search inside the apartment. The claimant’s denial of the allegations was repeated and Supt Fenwick’s pre-recorded statement was replayed.

132. Mr. Johnson (reporting live) recapped the information provided in earlier reports. Of note, he said that the police officers did not force their way into the property and were voluntarily given access to conduct the search. In relation to the allegation itself, he confirmed that it took place in 1985 at a Billy Graham event at the Bramall Lane Stadium. He went on to say that Billy Graham was a preacher who came to the UK and did a series of stadium sessions and that the claimant was present at one of those events.

**14 August 2014 -1800, BBC One News**

133. In the evening news, the BBC broadcast on the story lasted for about 4.30 minutes.

134. In the introductory segment, the allegation was reported as having been made recently but took place in the 1980s at the ‘Christian evangelist’ Billy Graham’s performance at a football stadium in Sheffield. The claimant’s statement, in particular his denial of the allegation as ‘completely false’ was emphasised and Supt Fenwick’s pre-recorded statement was re-played in full.

135. Then, Mr. Sillito’s live report from outside the gates of the complex included a recap of the allegation and details reported over the course of the day of the search. Footage of a Billy Graham event was played when Mr. Sillito identified the allegation as having taken place in 1985. He also confirmed that at the end of the five-hour search, the police
took away a number of items from the claimant’s apartment in metal boxes for examination. Footage of the claimant performing as a young musician and more recently at Wimbledon was also shown with the claimant being described as ‘one of Britain’s most successful and popular performers; a committed Christian’; who has been a ‘byword for clean-cut wholesome family-friendly pop music’.

136. So far as helicopter footage is concerned, the report showed the same footage as before, including the “blue glove” shots.

137. Mr. Sillito also described the police operation as a joint operation between South Yorkshire Police and Thames Valley Police. The report concluded with Mr. Sillito saying that this was just a search as no charge or arrest had been made and the one allegation levelled had been strenuously denied by the claimant.

138. For the first time on this day, in this broadcast the BBC broadcast a short clip of the claimant’s villa and vineyard in Portugal. This footage was accompanied by narration that the claimant was currently in Portugal as he was interviewed there earlier in the week but that there was no sign of him there today.

14 August 2014 – 2001, BBC News Channel

139. The BBC re-capped its reporting of the story from earlier in the day. In this broadcast there was the first actual reporting from Portugal. There were shots of the claimant’s property in Portugal (first shown at 1800), followed by a report by Tom Burridge, BBC’s Madrid correspondent, who reported from outside the gates of the claimant’s property in Portugal. He said that the claimant was a joint owner of the vineyard which was located 15 minutes from Albufeira (a popular tourist destination in the Algarve, Portugal). He reported that, according to the website of the vineyard, the claimant was very personally involved in producing the wine. He confirmed that the claimant was at the property in the morning but had gone to another part of Portugal for the next few days on a pre-planned trip with his sister.

14 August 2014 -2200, BBC News at Ten

140. This broadcast was nearly identical in content and format to the 1800 broadcast. This time it included a recording of the claimant being invited (in footage dated 1984) by Billy Graham to perform with him at one of his stadium performances and the claimant was filmed saying, ‘for me, you know, being a Christian has become the most important part of my life’.

141. Tom Burridge reported live from the Algarve to confirm the claimant’s whereabouts for the day in Portugal. He mentioned the claimant’s involvement in charity work in Portugal and confirmed that the Portuguese police were not involved in the investigation.

Other television broadcasts on 14-15 August 2014

142. Those are the most significant broadcasts, chosen to show the development of various aspects of the story as it was broadcast during 14th August. The unchallenged evidence was that on 14th August there were 44 BBC television broadcasts of the story, each similar to the last but with developing snippets as indicated above. The last broadcast
for the day was at 2331. 15 broadcasts of the story were televised on 15th August, with
the first at 0605 and last at 2316.

Viewing figures

143. The 14th August 1pm BBC broadcast attracted 3.2 million viewers. Viewer figures for
later BBC broadcasts on that day, so far as provided, indicated viewers in the many
hundreds of thousands.

Non-BBC television broadcasts

144. These are referred by way of example of the coverage elsewhere. As soon as the BBC
broadcast the story it was taken up by every other news organisation.

145. The claimant pointed me to six non-BBC broadcasts on 14th August. Four of the six
were produced by ITV News and broadcast at 1330, 1800, 1830, and 2200, one was by
Channel 5 news at 1700 and one was by Channel 4 news at 1900.

- The first ITV broadcast at 1330 reported the search of the claimant’s home as a breaking
news story. The ITV reporter Paul Davis said that in the last few minutes the South
Yorkshire Police had confirmed that they were searching the house in Berkshire of the
claimant and while no arrests had been made, a number of items had been taken from the
house. He confirmed that no comment had been made by the claimant or his representatives.
Later on in the broadcast, ITV confirmed that it had learned ‘in the last few minutes that
the alleged complainant is not from South Yorkshire, the alleged incident happened in
South Yorkshire at a Billy Graham event at ‘Bramble’ Lane in 1985’. ITV included the
aerial footage of the property and its grounds and the clip of the blue-gloved police officers
conducting the search inside the apartment.

- The other ITV news broadcasts included Supt Fenwick’s pre-recorded statement, the
claimant’s statement in response and footage of the claimant’s home in Portugal (2200
broadcast at 03:31). ITV reporters were shown reporting on the search from outside the
gates of the claimant’s property in the 1800, 1830 and 2200 broadcasts. One reporter
reported the claimant’s ‘annoyance’ at the press presence at the search.

- The Channel 4 news broadcast at 1900 included a report by a reporter standing outside the
gates of the claimant’s property. In his report, he was asked by the presenter in the studio
‘how Sir Cliff’s name got into the public domain so quickly’, in response to which he said
that there had been a leak to a media organisation which ‘goes directly against’ the Leveson
recommendations and that the name of a suspect should not have been publicised save in
exceptional circumstances. He said that now that the claimant’s name was in the public
domain, he might find himself the subject of further allegations. This was a prescient
remark, and turned out to be true, as will appear.

146. The story was also broadcast on other media worldwide in a large number of countries
in which Sir Cliff had a following.
BBC Online News articles

147. Several news articles appeared on the BBC website during the 14th and 15th August. The main BBC article attracted over 5m hits worldwide (4.4m in the UK). Others attracted lesser numbers, though they remained significant.

Print media

148. The story was taken up by the print media the next day and appeared on the front page of practically all the major print publications. It is unnecessary to give details. The coverage was very extensive.

The immediate aftermath - the BBC’s dispute with SYP

149. At the end of 14th August, a dispute blew up between SYP and the BBC as to how it was that the police came to confirm the investigation and disclose the search to Mr Johnson. The significance of this part of the facts lies in correspondence generated in the course of it which assists in resolving the dispute of fact between those two bodies as to what happened in the previous month when Mr Johnson met Supt Fenwick and Miss Goodwin. I shall outline the dispute here in order to provide some context for the correspondence but I shall leave the detail of the correspondence to a later section when I make findings about the dispute.

150. In the BBC Radio 4 broadcast at 6pm on 14th August there was a piece by a BBC journalist, Mr Danny Shaw, which was reproduced shortly afterwards on the BBC website. In it Danny Shaw reflected on how it was that the BBC came to be outside the gates when the police arrived for their search. He referred to a previous practice of the police tipping off reporters and the observations of the Leveson Inquiry that such activities should be more tightly controlled. The article went on:

“Since then, tip offs have dried to a trickle despite a series of high profile arrests. The media presence at Sir Cliff Richard’s home, therefore, was highly unusual - it appears to be a deliberate attempt by the police to ensure maximum coverage.

That is not illegal - but there are strict guidelines - and the force may have to justify its approach in the months to come.”
The italicisation is mine. Those italicised words are words which prompted a serious row. They suggest that the BBC’s coverage was as a result of a decision by SYP to tip off the BBC in order to achieve coverage for their own purposes. That caused problems for Mr Johnson, who knew that the original tip off came from someone outside SYP, and who feared that pointing the finger in that way at SYP would undermine his good relations with them. He had a discussion with Danny Shaw before publication and tried to head him off from saying something like that, but to no avail. Danny Shaw made a note of their conversation, and that is part of the material that I deal with later.

151. It also caused anger in SYP, because SYP’s case was not that it had tipped off the BBC for its own purposes (to maximise coverage) but that it felt itself compelled to cooperate with Mr Johnson lest Mr Johnson publish his story too early. It felt itself traduced, and made its views known in telephone conversations and in email traffic. SYP threatened to release a press statement setting out its own version of events, which the BBC very much did not want to happen, not least because it involved allegations which it was felt would not reflect well on the BBC. The matter was resolved when it was agreed between SYP and Mr Munro, in order to defuse the matter, that the BBC would tweet via Twitter, making it clear that SYP was not the original source of its information. That was initially rejected but accepted by 3pm on 15th August. The tweet appeared, and it said:

“Lots of q’s re original source of @BBCNews story on Cliff Richard. We won’t say who, but can confirm it was not South Yorks Police.”

While it was thought that that would resolve the matter, it did not quite do so, but the point fizzled out over the next couple of days.

152. As well as the inter partes dealings relating to this, there were significant internal BBC discussions, both oral and by email, involving Mr Munro, Mr Smith, Mr Declan Wilson and Matthew Shaw. In particular there was a telephone conversation involving those four, the fruits of which were recorded in an email. Mr Johnson spoke to some of those people at this time. The result was some email traffic which reflected on the history of the matter in a manner which is said to support SYP’s version of the events of July. The details of that appear below.
The aftermath and consequences for Sir Cliff - general

153. Since Sir Cliff was in Portugal at the time of the search he did not know about it until someone told him. On the day of the search he had planned to drive with his sister, her partner and a friend of Sir Cliff’s (John McElynn) to another region to meet a friend for lunch, and to stay overnight at a town farther on. At around 10am, immediately after the police arrived at the property, he was rung by a representative of the property’s management company who told him that the police were at the front desk with a warrant to search his apartment. He said they should be let in (having nothing to hide) and then immediately rang Malcolm Smith to tell him what was happening. Mr Smith said he would ring Sir Cliff’s solicitors - hence their involvement that morning.

154. Sir Cliff decided to keep to his plans for the day and arrived at the lunch venue shortly before 1pm. Malcolm Smith called Mr McElynn to tell him that a criminal allegation had been made dating back to 1985, relating to Sheffield and a male under 16. This was shocking to Sir Cliff, but they continued their lunch. At about 1.10pm Mr McElynn and Sir Cliff’s sister started to receive calls from people saying that they had heard what was happening at Sunningdale. That is how Sir Cliff learned that the allegations had been made public.

155. After lunch the party continued its journey and in the car, at about 3pm, Mr McElynn received a call saying that the BBC were showing footage of Sir Cliff’s apartment on television and there was a helicopter filming what the police were doing inside the apartment. When the party arrived at their destination they found a television (at between 4.30 and 5pm) and were able to see the footage of the police in the apartment filmed from the helicopter. All this was, understandably, very upsetting for the whole party, and particularly for Sir Cliff.

156. They decided to return early and drove back to Sir Cliff’s villa the next day. On the way Mr McElynn ascertained that all three entrances to the villa were peopled with reporters and photographers. Sir Cliff did not want to run that particular gauntlet so he went first to the house of a friend. However, later in the day he returned to his villa. He says, not surprisingly, that he felt besieged.

157. Sir Cliff’s evidence, on which he was not challenged, was that the situation then started to take a serious emotional and physical toll on him, and he was close to physical collapse. Photographers continued to surround his property and on one occasion he had to abandon a game of tennis when a photographer tried to take a photograph over the wall of the court. He kept the blinds of his house down. While some photographers left over the course of the following week, some remained, and when he left the villa on the evening of 22nd August in order to fly back to England to be interviewed by the police, he did so under a blanket in the back of a friend’s car. Because he did not want
158. He never went back to the Sunningdale apartment except to empty it for sale. His period of being under investigation lasted until June 2016, when he was told by the Crown Prosecution Service that he would not be charged. Mr Morris told me that that period of time (almost 2 years) was a long period to be held under investigation without charge or release. His experience was that these sort of investigations would not take more than a year, maybe a little more, but not as long as this one. Mr Smith said he was told by the police to expect an investigation of 6 to 12 weeks, but it kept being extended as more complaints were made which required investigation. On both pieces of evidence this was a long drawn out investigation, and the effects of having it publicly hanging over his head were therefore commensurately drawn out.

159. Sir Cliff’s case is that the effect on his life and affairs went on for a very considerable period thereafter. This is the subject of his damages claim and I will set out his case on that, and consider it, later in this judgment.

The main disputed area of fact - what was the reason for the SYP co-operation with the BBC?

160. This is the main dispute of primary fact in this case. What happened as between SYP and the BBC is of relevance to Sir Cliff’s claim, but its greater relevance is to the contribution proceedings. In order to resolve it I have to go over some of the ground already briefly traversed above, because detail becomes important. As a starting point it will be useful to remind oneself of the nature of the dispute. Mr Johnson’s case, in brief, is that he found out about the investigation into Sir Cliff from a confidential source, mentioned it to Miss Goodwin, and got confirmation of it, and some further details, at a meeting with Miss Goodwin and Supt Fenwick, who co-operated freely and for their own purposes and offered to give him details of an apparently forthcoming search in due course. The BBC’s case is that SYP actively wanted publicity for their search and investigation, in order to show that they were conducting this important investigation and give themselves publicity (but not for the operational reason of trying to identify further complainants). The SYP case is that Mr Johnson approached them with some details of the investigation, told him he was ready to publish the story, and that they felt they had to give him some co-operation (in the form of advance information of the search) in order to discourage him from publishing before the search and prejudicing their investigation. The disclosure was not truly voluntary.

161. The detailed cases and evidence are as follows. As before, any recitation of fact should be taken as a finding by me unless the contrary appears.
162. As appears above, the investigation into Sir Cliff originally emanated from MPS’s Operation Yewtree and was passed to SYP. Operation Yewtree’s first approach was made by DCI Stopford, who briefed Supt Fenwick, who in turn briefed Assistant Chief Constable Jo Byrne because of the high profile nature of the case. It was not until the end of May or the beginning of June that the case was actually handed over and acquired the name Operation Kaddie. Supt Fenwick did not assume the role of Senior Investigating Officer, but he was kept up to date with verbal briefings. He did not at that stage review the papers himself.

163. On 9th June 2014 a confidential source made Mr Johnson aware of the fact that Sir Cliff was under investigation. According to Mr Johnson the reference was oblique - one more high profile person being investigated - and he guessed (correctly) that the person was Sir Cliff. He said he had already seen internet rumours that Sir Cliff had been a visitor to Elm Guest House, a place where sexual abuse is said to have taken place. Then the contact said that the investigation might be “closer to home” for Mr Johnson, from which he guessed that that meant SYP because they were in the area in which he worked. The source did not correct him. Because of what was said, and the rumours, Mr Johnson guessed that there was an allegation of sexual abuse involving a boy and dating back some years. His evidence was that he did not know at the time that the original source of the information was Scotland Yard’s Yewtree investigation, but he discovered that that was the case during the course of these proceedings (when he was ordered to provide certain limited information about the source).

164. Mr Johnson spoke to his superior, Mr Wilson, about this. Mr Johnson’s witness statement acknowledges that he may have had a conversation, but Mr Wilson’s is clearer that there was a conversation at some point between the conversation with the source and the SYP meeting on 15th July, and I find it was not long after the source conversation. There was a discussion about the size of the story and the need to try to stand it up, with contacting SYP being one of the ways in which that might be done.

165. Mr Johnson says that he tried to get information from others to try to “stand up” this story, but failed to do so. So armed with such information as he had he took a chance at the end of a conversation that he was having with Miss Goodwin (with whom he had had previous dealings) about other things on 9th July and asked her if Sir Cliff was on SYP’s radar, or that he had heard he was. That is all he said. He achieved an audible gasp on the other end of the line, a remark about his having good sources and that Miss Goodwin said that she was not sure how much she could say, that she would check and would get back to him.

166. Miss Goodwin’s version of their telephone call is different. In April she knew of the possibility of the Cliff Richard investigation moving to SYP because she was told by Supt Fenwick, but did not know it had moved until June or July. She accepts that Mr Johnson introduced the topic, but insists that he also provided her with some details.
He made it clear that his source was Operation Yewtree, mentioned the location and event at which it occurred, the approximate age of the victim and that it occurred in the 1980s. Mr Johnson denied saying these things, and even denied knowing most of them (in particular that the source was Yewtree). Miss Goodwin said that she was left with the impression that Mr Johnson was ready to publish the story and was seeking a comment.

167. The content of this telephone call is important because the dispute about it is reflected in the dispute about the ensuing meeting on 15th July. Mr Johnson did not make a note of it. Miss Goodwin did, but her note stopped short of noting anything about this part of the conversation other than the note “BBC exclusive”. She said that that is because she was so surprised and taken aback that she put her pen down and listened rather than wrote. Her surprise (which I find to have existed and to have been considerable) is corroborated by Mr Johnson’s own evidence that there was a gasp at the other end, and by a note of a conversation that he had with Danny Shaw when trying to persuade him not to write the objected to parts of his article on 14th August. Mr Shaw made a note of that conversation which records that Mr Johnson said “Press officer cld’n’t hide it … off guard”.

168. Miss Goodwin was sufficiently concerned about what she had heard that she spoke to Supt Fenwick, and he confirmed to her that the matter was transferring in from Operation Yewtree. They mentioned the possibility of giving Mr Johnson a pre-recorded statement (presumably along the lines of that which was ultimately made, but that was not clear), and a note that she made of this meeting shows that. The note also contains the words “knows all” in such a way as to suggest (as Miss Goodwin says it did) that that is a reference to the state of knowledge of Mr Johnson. It is consistent with his saying rather more to her than he says he said. It also says:

“Pre rec may keep him quiet”

This means a pre-recorded interview may keep him quiet. If (as I find to be the case) this note is contemporaneous and not a forgery done a month later (which it would have to be to fit in with a conspiracy theory advanced by Mr Millar) it demonstrates that SYP was trying to suppress or disincentivise disclosure by Mr Johnson, not encourage it (which is the BBC’s case).

169. Either at Supt Fenwick’s suggestion or on her own initiative she then went to raise the matter with the Chief Constable. She told him of her conversation with Mr Johnson, including the fact that he said that his evidence came from Operation Yewtree. Her evidence, which I accept, was that she raised the possibility of Mr Johnson publishing his story and thereby alerting Sir Cliff, and they came down to two possible alternative courses of action - giving the pre-recorded interview or briefing Mr Johnson about the
search warrant. Sir Cliff’s privacy rights were discussed. The Chief Constable agreed that Mr Johnson could be given the date and location of the search nearer the time, but made it clear that Mr Johnson was not to accompany the search party. This evidence is corroborated by evidence given by the Chief Constable himself (Mr Crompton). He told me that he regarded Operation Yewtree as a plausible source of the story.

170. At a much earlier stage of an investigation into this matter, the Chief Constable gave an account of this meeting which put it on 15th July. However, I find that that was not accurate, as he accepted in the witness box. On 11th July 2015 Miss Goodwin emailed Supt Fenwick under the subject “and another…” in the following terms:

“This is a draft if asked only for the other job. The CC [Chief Constable] is keen that we don’t take anyone with us but is happy for a briefing to take place before hand.”

171. She said that this referred to her discussion with Mr Crompton about Sir Cliff and Mr Johnson, and I accept that evidence. It does not do so in terms, but it refers to a draft. No draft was attached but on 14th July she had what she described in an email as “another go” and attached a draft plainly relating to the Cliff Richard matter. So this email exchange clearly places her conversation with the Chief Constable as following her conversation with Mr Johnson and before the tripartite meeting on 15th July.

172. Reviewing the evidence at this stage, I consider that the probabilities are that Miss Goodwin is correct in her version of her early discussion with Mr Johnson. It is apparent on the objective evidence (her email of 11th July) that she had been to see the Chief Constable and that they were already considering briefing statements and briefing about the search. Something triggered that high level discussion. It was either a fear of exposure of their investigation or a decision to exploit an opportunity for publicity which had presented itself. Unless each of the Chief Constable, Supt Fenwick and Miss Goodwin are lying about this, and I do not think they are, it must be the former. And if it is the former then Mr Johnson must have said sufficient to spook them all. If all he said was that he was aware that they were looking into Sir Cliff then I do not consider that would have produced the level of concern that it did. It was because he had details, including the fact that the case had come from Yewtree, that there was a fear that he had enough to publish. I accept that the reference to Yewtree was made and it gave added force to Mr Johnson’s position. Mr Johnson’s case was that, like any journalist, he would never have mentioned Yewtree as his source even if he had known it, because a journalist would not reveal his or her source. In the present case I think that it is at least conceivable on the state of the evidence thus far in the narrative that Mr Johnson would have mentioned Operation Yewtree because doing so would be likely to get SYP’s attention more than if he did not, and I find that that is what he did. He may have felt that he was not betraying a source in that manner because the source would not be identifiable from such a generalised statement (as I found to be the case in an earlier judgment in which I ruled that Mr Johnson should reveal whether he
believed the source to be, or whether the information came from within, Yewtree or not). Or he may have said it because he was drawing an inference as to where the information ultimately came from even if his interlocutor was not involved in Operation Yewtree himself or herself. I do not think it matters which.

173. There are some grounds for finding that it is likely that his informant was a police officer or involved in a police force (probably the Metropolitan Police). In a conversation with Mr Danny Shaw before the latter published his piece on 14th August 2014 Mr Johnson had a conversation with Mr Shaw. The latter made a note of it which reads:

“Heard from another officer they are
looking at Cliff .. 2 months ago ..
Press officer cldn’t hide it … off guard
… said I’ll do nothing.”

174. Danny Shaw was not called to give evidence but Mr Johnson was cross-examined about what he said to Mr Shaw. He was understandably coy in his evidence about what he said about his source, in order to protect its confidential status, but eventually he gave some important pointers. Originally the words “another officer” were redacted from the note (unjustifiably in my view) but they were unredacted during the trial. Without saying exactly what he said Mr Johnson said he did not use the word “another”, or “officer”; nor did he say the equivalent of “officer”. He said that Mr Shaw had not recorded what he had been told. He also said that he did not “precisely” make it clear that the source was a police officer, or say that it was “definitely” someone in a police force; and he did not make that “explicitly clear”. He was skating round the edge of something, and I think that that something was that his source was indeed a police officer or possibly someone associated with a police force.

175. I now resume the narrative of July 2014. Mr Johnson and Miss Goodwin had agreed to meet on 15th July at 1pm in order to discuss other matters and on 14th July at 14:37 she emailed him asking him if he wanted her to “set something up with the officer in the celebrity case?”. She pointed out that the officer (who must have been Supt Fenwick) was going on holiday “if you want to get a pre rec” (ie a pre-recorded statement).

176. Mr Johnson replied (at 14:39):
“Oh that would be fab if you could, need to give the boss a few details to get a cameraman, haven’t said anything yet. How much can I say?”

177. There are two significant things about that email. The first is that it is false in saying that he has not said anything yet. He had had a significant discussion with Mr Wilson which he can hardly have forgotten about. I consider that this is an example of his being prepared to bend the facts in order to tease material out of a counterparty. The second is that, taken with the reply, it demonstrates that he had told Miss Goodwin more than that he knew Sir Cliff was on SYP’s radar. He is asking how much he can say. Ostensibly he is asking how much of the detail that he had mentioned to Miss Goodwin he would be at liberty to pass on. On his own version of events there was only one piece of information that he had said he knew - that Sir Cliff was on their radar. On Miss Goodwin’s he knew more than that, and his email makes more sense in that context. Mr Johnson sought to say that he intended to give her the opportunity to provide some more information, but that is not what this email apparently says, and the following emails make it clearer that the underlying assumption is that Mr Johnson had given her details (in the plural) and was asking how many of those he could pass on. At 14:46 Miss Goodwin responded:

“No one else has picked up on it yet so while ever it stays that way the story is all yours. If you can get away with saying the bare minimum I'd be grateful but accept you may have to give the name if pushed.”

178. At 14:55 Mr Johnson responded:

"Can you give me a quick call and we'll agree what I can pass on? [Number supplied]"

I consider that this email exchange tends to support Miss Goodwin’s evidence as to the contents of the 9 July telephone call, and I prefer her evidence on the point to Mr Johnson’s.

179. Before the meeting on 15th July Miss Goodwin conveyed that Supt Fenwick did not wish to do a piece to camera and instead wanted to "brief" Mr Johnson. The meeting then took place at 1 pm on 15th July. Before the meeting Supt Fenwick asked for, and was given, a précis of the investigation in order to remind himself. This is understandable, because he was, in his own words, "ridiculously busy", as the officer in charge of a very busy and important section of SYP. The précis that he got was a précis of the statement of the complainant. The précis summarised the complaint, and
that the incident took place at the ground of Sheffield Wednesday, because he (the complainant) remembered a lot of blue and white (the colours of Sheffield Wednesday), and he described going into a sports equipment type room.

180. The difference between the parties as to what happened at this meeting has been summarised above. Mr Johnson describes meeting Supt Fenwick (whom he had never met before) and that he made brief handwritten notes of what he was told. Supt Fenwick began by saying something along the lines of "it sounds like you know as much as we do", which surprised Mr Johnson. Mr Johnson checked that the celebrity in question was Sir Cliff, and Supt Fenwick provided him with details of the allegation. He was told that it involved a boy under 16 and a friend (now dead) who had come forward to say that he and his friend had been sexually assaulted by Sir Cliff in a dressing room after a Billy Graham event at Bramall Lane football ground (which is the football ground of Sheffield United, not Sheffield Wednesday) in the early 1980s. He had to be told who Billy Graham was. Supt Fenwick explained how Operation Yewtree had passed the allegation on. It was explained that if it came to a charge it would be one of sexual activity with a child. He was given detail about the alleged offence. Supt Fenwick said that he was not convinced that the complainant's evidence was strong enough to go to court, which Mr Johnson says he wrote down as "unlikely charge". When Mr Johnson asked what would be likely to happen next, he was told that SYP was planning to search Sir Cliff's property in Surrey on 7th August. Mr Johnson disclaimed any mention by him of Elm Guest House. If Sir Cliff was at the house then he would be arrested. A joke was made about considering arresting Sir Cliff when he had been at Wimbledon a few weeks before. Supt Fenwick would give a pre-recorded interview for the BBC either late in that week or when he returned from leave on 6th August. Mr Johnson denied that he ever said that his source was Operation Yewtree. The key point about all this is that all this information was said to have been volunteered by SYP for no apparent reason. Mr Johnson’s starting point had been that he knew, and said, only that Sir Cliff was on their radar.

181. SYP’s case is that the starting point was different. Mr Johnson had given more detail when he first rang, and a belief that he knew those matters was SYP’s starting point. Miss Goodwin told me she was keen to work with Mr Johnson to make sure that the story did not come out too early for SYP’s purposes. That was the strategy of having the meeting and conducting it. At the meeting Mr Johnson spoke about the detail of the allegations, including the fact that the incident had occurred at a Billy Graham rally at Bramall Lane (not the home ground of Sheffield Wednesday, which was Hillsborough). Mr Johnson mentioned the Elm Guest House allegations (of which Miss Goodwin was unaware). She did not remember Supt Fenwick saying that Mr Johnson knew as much as they did. Mr Johnson was told about the planned search and a request made that he should accompany the search party was turned down. Mr Johnson made it clear that he had a story that he was ready to publish; that concerned her.

182. Supt Fenwick gave similar evidence. He said he was apprehensive about the meeting but felt he had to hold it in order to listen to what Mr Johnson had to say given what
Miss Goodwin had told him about Mr Johnson’s knowledge of the investigation. Mr Johnson told them that he had got his information from Operation Yewtree, and gave the same details of which he was aware as Miss Goodwin had narrated. Mr Johnson mentioned Elm Guest House (of which Supt Fenwick was aware in general terms, but he did not know of an alleged link with Sir Cliff). Mr Johnson explained that he was ready to publish a story and wanted a comment, and from his (Supt Fenwick’s) side they explained that they did not want him to publish a story at that stage because the investigation was at an early stage. Supt Fenwick was very concerned at the damage a premature report would do to the investigation, including by tipping off Sir Cliff. Miss Goodwin explained to Mr Johnson that SYP would be prepared to give Mr Johnson the date and location of the search if he agreed not to publish the information he had got from his source. Mr Johnson agreed.

183. All three participants made notes of this meeting. Mr Johnson claims to have made his at the time. Miss Goodwin and Supt Fenwick made theirs in A4 ruled notebooks two days later (as each note internally acknowledges). That was said to be because they talked and realised they should make a note. Mr Millar put to both witnesses that their notes were made up after the dispute erupted on 15th August, in order to fit the story which SYP then wished to advance. That is a serious allegation, and I therefore have to devote a little time to these notes.

184. Miss Goodwin’s note appears on the bottom half of a page with a line dividing it from the note above it. The preceding note is dated 17th July; the following note is dated 21st July. The note reads:

“Dan Johnson 17-7 (meeting on 15th)
Knew detail of investigation - Got it from Yewtree = QP?
Bramall lane, underage boy
Elm Guest House - Surrey? - not ours.
Why not Yewtree, Ready to run
Req Comment! Or to go on warrant
- Declined both
Consider pre rec
or notify of search date + location
to prevent pub/broadcast - Human rights
BD - nature of allegations known
Kayleigh Shaw rape of child?
Scargill - specific to ECU - don’t know
what this is?”

185. The last two lines are written below the last ruled line on the page and look as though they have been fitted in. Miss Goodwin acknowledged that they, and the preceding line, were probably written after the rest of the note (she was not sure about the “BD”) line. The note was intended as a note for her about the Cliff Richard matter, and she decided to go back and add the other matters (which were dealt with at the meeting) afterwards.

186. Supt Fenwick’s note is written on the bottom half of a right hand page, separated from a previous note by a wavy line. The next page, being a left hand page, is blank. The page after that has two notes bearing the date 17th July. The preceding note is undated (as are the couple of notes prior to that). The note of the meeting reads:

“15.7.14 Dan Johnson/Carrie Goodwin Carbrook -
Notes made up after meeting (17/7/14)

DJ - Aware of CR allegations 12-14 yrs old - Billy Graham 80s
- Elm Tree Guest House
- Knew Everything
- Confirmed Police Source - Yew Tree - refused to name
- Going to print - wants exclusive
- Refused to take as part of a team, agreed to notify when we are doing warrant - As late as poss.
- Do not want him to publish now - not ready to go.
- Why SYP not Yewtree - explained.

DJ - Asked re BD - Early steps. CG gave official line.”
I have no hesitation in rejecting the suggestion that these notes were written after the row of 15th August and when the matter was heading for investigation elsewhere. First, I do not believe that the individuals concerned, and particularly, Miss Goodwin, would have indulged in that dangerous activity. It would have required a degree of conspiracy which I think is highly unlikely. Second, they do not read as notes which (if the BBC’s suggestion is accepted) must have been carefully contrived to give a certain impression as to their contents and appear to be contemporaneous. That is true of both the content and of their nature and appearance. The content just does not read that way, particularly Miss Goodwin’s with its abbreviations (“QP?” which apparently stands for qualified privilege). I think it very unlikely that she would have contrived the last three lines which would have required her to remember things which were not at the heart of the meeting. So far as appearance is concerned, for there to have been a conspiracy to contrive helpful mendacious notes post-15th August Supt Fenwick and Miss Goodwin would have had to have worked out they needed notes, realised that their notebooks did not have vacant slots for the 15th July but fortunately each have a vacant half page which enabled both of them to have pretended to create notes on the 17th. The availability of two half pages within the same timeframe would have been a very happy accident.

There are also problems with the timing of the alleged conspiracy. The theory is that once it was suggested by Danny Shaw that SYP had gratuitously leaked the investigation details and volunteered the search then Miss Goodwin and Supt Fenwick decided to deflect blame by saying that it was Operation Yewtree who leaked it and Mr Johnson told them that. On the way that case emerged at trial, that time was put as being the occasion of a text sent by Supt Fenwick at 21:09 on 14th August when he texted to Miss Goodwin:

“… go for gold. Tell him we will fight it and say bbc forced us to do deal.”

followed 2 minutes later by a text in which Supt Fenwick proposed wording for a press release which said that the BBC were tipped off by officers from Operation Yewtree. The conspiracy theory would have it that that is Supt Fenwick’s proposal for how to deal with the criticism, and would have to be the start of the conspiracy which involved the backdating of fabricated notes. No other starting point for the conspiracy was proposed or tested.

As Mr Rushbrooke pointed out, the timing of this conspiracy does not work. At 20:23, ie 45 minutes before the “go for gold” text, Miss Goodwin had texted the Chief Constable (Mr Crompton). In that text, in which she alerted him to the Danny Shaw story suggesting that SYP leaked the story to raise its profile, she said:
“It’s wildly inaccurate. The met leaked it and we asked the BBC not to run it but that we would give them a statement as soon as it was done.”

190. So the allegation about leaking from Yewtree (for which “the met” is likely to have been a synonym) was being made before the purported conspiracy to make it was hatched. Furthermore, there were even earlier indications that SYP were saying that it was the Metropolitan Police that leaked the story. At 19:22 Miss Goodwin texted Mr Johnson to complain about the Danny Shaw piece. She said:

“Just seen Danny Shaws report suggesting we tipped you off and it was to maximise coverage. Not happy about this at all. This wasn’t the case and brings the force into disrepute.”

191. That seems to have been her first reaction, and while it does not mention a tip-off from the Metropolitan Police or Operation Yewtree, it does dispute a rationale which is now the BBC’s case. More significantly, it was followed by an email from Miss Goodwin on 14th August very shortly afterwards timed at 19:26, sent to the media department and Supt Fenwick, referring to the Danny Shaw article saying the following:

“We need to challenge this as it implies firstly that we leaked it and secondly that this was to maximise coverage. I’ve challenged Dan Johnson on this.

I’ll draft a letter to Sir Bernard Hogan Howe addressing this from the Chief as it was Met officers that informed Dan.”

So hours before the conspiracy to blame disclosure on the Metropolitan Police was said to have been forged, Miss Goodwin was referring to that organisation as the original source.

192. Matters do not stop there. SYP keeps an internal digital database of media contacts (the “Solcara” database). In it there is an entry timed at 09:25 on the morning of 14th August in which Mrs Beattie recorded that Mr Johnson was aware of the warrant in advance and that “It is believed that the information came from the Met”. This latter point is inaccurate as it stands so far as it purports to refer to information about the warrant coming from the Metropolitan Police, but it is consistent with the theme that the original tip-off about the investigation came from the Metropolitan Police.
193. Accordingly, the idea that the Metropolitan Police should be blamed was not something that emerged during the evening of 14th August as a result of dealings between Miss Goodwin and Supt Fenwick. No other genesis for any such conspiracy was suggested. In the light of all of the above matters I find the conspiracy claim therefore fails, and with it so does the challenge to the notes based on their being a latter-day fabrication.

194. That does not, of course, mean that the notes are the only evidence of the meeting and have to be taken at face value. There is also the note taken by Mr Johnson. No challenge was made as to the contemporaneity of the note in terms of the day on which it was made, though there is a challenge as to whether it was made in the meeting or after it, which I do not need to resolve. The note reads as follows:

“15/7/14 SYP HQ

Single allegation single individual
– mid 80s [words “81/82 inserted” at this point above the rest of the text]. Unlikely charge

Billy Graham event – gospel Bramall Lane

under 16, sex allegation, [detail of allegation] in dressing room.
2 friends, one deceased as an adult.

Met no other matters

victim reported to ITV, Mark Williams Thomas

UK residence Surry[sic] -7th August

small SY team

This week pre-rec with Matt F or

week. Thursday 7th Wednesday 6th

10 officers, first thing morning.

Sexual activity with child.

Joanne Wright – media team.”

195. Mr Johnson’s evidence was that the material parts of this note represented what he was told by the police, none of which he knew before. The BBC’s case was that this helped to establish that all that information was being volunteered by SYP; it was not the case
that Mr Johnson already knew it. The case of SYP and Sir Cliff is that this note was an amalgam of some things that he was plainly told (for example the details about the search) and some things which were confirmed (not said ab initio) by Supt Fenwick or not said by him at all (for example, the detail about the Billy Graham event and the fact that it occurred at Bramall Lane).

196. Before making findings about that, which ultimately goes to the key question of whether or not SYP thought it was “buying off” (my expression) Mr Johnson or whether it was volunteering information for its own purposes, it is necessary to move to subsequent events, and particularly the post-search events and the email traffic surrounding its aftermath. The context is the fall-out from the Danny Shaw article to which I have referred above, and what is significant is what passed in certain emails internal to the BBC.

197. After the 15th July Mr Johnson had a telephone conversation with Mr Wilson at which the fruits of the 15th July meeting was discussed. Mr Wilson asked how Mr Johnson had managed to get the level of detail that he had got about the offence itself (not recorded in any of the notes). According to Mr Johnson’s witness statement he said he had got the police “‘over a barrel’ because of the tip-off I had received.” The concept of having them “over a barrel” would be entirely consistent with the case of the police and Sir Cliff that they felt obliged to offer Mr Johnson something to prevent something worse happening (ie premature exposure of their investigation) and inconsistent with Mr Johnson’s claim that all information was willingly given. Mr Johnson did not renge from his evidence about this, but sought to say that he made the remark to Mr Wilson in jest. I think it unlikely that there was any such jest. It would be a very odd remark to make in jest.

198. On 14th August, after the search was over, Mr Richard Clark of the BBC sent Mr Johnson an email with just the subject heading, “Good work, Dan. Well done. R”. Mr Johnson replied (at 18:00):

   “Thanks Richard, it was old fashioned journalism, not just a gift from the cops”

199. When asked what he meant by the phrase “old fashioned journalism” (which he had also used in a text to Miss Goodwin, adding the word “good” before it) he said that it meant “nurturing a source and getting information from them”. I agree with Mr Beer that on Mr Johnson’s version of events what he got was indeed a “gift from the cops” and there was not much “nurturing” going on. On the other hand, on the SYP version of events there was a process which might euphemistically be described as “nurturing”, and a threat or suggestion that he would publish could be said to be “old-fashioned”. This unguarded comment of Mr Johnson’s is more supportive of SYP’s case on the facts than his own.
200. Next is an email sent by Mr Johnson to Mr Munro and Mr Smith about the Shaw article row at 23:28 on 14th August. As appears above, Mr Johnson was not at all happy about the article and wanted it amended. Although the key words are those that I emphasise below in italics, it is worth setting out the whole email:

“Gary, I'd appreciate the chance to speak to you in the morning about the Danny Shaw piece before you do anything else. It is causing a huge problem with SY Police, they say it's giving the impression they tipped me off officially, making it harder for them to argue to other media that they didn't. I explained the full story to Danny and am surprised by the emphasis he's given. It does feel like biting the hand that feeds us and will undoubtedly mean we get no further info on this story (or any other involving SYP I suspect). I think we should amend his piece to reflect that I went to them with the info and they chose to confirm details and keep me informed rather than allow me to run the story before they were ready to take action. Otherwise we are defending an analysis/opinion piece which is misleading, over our ability to keep ahead of developments in this story and my personal relationship of trust, honesty and fair dealing with SYP.”

201. The totality of the email indicates Mr Johnson’s apparent concern to set the record straight. Although it might be thought to be a little surprising that he would want to have openly said what he seems to be suggesting in italics, what the italicised words clearly indicate is a version of events which is far more consistent with SYP’s case than Mr Johnson’s. He “went to them with the info” does not really describe his saying no more than Sir Cliff was on their radar; what SYP did was “confirm details”, not gratuitously supply every relevant fact about the investigation that was discussed at the meeting; and the choice facing SYP at the meeting was to face premature publication or “confirm” the details. They were “over a barrel”, to use Mr Johnson’s own phrase. Mr Johnson’s attempts to explain away those words in his cross-examination were unconvincing, though it is significant that he did say, in this context:

“21. I don't know the entirety of
22 why they decided on that course of action, but I think
23 in part it may have been them feeling that there was
24 a risk, if they didn't co-operate with me and keep me
25 informed, that I might go and report the story somewhere
1 before they were ready to do their search” (Day 7 pp120-121)
202. This is a telling concession (which also emerges at other points in his oral evidence). It shows what Mr Johnson had picked up, or was at least within the sense of the meeting. But if all that he had told them was that he had heard Sir Cliff was on their radar, where does the risk come from? He knew practically nothing. He must have given the impression he knew more than that. That would have given Supt Fenwick and Miss Goodwin something to be concerned about in terms of a premature publication. It would also explain why Supt Fenwick would have said at the meeting (on Mr Johnson’s own evidence) that he (Mr Johnson) seemed to know as much as the police did (see Mr Johnson’s account of the meeting, above).

203. The morning after the email of 14th August, Mr Smith had a conversation about this matter with Mr Johnson. Mr Smith had declined to direct Danny Shaw to alter his article. According to Mr Smith they had a discussion about Mr Johnson’s source (his original source). He does not remember discussing what Mr Johnson had said in his email the night before despite the fact that in his cross-examination he said it was “clearly something we were going to talk about the next day” (Day 9 p55). I find Mr Smith’s evidence very surprising, bearing in mind that Mr Johnson’s email seemed to have gone some way towards confirming what SYP were complaining about. Both he and Mr Munro seemed to play down the effect of that email by relying on something that was a common theme of the BBC’s evidence, namely that as a reporter Mr Johnson would not have had power to decree that a story be published (that would be a decision for editors) and that any respectable police force media department would know that. That seems to me largely to miss the point. Mr Johnson was saying what he was saying, and he himself had got the impression that the police believed they were at risk of a premature publication, whatever his powers might or might not be.

204. At around midday on 15th August there was a four-way telephone conversation about the issues thrown up by the Danny Shaw article and the SYP attitude to it, between Mr Munro, Mr Johnson, Mr Matthew Shaw and Mr Smith. It was preceded by an email from Miss Goodwin in which she set out the text of a press release which SYP intended to put out at 12.30 that morning. The email was sent to Matthew Shaw, who forwarded it to Mr Smith, who forwarded it to Mr Munro. Thus it was available for discussion at the four-way conversation. Its opening paragraphs read:

“South Yorkshire Police was contacted by a BBC reporter some weeks ago in relation to a planned investigation. The BBC reporter concerned had considerable detail about the operation and intended to run the story at the earliest opportunity.

In order to protect the integrity of the investigation and, of course, the individual’s right to a fair legal process, South Yorkshire Police had no option but to agree to the BBC’s request and let the reporter the date of the search [sic]. The reporter was informed the night before the search took place.”
Had we not taken this action, the media coverage could have allowed any potential evidence to have been removed or destroyed having a detrimental if not devastating impact on the investigation.

We note in the BBC’s coverage that suggest [sic] we need to justify our actions. Given their role in this we believe this to be unfair and inaccurate comment.”

205. There was thus no doubt about the stance that SYP was taking before that four-way conversation took place, and it was obviously discussed in that call. The main result of that telephone call seems to have been to accept the proposal that Mr Munro would send his tweet about SYP not being the original source of the BBC’s tip.

206. No note of the telephone conversation has been produced, though it is an important one for the purposes of this litigation, and no witness dealt with it substantially in his witness statement (though Mr Smith referred to it briefly). However, important parts of its content can be inferred from some subsequent email traffic which must have reflected what passed in that conversation, and in particular what Mr Johnson must have said (or failed to say) during it. That traffic, and how it relates to that four-way conversation, was as follows.

207. At 18:45 on the same day Mr Munro emailed Danny Shaw in the following terms (in response to an email from Danny Shaw saying that Mr Munro’s earlier tweet had prompted calls to the Metropolitan Police):

“I understand why they are getting calls, but SYP very exercised by implication that they briefed us to get publicity. In fairness I don’t think they did. We went to them. Our hand here rather weakened by handling if SYT [sic] over past few weeks, in truth. They would have gone public. Would have been bad news for all if they had.”

208. Since the preceding four-way conversation must have considered what the SYP was proposing to publish, the manner in which the story was obtained must have been in the forefront of Mr Munro’s mind, having had the benefit of a conversation with Mr Johnson about it. In this email he does not say anything which would suggest that Mr Johnson had told him that SYP had volunteered the information, which is Mr Johnson’s current version of events. In fact, it suggests the opposite. Mr Munro did not have the impression that SYP briefed Mr Johnson in order to get publicity, contrary to the way in which the BBC now puts its case, and what he says is inconsistent with the voluntary disclosure theory. Instead he refers to the “handling” of SYP over the preceding period, which is much more likely to refer to the pressure that SYP felt it was under as a result of a perceived threat to publish. I find that the reason why the SYP going public would...
have been "bad news" was because the BBC would have felt unable to deny the version that SYP was minded to put out. This email, and what it impliedly says about the four-way conversation, therefore provides support for SYP's version of the events of 15th July.

209. Of even more significance is an email that Mr Smith wrote to Mr Wilson and Mr Matthew Shaw at 18:33 on the following day (Saturday 16th August). Its subject matter is "dan the man". Again, it must reflect the content of the four-way conversation in which Mr Johnson took part. The relevant parts read as follows:

"Thursday and Friday were very full on with Cliff. Fantastic world exclusive from Dan. But... there are some issues about exactly how his relationship with SYP developed. Things got VERY heated on Thursday evening when they took exception to a Danny Shaw 1800 piece (that arse [individual named] mixing it as ever) which accused them of seeking maximum publicity, and said they'd have to answer for their actions. (a piece partly motivated by Danny's continuing bitterness about not being allowed by his bosses to be first to name Rolf Harris, but that's another story). In a series of angry conversations with Matthew [Shaw] on Thursday evening SYP ended up accusing Dan of blackmail. (Yes they used the word blackmail). They said he came to them with loads of detail on their investigation and they felt their only course of action to protect their enquiry was to cooperate totally with him. This suggests to me extreme naivete on their part. But it also suggests (and Dan Doesn't entirely deny this) a rather heavy-handed approach by him. He seems to have been nailing them to a wall, saying if they didn't give him a guarantee of an exclusive tip off on the search operation, he'd broadcast a story in advance. (Which of course we would never have done). One part of me is hugely impressed with his tactics. But it wouldn't look pretty if it came out – and it nearly did yesterday.

...

Anyway, the point of this long email is to warn you that Dan's had both a very successful and very bruising time, and we will need to talk to him further about his part in the bigger BBC. He just didn't get that – annoying and strange as it might be – BBC News has to report on itself in stories like this. And we'll need to talk through with him what's okay and what's not in getting exclusives.

I suggest we take him out for dinner on our Thursday night in Newcastle at the end of September. Either that or lunch on the friday.
In the short term, it's worth you repeating to him the message I tried to hammer home on Thursday and Friday — he should talk to nobody (apart from us) inside or outside the BBC about the genesis of this story.

There may be fallout this coming week (e.g. if Cliff Richard directly accuses the BBC of invading his privacy which he hasn't done yet.) So Dan may be called on by Fran (who knows about some but not all of this) to explain the sequence of events. If this happens, he'll need a lot of guidance and support…"

210. The thrust of this email is plain. Against the background of a clear assertion by SYP that it was pressurised into cooperating by some sort of threat or statement about an intention to broadcast, and against the background of a preceding conversation involving Mr Johnson at which the point must have arisen, not only is there no suggestion of a denial of SYP's case, there is positive support for it ("Dan doesn't entirely deny this", and "He seems to have been nailing them to a wall, saying if they didn't give him a guarantee of an exclusive tipoff on the search operation, he broadcast the story in advance"). While it records as a police assertion, and not as an apparent acceptance by Mr Johnson, that Mr Johnson approached with "loads of detail", there is no indication that Mr Johnson denied that, and if he did not provide them with knowledge of some detail (beyond "being on the radar") it is hard to see where the pressure can have come from. This email, against its background of the four-way telephone conversation, therefore supports the SYP case as to the genesis of the cooperation. Mr Smith never received a challenge to this from Mr Wilson, with whom Mr Johnson spoke on the following Monday.

211. This email was put firmly to Mr Johnson in cross-examination, so that he could respond to what it seemed to say about the reasons for SYP cooperating, and the level of detail apparently available to him. He was unable to explain satisfactorily how Mr Smith was left with the views expressed in the email consistently with what he now says happened at the 15th July meeting. Significantly, he did say more than once that the police may have felt they were under pressure, though he denied that it was as a result of anything that he said. Mr Johnson’s oral evidence did not in my view detract from the natural inferences to be drawn from the email as to what Mr Johnson did and did not say in the four-way conversation.

212. Although Mr Wilson acknowledged that to some extent he raised these matters with Mr Johnson on the Monday morning, on his return from holiday, and although the matters were rather striking, Mr Wilson had no real recollection of that meeting other than saying to Mr Johnson that if he thought there was anything he might have done wrong then he should say so now. I find it very surprising that he would not put the matters in the email to Mr Johnson and remember something of his response. I think it more likely that those matters were discussed between the two men, and do not accept Mr Wilson’s oft-repeated assertion of what he says he put to Mr Johnson.
213. Mr Smith’s account in cross-examination of what he really meant by this email was unimpressive and, I am sorry to have to say, to an extent evasive. What seem to be recorded as conclusions reached by him from a telephone conversation in which Mr Johnson took part were presented by Mr Smith as being no more than what SYP was saying and which it was for Mr Wilson to take up with Mr Johnson when he came back from holiday. He was unable to say what he meant by “tactics” deployed by Mr Johnson, despite the fact that they “impressed” him, according to the email. In my view he was seeking to evade the obvious construction of the email, and the obvious narrative that it contained as to the four-way conversation, because it was inconsistent with the BBC’s present case.

214. In all the circumstances I find that this email is a telling piece of correspondence in assessing what happened at the 15th July meeting. It supports Sir Cliff’s, and SYP’s case, not the BBC’s case.

215. Mr Munro was not cross-examined about that email, but he was cross-examined about the next relevant email, and confirmed that, in relevant respects, it confirmed what Mr Johnson had told him (and therefore the others) in the telephone conversation. The email is dated 17th August 2014 and is timed at 11:34; it is from Mr Munro to Ms Unsworth and Mr James Harding (her superior). This was effectively a hand-over note because Mr Munro was about to go on holiday. In it Mr Munro sets out what he described as “a summary of events leading up to the coverage on Thursday”. So far as relevant it reads:

“[Mr Johnson] approached SYP in the person of the Director of Comms, Carrie Goodwin. Dan and she met (I don’t know whether others were present) and at that meeting Dan told SYP he had the story. An arrangement was made at that meeting which ensured no reporting of the investigation by the BBC until the search of the Sunningdale property had been completed. Dan does say that he talked about the possibility of broadcasting the story ahead of that in the meeting, which SYP have subsequently described as "blackmail". (Clearly we would never have done so).

... 

Shortly afterwards [viz shortly after he proposed that he send his tweet to resolve the dispute with SYP] she [viz Miss Goodwin] rang to say that the Deputy Chief Constable had rejected that idea, and would issue the press release. It was clear by now that the BBC would have to rebut that statement because it spoke about the possibility of the BBC broadcasting a story which would have compromised the enquiry – something we clearly
would not have done, though Dan Johnson may have given the opposite impression."

216. The important elements of this are that Mr Johnson “had the story”; that there was an agreement for no reporting; that Mr Johnson talked about the possibility of broadcasting the story ahead of the search; and that Mr Johnson may have given the impression that he would broadcast the story. All those elements are inconsistent with the present case of the BBC (which appeared in its Defence, on which Mr Munro signed the statement of truth), a fact which, surprisingly, Mr Munro declined to acknowledge in the witness box. He seemed to think that the fact that Mr Johnson could not decide by himself what to broadcast, and that the BBC would not broadcast something which would compromise the inquiry (which he said was the case) somehow detracted from the plain force of what Mr Johnson had apparently said to him. He did, nonetheless, seem to accept that what he wrote reflected what Mr Johnson had said. What Mr Johnson said is not consistent with his (and the BBC’s current) case on what happened at the 15th July meeting.

217. I now turn back to consider the totality of that evidence in order to determine what happened at the meeting on 15th July, and the associated point of what Mr Johnson had said to pique Miss Goodwin’s interest in the preceding telephone call of 9th July. I find that the police case is to be preferred and accept the evidence of Miss Goodwin and Supt Fenwick and reject the evidence of Mr Johnson. Whatever it was that Mr Johnson said on 9th July, it was sufficient to cause her to discuss the matter and to go to see the Chief Constable. I am satisfied that Mr Johnson said something to the effect that the origin of his source was Operation Yewtree. He said that in order to add credibility to the basis of his probing, and in doing so he probably calculated that that would not reveal his actual source because the numbers involved in the Yewtree investigation were sufficiently large that it would not do so. The benefits to him were sufficiently great to induce him to add that fact. He also provided the other details which Miss Goodwin says she gave him. I accept the evidence of Mr Crompton about what he was told, and that a reference to Operation Yewtree was part of the picture which induced him to propose allowing Mr Johnson to know about the search when it happened. If Miss Goodwin had gone to the Chief Constable with just what Mr Johnson said he said I do not consider that Mr Crompton would have been as concerned as he was. Mr Johnson repeated the reference to Yewtree at the meeting on 15th July, which is why both Supt Fenwick and Miss Goodwin wrote down their references to it. Their notes are not later fabrications. I also find that the other details that Miss Goodwin and Supt Fenwick referred to were provided by Mr Johnson, again in order to suggest that Mr Johnson had some useful information which would induce SYP to talk to him (which it did). Had he merely said that Sir Cliff was on their radar Supt Fenwick would not have said something to the effect that he (Mr Johnson) knew as much as they (the police) did (which is Mr Johnson’s own evidence). It was because he claimed to have the details he did, and because he referred to his ability to publish a story at that point, that Supt Fenwick and Miss Goodwin were sufficiently concerned to offer him details of the search in order to procure that he did not publish. I accept that is what they did, and that there was an arrangement to that effect.
218. Even Mr Johnson accepted that they might have had that impression. He told his colleagues that, and indeed told me that. That means, in effect, that SYP did have it, and if they had that impression then it must have been because of what he said. It is barely credible that the meeting would have started with his having, and professing to have, virtually no detail, for him to receive detail voluntarily given, and Supt Fenwick and Miss Goodwin at that point to become concerned that Mr Johnson had a story which he could and might publish. That makes no sense.

219. It is no answer to that point to say that, as a matter of policy and internal organisation, Mr Johnson could not have procured publication by himself, a point much relied on by BBC witnesses and repeated by Mr Millar in his final written submissions. If he said that he could publish then he doubtless expected that to be taken at face value, and in any event it must have been. I do not accept the evidence of BBC witnesses to the effect that it is not credible that it would be believed because those receiving the statement would know that Mr Johnson could not decide on publication all by himself. For all they knew he might have been able to deliver the story, and to put in a call to the editors (which BBC witnesses said could and should have been done if SYP was concerned about it) would not necessarily have occurred to the police as the best plan in the circumstances - it was not guaranteed of success and would have involved a further on the record disclosure of the investigation. I would also add that if Mr Johnson knew he could not necessarily get the story published it makes his threat to do so even more undesirable.

220. Nor do other points made by Mr Millar and the BBC have much weight in the BBC’s favour. He suggested the following matters, to which I have added my determination:

(a) Mr Johnson’s ethical duties not to reveal his source made it highly unlikely he would refer to Operation Yewtree. I have already dealt with this.

(b) There are no SYP texts or emails before the evening of 14th August 2014 stating that Mr Johnson’s information came from Operation Yewtree or that he pressurised SYP into giving information. I find that the first part is not true - see the Solcara log entry referred to above. In any event, I do not consider that this demonstrates a contrived story - it just happens to be the case. Of more significance are the subsequent admissions of Mr Johnson to his colleagues that there was a linkage between non-publication and the provision of the search information.

(c) A potential story about the Mayor of Rotherham and his recent resignation was discussed at the same meeting, and Mr Millar submitted that the way in which it was dealt with demonstrated that what was happening was a responsible exchange of information between a journalist and a police force. Although there was a significant amount of analysis by both sides of what happened in relation to this point, I do not consider that any of it is significant enough to have a material bearing on this issue.
(d) It is implausible that Mr Johnson would have said or implied that the story would be published because that would be an editorial decision outside his control. I have already dealt with this point and dismiss it.

221. Mr Millar’s case inevitably involved his suggesting a motive for the alleged voluntary disclosures. This is an important part of the jigsaw puzzle. Mr Millar’s hypothesis was a desire on the part of SYP to achieve publicity for the force and its activities. He expressly disclaimed a case that the force wanted publicity in order to see if more complainants would come forward (a suggestion that had been made by others). While this motive is in general terms plausible, I do not accept that they had it in this case. The evidence of the police witnesses was that, left to their own devices, they would not have wanted publicity in this case, not least because at the time they did not regard the case as strong and would not have wanted publicity for a weak case. I accept their evidence. Apart from the disclaimed suggestion of a desire to “shake the tree” (my expression), no other motive was suggested. In the absence of a motive, a voluntary disclosure is even more unlikely.

222. I do not consider it is necessary to lengthen this judgment by a dissection of the notes of the 15th July meeting, even though such a dissection took place before me (particularly in relation to Mr Johnson’s note). It is sufficient to say that I have taken them into account and am satisfied that, in their own respective ways, they all represent versions of the truth. So far as Mr Johnson’s note is concerned, I am satisfied that it represents an amalgam of what he was told and did not know, and what he had previously understood and managed to get confirmed by Supt Fenwick at the meeting.

223. In finding, as I do, that the police were motivated by a desire to remove the risk of premature publication, and that there was an agreement to disclose the search date and time in exchange for non-publication, I do not intend to find a blatant threat by Mr Johnson which was met by the police response in the form of some sort of vigorous quasi-commercial haggle. Relationships between the two parties remained cordial. I consider that what happened was that Mr Johnson had already revealed he knew quite a lot (see his original conversation with Miss Goodwin) and that that re-emerged at the meeting. He got his information confirmed (which is much of what he was after, so he could stand up the story) and by saying that he had a story he could publish he was impliedly, and deliberately, suggesting that he might do so. That was understood by the SYP representatives, and there was a discussion in which it was understood, without semi-aggressive threats being made, that the police would induce him not to do so by offering information. It was a relatively cordial process, not a hard-nosed negotiation. That is why relationships were able to remain cordial. By the end of the meeting Mr Johnson had managed to disclose his hand sufficiently to worry the SYP representatives, he did worry them (or confirm the worries they already had) and that induced them to come to the agreement that they did about the search and about his not publishing. It was also agreed that the police would not give information about the investigation to other media outlets unless asked. In his own way Mr Johnson was quite clever about this, and that is doubtless what he meant by “old-fashioned journalism” in
his email later in the summer. I am sure he would not have regarded it as a process of “old-fashioned journalism” to start a meeting with just one suggestion, and have a whole lot of other information fall into his lap for no apparent reason. That is old-fashioned luck, not old-fashioned journalism.

Summary of findings of fact in relation to the June and July contacts

224. It will be convenient at this point to draw on all the above points and summarise my principal findings of fact in relation to the June and July contacts:

(a) When Mr Johnson was contacted by his source Mr Johnson was probably aware that the original source of the information was Operation Yewtree, or possibly the Metropolitan Police. His contact was someone in a police force, or someone associated with a police force. He was not being informed officially, and had no reason to suppose that his tip-off was sanctioned by anyone in authority.

(b) When he contacted Miss Goodwin he mentioned his source in general terms and said it was, or the information came from, Operation Yewtree, and he also gave further details which reasonably led her to suppose he had a reasonable amount of detail. It was against that background that she set up the meeting with Supt Fenwick.

(c) The tactic of Mr Johnson at that meeting was to exploit the opportunity to get confirmation of his story, and more details if possible. With that in mind he let it be known that he had a story that he could publish and gave, or encouraged, the impression that he would or might do so.

(d) Miss Goodwin and Supt Fenwick went into the meeting concerned that Mr Johnson already had a story that he could and might well publish, and retained that concern in and throughout the meeting, reinforced by what Mr Johnson said. In order to prevent that they confirmed and offered information, and, crucially, offered to alert him to the forthcoming search. They did not volunteer anything. Had it not been for their concern (or fear) of publication they would not have offered him anything, or at least nothing worthwhile, and would not have provided details of the search. They did not offer their information out of a desire to get publicity for the search. Mr Johnson and the SYP representatives agreed that he would not publish his story and in exchange he would be given advance notice of the search. In so agreeing Mr Johnson was aware that Supt Fenwick and Miss Goodwin thought there was a risk of publication and were buying him off. SYP also said they would not volunteer the same information to any other media outlet but would provide such information if asked.

The issues arising

225. In the light of the above facts I now have to decide the following:

(a) Did Sir Cliff have a legitimate expectation of privacy in relation to the fact of the investigation and the fact of the search of his apartment. Sir
Cliff says he did; the BBC says he did not, at least so far as the information was in its hands.

226. It will be noted that I have not included any issues arising under the DPA in that list. That is because I do not propose to consider them. Mr Rushbrooke submitted that he was entitled to a verdict on the DPA claim, although he accepted that if he won on privacy then he did not need his DPA claim, which would not get him any more than his privacy claim, and if he lost on privacy his DPA claim would not save him. In other words, it adds nothing to the privacy claim. In those circumstances I do not think it is necessary (or proportionate) for me to consider it, and I shall not do so.

The privacy claim - the legal framework

227. Putting on one side the DPA, Sir Cliff’s rights are said to flow from Article 8 of the European Convention on Human Rights, as introduced into English law by the Human Rights Act 1998. That Article reads:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

228. The BBC’s competing rights arise under Article 10, which reads:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of
national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

229. Where the two rights potentially conflict the court has to carry out a balancing exercise between those rights. The exercise was expressed thus In *McKennitt v Ash* [2008] QB 73:

“11 … Where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by Article 8? If no, that is the end of the case. If yes, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by Article 10? The latter enquiry is commonly referred to as the balancing exercise.” (per Buxton LJ)

230. Thus in the present case the exercise involves the following:

(a) Did Sir Cliff have a reasonable expectation of privacy in relation to the information published by the BBC on 14th August 2014? Putting it another way, were his Article 8 rights engaged?
(b) If so, and given that it was accepted by Sir Cliff for the purposes of this case that the BBC’s Article 10 rights (freedom of expression) are engaged, how are those rights to be balanced against Sir Cliff’s Article 8 rights, and in particular was there a public interest in publishing the information that was published?

**Did Sir Cliff have a legitimate expectation of privacy in the published information, and if so were his rights infringed?**

231. There was little dispute as to the legal elements of a claim based on what I will call privacy and the operation of Article 8. The Article will be engaged where an individual has a reasonable expectation of privacy. That is terminology which has been adopted in a number of cases, of which one example is the judgment of Lord Toulson JSC in *In re JR38* [2016] AC 1131:

“88. In *Campbell’s case* Lord Nicholls of Birkenhead said at para 21 that “Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy”. He also warned that courts need to be on guard against using as a touchstone a test which
brings into account considerations which should more properly be considered at the later stage of proportionality. Applying *Campbell's* case, Sir Anthony Clarke MR said in *Murray's* case at para 35 that “The first question is whether there is a reasonable expectation of privacy”. He said at para 36 that the question is a broad one which takes account of all the circumstances of the case, including the attributes of the claimant, the nature of the activity in which the claimant was involved, the place at which it was happening, and the nature and purpose of the intrusion. The principled reason for the “touchstone” is that it focuses on the sensibilities of a reasonable person in the position of the person who is the subject of the conduct complained about in considering whether the conduct falls within the sphere of article 8. If there could be no reasonable expectation of privacy, or legitimate expectation of protection, it is hard to see how there could nevertheless be a lack of respect for their article 8 rights.”

The formulation of the matters to be taken into account was actually slightly broader in what Lord Toulson described as “*Murray's* case” (*Murray v Express Newspapers plc* [2009] Ch 481):

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

The last two criteria are capable of being very relevant to the present matter.

232. By the time of final speeches the dispute in this case had become more refined and more limited. The pleaded case of Sir Cliff is that both the fact of the investigation and the search were matters in respect of which he had a legitimate expectation of privacy as against SYP and as against the BBC. That was a position maintained to the end of the trial. The Defence of the BBC denied such an expectation in relation to both those elements - the investigation and the search. No distinction was drawn between the SYP and the BBC in relation to those elements - the denial was made in relation to both. In those circumstances a significant amount of effort (particularly on the part of the claimant) was devoted to the question of whether there was, at least prima facie, a reasonable expectation of privacy generally in relation to a police investigation.
233. The BBC’s position had changed by final speeches. Mr Millar indicated that he accepted that as against a police force, and prima facie, the subject of an investigation would have a reasonable expectation of privacy in the existence and fact of that investigation. However, the position was not necessarily the same once the information had moved into the hands of a journalist, and it changed again when the investigation moved on to the phase of a search carried out under a search warrant. Once a journalist had acquired the information one had to make a fresh inquiry as to whether there was a reasonable expectation of privacy, taking into account all the circumstances, and once the matter had moved on to the phase of a search warrant based search the position changed, or was capable of changing, again. That shift might be thought to make it unnecessary to start from the normal starting point of considering the position as against the police, but it is still nonetheless in my view a useful starting point to a structured analysis of the present case, not least because, on the facts of this case, the information which the BBC got started with the police. If there is a right of privacy vis-à-vis the police then one can usefully ask why, and then consider why the movement of knowledge of the private information to a journalist would affect that situation. It will then be useful to consider whether the warrant and search make a difference.

234. The question of whether the existence of a police investigation into a subject is something in relation to which the subject has a reasonable expectation of privacy is not something which has been clearly judicially determined, though it has been the subject of judicial assumption and concession in other cases. In Hannon v News Group Newspapers Ltd [2015] EMLR 1 it was held to be arguable - it was not necessary to decide it. In PNM v Times Newspapers Ltd [2014] EMLR 30 Sharp LJ acknowledged “a growing recognition that as a matter of public policy, the identity of those arrested or suspected of a crime should not be released to the public save in exceptional and clearly defined circumstances”, but she did not actually decide the point. In ERY v Associated Newspapers Ltd [2017] EMLR 9 Nicol J said that there was a reasonable expectation of privacy in the information that a person was being investigated by the police, but he did so on the back of a concession that the fact that that person had been interviewed under caution attracted a reasonable expectation (see para 65).

235. ZXC v Bloomberg LP [2017] EMLR 21 goes a little further. In that case the claimant sought an interim injunction to restrain publication of the fact that he was the subject of an investigation by a law enforcement agency, and since Article 10 was in play the judge (Garnham J) had to decide whether the claimant was likely to succeed at trial in establishing that he had a reasonable expectation of privacy in the contents of the document. He indicated (para 29) that the fact that ERY proceeded from a concession meant it was only weak support for the existence of such an expectation, but rejected a submission by the defendant that there was a blanket rule against it - it was a fact sensitive question. He identified a number of features in that case (including the confidentiality of the document and the fact that it came into the hands of the defendant via an unauthorised leak) which led him to the conclusion that the claimant would reasonably have expected that the document:
“would remain private to the law enforcement agency and the other party receiving it” (para 35).

The emphasis is mine; those words may be relevant to the later point of whether the BBC is in any different position to SYP in this case.

236. Based on his assessment, Garnham J considered that the claimant would be able to establish that his Article 8 rights were engaged by the publication of the article (para 35). It does not have the binding effect of a final decision, but it goes further than any prior authority.

237. I respectfully agree with Garnham J that whether or not there is a reasonable expectation of privacy in a police investigation is a fact-sensitive question and is not capable of a universal answer one way or the other. Mr Millar’s concession in the present case indicates that the BBC does not say that the answer is always No. However, it will be useful to consider whether there is a prima facie answer, or a usual answer, to act as a starting point (and general guidance) in any given case. It will assist in resolving the present case because the quality of the information in the hands of SYP, and the reasons for a determination that it was private (if it was), will have a bearing on whether it should be differently characterised once in the hands of the BBC in this case.

238. Axel Springer AG v Germany [2012] EMLR 15, much relied on in this case, was a decision of the Grand Chamber of the European Court of Human Rights concerning the publication of articles about first the public arrest and then the conviction of a well-known figure, on drugs charges. The reasoning in the case is more about the application of Article 10 than it is about Article 8. The court seems to have accepted that Article 8 was engaged - that is implicit in the need to consider the balancing exercise which the court had to consider - but the decision does not really reveal anything which assists on this point in the present case. The case does not involve a consideration of whether the investigation was something which attracted privacy, and the arrest in that case was one which took place in public.

239. Certain extra-judicial pronouncements were urged on me as indicating the appropriateness of treating an investigation as something that would attract privacy rights under Article 8.

240. First, the report of Sir Brian Leveson in his Inquiry into the Culture, Practices and Ethics of the Press. At paragraph 2.39 Sir Brian concluded:
2.39. I would endorse the general views of Commissioner Hogan-Howe and Mr Trotter on this issue [viz the police briefing the press on suspects]. Police forces must weigh very carefully the public interest considerations of taking the media on police operations against Article 8 and Article 6 rights of the individuals who are the subject of such an operation. Forces must also have directly in mind any potential consequential impact on the victims in such cases. More generally, I think that the current guidance in this area needs to be strengthened. For example, I think that it should be made abundantly clear that save in exceptional and clearly identified circumstances (for example, where there may be an immediate risk to the public), the names or identifying details of those who are arrested or suspected of a crime should not be released to the press nor the public."

241. The evidence of Mr Trotter, to which reference is made there, pointed to cases where suspects have been identified and risked facing physical attacks and attacks in social media. (See paragraph 2.37). Both he and Commissioner Hogan-Howe gave as an example the case of Mr Christopher Jeffries, named as a suspect in a murder inquiry and who, as a result, was the victim of large amounts of publicity suggesting his guilt when ultimately a different person was convicted (paragraph 2.37 again). This can be taken to be a demonstration of at least part of the practical rationalisation behind Sir Brian’s recommendation.

242. Second, I was taken to the Judicial Response to the Law Commission Consultation Paper on Contempt of Court (4th March 2013, Treacy LJ and Tugendhat J), which in paragraph 5 agreed with and adopted the words of Sir Brian Leveson.

243. Third, there is the College of Policing’s Guidance on Relationships with the Media (May 2013), paragraph 3.5.2, which states that:

“… save in clearly identified circumstances, or where legal restrictions apply, the names or identifying details of those who are arrested or suspected of crime should not be released by police forces to the press or public. Such circumstances include a threat to life, the prevention or detection of crime or a matter of public interest and confidence. This approach aims to support consistency and avoid undesirable variance which can confuse press and public.”

244. Fourth, I was referred to Sir Richard Henriques’ "Independent review of the Metropolitan Police Service's handling of non-recent sexual offence investigations
alleged against persons of public prominence." This report was not intended to deal with privacy rights and reporting as such, but it does contain valuable material which goes to what happens when accusations are made against a prominent person notwithstanding that they turn out to be false and not pursued by the police (but after investigation). He said the following about the consequences of that:

“1.39. In the case of prominent people, it appears that they are more vulnerable to false complaints than others. The cases I have reviewed involve individuals, most of whom are household names. Their identities are known to millions. They are vulnerable to compensation seekers, attention seekers, and those with mental health problems. The internet provides the information and detail to support a false allegation. Entertainers are particularly vulnerable to false allegations meeting, as they do, literally thousands of attention-seeking fans who provoke a degree of familiarity which may be exaggerated or misconstrued in their recollection many years later. Deceased persons are particularly vulnerable as allegations cannot be answered.

1.40. A further and significant category of false complainant is referred to by Paul Gambaccini as a 'bandwagoner'; namely a person who learns that a complaint has been made and decides to support the original complaint (true or false) with a false complaint. It can be seen that, when an arrest or bail renewal is publicised involving a prominent person, further complaints are frequently made. These may be, and often are, true complaints. There is, however, within the cases I have reviewed, significant evidence of false complaints immediately following upon publicity. In many cases those complaints were withdrawn or the complainants simply disengaged, declining to make a statement in support of the complaint.”

245. In later paragraphs Sir Richard turns to consider the effect of an unfounded allegation of a serious offence being made against an innocent person. He says:

"1.94… It is difficult, if not impossible, to articulate the emotional turmoil and distress that those persons and their families have had to endure. The allegations have had a profoundly damaging effect upon the characters and reputations of those living and those deceased. In differing ways those reputations have been hard-won, over several decades, and yet in Operation Midland they were shattered by the word of a single, uncorroborated complainant… In short, these men are all victims of false allegations and yet they remain treated as men
against whom there was insufficient evidence to prosecute them. The presumption of innocence appears to have been set aside."

246. Sir Richard was, of course, not directly considering the question which I have to consider. He was considering the effect of false allegations and whether, in order to stop currency being given to them, there should be anonymity for a police suspect. He addressed that as a policy question. It is not part of my function to address policy. However, his report is of assistance because it points out the effect of an accusation being made, and the effect of publicising the identity of a person who is the subject of a police investigation. The consequences of such an accusation in that form are something that should be taken into account in considering whether the suspect has a legitimate expectation of privacy in the fact of the investigation. It is not a determining factor (no single factor is determining), but in my view it is relevant. It will also be relevant in considering the balance between Article 8 and Article 10, so far as relevant, in due course.

247. Those extracts are not authority going directly to the question which I am addressing, but they are material which can be said to go the factual underpinning of a consideration of whether there is, in general terms, a reasonable expectation of privacy. They tend to go to the consequences of their not being one, or tend to point up practical reasons which would support one.

248. It seems to me that on the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation, and I so rule. As a general rule it is understandable and justifiable (and reasonable) that a suspect would not wish others to know of the investigation because of the stigma attached. It is, as a general rule, not necessary for anyone outside the investigating force to know, and the consequences of wider knowledge have been made apparent in many cases (see above). If the presumption of innocence were perfectly understood and given effect to, and if the general public was universally capable of adopting a completely open- and broad-minded view of the fact of an investigation so that there was no risk of taint either during the investigation or afterwards (assuming no charge) then the position might be different. But neither of those things is true. The fact of an investigation, as a general rule, will of itself carry some stigma, no matter how often one says it should not. This was acknowledged in Khuja v Times Newspapers Ltd [2017] 3 WLR 351 (the PNM case re-named in the Supreme Court). The trial judge had acknowledged that some members of the public would equate suspicion with guilt, but he considered that members of the public generally would know the difference between those two things (see para 32). Lord Sumption was not so hopeful. He observed:

“Left to myself, I might have been less sanguine than he was about the reaction of the public to the way PNM featured in the trial.”
249. In the same case the minority Justices (Lords Kerr and Wilson) quoted from Cobb J’s observations in *Rotherham Metropolitan Borough Council v M* [2016] 4 WLR 177, with approval.

> “Then Cobb J quoted from a leading article in *The Times* on 19 October 2016 as follows:

> ‘False rape and abuse accusations can inflict terrible damage on the reputations, prospects and health of those accused. For all the presumption of innocence, mud sticks.’

> In the end Cobb J concluded that the restriction orders against identification of the men should be continued indefinitely. He said, at para 46:

> ‘I have reached the firm conclusion that there is no true public interest in naming the four associated males, against whom, in the end, no findings have been sought or made. [Their] article 8 rights … would be in my judgment significantly violated were they to be publicly exposed in the media as having been implicated to a greater or lesser degree, but not proved to be engaged, in this type of offending.’

> These observations seem to us to show great insight and to resonate strongly with the facts of the present case.”

250. These judicial remarks demonstrate at least some of the reasons why an accused should at least prima facie have a reasonable expectation of privacy in respect of an investigation. They are particularly appropriate to the type of case referred to there (of which, of course, the present case is an instance) but they are generally applicable, to varying extents, to other types of cases.

251. That is not to say, and I do not find, that there is an invariable right to privacy. There may be all sorts of reasons why, in a given case, there is no reasonable expectation of privacy, or why an original reasonable expectation is displaced. An example was given by Sir Brian Leveson in the extract quoted above, and others can be readily thought of. But in my view the legitimate expectation is the starting point. I consider that the reasonable person would objectively consider that to be the case.

252. That analysis and conclusion justifies the concession made by Mr Millar that, so far as the SYP was concerned, Sir Cliff had a reasonable expectation of privacy in relation to his investigation. So far as SYP was concerned nothing happened to displace it. It was not suggested that any legitimate operational concerns impacted on it. It was not, for example, suggested that this was a case in which the police wished to give publicity to the investigation in order to see if there were similar supporting allegations which would be relevant to their investigation (“shaking the tree”, to use the expression I used above).
253. Mr Millar went on to say that the search warrant and the search made all the difference. I think that the main thrust of his submission on this point was in the context of his submissions about a reasonable expectation as against the BBC, but it will nonetheless be useful, as a matter of analysis, to consider it in terms of the SYP first.

254. Mr Millar justified his submission that the search made all the difference (at least so far as the BBC is concerned) on the basis that the search was by a public authority and had been authorised by a court. He accepted my colloquial paraphrase of his submission that it showed the investigation was “getting serious” and had substance. It was viewable by others, and in many cases (though not this one, because of the seclusion of the premises) it would be something of which at least the neighbouring public would be aware because large numbers of police officers in and outside premises, coming and going, cannot be hidden.

255. For my part, and confining myself to reasonable expectation as against the SYP for the moment, I do not consider that a search, without more, removes the legitimate expectation of privacy which otherwise exists. It should be treated as part of the investigation. True it is that the police have to satisfy a magistrate granting a warrant that there is sufficient evidence to justify the grant of the warrant, but that is merely a function of the available evidence. It cannot be plausibly suggested that the reasonable expectation is lost when the evidence reaches a certain level without more, so it cannot matter that, in conjunction with that level, a magistrate is satisfied enough to grant a warrant. The obtaining of the warrant is a judicial event, though it is obtained in private (albeit principally so as not to tip off the suspect), so there is no necessary loss of privacy arising out of the procedure. The circumstances of the execution of the warrant may, as a matter of practice, involve a certain compromise of the privacy of the investigation, for the reasons given by Mr Millar, but it does not follow from that that privacy rights should be automatically and totally lost. If there is a legitimate expectation of privacy before the search then the search itself would have to be carried out with a due regard to it (which is doubtless why, in practice, the police do not now identify who the subject of the search was, even if neighbours might know). The fact that neighbours might know does not carry with it an inevitable loss of privacy; and in any event in many cases neighbours might know there is a search but not know why. I note that Sir Brian Leveson’s recommendation extended beyond mere investigation to the fact of an arrest. If an arrest should still remain private (which I do not have to decide) then I do not see why a pre-arrest search should be any different.

256. A certain amount of emphasis was given by the BBC to the fact that Sir Cliff was a public figure, and one who had promoted his Christian beliefs in his writing and his public appearances. Sir Cliff undoubtedly has those attributes. However, on the facts of this case they do not detract from his reasonable expectations. A public figure is not, by virtue of that quality, necessarily deprived of his or her legitimate expectations of privacy - see Rocknroll v News Group Newspapers Ltd [2013] EWHC 24 (Ch) at para 24. It may be that a given public figure waives at least a degree of privacy by courting publicity, or adopting a public stance which would be at odds with the privacy rights claimed, but nothing like that applies in the present case. There is nothing in Sir Cliff’s public status, either as an entertainer or a Christian, which would deprive him of his legitimate expectation of privacy. Indeed, his public status emphasises the need for privacy in a case such as this for the reasons demonstrated by Sir Richard Henriques in his report.
257. I therefore proceed on the footing that Sir Cliff had a legitimate expectation of privacy as against SYP both in relation to the investigation and in relation to the search. It is now necessary to deal with Mr Millar’s submission that once the material gets into the hands of a media organisation such as the BBC the position changes. To be fair to Mr Millar, his real point was to emphasise the position as at August 14th when the search was carried out and publicised in the manner that it was, against the background of the preceding events. His submissions focused more on the interaction with Article 10, which is a point to which I will have to come. However, for the purposes of analysis, and because I detected more than a mere suggestion that the reasonable expectation of privacy was different once information was in the hands of the media, it will be useful to consider that point.

258. I take as my starting point that the quality of the information as being private cannot, as a matter of principle, be affected by the nature of the recipient from time to time. If it starts out as private, it must retain that quality when it is disclosed in circumstances which do not, of themselves, remove the privacy (or the reasonable expectation), such as a disclosure for operational reasons. Sir Cliff’s rights in respect of the information in the hands of the police are not based on a reasonable expectation of privacy as long as the information does not fall into the hands of the media; he has a reasonable expectation of privacy full stop. Of course, it may be that the expectation is lost by other circumstances – for example, an operational reason for disclosure, as envisaged by Sir Brian Leveson. If that happens then there is no right of privacy once the information reaches the media. But that is because it has lost its private quality by reason of those circumstances not by reason merely of the fact that the information has reached the media.

259. Accordingly, and contrary to some of the apparent submissions made by Mr Millar (at least in opening) there is no basis for saying that a reasonable expectation of privacy, which previously existed, is somehow removed, or requires a complete reconsideration, merely because the information has come into the hands of the media. It may be that the legal source of the complaint has different features technically as against each of the defendants. As against SYP as a public authority there is a direct complaint against them under the Act. As against the BBC there is the tort which has been fashioned out of the Act so as to give a remedy against non-public authorities. But I do not consider that that difference (if it exists) matters. What matters is the substance of what is protected, and the substance of the protection. That is the same against both defendants. There is a tension with the media’s Article 10 rights, but that is resolved at a different stage of the legal analysis.

260. On the facts of this case nothing was different when Mr Johnson acquired more information from (or had it confirmed by) SYP. He was acquiring private information in circumstances which did not destroy the privacy. It was not disclosed for good operational reasons. It was disclosed because Mr Johnson had wrongfully exploited the previously acquired confidential information to manoeuvre SYP into its further disclosures, which SYP misguidedly made.

261. In the present case this analysis applies to both the information about the investigation (or its confirmation) and the information about the search. As against the BBC, Sir Cliff had a reasonable expectation of privacy under Article 8, as he did against SYP.
(and the Metropolitan Police). Nothing had happened which destroyed the expectation or its legitimacy.

262. In the context of the balancing exercise which I have to perform next, Mr Millar submitted that if Sir Cliff had a privacy right it was a weak one. There was no statutory anonymity, and there was no reasonable expectation of privacy vis-à-vis the complainant, which weakened such rights as he might have had against others. Sir Cliff was a public figure, like others who had actually been arrested and, in some cases, convicted. I do not accept this submission. The nature of the offence which was being investigated reinforced the legitimate or reasonable expectation because of the damage that could be done if it were revealed, and made it a strong one. As will appear, I do not think that Sir Cliff’s public standing means that this was an area of his life in which his expectations of privacy were lower (the point arises in a similar form in the Article 10 debate). If it be the case that he had no legitimate expectation of privacy as against the complainant (as to which I make no finding), then that does not mean he had no such expectation against anyone else (as is accepted by the BBC in accepting that there was a legitimate expectation as against the police).

263. That gets Sir Cliff over his first hurdle - the engagement of Article 8 vis-à-vis both SYP and the BBC. If matters stopped there then the disclosure by the BBC of both the investigation and the search would have infringed his rights. However, this overall conclusion does not get him home because the BBC is entitled to point to Article 10 and the engagement of its rights under that. That is the point to which I will turn once I have considered (briefly) a couple of other heads of claim made by Sir Cliff.

Privacy - respect for the home - and trespass

264. Article 8, and the English tort which essentially gives effect to it, include a right for respect to the home. In this case Mr Rushbrooke sought to make much of what was said to be an invasion of privacy rights from the filming of and (principally) into his home when the helicopter filmed, and the BBC broadcast, the pictures of the officers searching the apartment. He also claimed that there was a trespass by the helicopter.

265. I consider that the filming into Sir Cliff’s flat was an infringement of his English law privacy rights but I do not propose to dwell on it because in the context of the reporting itself and the disclosure of his investigation and the search it is rather overwhelmed in its significance in this action. It adds to what I find to be the somewhat sensationalist nature of the coverage, and that is its main significance. It is unnecessary to accord it any further separate treatment.

266. Mr Rushbrooke made much (at least in cross-examination) of an assertion that the helicopter trespassed in relation to the property when it flew and did its filming. I find that there was no trespass by the helicopter vis-à-vis Sir Cliff. Sir Cliff did not (as far
as I know) own the freehold of any part of the property, and without the freehold I do not see that he had any possessory rights that could be infringed by overflying. I assume that he held his apartment via a lease and not with the benefit of the freehold, so it is unlikely that he had any rights to the airspace above it which could found a claim in trespass. If there was a claim in trespass it would add nothing material to the privacy claims in any event; and it is not pleaded. The alleged claim was used to challenge BBC witnesses as to their cavalier approach to the question of the correctness of the overflying, but not surprisingly they were not in a position to say anything about the law of trespass in that context. Even if Sir Cliff owned a potentially relevant land interest, and even if the helicopter over-flew that land, it is not clear to me that the current state of the law of trespass by over-flying would entitle him to make a claim. I do not think that trespass adds anything to this claim.

**Article 10 and the balancing exercise with Article 8**

267. The BBC has its own rights of freedom of expression (with some associated rights, such as the protection of the identity of sources) under Article 10, set out above.

268. Section 12 of the Act is also relevant to the debate which follows; subsection (4) is relevant to journalistic material:

“12 - Freedom of expression

(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.

…

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.”
269. The following principles are applicable to the interaction between Articles 8 and 10, and to the application of Article 10.

270. It is well established in authority that in a case in which both Article 8 and Article 10 are engaged (and therefore likely to be pulling in different directions) that the court has to perform a balancing and weighing act to ascertain which predominates in the case in question – see McKennitt v Ash, above. As a matter of principle neither of them has primacy.

“17. The interplay between articles 8 and 10 has been illuminated by the opinions in the House of Lords in Campbell v MGN Ltd [2004] 2 AC 457. For present purposes the decision of the House on the facts of Campbell and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.” (In re S [2005] 1 AC 593 per Lord Steyn).

271. In carrying out that balancing exercise a number of features are capable of coming into play. Many of them appear from the Axel Springer case, which was heavily relied on by Mr Millar as providing many of the essential criteria and guidance as to how they should be applied in the present case.

272. Overlaying these matters is a point stressed by Mr Millar in his opening, which is what he says is the “duty” of the press to report matters of public interest. In support of his proposition that there was such a duty he relied on Sunday Times v The United Kingdom (1979) 2 EHRR 245:

“Furthermore, whilst the mass media must not overstep the bounds imposed in the interests of the proper administration of justice, it is incumbent on them to impart information and ideas concerning matters that come before the courts just as in other areas of public interest. Not only do the media have the task of imparting such information and ideas: the public also has a right to receive them.” (At page 280)

273. To similar effect is the judgment of the ECHR in Axel Springer at paragraph 79:

“The Court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is
Nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of ‘public watchdog’.

274. While I wonder with respect whether “duty” is quite the right word, I do not consider these descriptions of the function of a free press (which cannot as such be doubted) assist the debate at this stage in the reasoning. The freedom of expression recognised in Article 10 is clear. The question is how it is balanced against a right of privacy. That debate is not assisted by a reference to a “duty” to publish. The balancing exercise invokes more refined concepts than that.

275. I therefore turn to the points said to arise from the decision in Axel Springer. At paragraph 89 the Court (under the heading "Criteria relevant for the balancing exercise") said:

“Where the right to freedom of expression is being balanced against the right to respect for private life, the criteria laid down in the case law that are relevant to the present case are set out below.”

276. There then follow a number of criteria which are developed to a certain extent. I shall not set out the full development. The relevant points can be conveniently summarised as follows (substituting Latin script for the Greek paragraph numbering in the original).

"(a) Contribution to a debate of general interest

.... The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognised the existence of such an interest not only where the publication concerned political issues or crimes ... But also where it concerns sporting issues or performing artists…”

(b) How well-known is the person concerned and what is the subject of the report?

The role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo constitute another important criterion related to the preceding one. In that connection a distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures. Accordingly, whilst a private individual unknown to the public may claim particular protection
of his or her right to private life, same is not true of public figures… A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions…

Whilst in the former case the press exercises its role of 'public watchdog' in a democracy by imparting information and ideas on matters of public interest, that role appears less important in the latter case. Similarly, although in certain special circumstances the public's right to be informed can even extend aspects of the private life of public figures ... This will not be the case – even where the persons concerned are quite well known to the public – where published photographs and accompanying commentaries relate exclusively to details of the person's private life and have the sole aim of satisfying the curiosity of a particular readership in that respect…

(c) Prior conduct of the person concerned.

The conduct of the person concerned prior to publication of the report or the fact that the photo and the related information have already appeared in an earlier publication are also factors to be taken into consideration… However, the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the report or photo at issue…

(d) Method of obtaining the information and its veracity.

The way in which the information was obtained and its veracity are also important factors. Indeed, the court has held that the safeguard afforded by art. 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism…"

(e) Content, form and consequences of the publication

The way in which the photo or report are published and the manner in which the person concerned is represented in the
photo or report may also be factors to be taken into consideration…

(f) Severity of the sanction imposed.

Lastly, the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of an interference with the exercise of the freedom of expression…”

277. In addition to those matters Article 12(4)(b) requires the court to have regard to any relevant privacy code. In the present case it was common ground that the BBC’s Editorial Guidelines (to which I will come) is the, or a, relevant code for these purposes.

278. I shall consider the parties’ respective cases on these matters before then myself carrying out the balancing act which I am required to carry out. It will be apparent that some of these matters assumed a greater significance than others.

**Contribution to a debate of public interest**

279. Mr Millar urged that this was plainly fulfilled. Sexual abuse of children was and is a matter of serious public concern, and abuse carried out by those in a public position and who had contact with children in that position was of particular concern at the time. Police investigations into such people were a matter of legitimate public interest. There was an ongoing debate as to whether such investigations had been carried out properly in the past.

280. That is the only public interest defence put forward by the BBC in final submissions. In her evidence Miss Unsworth proposed and was cross-examined on others (or variations of them), including the possibility that reporting on the search would or might encourage other victims to come forward, but they were not pursued into final submissions. In any event, the question of contribution to a debate of public interest is to be objectively determined, not determined solely by reference to the subjective views of the editor with the ultimate responsibility for deciding to publish (which is what Ms Unsworth was). For what it is worth, I do not believe that this justification was much in the minds of those at the BBC at the time. I think that they, or most of them, were far more impressed by the size of the story and that they had the opportunity to scoop their rivals.
281. It seems to me to be right to break this claim down into two parts. The first is whether the report of an investigation into (and search of the premises of) a well-known but unidentified celebrity would fall under Mr Millar’s point. In my view it would. Some of the background to this has appeared already. In 2012 it became apparent that Jimmy Savile had used his celebrity position to carry out many acts of sexual abuse. He was never charged in his lifetime, despite police investigations. In the years that followed various celebrities and others in public life were charged with sexual abuse offences, and several were convicted. Rolf Harris, Stuart Hall and Max Clifford were all convicted. Gary Glitter was investigated and had been charged by the time of the events with which this action was concerned, and he was subsequently convicted. Others were charged but acquitted (I shall use my discretion so as not to enshrine their names in this judgment, but their position was publicly known), and yet others were known to have been the subject of investigations. Sexual abuse by others without celebrity status had also been very much in the news, particularly in Rochdale and Rotherham. The whole thing was very much a source of legitimate public interest and concern, and the public had a legitimate interest in knowing at a general level that the police were pursuing alleged perpetrators, and particularly those who might have abused their celebrity status. At that level, therefore, information about the inquiry did, in the terminology of Axel, contribute to a debate of general public interest.

282. The second part involves the element of identifying the individual concerned. It does not follow that, because an investigation at a general level was a matter of public interest, the identity of the subject of the investigation also attracted that characterisation. I do not think that it did. Knowing that Sir Cliff was under investigation might be of interest to the gossip-mongers, but it does not contribute materially to the genuine public interest in the existence of police investigations in this area. It was known that investigations were made and prosecutions brought. I do not think that knowledge of the identity of the subject of the investigation was a material legitimate addition to the stock of public knowledge for these purposes.

The public status of Sir Cliff and his prior conduct

283. These are the second and third of the Axel Springer factors, and the BBC argues they can usefully be taken together. I agree with that. He was a known, respected and popular public figure. His livelihood involved him putting himself in the public eye, principally by way of performance and recording. He had and still has very many fans. Even into his 70s he was and is performing. His Christian beliefs were the subject of reports and his own exposition in his books. The BBC submits that this means that he must, as a matter of legal principle, expect more limited privacy rights than a purely private individual.

284. I accept that to a degree, and in certain circumstances, a person who has placed himself or herself into public life has a diminished expectation of privacy. That is because the
very act of making certain aspects of oneself public means, by definition and by logic, that there is a corresponding loss of privacy in those areas which are made public. However, it does not follow that there is some sort of across the board diminution of the effect of privacy rights - see Rocknroll v Newgroup Newspapers Ltd (above). It all depends on the extent of the self-induced publicity and the areas in which there has been, in effect, a sort of voluntary surrender. It depends on the degree of surrender, the area of private life involved and the degree of intrusion into the private life. When the Court in Axel Springer referred to the public status criterion in the passages cited above, it was not referring to some generalised diminution of privacy rights in all areas. It was essentially contrasting someone in public life with someone not in public life. It is noteworthy that the Court acknowledged that there were areas of the life of a public person which could appropriately remain private - see the reference to material which is published merely to satisfy curiosity.

285. In accordance with that, I would agree with the proposition that Sir Cliff’s oft-stated and well-known position as a Christian, promoted by him, might make disclosures of actual conduct which might be regarded as unchristian something to which he has rendered himself vulnerable by virtue of his public position. However, that does not mean that unsubstantiated allegations, or investigations, into unproved conduct fall into the same category. Sir Cliff’s Christian stance might make the allegations of more interest in a general sense, and might appeal to the “curious” or the prurient, or provide material for the opinionated (see some of the subsequent publications referred to in the section below on damages), but that does not justify an invasion of his privacy.

286. It occurs to me that these two criteria are capable of revealing a two-edged sword. Publication of the fact of a criminal investigation search warrant might be thought to be of particular interest because of the contrast between the underlying allegations and Sir Cliff’s public position and stated views. On the other hand it is precisely because of that contrast that the publication of the material is capable of being so intrusive and (on Sir Cliff’s case, and as I find in due course to be the case) so damaging to his reputation and his life that the disclosure might be said to be disproportionately disadvantageous to him and to weight the balance against disclosure.

287. In the end I do not find that these two factors are particularly weighty ones in the BBC’s favour. Public figures are not fair game for any invasion of privacy, and I do not consider that Sir Cliff’s adoption of his public position and his stated views indicate that he has self-diminished the weight of his right to privacy in respect of allegations of the kind which underpin the BBC’s disclosures, and therefore in respect of the disclosures themselves.

The method of obtaining the information and its veracity
288. The Court in *Axel Springer* made it clear that a journalist’s right of freedom of expression was subject to the proviso that the journalist is acting in good faith and on an accurate factual basis, providing “‘reliable and precise’ information in accordance with the ethics of journalism” (see above). The expression “method of obtaining the information” is a point appearing in the heading in the judgment, not in its formulation of its point, but it is clearly part of the inquiry which the Court deemed appropriate under the proviso. A number of features have to be considered under this head.

289. The veracity of the published information in this case is not in issue. What the BBC published was accurate. What is more questionable is the method of obtaining the information.

290. The BBC’s information trail started with the information provided by the confidential source, with its ultimate source in Operation Yewtree. From this Mr Johnson knew, or ought to have known, that the information was confidential and sensitive. The BBC have accepted that, so far as SYP was concerned, the information about the investigation was information in respect of which Sir Cliff had a reasonable expectation of privacy, and the same applies as against the Metropolitan Police (Operation Yewtree). It simply ought not to have been disclosed, as the provider of the information doubtless well knew. However, that degree of confidentiality is not a determining factor against publication. The press often performs a valuable function in disclosing information which others might wish to remain private. The privacy, and its degree, is but one factor in the calculation.

291. So far as the information about the search is concerned, Mr Johnson did not get that in a straightforward manner. He got it in the circumstances appearing above. No doubt when journalists get information, or get confirmation of information they believe they have, they will justifiably resort to subtle means from time to time, in the public interest of publishing justifiably publishable information. Mr Johnson might regard this sort of thing as “good old-fashioned journalism”, and in many circumstances there may ultimately be nothing too wrong about it when looked at in the round. However, in the present case Mr Johnson relied on a form of threat (not overtly made in a hostile manner, but understood as such by SYP nonetheless) to get his information about the search and the confirmation that he felt he needed. He knew the information was not volunteered by SYP, whether for its own purposes or otherwise. It matters not whether he was in a position, by himself, to carry out that threat. SYP thought it could be implemented.

292. Again, this state of affairs does not mean that the public interest, and the Article 10 rights of the BBC, are completely outweighed by Sir Cliff’s privacy rights. Not all journalistic subterfuge, or ploys such as that adopted one way or another by Mr Johnson, are unethical. They are sometimes justifiable. But on the facts of this case it does weaken the BBC’s position. It is very significant that the publication started with
obviously private and sensitive information, obtained from someone who, to the
knowledge of Mr Johnson, ought not to have revealed it, and confirmed and bolstered
with a ploy in the form of a perceived threat that ought not to have been made (or
allowed to stand).

293. One further aspect of the facts falls to be considered under this head. The BBC
acknowledged that it needed to give a form of right of reply, which in this case meant
(sensibly) a right to comment before the broadcast. The need for such a thing is
reflected in the BBC’s own Editorial Guidelines (para 6.4.25). As soon as it could do
so it therefore sought to contact Sir Cliff and his representatives. Thus far that was
responsible. The BBC’s position was that it gave adequate time for a response before
it made its broadcast, and then published Sir Cliff’s denial statement as soon as it had
it. Mr Smith acknowledged that a fair chance had to be given for a comment, and Miss
Kitterick’s evidence in chief said that that was the reason why the right of reply was
given. In my view it is also proper to give the subject some sort of opportunity to
challenge publication before it happens, whether by persuasion or injunction. The
question arises as to whether the dealings between Miss Kitterick on the one hand and
Sir Cliff’s representatives on the other, prior to publication at 1pm, was in fact sufficient
to give a fair opportunity for a statement or discussion before the broadcast or not.

294. Bearing in mind the professed objectives of the right of reply opportunity, I do not think
that it was. Although the BBC did not know for certain that Sir Cliff would not be at
the property, they knew it was likely, and certainly likely enough that they went to the
trouble and expense of having reporters available to interview him (allegedly) in
Portugal and Barbados. His absence abroad would be likely to affect the response time
in respect of any statement. It then became apparent that his main PR representative,
Mr Hall, was also abroad. Mr Hall adopted the view that he wanted to understand what
the police were saying before he made a comment, and thought for some time
(reasonably but incorrectly) that the BBC were trying to extract a confirmation from
him rather than actually get a statement in relation to a broadcast that was, at that stage,
likely to happen. He did not understand, or quite believe, that a broadcast was as
imminent as it turned out to be. He had to work out for himself that the police were not
naming Sir Cliff, and that would be a matter which he would need to feed into the mix
before replying. His desire for further information, beyond that which the BBC had
decided to feed him, before responding, was understandable. I do not think that the
circumstances gave him a proper opportunity to prepare a reply before the broadcast at
1pm; much less did it give an opportunity for persuasion (or an injunction), though as
will appear below I do not give any weight to that latter factor.

295. To that extent it can be said that the BBC did not quite comply with what it itself saw
as the ethical requirements of its journalism at that stage. The real reason for that was,
in my view, because it was giving a lot of weight, in its own deliberations, to preserving
the exclusivity of its own scoop. The material at trial demonstrated not only that people
were very excited at the prospect of this scoop, but also that they were very keen to
preserve it as their own. The latter point is demonstrated by a number of things, including the very questionable (in contractual terms) exclusion of ITN from knowledge of the launch of the helicopter and the fear, expressed in emails, that Sky News might pick up the event. I think and find it likely that this is what motivated the BBC in relation to timing at the end of the chain of events. It was important, if possible, to get the news to broadcast for 1pm (ITN would have a lunchtime broadcast at 1.30), rather than waiting any longer. That led the BBC to truncate, unfairly, the opportunity for Sir Cliff to get in a reply before the first broadcast. I emphasise that I am not finding that there is anything inherently wrong with a desire to beat a rival to a story. What happened in this case was that that view unduly skewed other judgments that had to be made.

296. Having said that, I do not consider that this point attracts a lot of weight in the scales. A statement was forthcoming by 2pm, and this point was not pressed on me in final submissions by Mr Rushbrooke in this context (as opposed to the DPA context). Even importing it as a point from the DPA context, while I think that the drive to preserve exclusivity at the expense of waiting a more appropriate length of time for a statement is less than impressive, there are much weightier points in Sir Cliff’s favour than that one.

297. For the sake of completeness I should also add that in his evidence Mr Hall said that if he had known of the sort of operation that the BBC were mounting, alongside what he later discovered, he would have considered applying for an injunction to restrain the broadcast. As it was he had no opportunity to do that before 1pm. However, there was no submission made to me in final submissions under this head that the BBC’s conduct unfairly cost Sir Cliff the opportunity of getting an injunction and was therefore not responsible journalism, and I shall not rely on any such point in this judgment. A similar point is taken in relation to the DPA claim, but it is slightly differently couched. The question of the extent to which advance notice should be given in a privacy case so as to give an opportunity to apply for an injunction is a substantial question which was not much debated before me, and I would not wish to embark on a consideration of that important area without more submissions than I received.

The content, form and consequences of the publication

298. To a large extent the content and consequences of the publication have already been taken into account at the stage of considering whether privacy rights have been engaged. In this case so far as the publications revealed a police investigation into alleged sexual misdemeanours, they have already engaged Article 8, and the same is true of the less significant lack of respect for the home. Likewise, the likely serious consequences of disclosure have already been taken into account in considering whether there was a legitimate expectation of privacy at that first stage. The consequences were capable of being immensely serious.
299. Nonetheless, according to the jurisprudence in *Axel Springer* they emerge again at the balancing stage, and I shall loyally bring them back in. At this stage the following additional points seem to be highly material under this head.

300. First, the content and form. The coldly stated facts of the content and form of the broadcasts appear in the narrative set out in this judgment. That narrative does not really do justice to the quality of the broadcasts. They were, as I have said, presented with a significant degree of breathless sensationalism. The story was the main point in the news - there was nothing wrong with that in itself, but it did lend a certain urgency to the report. In some broadcasts it was accompanied by a ticker running across the bottom of the screen emphasising the story and maintaining its presence throughout the bulletin. Mr Johnson, and in some broadcasts another journalist, were broadcasting from outside the property. There was an attempt to lend drama to the broadcast by showing cars entering the property, and the helicopter shots added more, somewhat false, drama. In evidence there was an attempt by Mr Smith to justify the use of the helicopter as providing evidence as to what was going on inside, as if some form of verification was necessary or appropriate. I find that that was a spurious justification. The helicopter shots did not verify or evidence anything particularly useful or controversial that needed evidencing. They were moving pictures of the property, of seven or eight people in plain clothes walking to a building, the same people walking back to their cars and fuzzy shots of two or three people in Sir Cliff’s flat. It may have made for more entertaining and attention-grabbing journalism. It may be justifiable or explicable on the footing that TV is a visual medium and pictures are part of what it does. It did not, however, add any particularly useful information. Mr Munro also referred to the helicopter shots as being justifiable on the basis that it enabled the public to see a police operation going on, in relation to which there was a genuine public interest. That is more of a justification, but I still consider that the main purpose of utilising the helicopter was to add sensationalism and emphasis to the scoop of which the BBC was so proud. The BBC viewed this as a big story, and presented it in a big way. This was also manifested in other aspects of the coverage - the coverage from Portugal, pointless though it turned out to be, lent an urgency to the presentation of the story.

301. In short, and insofar as it is relevant under this head, the BBC went in for an invasion of Sir Cliff’s privacy rights in a big way.

302. The consequences of any disclosure of the police investigation would probably have been serious for Sir Cliff once the disclosure gained a wide currency. However, they are likely to have been magnified by the manner and style of the broadcasting that occurred in this particular case, which are described elsewhere in this judgment.
Severity of the sanction imposed

303. It appears that what the court is concerned about under this head is the chilling effect on reporting of imposing a particular level of sanction in this case. If one is considering how Article 10 rights are to be balanced against Article 8 rights then, at this stage of the reasoning it is first relevant to consider whether any sanction would have a chilling effect. I do not consider it would. If it would otherwise be right to hold that Sir Cliff’s Article 8 rights be of greater weight in the balance, then I do not consider that imposing any sanction would tilt the balance back in favour of the BBC.

304. Whether or not any given sanction is so severe as to be “chilling” depends on the level of sanction. That is more appropriately dealt with when considering the level of sanction at the damages stage, if that otherwise arises.

Other factors for the balance

305. On the facts of this case other factors have to be taken into account at the balancing stage.

306. The first is the BBC’s own editorial guidelines. It was common ground in this case that the Human Rights Act requires these to be taken into account under section 12(4)(b) as a relevant privacy code. Mr Rushbrooke sought to make much of this point, cross-examining in particular Ms Unsworth on how she thought the broadcast could be brought within its provisions. I do not propose to devote a significant part of this judgment to this issue because, having considered the code, and having considered Ms Unsworth’s cross-examination, I do not think that it advances the debate very much.

307. The guidelines start with a Foreword from the then chairman, Sir Michael Lyons. It acknowledges that the highest standards are expected of the BBC, whilst acknowledging the balance that has to be struck between protecting those who need protecting and avoiding unjustifiable offence, and “the BBC’s right to broadcast challenging and innovative work that tests assumptions and stretches horizons”. The guidelines are intended to help to achieve those goals.

308. Section 7 deals with “Privacy” and it acknowledges the need to balance privacy and “the right to broadcast information in the public interest”. It refers to the fact that:
309. There is then a section on “The Public Interest”, which was the focus of most of the cross-examination:

“Private behaviour, information, correspondence and conversation should not be brought into the public domain unless there is a public interest that outweighs the expectation of privacy. There is no single definition of public interest. It includes but is not confined to:

- exposing or detecting crime
- exposing significantly anti-social behaviour
- exposing corruption or injustice
- disclosing significant incompetence or negligence
- protecting people’s health and safety
- preventing people from being misled by some statement or action of an individual or organisation
- disclosing information that assists people to better comprehend or make decisions on matters of public importance.

When using the public interest to justify an intrusion, consideration should be given to proportionality; the greater the intrusion, the greater the public interest required to justify it.”

310. So far as an exposition of relevant factors is concerned, that passage is unexceptional. It does not, of course, dictate a clear answer as to whether or not the broadcast of the search in this case could be justified, but it does refer to the right balancing exercise.

311. Ms Unsworth was cross-examined as to which of the non-exclusive items she considered applied to this case. She identified the first and fifth of them as being relevant, though it was not clear to me whether she actually considered them at the time. I agree with Mr Rushbrooke’s submission (and what he put to the witness) to the effect that the broadcasting of the search did not fit comfortably with either of those. She also suggested in cross-examination that she would have considered that the broadcast might
lead to other complainants coming forward, which might just be fitted into the first of the bullet points (though she did not suggest it did).

312. It is true that Miss Unsworth did not convincingly relate her public interest justification for the broadcast to any of the specific matters enumerated in the Guidelines. However, I do not think that that matters very much in this context, for two reasons. First, the justifications are non-exclusive - they are merely useful factors or examples, leaving other justifications open. Second, while I am prepared to accept that a journalist’s views on the justification of publication (or his/her absence of views) might assist the court in detecting the public interest in the balancing exercise, the ultimate question is one for the court, not for the journalist. So it does not help much if Ms Unsworth did not consider the guidelines, considered the wrong ones, or misinterpreted the right ones. Ultimately the question of relevance and balance is one for me, based on all the facts. Mr Millar has formulated the BBC’s alleged public interest, and that is the one that I shall consider, and the Guidelines do not help on that.

313. I will, however, comment on one thing that apparently did concern Ms Unsworth. She was concerned that the BBC would be criticised in the future if it did not report on the search at the time and if it came out in due course that it had known about it. I should say that I do not consider that to be a good reason for reporting. It is quite understandable that the BBC would have been sensitive about not reporting, given the background of the Jimmy Savile matter, but that should not have led it to report matters which should otherwise not have been reported, at least in a matter which was not related to activities involving the BBC itself. There was no obligation on the BBC to report. Future criticism of the nature feared by Ms Unsworth does not matter. What matters to this point is whether there was some sort of positive obligation at the time (which there would have to be if future criticism was to be justified). There was none.

314. The second matter which statute expressly requires me to consider is the public interest in publication - see section 12(4)(a)(ii) of the Human Rights Act. I have in fact taken that into account above in considering one of the Axel Springer factors.

The striking of the balance

315. Having considered all those matters I am now in a position to consider how the various factors are to be weighed against each other. I have come to the clear conclusion that Sir Cliff’s privacy rights were not outweighed by the BBC’s rights to freedom of expression. This is an overall evaluative exercise which is not a precise scientific measuring one, but the most significant factors are as follows.
316. First, for reasons that are apparent elsewhere in this judgment, the consequences of a disclosure for a person such as Sir Cliff are capable of being, and were, very serious. The failure of the public to keep the presumption of innocence in mind at all times means that there is inevitably going to be stigma attached to the revelation, which is magnified in this case by the nature of the allegations against him, which were allegations (especially in the then climate) of extreme seriousness. There are also likely to be other invasive consequences of the kind referred to by Sir Richard Henriques in his report, which I have quoted above. Reporting on the investigation and the search was a serious invasion which required an equally serious justification (as the Guidelines acknowledge).

317. The main point urged in favour of disclosure is the public interest point formulated by Mr Millar. I acknowledge a very significant public interest in the fact of police investigations into historic sex abuse, including the fact that those investigations are pursued against those in public life. The public interest in identifying those persons does not, in my view, exist in this case. If I am wrong about that, it is not very weighty and is heavily outweighed by the seriousness of the invasion.

318. Also weighing against the interests of freedom of expression in this case is the style of the reporting. A lower key report of the search and investigation (for example, done merely by a measured reading of the relevant facts by a presenter in the studio) would, on my findings be a serious infringement, and would not be outweighed by the BBC’s rights of freedom of expression. What the BBC did was more than that. It added drama and a degree of sensationalism (and not just pictorial verification) by the nature of its coverage. The impact of the invasion was, in my view, very materially increased. Adding impact is, after all, the purpose of adding pictures to a story. That is what the BBC did, quite handsomely.

319. So far as the other factors which I have considered above have weight, they add it to Sir Cliff’s side of the scales. I will not re-list them here.

320. These conclusions relate to the balance as between Sir Cliff’s privacy rights and the BBC’s Article 10 rights. I do not consider that the additional limited invasion of Sir Cliff’s rights in relation to his home adds anything worthwhile to this part of the debate. The infringement of his privacy rights from the filming into his home is relatively minor in its context for the purposes of this part of the debate.

321. Last under this head I deal with a very broad point raised by Mr Millar. He submitted that the case against the BBC raised “issues of great, arguably of constitutional, importance for the freedom of the press in this country.” If Sir Cliff’s claim were successful it would undermine the long-standing press-freedom to report the truth about police investigations (respecting the presumption of innocence), and if that freedom is undermined then that should be a matter for Parliament and not the courts.
I think that Mr Millar may have been overstating the constitutional importance of this case a bit. I agree that the case is capable of having a significant impact on press reporting, but not to a degree which requires legislative, and not merely judicial, authority. The fact is that there is legislative authority restraining the press in the form of the Human Rights Act, and that is what the courts apply in this area. That Act will have had an effect on press reporting before this case because of Article 8, and the balancing exercise between Articles 8 and 10 is done by the courts under and pursuant to the legislation. The exercise that I have carried out in this case is the same exercise as has to be carried out in other, albeit less dramatic, cases. If the position of the press is now different from that which it has been in the past, that is because of the Human Rights Act, and not because of some court-created principle.

**Determination on liability**

I therefore find that the BBC is liable for infringing Sir Cliff’s privacy rights when it disclosed, by broadcasting, the fact that Sir Cliff was the subject of an investigation for historic sexual abuse and that his property was being searched in connection with that investigation. That means that I now have to go on and consider the question of damages.

**Damages - an outline of the questions for consideration**

By virtue of previous case management directions only some damages questions are currently before me. They are:

(a) General damages arising out of what I have found in relation to the wrongs committed by the BBC, including aggravated damages (if any).
(b) Whether certain categories of special damages can be claimed as a matter of causation. I am not asked to make any quantified award of special damages. It is hoped that clearing away some more general issues that arise in relation to some of these areas will facilitate the despatch of any more detailed inquiry, or even facilitate a settlement of the claims in whole or in part.

There is one significant point accepted by Mr Millar in respect of general damages. He does not take the point that the consequences of his client’s disclosure would have been sustained anyway as a result of disclosure by someone else. He accepted that in terms of general damage his client, if it acted wrongfully in publishing the search (and therefore the investigation) started the ball rolling and would be responsible for the consequences, without reference to the possibility that someone else might or would have revealed the story. Nor does he seek to limit the extent of his client’s liability to
general damages by reference to the fact that the story was re-published by so many other organisations and people. That means that I do not have to consider Mr Rushbrooke’s evidential case to the effect that, absent the BBC’s broadcasts, it is unlikely that the investigation would have been revealed in other media. In effect, the BBC becomes responsible for the wide publicity given to the story by itself and by others.

**General damages - the facts**

326. I have not yet dealt with all the consequences relied on by Sir Cliff as giving rise to his damages claim and so I now need to take up the story from where I left off above, at the point shortly after the story broke.

327. The breaking of the story had a very serious effect on Sir Cliff for a considerable period thereafter. As Ms Unsworth said she anticipated, it had a “significant impact” on him (she impliedly accepted the expression “huge impact”) and would cause him “serious distress”. She accepted:

> “17…but it
18 certainly occurred to me that this was a fairly
19 momentous thing that we were doing as far as a very
20 high-profile individual was concerned, yes.” (Day 10)

She was right about that.

328. Sir Cliff gave largely unchallenged evidence about the personal effect on him of the exposure by the BBC. He had to sit in Portugal watching a highly publicised search of his house, portrayed on TV for all to see, which was seen by others before he saw it himself and which was broadcast to a large number of countries. This prompted the sort of press interest which I have outlined above. Other broadcasters took up the story - ITN ran it on their 1.30pm news bulletin and they used the helicopter shots. The audience figure for the first BBC broadcast alone was 3.2m people. During the day the subsequent broadcasts will have reached hundreds of thousands, if not millions, more in this country alone. The first BBC internet article alone garnered over 5.1m views (almost 4.5m of them from the UK). Subsequent internet articles attracted hundreds of thousands more hits or views. Over the next two days all major print press media ran the story. Some used stills from the helicopter coverage. It gained enormous worldwide currency.
329. That in turn led to an increased focus by the public on Sir Cliff, and in the case of some individuals it led to the publication of abuse and trolling posts on the internet. There was at least one blackmail attempt made against him (see below). A great deal of unwelcome public attention arose. Sir Cliff felt trapped in his own home, and he felt despair and hopelessness leading, at times, to physical collapse. At first he did not see how he could face his friends and family, or even his future. He felt the whole world would be talking about whether he had committed the alleged offences or not. Sleeping was difficult; he resorted to sleeping pills.

330. The impression that he had was that his life’s work was being torn apart. The adverse publicity removed his status as a confident and respected artist and what he described as “a good ambassador for this country”. He felt and still feels tainted. His health suffered, and he contracted shingles, which he put down to stress. Although there was no medical evidence as to that causation I accept that throughout the entire period he was the subject of severe stress, and that that stress far exceeded the anxiety, and perhaps some level of stress, that he would inevitably have been under from the investigation by itself had the news of it not been publicised.

331. His friend Miss Gloria Hunniford gave unchallenged witness statement evidence of the apparent changes brought about by the disclosures. He lost his positivity and upbeat nature. She was told by him that he was reluctant to spend time in the UK because of the criminal allegations and the number of people who had become aware of them. She saw he had lost weight. He would later talk about how violated and betrayed he felt by the broadcast (a point which he himself made in the witness box). He improved once he was told he would not be charged, but not so as to become his former self.

332. Although at the time of these events Sir Cliff was 73, he was still working as an entertainer. However, as a result of these events that part of his life was, to an extent, put on hold, and his professional standing was diminished. Scurrilous material was published on the internet, which cannot have been pleasant. Sony, with whom he had intended to record an album in 2015, put the recording on hold. A planned release to coincide with his 75th birthday did not prove possible. An updated edition of his autobiography was shelved (a matter which arises under the special damages head, but I refer to it now to show the general effect on Sir Cliff’s life). Because of what he perceived as the stigma surrounding the revelations, Sir Cliff felt he could not or should not participate in other events, such as appearances at the London Palladium and at Canterbury Cathedral. Nor did he feel he could attend tennis tournaments (as a spectator), which he generally very much enjoyed. He claimed that retailers declined to stock one of his annual calendars, because of the publicity (which, again, I refer to to show the general effect on his life, irrespective of any special damages claim that might arise out of it). Even after it was announced he would not be charged, a charity with which he had been concerned (Dreamflight) asked him not to appear at a “waving
off” of a flight of sick children, because (he was told) his appearance might detract from a team of paralympians who were doing the same thing.

333. I accept all this evidence. It adds up to a life that was hugely affected for almost 2 years by loss of public status and reputation, embarrassment, stress, upset and hurt, with some consequential health effects. All this is entirely understandable. None of it results from over-sensitivity. I also accept that practically all of this was caused by the BBC’s broadcasting the story in the first place (and itself repeating it over the course of the day). Some of the dissemination of the information will have been by other media which were alerted by the BBC’s broadcast, but in the light of Mr Millar’s concession on causation I do not have to consider the extent to which that is true because Mr Millar basically accepted it all stemmed from the BBC in the first place.

**Damages for damage to reputation**

334. Sir Cliff’s claim has various elements. I consider them, so far as relevant, below but I start with the question of reputation. Mr Millar submitted that insofar as Sir Cliff’s claim was based on damage to reputation then that could not be the subject of a privacy claim; loss of reputation was the sole province of defamation.

335. It is true that to a significant degree the adverse effect on Sir Cliff was damage to his reputation, though that is not of the essence of a privacy claim. It is not the sole basis on which damages can be claimed. Nonetheless, some damage to reputation is inherent in the facts of the present case, and can fairly be seen as being part of the reason why Sir Cliff felt it necessary to lower his public profile after the search. I therefore need to consider whether Mr Millar’s submission is correct, because if and insofar as it is then Sir Cliff’s damages claim would have to be abated.

336. Mr Millar’s starting point is Lonrho v Fayed (No 5) [1993] 1 WLR 1489. The question in that case was whether the claimant could maintain an action based on an alleged conspiracy to damage the claimant’s reputation. The Court of Appeal held unanimously that an action claiming damage to reputation “and feelings” (per Lord Dillon at p1496C) must do so in a defamation action, so that the full panoply of defences to a defamation claim could be deployed by the defendant and not side-stepped by the claimant. He said that any action based on injury to reputation must allow the defendant to be able to prove the truth, so that the defendant cannot benefit from a reputation which is not justified.

337. This point, and this authority, was considered by me in Hannon v News Group Newspapers [2015] EMLR 1. That decision involved a consideration of whether a claim for damage to reputation, based in privacy, should be struck out on the footing
that *Lonrho* decided the point against the claimant to a striking out standard. In that case I rejected the submission that *Lonrho* decided the point against a claimant sufficiently clearly to justify a striking out. I will not repeat the reasoning which led me to that conclusion - it extends over several pages and there is no point in my setting it out here again. Nothing that I have heard by way of submission in this case causes me to revisit that reasoning. The main point was that it was not sufficiently clear that the principle expounded by the Court of Appeal should be applied in the developing area of the tort of privacy. The question simply did not arise.

338. Mr Millar then turned to the decision in *Gulati v MGN Ltd* [2016] FSR 12 (at first instance) in which he said there was an implication that damages for damage to reputation were not recoverable. He said that in that case the court had to consider whether privacy damages could be recovered for something other than distress, and no separate consideration was given to the question of damage to reputation. The court rejected a submission that an analogy could be drawn with libel damages when quantifying privacy damages.

339. In my view *Gulati* is not capable of sustaining that implication. The issue simply did not arise in that case. The questions that arose principally concerned whether the damages should be confined to compensation for distress. There were no arguments about damage to reputation specifically or in any form. When I, as the trial judge, declined to apply defamation damages by analogy, it was because no-one managed to tell me how that analogy could work, not because I was implicitly rejecting some sort of reputational element to damages. In any event, it does not appear that my rejection was total, because I qualified my rejection with the words “At least on the facts of this case …”. The implication sought by Mr Millar simply cannot be made.

340. Next Mr Millar relied on an implication which he said was to be drawn from *Cooper v Turrell* [2011] EWHC 3269 (QB). In that action an individual sued another individual for libel and misuse of private information (medical information). The claims were wrapped up in factual terms and Tugendhat J found in favour of the claimant on both claims. When it came to the assessment of damages Tugendhat J said:

“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.”
341. Mr Millar submitted that it is implicit in the reasoning in that paragraph that damages for misuse of private information do not include damages to injury to reputation. If it were otherwise then Tugendhat J would also have had to have avoided double counting for that reason as well and would have been required to make a further reduction.

342. Once again I do not accept the implication. It is not clear that the point arose in that case - it is not clear that there was any part of the privacy case which amounted to a claim for damage to reputation, or that the point was in the judge’s mind. In the absence of such a factor in the case and apparently present in the judge’s mind one simply cannot make the implication which Mr Millar seeks to make.

343. That case law does not support Mr Millar. In fact, recent case law points the other way. In Khuja the preponderance of speeches acknowledged that the protection of reputation was part of the function of the law of privacy. Lord Sumption, giving the judgment of the majority, said:

“21 In Campbell v MGN Ltd [2004] 2 AC 457, the House of Lords expanded the scope of the equitable action for breach of confidence by absorbing into it the values underlying articles 8 and 10 of the European Convention on Human Rights, thus effectively recognising a qualified common law right of privacy. The Appellate Committee was divided on the availability of the right in the circumstances of that case, but was agreed that the right was in principle engaged if in respect of the disclosed facts the person in question had a reasonable expectation of privacy. The test was whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than the recipient, would find the disclosure offensive. The protection of reputation is the primary function of the law of defamation. But although the ambit of the right of privacy is wider, it provides an alternative means of protecting reputation which is available even when the matters published are true.” (my emphasis)

He went on:

“34. In my opinion, Tugendhat J committed no error of law, and his conclusion was one that he was entitled to reach. Left to myself, I might have been less sanguine than he was about the reaction of the public to the way in which PNM featured in the trial. But that would have made no difference to the conclusion, for the following reasons:
(3) The impact on PNM's family life is indirect and incidental, in the same way as the impact on the claimant's family life in In re S and on M's family life in In re Guardian News and Media Ltd. Neither PNM nor his family participated in any capacity at the trial, and nothing that was said at the trial related to his family. But it is also indirect and incidental in a different and perhaps more fundamental sense. PNM is seeking to restrain reporting of the proceedings in order to protect his reputation. A party is entitled to invoke the right of privacy to protect his reputation but, as I have explained, there is no reasonable expectation of privacy in relation to proceedings in open court…” (again my emphasis)

There is nothing implicit about that; Lord Sumption’s pronouncements are quite explicit. He is expressing his own views on the protection of reputation, and approving Tugendhat J’s views on the same point.

344. Although they differed in the result of the appeal, it is also quite apparent that the minority also regarded the protection of reputation as being part of the function of the law of privacy. As well as citing passages from the works I have referred to above which refer to damage to reputation, in support of their decision, they ended by saying:

“381. In the present case the newspapers argue that the debate of general interest surrounds the power of the court to postpone publication of a report of part of its proceedings under section 4(2) of the 1981 Act. What, then, is suggested to be the contribution to that debate which identification of PNM would make? By e-mail dated 8 October 2013, Times Newspapers Ltd offered its answer: “We wish to identify your client in our reporting since this would make the piece considerably more engaging and meaningful for our readers.” We would not quarrel with this. It accords with the observations made by Lord Rodger JSC in the Guardian case when in para 63 he answered Romeo’s question about the significance of a name. But, against the public interest that the proposed piece about section 4(2) would be considerably more engaging and meaningful, this court needed first to recognise the risk to PNM that his identification would generate a widespread belief not only that he was guilty of crimes which understandably attract an extreme degree of public outrage but also that he had so far evaded punishment for them;
and then, in consequence, to balance the risk of profound harm to the reputational, social, emotional and even physical aspects of his private and family life, notwithstanding that he is presumed by the law to be innocent and has had no opportunity to address in public the offences of which at one time the police suspected him to be guilty.” (my emphasis).

345. It is therefore quite plain that the protection of reputation is part of the function of the law of privacy as well the function of the law of defamation. That is entirely rational. As is obvious to anyone acquainted with the ways of the world, reputational harm can arise from matters of fact which are true but within the scope of a privacy right. In *Khula* the effect of knowledge of police investigations which did not give rise to a charge, in terms of damage to reputation, was acknowledged. It is not difficult to think of others - for example, knowledge of certain medical conditions. If the protection of reputation is part of the function of privacy law then that must be reflected in the right of the court to give damages which relate to loss of reputation. That loss of reputation has an impact on the feelings of the wronged individual (which can be reflected in damages), and will inevitably come in to that extent in any event. The facts of the present case are a very good example of that, in my opinion. Mr Millar submitted that the facts of the present case “vividly” demonstrate why damage to reputation must be excluded from a claim in privacy, because the facts (that Sir Cliff was being investigated for historic sexual abuse involving a minor) were true and the freedom of the press to report those true facts should not be undermined by the award of damages for misuse of private information. I think the exact opposite is the case. The facts of this case (on the footing that the public interest in reporting does not outweigh Sir Cliff’s privacy rights) vividly demonstrate why damages should be available for an invasion of privacy resulting (inter alia) in damage to reputation.

346. I therefore reject this attempt by the BBC to limit the scope of the damages to which it is liable.

**General damages - the basic award**

347. Sir Cliff claims both what I will call basic general damages and aggravated general damages. In support of the latter claim he relies on a number of factors which are set out in the next section of this judgment. Some of them are matters that I think it more appropriate to treat as part of his basic general damages claim as opposed to aggravated damages and I do not separate them out in terms of an award. One or two do merit separate treatment and that again appears in the next section.
348. There was little resort to comparables by either side in this case. Mr Rushbrooke sought
to draw some parallels with the larger awards made in Gulati (above) to provide some
justification for an overall figure, including aggravated damages, which he put in the
region of £175,000 to £250,000 (which is a pretty broad range). I do not think that
those Gulati cases are a useful guide in this case because the larger figures were the
aggregate of a lot of separate claims and elements. Mr Millar said that this case was
not as valuable as the £60,000 figure (roughly £76,000 in today’s monetary values)
awarded in Mosley v UK [2008] EMLR 20, and that (if I am to award any general
damages) the figure should be less than in that case where the journalism was found by
the ECHR to have concentrated on the sensational and lurid, to titillate and entertain
(Mosley v UK [2012] EMLR 1). He submitted that I had to bear in mind the chilling
effect of awarding excessive damages. Unlike the Mosley case, this case was not one
where the report was purely sensationalist. It was one where the journalism was
responsible, albeit (on my findings) wrongful vis-à-vis Sir Cliff. In answer to a question
from me, Mr Millar expressly disclaimed any reliance on any defamation comparables.

349. As appears below, I acknowledge the need to keep damages claims within bounds so
as not to contribute to an illegitimate chilling effect on legitimate journalism, but that
does not mean that Sir Cliff should not have proper compensation for the wrongs
committed against him. I shall bear that in mind when reaching my figure. So far as
Mosley is concerned, I find it of limited assistance because of the very different nature
of the victim, the publisher and the publication in this case, (nationwide instant
transmission, by a national broadcaster, to large numbers of people, several times in a
day), the triggering of publications by others, the nature of the facts published, and the
identity and attributes of the claimant, and the huge consequential publicity given in the
rest of the media. But if one is comparing the two cases, I can say at this stage of the
reasoning that, contrary to the submission of Mr Millar, I regard the present case as
much more, not less, serious than Mosley, and worthy of a much greater sum, not a
lesser sum, than Mosley.

350. The following factors should be taken into account in assessing general damages in this
case:

(a) Damages can and should be awarded for distress, damage to health,
invasion of Sir Cliff’s privacy (or depriving him of the right to control the
use of his private information), and damage to his dignity, status and
reputation. (Gulati in the Court of Appeal [2017] QB 149 at para 45;
Gulati at first instance, supra; and the discussion above about reputation.)

(b) The general adverse effect on his lifestyle (which will be a function of
the matters in (a)).

(c) The nature and content of the private information revealed. The more
private and significant the information, the greater the effect on the
subject will be (or will be likely to be). In this case it was extremely
serious. It was not merely the fact that an allegation had been made. The fact that the police were investigating and even conducting a search gave significant emphasis to the underlying fact of that an allegation had been made.

(d) The scope of the publication. The wider the publication, the greater the likely invasion and the greater the effect on the individual.

(e) The presentation of the publication. Sensationalist treatment might have a greater effect, and amount to a more serious invasion, than a more measured publication.

351. Those factors clearly inter-relate with each other but it is useful to separate them out as being relevant factors. Applying those factors yields the following results. In taking them into account I have been careful to take an overall view, and have not double-counted their respective effects.

352. The effect on Sir Cliff in general terms appears above. It was profound. It affected his dignity, status and reputation to the extent that he felt he could not face the world in the manner in which he had done previously. It had an effect on his health and well-being and he will justifiably have felt he could not robustly assume that everyone who heard about the events would have firmly in mind the presumption of innocence. All this went on, in substance, for virtually 2 years until the decision not to charge him was taken and made public. Even then the effects would not and did not automatically and totally evaporate. Sir Cliff said in the witness box that he would never get over it completely, and I accept that evidence.

353. The distress in this case was increased to a degree by some of the factors that were urged on me by Mr Rushbrooke as justifying an award of aggravated damages. Those factors are identified in the next section of this judgment. Some of them have been taken into account in the basic damages figure.

354. As to (c), the content of the disclosed information was extremely serious, especially in its context at the time (that is to say the background of previous investigations, charges and convictions of others for sexual offences involving minors). What was disclosed was not an investigation for some much more minor crime. It was an investigation into a crime which the public generally regard with a large degree of abhorrence. The disclosure was made more serious (not more justifiable) by Sir Cliff’s prominence. As I have already observed, Ms Unsworth appreciated that the consequences of this sort of disclosure could be very great for Sir Cliff because of its nature, and she was right about that.
355. As to (d), the initial publication in the 1pm news bulletin reached a lot of viewers. More were reached when the story was repeated on the BBC, with added detail, during the rest of the day. ITN picked it up (using some of the helicopter footage) at 1.30. Print media followed that day and the next, some of them using stills taken from the helicopter footage. It appeared on websites, and the broadcast (or an equivalent) was viewed in a large number of other countries in which Sir Cliff was known. This was not just a story in one newspaper; once the BBC had broken it it achieved world-wide currency. As I have indicated, no attempt was made by the BBC to suggest that this widespread dissemination would have happened anyway. It all stemmed from the BBC’s broadcasts.

356. As to (e), the publication by the BBC itself was not a measured factual publication, but one which was more sensationalised in the manner already disclosed. It was even more likely to grab one’s attention than, say, a “talking head” in the studio. It would be bad enough for Sir Cliff to be abroad and hear about the investigation in a more factual broadcast and realise from the broadcast that it was being publicly disseminated. It was significantly worse that he, and the rest of the world, watched his own home being approached and then, to a small degree, actually being searched. The approach was likely to hype the event, increase awareness and increase upset and distress.

357. I acknowledge that in assessing the distress caused to Sir Cliff I should not award him anything which reflects such distress and discomfort as he would have experienced from the investigation as such (not publicised). I am satisfied that he would have experienced a level of upset from this, but it would pale into insignificance beside the effects of knowing that everyone knows, with all the consequences of that. My deliberations take all this into account.

358. Bearing all those factors in mind I assess the general damages (without aggravated damages) at £190,000. As I have said, I was given no useful comparables, and I am unaware of any useful comparables in the realm of privacy, but I consider that that figure, as well as being appropriate for the facts of this case, is not out of line when one considers damages for personal injury (which is a sort of check imposed in defamation cases and must be borne in mind in privacy cases - see my decision in Gulati). Although no-one pointed me in the direction of defamation cases, I have wondered whether there were any lessons at all to be gleaned from defamation cases where the defamation alleged was an allegation of serious criminal conduct. I have myself reviewed the cases set out in Appendix 3 to Gatley on Libel and Slander, 12th Edition, and did not detect any real comparables there (certainly none involving a combination of serious criminal allegations, worldwide publication and a claimant with the reputation of Sir Cliff), but I think I can safely say that, using the more serious cases as a sanity check, my figure passes. If one refers back to the Mosley case and asks, as a crude cross-check, whether this case is at least twice as bad as that one in terms of the nature of the information disclosed, the extent of the disclosure, the manner of the disclosure, the identity of the victim and the effect on the victim, I think that the answer would be Yes, though I stress that that is not how I have assessed the figure.
I have borne in mind that awards of damages are not to be such as to have a chilling effect on the right of freedom of expression. I do not consider that an award of that amount should have a chilling effect of the kind which is to be avoided. A claimant is entitled to proper compensatory damages and the figure I have specified is a proper figure for that purpose. I do not consider that it requires any modification on the footing that such figures would have a chilling effect on the exercise of a newspaper’s right of freedom of expression. It is not an excessive figure; there is no punitive element; it is a genuine compensatory figure; the reason that the story existed as a story was because information was acquired in breach of a right of privacy in the first place, and then confirmed by less than straightforward means by the BBC’s reporter; and it was entirely the decision of the BBC to present the story at all, and then to present it as it did. One of the main motivations of the BBC was the excitement of its scoop. None of that requires any modification of damages otherwise properly payable to Sir Cliff on the basis that responsible journalism would be disincentivised (chilled).

Aggravated damages

It was not disputed that aggravated damages can be awarded in a privacy case (as they were in Gulati). What was disputed was whether they should be awarded in this one.

Mr Rushbrooke relied on various factors as justifying an aggravated damages claim:

(a) The flagrancy of the disregard of Sir Cliff’s privacy and the BBC’s failure to give him adequate notice of their intention to broadcast, which deprived him of the opportunity to seek an injunction restraining publication.

(b) The BBC’s failure to acknowledge wrongdoing or to apologise to Sir Cliff at any stage (other than expressing sorrow that Sir Cliff had felt distressed), and indeed relying on a professed “duty” to report the search and investigation.

(c) Submitting the broadcast for a Royal Television Society award in the category “Scoop of the Year”, and then “contemptuously” (to use Mr Rushbrooke’s word) refusing to withdraw it when asked to do so by Sir Cliff’s solicitors.

(d) Causing Sir Cliff to incur very substantial legal costs in this litigation by defending it in aggressive manner, including putting everything in issue, and even refusing to admit in the Defence that the coverage (as opposed the fact of the investigation) caused Sir Cliff distress, and criticising him for spending too much money on his lawyers (which Sir Cliff found a painful allegation to read).
(e) Cross-examining Sir Cliff in an intrusive way about his religious and political beliefs without any good reason for doing so, apparently so as to insinuate hypocrisy, and causing him to re-live painful events leading him to break down in tears.

362. I shall deal with each of those briefly in turn.

363. So far as (a) is concerned, I do not accept that the invasion of Sir Cliff’s privacy rights was flagrant in the sense that the BBC were aware of them, aware of the risks involved in publishing and went ahead in a reckless fashion. Its regard for privacy rights does not seem to have been very great, but the disregard was more in the nature of negligence than recklessness, and I am not sure it deserves the characterisation “flagrant” (if that characterisation matters). What matters more is that it was extremely serious. So I do not think that “flagrancy” is a reason for inflating damages. However, I think that the failure to give more warning before the broadcast was something which understandably caused distress. Had there been more warning then there was a chance that the BBC might have been headed off, or that an application for an injunction might have been made, but as I have indicated that was not particularly urged on me in final submissions and I do not rely on it. Rather than treat this factor as an aggravating one, I have taken it into account in the basic damages.

364. As to (b), the BBC’s stance was the familiar one of a defendant in not admitting liability and maintaining a stout, albeit misplaced, defence. I do not think it attracts aggravated damages in this case any more than in any other.

365. The submission of the broadcast for an award (which it did not win) does properly fall for separate treatment. It is quite understandable that a broadcasting organisation which first infringes privacy in this way, and then promotes its own infringing activity in a way which demonstrates that it is extremely proud of it, should cause additional distress (which it did), both by demonstrating its pride and unrepentance and to a degree repeating the invasion of privacy with a metaphorical fanfare. Ms Unsworth expressed the view that it was not a good idea to have submitted the broadcast, and she was right about that (she was not asked for her views at the time), and I think it right that this very unfortunate event should be treated as aggravating the damage caused (which it did). It should attract a claim for aggravated damages which I treat separately and in respect of which I award an additional £20,000.

366. The features in (d) amount to a claim that the BBC defended the action. I do not think that the conduct of the pre-trial defence was such as to attract a claim for aggravated damages. I am sure a large number of successful claimants are aggrieved that the defendant did not cave in or make more admissions than he/she/it did, but I do not consider that that should be allowed to aggravate the damages in this or, generally, any
other case. There is nothing sufficiently special about this case which sets it apart from others in this respect.

367. As to (e), there was nothing in the cross-examination of Sir Cliff which in any way aggravates the claim or the damages. I have reviewed the transcript carefully, and have a clear recollection of its tone. Objectively it was not particularly hostile and does not demonstrate an attempt to insinuate hypocrisy, and I do not recollect that that was its tone at the time. It was a legitimate attempt to establish Sir Cliff’s publicly stated stance on various matters in order to make good the BBC’s case on the public profile of Sir Cliff. To a degree the cross-examination required Sir Cliff to re-live painful events, but not to any excessive or improper extent, and certainly not in such a way as to aggravate damages.

368. I add one further point by way of explanation. Were it not for one factor I would probably have wrapped all aggravating features up into an overall figure, which is sometimes the preferred course. However, as will appear below, it is necessary for the purposes of the contribution claim to separate out the true aggravated damages in this case, so I have done so.

Standing back

369. That gives a total of general and aggravated damages of £210,000. I need to stand back and reflect on whether, overall, that is an appropriate figure to award. Having performed that exercise I am satisfied that it is. It is a large figure, but this was a very serious invasion of privacy rights, which had a very adverse effect on an individual with a high public profile and which was aggravated in the manner to which I have referred.

Special damages

370. I am not asked to rule on any amount of special damages in this litigation. Instead I am asked to rule on certain limited points in relation to certain limited transactions in order to give guidance for a future resolution of this area of the dispute, whether by settlement or by future hearings.

371. The background to part of the special damages claim is as follows. When the search and investigation were made so dramatically public Sir Cliff felt that he had to respond to some of the knock-on consequences of that. The news prompted great interest from media outlets, individuals and even Parliament. This created what Sir Cliff perceived were practical, often reputational, problems arising out this renewed interest. Newspapers became interested in related stories; websites and other publications published sometimes scurrilous materials about him; a House of Commons Select Committee decided to investigate certain aspects of the broadcast. In order to limit the effect of this activity solicitors (Simkins) and his usual PR firm (PHA Media) were engaged to counter some of these effects or to present certain aspects of Sir Cliff’s position, and the costs of so doing are claimed as special damages in this case.
372. In addition to those alleged losses, Sir Cliff also claims to have lost the opportunity to publish a revised version of his autobiography and to have suffered loss as a result.

373. Determining all the matters under this head would be a very substantial exercise, entailing potentially very substantial disclosure. It was therefore determined, by a combination of agreement and judicial ruling, to limit the scope at this stage to trying to establish some points of principle that arose across various categories of claims with a view to limiting future debate. Consequential PR costs are not to be dealt with in this phase of the litigation; the claim to those will be pursued later. So far as other elements are concerned the issues to be determined were set out in an order of 14th December 2017 (replacing similar terms in an earlier order). In understanding those provisions it is necessary to understand that costs paid to the solicitors were paid by Balladeer Ltd, one of Sir Cliff’s service companies, and the advance for his book was to be paid to another (Vox Rock Ltd). The question of whether he could recover anything in respect of moneys paid by, or to be paid to, those companies (as opposed to himself personally) is a separate question which is again to be parked for the moment, and the approach at this stage of the litigation was to assume that that factor would not of itself be a bar to recovery. With that in mind the following provisions of the order can be understood. The order provided that the following special damages issues would be tried at this trial:

“4.1 In respect of legal costs claimed as damages, and on the assumed basis that the fact that such costs were paid by Balladeer Ltd and not the Claimant is no bar to recovery, (a) whether in respect of any of the generic categories identified in the Claimant’s Part 18 Response dated 18 May 2017, the Claimant's case on causation as set out in paragraphs B-D of the introductory section of the Claimant's Response and under paragraph 2.2 of the said Response should be accepted or rejected and, if so, (b) whether legal costs in respect of all or any such work are recoverable as a matter of law as damages in this action;

4.2 In respect of the revised edition of the Claimant's book "My Life, My Way" and on the assumed basis that the fact that the advance for the book would have been paid to Vox Rock Ltd and not the Claimant is no bar to recovery, (a) whether production and publication of the book was shelved in consequence of the allegedly unlawful conduct of one or both Defendants and, if so, (b) whether the sum of the agreed advance for the book is recoverable as damages in this action."
Something has gone slightly wrong with the drafting of 4.1 - I think that it should read at the end “…should be accepted or rejected, and if accepted, (b) whether legal costs [etc]”. That makes logical sense, and that is how I shall approach it. I can deal with this matter without setting out the terms of the Response which sets out the causation matters in question.

374. So far as the paragraph 4.1 items are concerned, the matter was presented by reference to sample events chosen by the claimant in order to try to flush out the causation questions said to arise. Even in relation to those sample events I am invited to consider recoverability only. The evidence was as appears below.

375. Sir Cliff gave evidence about the “persistent media speculation and enquiries about where things were with the police investigation”, and the other matters (the nature of which I have set out) which caused him to engage professionals to deal with them. He explained, and I accept, that he and his office could not deal with those matters themselves because they had neither the time nor the expertise. He therefore engaged Simkins and his PR firm to deal with them. That gave rise to the sample transactions before me. In this narrative I shall set out the details of each sample claim and make findings of fact where they are contentious and relevant to the claim. I also refer to the amount of the claim made in relation to each sample, not by way of finding by merely by way of narrative. I shall then consider the principles applicable generally to this area of the case, and return to apply them to each of the instances separately.

Facebook - Christians against Cliff

376. On the same day as the search (14th August) a Facebook page was created called “Christians against Cliff”. It is not completely clear when in the day it was created but judging by the earliest post it was late in the day, and some time after the search was publicised. It contains a large number of outrageous, highly offensive and defamatory allegations and remarks about Sir Cliff. Mr Rushbrooke invites me to infer that its setting up was prompted by the publicity given to the search by the BBC, and I draw that inference. The coincidence is otherwise too great.

377. While Sir Cliff did not challenge all the hostile internet posts about him, he did challenge this one via Simkins who sought to have the page taken down. Simkins asked Facebook to take down the post on 27th August. Facebook originally declined to do so, but after significant email traffic it blocked the site from viewing in the UK, and then, after a detailed email indicating how defamatory the email was in a number of other jurisdictions, the page was taken down completely. The estimated total fees for this work are said to be a little over £11,700.
Print media

378. The next sample involved dealing with the print media. Mr Benaim’s evidence, which I accept, is that they were contacted by a number of print media organisations prior to intended publication of stories about supposed facts concerning the allegation, the number of complainants, the progress of the investigation, the health of Sir Cliff and other matters apparently of interest. It is Sir Cliff’s case that these instances would not have occurred had it not been for the interest stimulated by the BBC reporting. In these instances Simkins advised behind the scenes, or engaged directly with the media to head off inaccurate stories or to correct published inaccuracies.

379. The first sample in question involved the Sunday Mirror. On 23rd August 2014 a journalist from that newspaper wrote to Mr Benaim saying:

“Please find details below about a story we are planning to run in tomorrow’s paper.

In addition to the information from my news editor, we would like to make it clear that the tone of such a story would reflect how Sir Cliff has been subjected to an earlier investigation which failed to provide any evidence to take it further.

Therefore we would kindly request a response from a representative of Sir Cliff about any understandable anger at the previous, seemingly, unfounded investigation.

We would obviously repeat his statement and strong denial regarding the latest investigation in the article.”

380. The information in question was apparently about an alleged investigation carried out in relation to events which at the time were believed to have taken place on foreign soil between 1997 and 2001; the investigation was said to have been dropped due to insufficient evidence.

381. The first response of Simkins was to request further details and to invite the newspaper to refrain from publishing until further information had been provided. A strong letter was then sent to the editor the same day, emphasising the defamation risk in publishing the story and saying that Sir Cliff was not aware of any prior investigation. The story was not published. It seems to me to be highly likely, if not inevitable, that the newspaper’s interest in the story was only triggered because it had become known via the BBC broadcast that Sir Cliff was under investigation; that made the previous investigation of interest.
382. The next intervention with the Mirror Group came in January 2015 when Simkins wrote another letter in response to a suggestion by the newspaper that it was intending to pursue a story based on a claim that the police were then investigating Sir Cliff in respect of a number of "allegations" (in the plural). Again Simkins protested that any such publication would be defamatory. That, again, in my view was a threat to publish which arose out of the disclosure of the search and investigation back in August 2014.

383. Further examples of Simkins’ intervention with Mirror Group were given covering the period up to 2016. The estimated fees incurred during this period on these matters were said to be £24,595.

384. Mr Millar submitted that “but for” causation had not been established in relation to this head of damages. It was known before 14th August that various stories were circulating about Sir Cliff, and one of the reasons for having a PR firm engaged was to have a team available to be able to deal with that. The newspapers in question had their own questing journalists and it is not possible to say that “but for” the BBC broadcast these journalists would not have pursued the stories.

385. I do not accept this analysis of causation. What Sir Cliff complains about is not that journalists investigated these stories, but that they threatened to publish them when they did and had to be seen off. I am satisfied on the balance of probabilities that had the BBC not broken the story these newspapers would not have threatened to publish when they did. The idea of publishing probably came on the back of the BBC story; the BBC story was (as I have said) the trigger. That is much more apparent from the timing of the first story (just over a week after the broadcast), but the background is still the same for the later ones. The BBC revelations were the very important background to what the papers proposed. But for that broadcast I do not consider it likely the other disclosures would have been proposed.

Broadcast media

386. Next Sir Cliff relied, by way of example, of an interaction with Sky News in January 2015. Sky indicated that it was minded to broadcast a story that there were now two more allegations made against Sir Cliff, albeit that the prosecuting authorities had not said there was more than one. In order to protect Sir Cliff’s interests Simkins dealt with this, after some internal discussion, by writing a warning letter to Sky, warning of the defamation risk. The item was not broadcast. Yet again it is sufficiently apparent that this threat would not have been made had there not been the prior broadcast information about an allegation (in the singular) - Sky was seeking to develop that news, not start a
completely new story running. Having said that, it is more likely in this case that the
investigation which (allegedly) revealed the other allegations was itself prompted by
the initial BBC publication as well.

387. The costs of Simkins associated with this event were said to be £1,930.50.

**Attempted blackmail**

388. On 20th August 2014 an individual contacted PHA Media on behalf of a “friend” who
had made allegations about Sir Cliff. The individual said that the “friend” required a
financial “reward” for not publicising the story. The individual was reported to the
police and questioned but ultimately not prosecuted. He published scurrilous material
about Sir Cliff on Twitter, and Mr Benaim’s firm advised in relation to an article due
to be published in the Sunday Mirror which was to feature an interview with the
blackmailer (it was ultimately not published). A letter was sent to the Sunday Mirror
by Simkins on 21st May 2016 warning them off from publishing the story. A reply on
the same day indicated that it had had its intended effect.

389. It is plain that the blackmailer was prompted by the BBC broadcast and/or subsequent
publicity flowing from it, and that but for the broadcast the blackmail attempt would
not have been made and the legal fees would not have been incurred.

390. The fees said to have been incurred in relation to the activity in dealing with this event
are said to be just over £15,500.

**Advising in relation an inquiry by a Home Affairs Select Committee**

391. At the end of August 2014 the Home Affairs Select Committee started an inquiry into
the question of how the search of Sir Cliff’s property entered the public domain. In a
letter it asked various limited questions of Sir Cliff which Simkins answered on his
behalf. When it seemed to Simkins that the Committee would make a finding
exonerating the BBC Simkins sent a short letter (22nd October 2014) suggesting that
that would be inappropriate while a “live investigation” was ongoing (to no avail) and
in February 2015 it took up questions arising out of an SYP letter published by the
Committee and which was said to contain misleading statements to the disadvantage of
Sir Cliff. Further correspondence followed, again in an attempt to head off more
adverse publicity arising out of further publications.
392. Again it is plain that, but for the BBC broadcast, this inquiry and the questions of Sir Cliff, and the other steps referred to, would not have happened.

393. Fees of over £32,000 are said to have been incurred in relation to this activity.

**Assisting with potential US immigration difficulties**

394. From time to time Sir Cliff has to pass through US immigration, usually in transit, and there was concern that public knowledge of the investigation might lead to difficulties with the US immigration authorities. Simkins assisted in the instruction of US immigration specialists to try to head off those difficulties. A letter was written by those experts to US Immigration at Shannon Airport to ease any possible difficulties. Whether as a result of that letter or not, there were no difficulties.

395. “But for” causation under this head is obvious.

396. The Simkins costs of this exercise are £5,441.50.

**Advising on media interviews after the decision not to charge**

397. Once it had been announced that Sir Cliff would not be charged Sir Cliff considered how best to repair the damage done by the broadcast (including damage to his reputation) with his advisers, including Simkins. It was decided to provide one print interview (with the Daily Mail, as it turned out) and one TV interview (with ITV). Simkins assisted in the process, including the drafting of contracts and checking the content of the interviews. Their legal input included what it was and was not safe or proper to say in the light of the criminal investigation. Part of the thinking behind this process was to match the publicity which the BBC had given with Sir Cliff’s own publicity once he had been released from the threat of charge. This is said to have involved a large number of telephone calls, meetings and email exchanges.

398. Again, “but for” causation is obvious.

399. Simkins’ fees for this are said to have been almost £31,000.
The lost book advance

400. Prior to the events of August 2014 there were fairly well advanced plans for Sir Cliff to publish an updated version of his book “My Life, My Way”, last published in paperback in 2009. It was to have new content and new photographs covering the intervening period, timed to come out at the time of his 75th birthday tour in October 2015. A launch would have been accompanied by publicity such as interviews and other appearances. A substantial advance had been agreed, albeit not finalised in the form of a signed contract. New photographs and an updating chapter were planned. I find that had there been no police investigation and search this is a project which would probably have come to fruition.

401. Sir Cliff’s case is that this commercial opportunity was lost because of the BBC publicity given to the search. Sir Cliff and Mr Smith felt that preparation for publication, and the publication itself, could not continue or take place while the police investigation was pending. Sir Cliff would have found dealing with the events (for the purposes of publication) difficult if not impossible. Accordingly, although the publishers were still said to be interested, it was decided to postpone pursuing the project until the investigation was over. By the time that that happened in June 2016 they had missed the boat of the 75th birthday party, the publishers had lost interest in the project as a commercial opportunity, and Sir Cliff had also lost interest in it. Accordingly the publication did not take place, and will not take place. The advance will therefore not be paid. I accept that that is now the end position.

402. I am invited to make findings of causation to the effect that the BBC’s publication caused the loss of the advance both in fact and in law. I found the evidence to be a little thinner than I would have expected for such a significant part of the damages claim. The literary agents (who dealt with the publishers) were not called to give evidence of the attitude of the publishers and the prospects for publishing. Their views were conveyed via the hearsay evidence of Mr Smith. There was some desultory email traffic between Sir Cliff’s literary agents and Mr Smith about this. Mr Smith had assumed that the publishers would have lost interest, but it appears that they had not. Nonetheless, on 5th November 2014 Mr Smith told the literary agents that:

“I don’t think the timing is good just now, but I do think is [sic] now greater merit for a book than there was pre-Rave [ie pre-search]. Let’s keep it simmering - on the front of the stove.”

403. In order for this part of the claim to be established it must be determined that:

(a) A publication would probably have resulted had there been no investigation and no search.
(b) The publication would still have happened even if the investigation, without its disclosure, had taken place. That is because it is, and has to be, Sir Cliff’s case that it was the publicity that caused the publication to be lost.

(c) The publicity given to the search caused a delay in preparation of the publication for such a period that the commercial opportunity was lost.

404. I have already found (a) to be the case. A finding in terms of (b) involves ascertaining what would have happened had there been an investigation without publicity, which in turn involves establishing that the investigation would not have caused any hold-up in publication either because the publication events would have gone ahead in parallel with the investigation, or any temporary roadblock posed by the investigation would have been removed in time to allow publication to coincide with Sir Cliff’s 75th birthday. According to Sir Cliff’s evidence the plan was to create the extra material at the end of 2014 or beginning of 2015, in time for all the necessary steps to be taken for publication in October 2015. The extra material would have been prepared by Ms Penny Junor on the basis of interviews with Sir Cliff.

405. The factual question of what Sir Cliff would have done by way of preparation while the investigation was pending (without the publicity) was not made particularly clear in his evidence in chief, but I think that a fair interpretation of all the evidence (including Mr Smith’s) is that even without the publicity he would have found it hard to deal with the preparation of the book whilst still under investigation, partly because he was upset by the allegations themselves. I think it likely that he would have felt he could not do it until he was cleared, irrespective of the publicity given to the search.

406. That means that, as a matter of causation, Sir Cliff has to establish that absent the publicity the investigation would have been over by a point in time at which it was still not too late to prepare the material for the publication. On the evidence I heard that means it would have had to have been over by the end of 2014 or the very beginning of 2015 in order to allow time for all the work to be done. The evidence going to that came from two sources and has already been identified above. First, Mr Smith gave evidence that he was given an initial police estimate of 10-12 weeks for concluding the investigation (amended to 6 to 12 weeks in his cross-examination). Second Mr Morris gave evidence that, in his experience as a criminal solicitor, a year would be exceptional and 22 months was extraordinary. He understood from the police that the great length of time was because the police had a number of “tasks” to fulfil, by which he seemed to mean follow up inquiries from additional sources of information (‘bandwagoners’ to adopt Sir Richard Henriques’ term), and Mr Smith said he was told by the police that the investigation was lengthened by the number of false accusations which were made but which they nonetheless had to investigate. It is a little striking that Supt Fenwick was not asked why the investigation took as long as it did.
407. That evidence is thinner than one would expect for such an important point, but on the basis of it I am prepared to find, and do find, that the investigation was prolonged by the need to investigate “bandwagoning” complaints, and that that need arose from the publicity that was given to the raid. I consider it likely, on the balance of probabilities, that had it not been for the publicity, the investigation would have been over in time for the book publication to take place as planned. If it had taken a little less than 6 months (which is more than the 12 week maximum suggested by the police) then there would just have been time, and I consider it likely that it would have been done. I was not invited by either side to approach this as a “loss of a chance” case.

408. I therefore find causation in fact to be established in respect of this head of loss.

The basis of recovery of these special damages and my findings on the transactions presented in this case

409. Since I am not required to find any specific amounts under any of the above heads, and the purpose of the exercise is to reach some decisions about causation (and any related issues) with a view to being able to apply those decisions elsewhere, I shall take each of the samples and make findings of liability short of quantum.

410. In connection with this phase of the exercise Mr Rushbrooke principally asserted what I call causation in fact without much analysis as to whether the events fell within what I can call causation in law. Mr Millar did indulge in that analysis, and appropriately so. He also reminded me of the requirement that damages should be justified in law and not be pitched so as to have a chilling effect on press freedom of expression.

411. Mr Millar’s first point is that there must be causation in fact, by which he means compliance with a “but for” test. I agree that that is a first test, and, as appears above, I find that it is fulfilled in the case of all instances referred to above.

412. Next Mr Millar submitted that there should be causation in law. The principal significance of the point in this case is said to be in the context of Sir Cliff’s having to deal with acts of third parties, which applies to Simkins’ dealings with Facebook, the other would-be publishers and possibly the Home Affairs Select Committee matter. I do not see how the point arises in relation to the other sample claims.

413. In relation to the acts of third parties, Mr Millar relied on a passage in Clerk & Lindsell on Torts, 22nd Edition at paragraph 2-111:
“The question of the effect of novus actus “can only be answered on a consideration of all the circumstances and, in particular, the quality of that later act or event”. Four issues need to be addressed. Was the intervening conduct of the third party such as to render the original wrongdoing merely part of the history of events? Was the third party’s conduct either deliberate or wholly unreasonable? Was the intervention foreseeable? Is the conduct of the third-party wholly independent of the defendant i.e. does the defendant over the claimant any responsibility for the conduct of that intervening party? In practice, in most cases of novus actus more than one of the above issues will have to be considered together.”

414. He also pointed to McManus v Beckham [2001] 1 WLR 2982, a case which involved the repetition of a similar slander to that of which the defendant stood accused. Mr Rushbrooke relied on that case, for his part averring that it demonstrated that reasonable foreseeability of some form of repetition or expansion of the original wrong was sufficient to bring resulting damage within the original wrong.

415. It does not seem to me that the novus actus/third party acts line of cases necessarily provide an answer to the questions arising out of the sample cases. This is not a case in which Sir Cliff is claiming damages flowing from an actual publication by the print and broadcast media, or damages flowing from the defamatory abuse on the “Christians Against Cliff” website, or at least not under this part of the argument. He is claiming for something different - the cost of steps taken by his solicitors on his behalf to protect his reputation by preventing acts which were apparently prompted by the BBC publication, or bringing them to an end. That seems to me to invoke not so much the novus actus line but cases about the cost of mitigation of loss (though it is not quite on all fours with them) and a consideration of the scope of the tort.

416. One point of Mr Millar’s needs to be despatched at this point in the argument. He argued that all or most of the sample claims could not fall within the scope of the tort (and thus fell outside a damages claim) because they were intended to protect the reputation of Sir Cliff, and the law of privacy did not protect reputation - that was the province of the law of defamation. I have already dealt with that point. Damage to reputation is within the scope of the tort of infringement of privacy rights - see above.

417. With that cleared out of the way I can turn to the above samples, and I start with the solicitors’ attempts to stop further stories being published by the media. The starting point to the inquiry is to reflect further on what it is that the privacy right protects. It protects an individual from the consequences of an invasion of privacy in terms of loss of autonomy over the information in question, distress and damaged feelings, and
(interacting with the second) some damage to reputation (in some cases, and certainly this one). The protection of those interests is within the scope of the tort.

418. In many, if not most, cases, where there is a single infringement of privacy rights, the risk to reputation will be the risk, or damage, caused by the infringement itself. However, the background to this case presents another area of risk. Sir Cliff was already the subject of a certain amount of unpleasant tittle tattle, largely confined to websites with no great readership. At the same time he was the sort of celebrity that the press would be interested in if something adverse came out - as is demonstrated by the facts of this case. In all those circumstances it is reasonably foreseeable (indeed virtually inevitable) that the press would start digging about for additional stories (or disinter previously buried stories) to see if there was other publishable material in the light of what had already been disclosed. That presents a further risk to his reputation which would not have occurred had the original publication not taken place. The press would be emboldened and incentivised to consider further stories, and that was reasonably foreseeable. Sir Cliff was exposed to the risk of further scurrilous publication or adverse publicity building upon, even if not quite the same as, the original infringement.

419. I regard that as being within the scope of the interests which the privacy right is intended to protect. That is not to say that the BBC in this case would necessarily be liable for the actual consequences of a publication of further material (to the same extent as the second publisher) but an attempt to stop it happening would be a reasonable attempt to contain the damage to his reputation which flowed from the original publication. The principles of remoteness in a confidentiality action, which I regard as analogous to the present case for these purposes, were considered in Douglas v Hello Ltd (No 3) [2006] QB 125. In that case the publishers of illicitly taken wedding photographs were held liable for damages, and those damages, in part, reflected re-publication of some of the photographs in publications other than the defendant’s. Those damages were allowed by Lindsay J at first instance and by the Court of Appeal as coming with an appropriate remoteness test. Lindsay J had held that the subsequent photographs “were not so remote a consequence of Hello’s publication as not to be laid at Hello’s door”, and that finding was allowed to stand. The Court of Appeal held:

“240. In our judgment, although it might have been better if the judge had given fuller reasons for his decision on this point, his determination on remoteness was one that he was entitled to reach. While the resolution of the question of remoteness will often involve issues of law, it is normally a fact-sensitive determination, which must carry with it a degree of inference and value judgment. As Laws LJ said in McManus v Beckham [2002] 1WLR 2982, at paragraph 39, in connection with a slander action, "The reality is that the court has to decide whether, on the facts before it, it is just to hold [the defendant] responsible for the loss in question".
242. In all these circumstances, we have reached the conclusion that the judge was entitled to decide, as he did, that the losses suffered by OK! from the publication of the unauthorised photographs in the two newspapers were "sufficiently consequential upon the breach and sufficiently foreseeable to make Hello Ltd liable for them in the normal way".

420. Although the courts in that case were considering a different type of damage, I consider that the successful attempts in this case to see off other media interest fall well within the description contained in that paragraph 242. They were part of a reasonable and justifiable attempt, targeted at a foreseeable event, to prevent the worsening of Sir Cliff’s reputational position (and distress) when that reputational position (and distress) was caused by the BBC and damage to reputation (and distress) is one of the things that privacy law is designed to prevent - its protection is within the scope of the tort.

421. I therefore find the sample activities and proper costs associated therewith, in relation to the print and broadcast media, to have been caused factually and legally (for the purposes of claiming their cost as damages) by the BBC.

422. Turning to the “Christians against Cliff” website, I find that it was foreseeable that the disclosure of the search would lead to an increase in interest in the trolling community which had already put rumours about Sir Cliff on the internet. Mr Benaim gave evidence of the awareness of Sir Cliff’s team of scurrilous rumours about Sir Cliff on the internet, and they had it in mind to start to take action once they had reached what they had regarded as a “tipping point”, which had not occurred prior to the BBC broadcast. Mr Johnson and Mr Wilson were both aware of internet rumours linking Sir Cliff to Elm Guest House in Barnes, at which it was rumoured sexual exploitation occurred. Bearing in mind the position of Sir Cliff in the public perception, and the apparent propensity of some people to circulate rumours about him without any apparent evidential foundation, it was in my view reasonably foreseeable that this activity would increase. Christians against Cliff is a manifestation of that. The precise form of the page was not foreseeable, but an attack on Sir Cliff’s reputation of the nature of that which appeared there was. Since the attack went to his reputation, the damage which would be caused by it is within the scope of the tort in the same way as attacks on his reputation by the formal print media would be. An attempt to reduce or mitigate that should in principle be within recoverable damages in the same way as seeing off stories by the formal print media should be.

423. Mr Millar objected that it would be unjust to hold the BBC responsible for the deliberate and independent acts of a third party who posted the material. The first answer to this
is that that is not quite what Sir Cliff is seeking to do. He is not seeking damages in respect of the attacks on his reputation carried out by the third party or parties concerned. That would or might raise different questions. Instead, he is seeking to stop that activity, and recover the costs of so doing. Since this sort of activity was a foreseeable, if indirect, consequence of the commission of the wrong, insofar as one has to consider the intervention of a third party it was foreseeable and linked to a sufficient degree to justify recovery of damages in respect of the costs.

424. Next Mr Millar submitted that it was not reasonable to resort to solicitors to have the page removed. He said it contained vulgar abuse, contained nothing of any factual significance and attracted no real attention (it is said to have attracted only 50 “likes”). I disagree with all that. The abuse in this particular case went beyond the vulgar, and it attacked the publicly-known (and clearly professed) core beliefs of Sir Cliff. I shall not dignify any of the postings by setting them out in this judgment but the tone is reflected in the “About” entry for the page which I shall, with a little regret, set out here:

“A page for good, solid stand up Christians who are appalled at the evil paedo homogay Cliff Richards obvious guilt and demand he be denounced by the church.”

425. The number of “likes” does not necessarily reflect the attention it got and I consider that Sir Cliff and his advisers were justified in taking the view that this, and the content of the site, went too far and justified some positive action. In all the circumstances the engagement of solicitors in the process (not easy) of having the page taken down was justified by the seriousness of the content of the site and the likely greater attention that would be paid to solicitors’ correspondence invoking legal principles on the topic rather than correspondence from a layman. Having seen what it took by way of solicitors’ efforts to get the page taken down, I consider it unlikely that lay correspondence would have achieved the same result.

426. Next I turn to the attempted blackmail. This is on analysis another threatened publication, though with a different motivation. In my view it runs with the others for the same reasons. Engaging solicitors to deal with it, in the circumstances, was reasonable. It was a sensitive matter which justified their handling.

427. The Select Committee matter falls outside the scope of the damages claim. It was not a foreseeable event, or an event of a type that was foreseeable, and the consequences of it do not fall within the scope of the tort.
428. The same applies to the US immigration matter. I am not satisfied that the need for expenditure was foreseeable, that it was within the interests that are protected by the tort or that it is fair and reasonable for it to be attributed to the tort for damages purposes.

429. Advising on media presentations after the decision not to charge should (within reason) present recoverable loss. The cost incurred is a reasonable step to mitigate loss by retrieving damaged reputation and reducing damage to feelings, and should be recoverable as such. In the circumstances it is understandable, justifiable and reasonable that some legal advice should be taken and in my view this head of damage, in principle, is damage which is recoverable in causation terms.

430. So far as the book advance is concerned, the only point taken by Mr Millar in relation to causation in law is that this loss is consequential on damage to Sir Cliff’s reputation, and that the law of privacy does not compensate for damage to reputation. I have already ruled against him on the point about reputation, so this causation point of Mr Millar’s goes as well. In the absence of any other remoteness or allied point, I therefore find in favour of Sir Cliff so far as causation in law is concerned. So far as necessary, I would find that it is reasonably foreseeable that a commercial opportunity which arises out of exploitation of reputation can be lost if the reputation is sullied, even if only temporarily, and that that is what happened here. Such a loss is within the scope of the protection given by the tort and it is not unjust that the defendant should be liable for it.

The contribution claims

431. There are contribution cross-claims in this matter. SYP claims a contribution from the BBC in respect of such damages as they are both liable for out of the £400,000 which it has agreed to pay and has paid (which SYP says is the vast bulk of those damages). The BBC resists that claim and claims its own contribution in the sum of the total amount in which it is liable to Sir Cliff - in effect, though not in name, an indemnity - making this somewhat striking claim pursuant to what it says is the proper operation of the relevant Act, Article 10 and the principles governing the freedom of the press.

The legislation and its operation

432. The relevant domestic legislation pursuant to which SYP makes its claim is the Civil Liability (Contribution) Act 1978 (“the Contribution Act”) which provides, so far as material, as follows:
“1. Entitlement to contribution

(1) Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).

….

(4) A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.”

433. SYP makes its claim pursuant to section 1(1), as a person who has made a bona fide settlement payment under section 1(4). The assessment of its contribution is under section 2(1):

“2. Assessment of contribution

(1) Subject to subsection (3) below, in any proceedings for contribution under section 1 above the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.”

434. The scope of damage covered by the Act is set out in section 6:

“Interpretation

(1) A person is liable in respect of any damage for the purposes of this Act if the person who suffered it (or anyone representing his estate or dependants) is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).”
435. The two principal determining factors in an assessment of what it “just and equitable” under section 2 are the degree of fault and the extent of the conduct of the two perpetrators. In *Downs v Chappell* [1997] 1 WLR 426 at 455H Hobhouse LJ said:

“The extent of a person's responsibility involves both the degree of his fault and the degree to which it contributed to the damage in question. It is just and equitable to take into account both the seriousness of the respective parties' faults and their causative relevance. A more serious fault having less causative impact on the plaintiff's damage may represent an equivalent responsibility to a less serious fault which had a greater causative impact.”

Of those two factors the latter is likely to be the more significant.

436. These principles were not disputed in these proceedings.

**Can the BBC be subject to the contribution claim made; and does it have a full claim against SYP?**

437. This point logically needs to be taken next because the BBC claims that a combination of its Article 10 freedom of expression rights, and its status as a news publishing media, mean that there can be no effective claim by SYP even if an application of the 1998 Act would otherwise make it subject to a claim; and it claims that those factors in fact give it the right to recover from SYP 100% of whatever it is liable to Sir Cliff for (insofar as SYP is liable for the same damages).
438. Mr Millar’s argument to that effect stems from the wording of Article 10 and what is said to be the effect of the Human Rights Act. His argument ran thus. SYP is a public authority. As such it cannot invoke a right to freedom of expression either at common law, or under Article 10 of the Convention. So far as the Convention is concerned that is because a public authority has only duties under the Act and cannot be a “victim” under section 7. The BBC, however, is not a public authority, and it has its rights to freedom of expression conferred by Article 10. A right to contribution would interfere with (or I suppose engage) that right because it would tend to penalise or disincentivise its use. That requires a justification under Article 10(2), and SYP cannot bring itself within that provision. Article 10(2) lists the sort of conditions and requirements that have to be fulfilled in order to justify an interference with Article 10(1) rights and none of them can be made to apply in the present circumstances. Requiring a media organisation to contribute to damage which has been admitted (or, I suppose, found) to be caused by a public authority which has violated the Article 8 rights of an individual is not a legitimate aim under Article 10(2). The only candidate aim from Article 10(2) which had been proposed by SYP was “for the protection of the … rights of others”, and SYP had suggested that the relevant “other” was Sir Cliff; but the contribution rights did not protect Sir Cliff.

439. Even if there were a right which could be viewed as being protected, Mr Millar went on to submit that it was impossible to see how it would be necessary “in a democratic society” (within Article 10(2)) to allow a contribution to a public authority where it has provided information to the media, knowing it would be used to report the activities of the public authority. There is no pressing social need for the public authority to be able to claim a contribution. On the contrary, there is a pressing social need for journalists to be able to report on the activities of a public authority, and to allow a right of contribution would discourage the press from reporting on matters of public importance. One should read the reference to “damage in question” in the Contribution Act in such a way as to make it compatible with the BBC’s Convention right, which would involve denying SYP its contribution.

440. This seemed to me to be a striking argument which, if correct, effectively gave the BBC a “get out of jail free card” in circumstances such as the present where it is liable for infringement of privacy rights along with a public authority. It could cast the whole burden of the damages claim on the public authority. Mr Millar went so far as to acknowledge that if, in this case, Sir Cliff had sued the BBC alone, and had not claimed against the SYP (though assuming SYP’s liability to Sir Cliff) then the BBC could claim a complete indemnity from SYP (as indeed it does in this case on its present facts). Leaving aside the intricacies of the Human Rights Act, it would prima facie seem to be completely unfair that the BBC, which has (on this hypothesis) committed a wrong, should be able to shuffle off the burden because it can invoke its freedom of expression rights in circumstances in which it has been found that those rights do not provide a defence to the claim by Sir Cliff. But the Convention rights have been invoked and, of course, I have to consider them to see if they compel such a strange result. I am not displeased to find that they do not.
441. The first answer to this point is that the right of contribution does not, of itself, interfere with the BBC’s right of free speech. The right of contribution only arises when it has been first determined that the BBC is liable to Sir Cliff in respect of the same damage as SYP. One can only find that liability by deciding that the BBC’s right of freedom of expression is outweighed by Sir Cliff’s right to privacy. Once that is decided then the limits to the BBC’s freedom of expression have been set, and that freedom is not further interfered with by a claim for contribution. In other words, a successful contribution claim presupposes that there is already a limit to the freedom of expression right, set by Sir Cliff’s claim, and there is no further encroachment by virtue of the contribution claim.

442. The second answer is that, if it is necessary to fit this case into the catalogue of permissible detractions in Article 10(2), then I do not see why it should not fit into “formalities [etc] necessary in a democratic society … for the protection of the … rights of others…”. Rights under the Contribution Act would seem to me to be “rights of others” for these purposes, and Mr Millar did not seem to contest that they were capable of being “rights”, because in his reply he accepted that if SYP had not been a public authority then its rights to seek a contribution under the Act would have fallen within this expression “rights of others”. It seems to me he was right in his implied concession. The term is very broad, and it has been very broadly construed - see eg the right of consumers to be protected from excessive TV advertising and to have good quality programmes apparently recognised in *RTL Television GmBH v Niedersachsisches Oberverwaltungsgericht* [2004] 1 CMLR 5.1

443. Mr Millar, while apparently accepting that the Contribution Act created “rights” for these purposes, said that SYP could not be an “other” within the expression. He submitted that it was not a socially desirable objective (or, I suppose, “necessary in a democratic society”) to allow a public authority, such as the SYP, which has committed a wrong, to be allowed to claim a contribution in respect of that wrong. “Rights of others” should not include a police force (as part of the state) seeking to recover in respect of the wrong when they were the source of the wrong. It would be worrying if that were the case. He pointed out that there was no authority in this jurisdiction or in Strasbourg which would allow a public authority to recover in those circumstances.

444. I consider that this submission fails. I do not find it in the least worrying that an organ of the state, which is a joint wrongdoer, should be able to recover a contribution from the joint wrongdoer, and resist what is in effect an indemnity in favour of that joint wrongdoer. I think I would find it worrying if Mr Millar were right. The objectives of the Act are not in the least bit damaged by such a contribution. The rights of the victim

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1 “70 The restriction at issue pursues a legitimate aim involving “the protection of the … rights of others” within the meaning of that provision, namely the protection of consumers as television viewers, as well as their interest in having access to quality programmes. Those objectives may justify measures against excessive advertising”.
are not affected - he or she will have recovered and received appropriate vindication. That having happened, the concept that a co-wrongdoer should share the burden is entirely appropriate (if not necessary) in a democratic society. I cannot understand why the non-state perpetrator should get off financially scot-free. Nor am I troubled by the absence of any authority which supports this position. That could well be because it is obviously right.

445. With those objections in principle out of the way I can now turn to determining whether there should be any, and if so what, contributions as between SYP and the BBC.

446. Applying the above factors, I find that the BBC was the more potent causer of Sir Cliff’s damage, and its breach was more significant for these purposes than SYP’s. I reach that conclusion for the following reasons.

(a) When Mr Johnson approached SYP he already had information about Sir Cliff. He had received it knowing that it must have been communicated to him in breach of confidence and, on my findings, there was already a breach of Sir Cliff’s privacy rights by the person who communicated it to him. When he dealt with SYP, SYP again made a disclosure which infringed Sir Cliff’s privacy rights, and this was a serious breach. It was serious because it was deliberate, and even though they were confirming something that Mr Johnson also apparently knew, they were (as it happened) confirming the position to him in a useful way. There was then a further serious breach when they subsequently told Mr Johnson of the search. While of themselves the disclosures by SYP did not do a lot of damage at that stage, they were done knowing that the BBC would be likely to use its knowledge as the basis of broadcast news. All that is serious. On the other hand SYP’s disclosures were not (on my findings) done for any sort of gain or advantage and they felt maneuvered into a disclosure by Mr Johnson. Mr Johnson knew, or ought to have known, that what he was getting was exceptional and was provided in breach of confidence.

(b) The decision to publish was entirely that of the BBC. It was the act of publication that did the damage - not much damage was caused by the mere disclosure by SYP. It had acquired what it needed by way of private information by means of a form of undesirable manoeuvre. In pursuing and publishing the story it was very materially motivated by the desire to scoop its rivals, which to a degree blinded it to other relevant considerations.

(c) The manner of reporting was, of course, chosen by the BBC and was such as to give great emphasis to the news. In particular, they decided to add sensationalism by using the helicopter. In circumstances in which they knew that Sir Cliff was probably not at home, and having no reason to believe that he would be watching the news, they broadcast pictures of the search so that (as it happened, predictably) the rest of the viewing world would see the
search before Sir Cliff did. It was also the BBC’s decision to name Sir Cliff. The BBC also chose the prominence given to the news.

447. All these factors point to the BBC bearing a greater share of the damages than SYP. Mr Beer suggested that the proportions should be 20%/80% SYP/BBC. I do not think that those proportions adequately reflect the responsibility of SYP. In my view the split should 35% as to SYP and 65% as to the BBC.

448. This will be applied to the damages for which they are jointly responsible. I need to separate out damage (if any) caused by the BBC for which SYP is not responsible (liable), and damage caused by SYP for which the BBC is not responsible. This requires but small adjustments. Mr Beer submitted, and I agree, that the SYP should not be treated as being liable for any element of aggravation. Accordingly, SYP will not be required to contribute to (and the BBC will not be able to take into account in any recovery) the aggravating element which I have identified above. Mr Beer submitted that the more extravagant elements of the reporting should fall into the same bracket, but I do not accept that. I have not awarded aggravated damages in respect of those. I have, however, taken them into account in fixing the proportion to which his client should contribute.

449. There is a small element which goes the other way - damage for which SYP is solely liable, namely damage flowing purely from the disclosures by SYP, absent the exploitation. That part of the damages would be damages for which SYP is not liable along with the BBC. Mr Beer accepted as much. Were it not for the Contribution Act it would not be necessary, or indeed appropriate, to separate out that part, and the exercise has an air of artificiality about it. However, I accept it should be done.

450. One therefore has to imagine that the SYP made its disclosure but the BBC did nothing with it and merely received it. The act of disclosure of that information would normally be an act of some significance because it is a serious infringement of Sir Cliff’s privacy rights even if it is unknown to him (so that it cannot have had an impact on his feelings). However, it would not attract much damages, and its impact in the present case is lessened by the fact that the BBC already had much of the information and Sir Cliff’s rights had already, to that extent, been infringed. What SYP did was to confirm much of it and add the information about the search. Mr Beer invited me to put a percentage figure on the total sum which reflected that portion of the total damages, though he said it was nil. I do not think it is quite nil, but in the context of this case it is not very great. I think it is £5,000.

451. My apportionment figure will therefore apply to the total damages sums involved, less the £5,000 and the successful aggravated damages claim of £20,000. Bearing in mind that the total damages claims will not be determined until the special damages have
been determined, but SYP have already paid a sum in damages, the question of the timing of payments under this part of the order will have to be the subject of further argument.

452. It was not, I think, disputed that a contribution claim can extend to costs, though there was no argument before me as to how it would be applied. In the absence of argument it is not completely clear to me whether it would be right to apply the same contribution division to the costs up to the date of the SYP’s settlement, and I shall entertain further argument on the point in due course

**Conclusion**

453. I therefore find:

i) The BBC is liable to Sir Cliff Richard for infringing his privacy rights.

ii) The BBC should pay general (including aggravated) damages in the sum of £210,000 in respect of that infringement.

iii) Legal causation has been established in respect of certain sample special damages claims, subject to the caveats appearing above.

iv) The damages for which both the BBC and SYP are liable shall be apportioned 65:35 as between the BBC and SYP.

v) Otherwise in accordance with the remainder of my judgment above.

454. The finalisation of the amount of any special damage will take place on a further inquiry, for which I will make directions in due course.
Why the public isn’t allowed to know specifics about the George Pell case

March 21, 2018 11.09pm EDT

Many Australians are left perplexed when media coverage of high-profile criminal cases is suddenly suspended or abbreviated “for legal reasons”. The current committal hearing of Catholic Cardinal George Pell on historical sexual offences engages the principle of “open justice” and some of its most important exceptions.

Coverage of such matters is restricted at various stages of criminal trials. This is because of the relative priority the courts and lawmakers have assigned to the principles of open justice and the administration of justice, and the competing rights of free expression, privacy and a fair trial.

What is ‘open justice”?

The principle of open justice dates back to at least the 12th century; it involves people’s access to observe the goings-on in a courtroom. It was later extended to the media as “the eyes and ears of the public” in court.

Australia’s High Court has ruled that open justice is of constitutional significance, and nothing should be done to discourage the media from publishing fair and accurate reports of what occurs in the
An open court involving fair and accurate media coverage is thus the default position for Australian courts. The common law recognises only a limited number of well-defined exceptions. Lawmakers have developed hundreds more.

One important common law limitation is in the area of _sub judice_ contempt. This puts a halt to prejudicial coverage of a criminal matter from the moment an accused is arrested or charged right through until the appeal period has expired.

Important restrictions here are upon any suggestion an accused might be guilty (or innocent), coverage of contested evidence that may or may not be put to a jury, coverage of earlier proceedings (such as preliminary hearings and royal commissions), interviews with key witnesses, details of any confessions, the criminal history or character evidence about the accused, and visual identification of the accused if that might be at issue in a trial.

### Specific restrictions on court cases

Legislation in all Australian jurisdictions has placed a litany of further restrictions on attendance at – and reporting on – a host of situations. These include family law cases, juvenile cases, mental health proceedings and – most relevant here – sexual matters.

The statutory gags forcing closure of courts, banning of coverage, and de-identifying of parties vary in important ways. This is because lawmakers have placed a differing emphasis on the competing rights and interests.

For example, if Pell was facing his committal hearing in South Australia or Queensland, he could not even be identified until after he is committed to trial – if that eventuates.

Lawmakers in those states have decided the reputational damage attached to an allegation of a serious sexual offence is so damaging that an accused person should not be identifiable until it is proven there is at least a prima facie case to answer at trial.

In Victoria, where Pell’s committal hearing is taking place, the accused can usually be identified. However, other restrictions apply either under legislation or in suppression orders issued by a presiding judge or magistrate.

In no Australian jurisdiction can the victim (known as the “complainant”) be identified – directly or indirectly – in sexual matters. But the laws vary on whether they might be identified after proceedings with their permission or the court’s permission.

This means complainants who might have been identified in earlier coverage or proceedings are
suddenly rendered anonymous from the moment the matter is “pending” – after the arrest or charging of a suspect.

Special protections apply to complainants during committal hearings involving sexual offences. This includes closing the court while victims give evidence.

A complex array of policy issues inform these kinds of restrictions. These include the perceived vulnerability of victims, their privacy, and the important likelihood that victims might not come forward to bring charges of this nature if they sense they might be in the media spotlight.

Do we need a rethink in the digital age?

Victoria has had more than its share of journalists and others falling foul of court restrictions through defiance or ignorance of the law.

Former journalist and blogger (now senator) Derryn Hinch has twice been jailed as a result of contemptuous coverage – once in 1987 for broadcasting prejudicial talkback radio programs about a former priest facing child molestation charges, and again in 2013 after refusing to pay a A$100,000 fine for blogging the prior convictions of Jill Meagher’s accused killer in breach of a suppression order.

Read more: You wouldn't read about it: Adrian Bayley rape trials expose flaw in suppression orders

Two ABC journalists were convicted of identifying a rape victim in radio broadcasts in 2007. They and their employer were later ordered to pay her $234,190 in damages in a civil suit for the invasion of her privacy among other injuries.

In 2017, Yahoo!7 was fined $300,000 for contempt after it published social media material about a victim and the accused. The publication forced the jury in a murder trial to be discharged.

Many of the restrictions on coverage are problematic in the digital era. Mainstream media are more likely to be charged with sub judice contempt than social media users because the large audiences of mainstream media mean their prejudicial coverage is more likely to reach potential jurors.

The cross-jurisdictional nature of digital publishing also renders journalists and social media users subject to the tangled web of restrictions on criminal justice reporting when covering a criminal matter from another state.

Court orders to take down earlier reportage on websites are typically futile, because online
dissemination is so widespread. So, the bizarre situation exists where the prior character evidence and coverage of earlier proceedings still sits online for anyone to access with a simple search of an accused’s name.

This is problematic if a rogue juror decides to become a cyber Sherlock Holmes. It means we require better training of jurors.

**Read more: Trial by social media: why we need to properly educate juries**

Suppression orders are also a problem because these are typically circulated only to mainstream media in the trial’s immediate vicinity. This leaves others blissfully unaware of the orders. Some orders – known as “super injunctions” – are so secret that even publication of the fact they have been issued is prohibited.

Victoria’s Open Courts Act was meant to reduce the number of suppression orders and inject an element of consistency to the issuing of these. However, it has been problematic.

At least the media are better assisted in the modern era. Court information officers help explain the various restrictions and keep the media well briefed in high-profile trials – as they have done in Victoria during Pell’s committal hearing.
Sexual offences publishing restrictions in Australia – a guide for journalists

By MARK PEARSON Follow @Journlaw

Our fifth edition of The Journalist’s Guide to Media Law (Allen & Unwin, 2014) goes to the printer this week for publication later this year.


Co-author Mark Polden and I have decided to move some of the comparative tables on reporting restrictions throughout Australia across to this blog – journlaw.com – so we could free up space in the new edition to discuss other important issues such as media law for public relations consultants and the implications of digital and social media.

We will work to update the reporting and publishing restrictions tables over coming months, but for the moment I am publishing them as they stood at the date of our fourth edition in 2011.

As I upload them over coming weeks I would appreciate any students or colleagues using the comments section below to advise of any updates in your jurisdictions and I will act to update the tables accordingly.

Looking forward to your collaborative input!

Sexual offences publication restrictions

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<tr>
<th>Jurisdiction</th>
<th>Law</th>
<th>Exception</th>
<th>Legislation</th>
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<th>State</th>
<th>Identification Restrictions</th>
<th>Evidence Act</th>
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<tr>
<td>ACT</td>
<td>Complainant must not be identified by name, ‘reference or allusion’, including allowing someone to find out their ‘private, business or official address, email address or telephone number’. Complainant may consent. (Seek legal advice on proving consent.)</td>
<td>Evidence (Miscellaneous Provisions) Act 1999, s. 40.</td>
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<td>New South Wales</td>
<td>Complainant must not be identified, even after proceedings disposed of.</td>
<td>With permission of court. Consent of complainant aged over 14. (Seek legal advice.) Crimes Act 1900, s. 578A; Children (Criminal Proceedings) Act 1987, s. 15A.</td>
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<tr>
<td>Northern Territory</td>
<td>Complainant must not be identified at all. Accused cannot be identified until after committal. No mention of ‘name, address, school or place of employment’ for either.</td>
<td>With permission of court. Protection for accused. Sexual Offences (Evidence and Procedure) Act 1983, ss. 6, 7 and 11(2).</td>
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<tr>
<td>Queensland</td>
<td>Complainant must not be identified at all. Accused cannot be accused only applies to Act 1978, ss. 6 and...</td>
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Sexual offences publishing restrictions in Australia – a guide for journalists...

7. ‘prescribed sexual offences’:
   (a) rape;
   (b) attempt to commit rape;
   (c) assault with intent to commit rape;
   (d) an offence defined in the Criminal Code, section 352.1. Seek legal advice about other offences.

South Australia
Case and related proceedings including identity of accused cannot be reported until accused has been committed for trial. Complainant must not be identified at any stage. Publishers must publish prominent report of result of proceedings they have covered at earlier stage when accused has been identified.

- Pre-committal reports can be made with permission of accused. (Seek advice.)
- Complainant can be identified with ss. 71A and B. Evidence Act 1929, Evidence Act 2001, s. 194K. Court may allow identification ‘in the public interest’.

Tasmania
Complainant and witnesses other than defendant must not be identified unless child victim.

Evidence Act 1929, ss. 71A and B. Evidence Act 2001, s. 194K.
be identified, even if dead. Also bans ‘any picture purporting to be a picture of any of those persons’.

Victoria
Complainant must not be identified, even if proceedings not pending.

If proceedings not pending, with permission of court or complainant (seek legal advice) or on proof that no complaint of offence had yet been made to police. If proceedings pending, with permission of court only.

Judicial Proceedings Reports Act 1958, s. 4.

Western Australia
Complainant and their school must not be identified.

With authorisation in writing by complainant aged over 18 and mentally capable of making decision. (Seek legal advice.)

Evidence Act 1906, s. 36c.

Disclaimer: While I write about media law and ethics, nothing here should be construed as legal advice. I am an academic, not a lawyer. My only advice is that you consult a lawyer before taking any legal risks.

© Mark Pearson 2014
In the matter of -

and

The Court orders that:

Publication of
(A) THE NUMBER OF COMPLAINANTS SAVE FOR THAT THERE ARE 'MULTIPLE COMPLAINANTS'
(B) THE NUMBER OF CHARGES SAVE FOR THAT THERE ARE 'MULTIPLE CHARGES'
(C) THE NATURE OF THE CHARGES AGAINST THE ACCUSED SAVE THAT THEY ARE
'HISTORICAL SEXUAL OFFENCES'
(D) THE FACT OF THIS ORDER AND THE CONTENTS OF THIS ORDER SAVE FOR SUCH
PUBLICATION AS MAY BE NECESSARY TO PERMIT NOTIFICATION OF THIS ORDER BY
OFFICER OF THIS COURT TO MEDIA OUTLETS
is prohibited.

Order applies to the following states/territories:
- Victoria
- Australian Capital Territory
- New South Wales
- South Australia
- Northern Territory
- Tasmania
- Queensland
- Western Australia

Applicable grounds:
- prevent a real and substantial risk of prejudice
  to the proper administration of justice

For the purpose of this order, publication means the dissemination or provision of access to the public
by any means including, publication in a book, newspaper, magazine or other written publication; or
broadcast by radio or television; or public exhibition; or broadcast or electronic communication;
pursuant to the Open Courts Act 2013.

This order will expire in
7 DAYS AFTER THE COMPLETION OF THE
COMMITTAL PROCEEDINGS

Order made at MELBOURNE on [date] 2017

Magistrate

NOTICE: A person must not contravene this order, pursuant to section 23 of the Open Courts Act 2013.

PENALTY: Individual - 600 penalty units and/or imprisonment for 5 years
Body Corporate - 3000 penalty units

A copy of this order must be sent to-
Manager, Magistrates' Support Services
FAX - 9628 7793
Email - magistratessupport@magistratescourt.vic.gov.au
Fax to: MANAGER, MAGISTRATES' SUPPORT SERVICES 9628-7793
Neutral Citation Number: [2018] EWHC 799 (QB)
Case Nos: HQ15X04128
HQ15X04127

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

HQ15X04127
Royal Courts of Justice
Strand, London, WC2A 2LL
13/04/2018

B e f o r e :

MR JUSTICE WARBY

Between:
(1) NT 1
(2) NT 2
- and -
GOOGLE LLC
-and-
THE INFORMATION COMMISSIONER

Claimants
Defendant
Intervenor

Hugh Tomlinson QC & Jonathan Barnes (instructed by Carter-Ruck) for the Claimants
Antony White QC and Catrin Evans QC (instructed by Pinsent Masons LLP) for the Defendant
Anya Proops QC & Rupert Paines (instructed by in-house lawyers for The Information Commissioner)
Mr Justice Warby:

**INTRODUCTION**

1. These two claims are about the "right to be forgotten" or, more accurately, the right to have personal information "delisted" or "de-indexed" by the operators of internet search engines ("ISEs").

2. The claimants are two businessmen who were convicted of criminal offences many years ago. The defendant, ("Google"), needs little introduction. It operates an ISE called Search which has returned and continues to return search results that feature links to third-party reports about the claimants' convictions. The claimants say that the search results convey inaccurate information about their offending. Further, and in any event, they seek orders requiring details about their offending and their convictions and sentences to be removed from Google Search results, on the basis that such information is not just old, but out of date, and irrelevant, of no public interest, and/or otherwise an illegitimate interference with their rights. They also seek compensation for Google's conduct in continuing to return search results disclosing such details, after the claimants' complaints were made. Google resists both claims, maintaining that the inclusion of such details in its search results was and remains legitimate.

3. This public judgment is given after the trial of both claims. In this judgment the claimants are anonymised, for reasons which will probably be obvious from this short summary of the cases, but are explained in more detail in judgments given at the Pre-Trial Reviews: [2018] EWHC 67 (QB) ("the First PTR Judgment") and [2018] EWHC 261 (QB) ("the Second PTR Judgment"). In short, anonymity is required to ensure that these claims do not give the information at issue the very publicity which the claimants wish to limit. Other individuals and organisations have been given false names in this judgment for the same reason: to protect the identities of the claimants.

4. I have prepared a separate, private judgment in each case containing details that may be important to help the parties and any Court that has to review this case in future, but which tend to identify the claimants. The contents of the private judgments may not be published. That is because, whatever the outcome of these claims, it is not necessary or proportionate for the Court to place on the public record personal data which either is or may at some stage become private, and which in any event is not so generally accessible that the Court should proceed on the basis that its judgment can add nothing to the impact on the claimant. Cf L v The Law Society [2010] EWCA Civ 811 [2] (Sir Anthony Clarke MR).

**THE CASES IN A NUTSHELL**

5. The essential facts of NT1's case are that in the late 1980s and early 1990s, when he was in his thirties, he was involved with a controversial property business that dealt with members of the public. In the late 1990s, when he was in his forties, he was convicted after a trial of a criminal conspiracy connected with those business activities, and sentenced to a term of imprisonment. He was accused of but, never
tried for, a separate conspiracy connected with the same business, of which some of its former staff were convicted. There was media reporting of these and related matters at that time. Links to that reporting were made available by Google Search, as were other links, including some to information on a parliamentary website. NT1 was released on licence after serving half his sentence in custody. The sentence came to an end in the early 21st century. Some years later it became a "spent" conviction, a term I shall explain. The reports remained online, and links continued to be returned by Google Search. In due course, NT1 asked Google to remove such links.

6. His first "de-listing" request was submitted to Google on 28 June 2014. It asked for the removal of six links. Google replied on 7 October 2014, agreeing to block one link, but declining to block any of the other five. NT1 asked Google to reconsider, but it stood by its position. On 26 January 2015, NT1's solicitors wrote to Google requiring them to cease processing links to two media reports. In April 2015, Google replied with a refusal. On 2 October 2015, NT1 brought these proceedings, seeking orders for the blocking and/or erasure of links to the two media reports, an injunction to prevent Google from continuing to return such links, and financial compensation. In December 2017, NT1 expanded his claim to cover a third link, relating to a book extract covering the same subject-matter, in similar terms.

7. The facts of NT2's case are quite separate from those of NT1. The only connections between the two cases are that their factual contours have some similarities, they raise similar issues of principle, and they have been tried one after the other with the same representation. In the early 21st century, when he was in his forties, NT2 was involved in a controversial business that was the subject of public opposition over its environmental practices. Rather more than ten years ago he pleaded guilty to two counts of conspiracy in connection with that business, and received a short custodial sentence. The conviction and sentence were the subject of reports in the national and local media at the time. NT2 served some six weeks in custody before being released on licence. The sentence came to an end over ten years ago. The conviction became "spent" several years ago. The original reports remained online, and links continued to be returned by Google Search. NT2's conviction and sentence have also been mentioned in some more recent publications about other matters, two of them being reports of interviews given by NT2. In due course, NT2 asked Google to remove such links.

8. The first de-listing request on NT2's behalf was submitted by his solicitors on 14 April 2015. It related to eight links. Google responded promptly by email, on 23 April 2015. It declined to de-list, saying that the links in question "relate to matters of substantial public interest to the public regarding [NT2's] professional life". On 24 June 2015, NT2's solicitors sent a letter of claim and on 2 October 2015 they issued these proceedings, seeking orders for the blocking and/or erasure of links to the two media reports, an injunction to prevent Google from continuing to return such links, and financial compensation. In the course of the proceedings, complaints about a further three links have been added to the claim. The claim advanced by NT2 therefore relates to eleven items. NT2 claims the same heads of relief as NT1.

9. The main issues in each case, stated broadly, are (1) whether the claimant is entitled to have the links in question excluded from Google Search results either (a) because one or more of them contain personal data relating to him which are inaccurate, or (b) because for that and/or other reasons the continued listing of those links by Google involves an unjustified interference with the claimant's data protection and/or privacy rights; and (2) if so, whether the claimant is also entitled to compensation for continued listing between the time of the delisting request and judgment. Put another way, the first question is whether the record needs correcting; the second question is whether the data protection or privacy rights of these claimants extend to having shameful episodes in their personal history eliminated from Google Search; thirdly, there is the question of whether damages should be paid.
Those are novel questions, which have never yet been considered in this Court. They arise in a legal environment which is complex, and has developed over time. Many of the legislative provisions date back to before the advent of the internet, and well before the creation of ISEs. As often happens, statute has not kept pace with technical developments. I have however had the benefit clear and helpful submissions not only from Mr Tomlinson QC and Mr Barnes for NT1 and NT2, and Mr White QC and Ms Evans QC for Google, but also from Ms Proops QC and Mr Paines on behalf of the Information Commissioner ("ICO"), whom I allowed to intervene in the case: see the Second PTR Judgment at [9-11]. During the trial process some of the complexities that appeared to loom large at the outset have either disappeared, or receded into the background. The trial has ended with quite a large measure of agreement as to the principles I should apply, albeit not as to the answer I should reach by doing so. Mr Tomlinson and Mr White both submitted that on the facts their respective clients' cases were "overwhelming". I find the matter more finely balanced.

I have heard factual evidence from three witnesses. I heard from NT1 and NT2 themselves, and from Stephanie Caro, a "Legal Specialist" at Google. Ms Caro is not a lawyer. Her primary responsibility is to assess or oversee the assessment of de-listing requests. All three witnesses gave oral evidence and were cross-examined. Ms Caro gave evidence once only. By agreement, the oral evidence she gave in the NT1 stands as her evidence in the NT2 action, in addition to her two witness statements in that case. I also have two witness statements that were undisputed, and a wealth of documentary evidence. There is, in particular, extensive historic documentation relating to the case of NT1, to which detailed reference has been made.

The conclusions I have reached are summarised at the end of this judgment: see [229], [230]. What follows explains the legal context, the facts in outline, and the process of reasoning by which I have arrived at my conclusions. This is inescapably a rather lengthy process.

THE LEGAL FRAMEWORK

Ten key features

It is convenient to begin by sketching in ten key features of the existing legal framework, taking the enactments and the corresponding common law developments in chronological order. They are:

1. The European Convention on Human Rights, 1951 ("the Convention"), of which the United Kingdom was a founding signatory. Of particular relevance are the qualified rights to respect for private and family life (Article 8) and freedom of expression (Article 10).

2. The European Communities Act 1972 ("the 1972 Act"), by which the United Kingdom Parliament decided that the Treaty of Rome (25 March 1957) and other constitutional instruments of what was then the European Economic Community should be given direct legal effect in the UK without further enactment. As a result, domestic law has since 1973 been subject to European Union law as contained in Directives and, later on, Regulations of the EU as interpreted by the European Court of Justice, now known as the Court of Justice of the European Union ("CJEU"). Section 3 of the 1972 Act requires UK courts to make decisions on matters of EU law "in accordance with … any relevant decision of the [CJEU]…".

3. The Rehabilitation of Offenders Act 1974 ("the 1974 Act") which provides by ss 1, 4 and 5 that some convictions become "spent" after the end of a specified rehabilitation period. Whether a conviction becomes spent and if so when depends on the length of the sentence. The 1974 Act contains
provisions specifying the legal effects of a conviction becoming spent. Those effects are subject to certain specified exceptions and limitations.

(4) Directive 95/46 EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, of 24 October 1995, aka the Data Protection Directive (or "the DP Directive"). The purposes of the DP Directive included safeguarding individuals' fundamental rights and freedoms, notably the right to privacy, to an equivalent extent within the Member States of the EU. Provisions of particular relevance are contained in Articles 2, 6, 8, 9, 12, 14, 23 and 29.

(5) The Data Protection Act 1998 ("the DPA"), enacted on 16 July 1998 in order to implement the DP Directive. Of particular relevance are DPA ss 1, 2, 4, 10, 13, 14 and 32; the first, fourth, sixth and seventh Data Protection Principles in Schedule 1; Schedule 2 paragraph 6; Schedule 3 paragraphs 5, 6(c) and 7A; and paragraph 3 of the Schedule to certain regulations made under DPA s 10, namely the Data Protection (Processing of Sensitive Personal Data) Order 2000 (SI 2000/417) ("the 2000 Order").

(6) The Human Rights Act 1998 ("the HRA"), enacted on 9 November 1998, by which the rights and freedoms enshrined in the Convention became directly enforceable before the Courts of the United Kingdom. Sections 2 and 6 of the HRA impose on the Court duties to interpret and apply domestic legislation in accordance with the Convention Rights, and not to act incompatibly with the Convention.

(7) The 2004 decisions of the House of Lords in Campbell v MGN Ltd [2004] UKHL 22 [2004] 2 AC 457 ("Campbell") and In re S (A Child) [2004] UKHL 47 [2005] 1 AC 593 ("Re S"), in which the House recognised the development, under the influence of the HRA, of a common law right to protection against the misuse of private information, and established the methodology to be adopted in reconciling the competing demands of Articles 8 and 10 of the Convention.

(8) The Charter of Fundamental Rights of the European Union 2000/C 364/01 ("the Charter"), by which the EU recognised and sought to strengthen the protection for certain fundamental rights resulting from the Convention and from constitutional instruments of the EU. Of relevance are Articles 7 (respect for private life), 8 (protection of personal data), 11 (freedom of expression and information) 16 (freedom to conduct a business) and 47 (right to an effective remedy). The Charter was proclaimed by the European Parliament in December 2000, but only took full legal effect on the entry into force of the Lisbon Treaty on 1 December 2009. Member States are required to act compatibly with the Charter when implementing EU law: Rugby Football Union v Viagogo Ltd [2012] UKSC 55 [2012] 1 WLR 3333 [26-28]. This means, among other things, that the DP Directive must be interpreted and applied in conformity with the Charter rights: Lindqvist v Aklagarkammaren I Jonkoping (C-101/01) November 6, 2003 [87].

(9) The May 2014 decision of the CJEU in Google Spain SL & another v Agencia Espanola de Proteccion de Datos (AEPD) and another Case C-131/12 [2014] QB 1022 ("Google Spain"), in which the CJEU interpreted the DP Directive and the Charter as creating a qualified right to be forgotten. The Court went on to apply that right to the facts before it, by holding that the individual complainant was entitled to have Google de-list information of which he complained. It is this decision that prompted the original complaints by NT1 and NT2, and hundreds of thousands of other de-listing requests. Google's evidence, contained in a "Transparency Report" is that between the Google Spain decision and 4 October 2017 – a period of some 3 ½ years - it had been asked to de-list almost 1.9m links or URLs (Universal Resource Locators).

(10) Regulation (EU) 2016/679, aka the General Data Protection Regulation ("the GDPR"). This is a
legislative measure of the EU enacted on 27 April 2016, with the stated purposes among others of "strengthening and setting out in detail the rights of data subjects and the obligations of those who process … personal data ..." (Recital (11)). The GDPR came into force on 25 May 2016 and will have direct effect in Member States, including the UK, from 25 May 2018. Article 17 of the GDPR is headed "Right to erasure ('right to be forgotten')" and is relied on by Google as a "setting out in detail" of the right, which should guide my decision.

14. Some of these points, and their relevance, need further explanation at this stage.

The 1974 Act

15. This was an Act "to rehabilitate offenders who have not been reconvicted of any serious offence for periods of years." Section 1(1) provides that in certain events a person who has been convicted of an offence "shall for the purposes of this Act be treated as a rehabilitated person in respect of the … conviction and that conviction shall for those purposes be treated as spent." The provisions as to when those consequences follow are reasonably complex, but for present purposes it is enough to say that the key conditions are that the sentence imposed is not one which is excluded from rehabilitation under the Act; that the offender has served the sentence; and that the "rehabilitation period" that applies to the sentence has expired without the offender having another sentence passed upon him which is excluded from rehabilitation.

16. The rehabilitation periods that apply are set out in s 5 of the Act. With one immaterial exception they depend on the length of the sentence, and take effect from the end of the sentence. The scheme does not depend in any way on the nature of the offence for which the sentence was imposed. It does depend on the age of the offender; rehabilitation periods for most custodial sentences are halved for those under 18. The scheme has been modified from time to time, and differs as between England & Wales on the one hand and Scotland on the other. For the purposes of this case, it is sufficient to note the following.

(1) The sentence imposed on NT1 was one of four years' imprisonment. Under the law of England & Wales as it stood until 10 March 2014, any sentence of more than 30 months' imprisonment was excluded altogether from rehabilitation. Amendments made by s 139 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") enlarged the range of sentences that could become spent, embracing any sentence of 48 months or less. The amendments provided for a sentence of between 30 and 48 months to become spent after 7 years.

(2) The sentence imposed on NT2 was one of six months' imprisonment. Such a sentence was always capable of becoming spent. Until 10 March 2014, the rehabilitation period for such a sentence was 7 years. The amendments introduced by LASPO reduced that period to 2 years.

(3) LASPO s 141(2) provided that the 1974 Act applies "as if [these] amendments … had always had effect". The consequence is that some old convictions, including those of NT1 and NT2, are now to be treated as having become spent before the amendment was made.

17. Section 4 of the 1974 Act is headed "Effect of rehabilitation" and begins as follows:-

"(1) Subject to sections 7 and 8 below, a person who has become a rehabilitated person for the purposes of this Act in respect of a conviction shall be treated for all purposes in law as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of that conviction …"
The emphasis is mine. It highlights wording of exceptional breadth that might at first sight be thought to provide a complete and ready answer to these claims. But nobody suggests that this is its effect. All parties have treated s 4(1) as embodying a legal policy to which the Court should have regard in resolving the issues before it. The weight to be given to that policy generally, and in this case in particular, is controversial. I shall come to the arguments of the parties and the ICO in these respects.

18. But I should mention at this stage a point made by Mr Tomlinson, which is that evidence to prove his clients’ offending, conviction and sentence is only before the Court by way of exception to a general rule against the admission of such evidence. Section 4(1) of the 1974 Act goes on to set out a conditional prohibition on the admission before a judicial authority of any "evidence … to prove that … [a] person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction" and on any question being asked which cannot be answered without acknowledging or referring to such a conviction. This prohibition is subject to s 7. It does not apply to proceedings in which the person is a party or witness, if he consents to the admission of the evidence (s 7(2) (f)). Nor does it apply to a case in which the Court is satisfied that justice cannot be done except by admitting such evidence (s 7(3)). Mr Tomlinson's analysis is that evidence to prove the conviction is before me by consent, though he concedes that it would otherwise have been admitted under s 7(3). It seems to me that Mr Tomlinson's analysis is correct.

19. Google attaches importance to another of the express limitations on the statutory right to rehabilitation. Section 8 is headed "Defamation actions". Section s 8(1) provides that the section applies to

"… any action for libel or slander begun after the commencement of this Act by a rehabilitated person and founded upon the publication of any matter imputing that the plaintiff has committed or been charged with or prosecuted for or convicted of or sentenced for an offence which was the subject of a spent conviction."

20. The section, in its current form, goes on to say as follows:

"(3) Subject to subsections (5) and (6) below, nothing in section 4(1) above shall prevent the defendant in an action to which this section applies from relying on any defence of justification or fair comment or [under section 2 or 3 of the Defamation Act 2013 which is available to him or any defence] of absolute or qualified privilege which is available to him, or restrict the matters he may establish in support of any such defence.

(4) Without prejudice to the generality of subsection (3) above, where in any such action malice is alleged against a defendant who is relying on a defence of qualified privilege, nothing in section 4(1) above shall restrict the matters he may establish in rebuttal of the allegation.

(5) A defendant in any such action shall not by virtue of subsection (3) above be entitled to rely upon the defence of justification [a defence under section 2 of the Defamation Act 2013] if the publication is proved to have been made with malice."

21. In summary, a defendant who is sued for defamation in respect of a publication imputing the commission by the claimant of a criminal offence which is the subject of a spent conviction can rely on any reporting privilege that may exist and/or on a defence of truth or honest opinion, unless the publication is proved to have been made with malice. In defamation, a conviction is conclusive proof of guilt, against a claimant: Civil Evidence Act 1968, s 13. So in any such claim the real issue will be
malice, which appears to mean an irrelevant, spiteful, or improper motive: *Herbage v Pressdram & Ors* [1984] 1 WLR 1160 (CA). These are not defamation claims, but Google invites me to regard this aspect of the 1974 Act as also embodying an important legal policy to which I should give effect in rejecting the claimants' claims.

**Some key points of data protection law**

22. The DP Directive and the DPA impose duties on "data controllers", that is to say those who make decisions about how and why "personal data" relating to "data subjects" is "processed". "Personal data" is a broad notion, comprising a wide range of information which relates to an individual and is processed by computer. "Processing" is a very widely defined concept, encompassing almost any dealings with personal data, including holding the data and disclosing it or the information in it: see DPA s 1(1). The statutory duty imposed on a data controller by DPA s 4(4) is, subject to section 27(1),

"… to comply with the data protection principles in relation to all personal data with respect to which he is the data controller."

23. The data protection principles are listed in DPA Schedule 1. The principles relied on by the claimants are the First, Second, Third, Fourth, Fifth and Sixth (of eight):

"1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

2. Personal data shall be obtained only for one or more specified and lawful purposes, and shall not be further processed in any manner incompatible with that purpose or those purposes.

3. Personal data shall be adequate, relevant and not excessive in relation to the purpose or purposes for which they are processed.

4. Personal data shall be accurate and, where necessary, kept up to date

5. Personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes.

6. Personal data shall be processed in accordance with the rights of data subjects under this Act."

24. The term "sensitive personal data", which appears in the First Principle, is defined by DPA s 2 and includes:

"… personal data consisting of information as to ... the data subject ['s] —

(e) … physical or mental health or condition …
... 

(g) the commission or alleged commission by him of any offence, or

(h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings."

The claimants each contend that by returning against an internet search of his name the URLs complained of Google is and has been making available to internet users the information contained in the third party publications and thereby processing the claimant's personal data, some or all of which is sensitive personal data within the categories set out above. The claimants contend that the processing has been carried on by Google in breach of the duty imposed by DPA s 4(4), because it is non-compliant with one or more of the six data protection principles cited above. The claimants' case is that in breach of these principles the information returned by Google is in some respects inaccurate, and in any event "way out of date and … being maintained for far longer than is necessary for any conceivable legitimate purpose …".

25. Google denies the allegations of breach in any event, but it relies on a carve-out from the duty imposed by DPA s 4(4). As already noted, that duty is expressed to be "subject to s 27(1)". Section 27(1) provides that "References in any of the data protection principles or any provision of Parts II and III [of the Act] to personal data or to the processing of personal data do not include references to data or processing which by virtue of [Part III of the DPA] are exempt from that principle or other provision." One set of exemptions provided for in Part III is to be found in s 32, headed "Journalism, literature and art". Those three activities are defined in DPA s 2 as "the special purposes". I shall refer to s 32 as "the Journalism Exemption". Google's right to rely on the Journalism Exemption is contested by the claimants, and the ICO.

26. The claimants each seek three remedies: an order for the blocking and/or erasure by Google of their personal data, an injunction to prevent its further processing, and damages.

27. The claims for blocking and/or erasure rely on DPA ss 10 and 14. Section 10 gives data subjects a right to object to processing that is likely to cause damage or distress and a corresponding right, if the data controller does not stop the processing complained of, to seek a Court order prohibiting such processing. At one stage, Google was contending that NT1's "section 10(1) notice" was non-compliant with the statute, but Mr White has not in the end pressed that point so it is sufficient to set out the provisions relating to the Court's powers, which are contained in s 10(4):

"If a court is satisfied, on the application of any person who has given a notice under subsection (1) which appears to the court to be justified (or to be justified to any extent), that the data controller in question has failed to comply with the notice, the court may order him to take such steps for complying with the notice (or for complying with it to that extent) as the court thinks fit" (emphasis added).

This wording falls to be interpreted and applied in the light of the corresponding Article of the DP Directive, Article 14, which requires Member States to grant data subjects the right to object to what may otherwise be lawful processing "on compelling legitimate grounds relating to his particular situation", and provides that "Where there is a justified objection, the processing … may no longer involve those data."
28. Section 14 of the DPA provides:

"Rectification, blocking, erasure and destruction

(1) If a court is satisfied on the application of a data subject that personal data of which the applicant is the subject are inaccurate, the court may order the data controller to rectify, block, erase or destroy those data and any other personal data in respect of which he is the data controller and which contain an expression of opinion which appears to the court to be based on the inaccurate data."

Neither of the claimants has claimed "rectification" of any of the data, only its blocking or erasure.

29. The wording of s 14 would seem to be narrower in scope than that of the corresponding Article of the DP Directive. Article 12(b) requires Member States to guarantee every data subject the right to obtain "as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data" (emphasis added). But any discrepancy appears to be immaterial for present purposes, as Google takes no point on it.

30. The claimants' claim for compensation relies on s 13 of the DPA, which provides:

"13. Compensation for failure to comply with certain requirements

(1) An individual who suffers damage by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that damage.

(2) An individual who suffers distress by reason of any contravention by a data controller of any of the requirements of this Act is entitled to compensation from the data controller for that distress if—

(a) the individual also suffers damage by reason of the contravention, or

(b) the contravention relates to the processing of personal data for the special purposes.

(3) In proceedings brought against a person by virtue of this section it is a defence to prove that he had taken such care as in all the circumstances was reasonably required to comply with the requirement concerned."

31. I have placed s 13(2) in italics because, as the Court of Appeal held in Vidal-Hall v Google Inc [2015] EWCA Civ 311 [2016] QB 1003, the sub-section fails effectively to implement Article 23 of the DP Directive, and has to be disapplied because it is incompatible with the Charter. Accordingly, compensation is recoverable under the DPA for non-material damage, as well as material loss. It is helpful, in view of one of the arguments I have to consider, to set out the steps in the Court of Appeal's conclusion:

"79. … article 23 of the Directive does not distinguish between pecuniary and non-pecuniary damage. There is no linguistic reason to interpret the word "damage" in article 23 as being restricted to pecuniary damage. More importantly, for the reasons we have given such a restrictive interpretation would substantially undermine the objective of the
Directive which is to protect the right to privacy of individuals with respect to the processing of their personal data.

...

84. .... if interpreted literally, section 13(2) has not effectively transposed article 23 of the Directive into our domestic law. It is in these circumstances that the question arises whether it is nevertheless possible to interpret section 13(2) in a way which is compatible with article 23 so as to permit the award of compensation for distress by reason of a contravention of a requirement of the 1998 Act even in circumstances which do not satisfy the conditions set out in section 13(2) (a) or (b).

...

94. We cannot … interpret section 13(2) compatibly with article 23.

95. Mr Tomlinson and Ms Proops [Counsel for the claimants and the ICO] submit that section 13(2) should be disapplied on the grounds that it conflicts with the rights guaranteed by articles 7 and 8 of the Charter. We accept their submission. …

96. Article 47 of the Charter provides: "Right to an effective remedy and to a fair trial. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article.

97. Article 7 provides that "Everyone has the right to respect for his or her private and family life, home and communications". Article 8(1) (as we have earlier noted) provides that "Everyone has the right to the protection of personal data concerning him or her".

98. As this court stated in the Benkharbouche case [2016] QB 347, paras 69—85, (i) where there is a breach of a right afforded under EU law, article 47 of the Charter is engaged; (ii) the right to an effective remedy for breach of EU law rights provided for by article 47 embodies a general principle of EU law; (iii) (subject to exceptions which have no application in the present case) that general principle has horizontal effect; (iv) in so far as a provision of national law conflicts with the requirement for an effective remedy in article 47, the domestic courts can and must disapply the conflicting provision; and (v) the only exception to (iv) is that the court may be required to apply a conflicting domestic provision where the court would otherwise have to redesign the fabric of the legislative scheme."

Google Spain

32. The claimant was a Spanish national who wanted to remove two links on Google Search to an auction notice posted on a Spanish newspaper's website, following his bankruptcy. He complained that the auction notice was many years out of date and was no longer relevant. When the newspaper and Google declined to remove the links to the notice, he brought a complaint to the Spanish data protection authority against the newspaper, Google, and Google Spain SL, its Spanish subsidiary. The CJEU held that Google was bound by the DP Directive because it had set up a subsidiary in an EU member state which was intended to promote and sell advertising space offered by Google Search and which orientated its activity towards the inhabitants of that state. The CJEU proceeded to hold as follows:
(1) In making available information containing personal data published on the internet by third parties an entity operating an ISE is processing personal data for the purposes of the DP Directive, and is a data controller in respect of that processing, with an obligation to ensure "within the framework of its responsibilities, powers and capabilities", that the data subject's rights are protected in accordance with the DP Directive: see in particular [28], [33-34], [38].

(2) There is a "right to be forgotten": a data subject's fundamental rights under articles 7 and 8 of the Charter entitle them to request that information no longer be made available to the general public by means of a list of results displayed following a search made by reference to their name, and their rights may override the rights and interests of the ISE and those of the general public. It is unnecessary for the data subject to show that the inclusion of the information in the search results caused prejudice. See in particular [94], [96].

(3) Upon application by a data subject a national authority or court can therefore, in an appropriate case, order the operator under Article 12(b) and/or 14(1)(a) of the DP Directive to remove, from search results displayed following a search made on a person's name, links to web pages published by third parties containing information relating to that person; this may be so, even if that name or information has not been erased beforehand or simultaneously from those web pages, and even where the publication of the information on those web pages is lawful: see in particular [81], [85], [94], [99].

33. It is worthy of note that the Court drew distinctions between the processing of information for journalistic purposes on the one hand, and its processing by ISEs on the other, suggesting that the rights of data subjects will vary accordingly. The following features of the Court's reasoning are important:

(1) The impact of processing by an ISE will tend to have a more significant impact on the privacy and data protection rights of individuals than other forms of processing. Such processing

"... is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any Internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the Internet —information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty—and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the Internet and search engines in modern society, which render the information contained in such a list of results ubiquitous: see to this effect eDate Advertising GmbH v X (Joined Cases C-509/09 and C-161/10) [2012] QB 654; [2011] ECR I-10269, para 45" ([80])."

(2) ISEs did not appear to the Court to be processing information "solely for journalistic purposes", so as to benefit from the privileges enjoyed by the latter:

"... the processing by the publisher of a web page consisting in the publication of information relating to an individual may, in some circumstances, be carried out 'solely for journalistic purposes' and thus
benefit, by virtue of Article 9 of Directive 95/46, from derogations from the requirements laid down by the directive, whereas that does not appear to be so in the case of the processing carried out by the operator of a search engine. It cannot therefore be ruled out that in certain circumstances the data subject is capable of exercising the rights referred to in Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 against that operator but not against the publisher of the web page". ([85] emphasis added).

(3) A delisting request relating may therefore be made, and upheld, in respect of "links to web pages published lawfully by third parties and containing true information in relation to him personally …" if the inclusion of those links in the list of search results returned by the ISE nonetheless

"appears, having regard to all the circumstances of the case, to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue carried out by the operator of the search engine" ([94], emphasis added).

(4) A delisting request should be assessed by reference to the circumstances which obtain at the time when the request is made: [94], [96].

34. The Court held that the seriousness of the potential effects of listing by an ISE meant that it "cannot be justified by merely the economic interest which the operator of such an engine has in that processing". That was a reference to Google's rights under Article 16 of the Charter. The validity of a delisting request should be determined, said the Court, by striking "a fair balance" between "the legitimate interest of internet users potentially interested in having access" to the information and "the data subject's fundamental rights under articles 7 and 8 of the Charter": [81]. At [81], and again at [97], the Court observed that the latter rights would "as a general rule" override not only "the economic interest of the operator of the search engine but also the interest of the general public in finding that information on a search relating to the data subject's name". Whether it did so in an individual case would depend however on such factors as "the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life…". That role might be a reason for concluding "that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question."

35. The information complained of in Google Spain had initially been published 16 years earlier, and was drawn from the on-line archives of a part of the newspaper containing official announcements. On the facts, the CJEU held that having regard to the sensitivity of the data, and since there did not appear to be "particular reasons substantiating a preponderant interest of the public" in having access to that information "in the context of such a search", Articles 12 and 14 of the DP Directive required the removal of the links from the list of results: [98].

The Article 29 Working Party Guidelines

36. Article 29 of the DP Directive established a Working Party on the Protection of Individuals with regard to the Processing of Personal Data ("the Working Party"). Its membership includes a representative from the regulatory authority of each Member State. The functions of the Working Party are described in Articles 29 and 30 of the DP Directive and Article 15 of Directive 2002/58/EC. In summary, it is
empowered to examine and make recommendations on matters relating to data protection in the EU, and has "advisory status". On 26 November 2014 the Working Party adopted and published "Guidelines on the Implementation of [Google Spain]". The document falls into three parts: An Executive Summary; Part I entitled "Interpretation of the CJEU Judgment"; and Part II, entitled "List of common criteria for the handling of complaints by European data protection authorities". I have considered all three parts of the Guidelines document.

37. The Executive Summary helpfully identifies four salient features of the Google Spain decision:

"1. Search engines as data controllers

The ruling recognises that search engine operators process personal data and qualify as data controllers within the meaning of Article 2 of Directive 95/46/EC. The processing of personal data carried out in the context of the activity of the search engine must be distinguished from, and is additional to that carried out by publishers of third-party websites.

2. A fair balance between fundamental rights and interests

In the terms of the Court, "in the light of the potential seriousness of the impact of this processing on the fundamental rights to privacy and data protection, the rights of the data subject prevail, as a general rule, over the economic interest of the search engine and that of internet users to have access to the personal information through the search engine". However, a balance of the relevant rights and interests has to be made and the outcome may depend on the nature and sensitivity of the processed data and on the interest of the public in having access to that particular information. The interest of the public will be significantly greater if the data subject plays a role in public life.

3. Limited impact of de-listing on the access to information

In practice, the impact of the de-listing on individuals’ rights to freedom of expression and access to information will prove to be very limited. When assessing the relevant circumstances, DPAs will systematically take into account the interest of the public in having access to the information. If the interest of the public overrides the rights of the data subject, de-listing will not be appropriate.

4. No information is deleted from the original source

The judgment states that the right only affects the results obtained from searches made on the basis of a person's name and does not require deletion of the link from the indexes of the search engine altogether. That is, the original information will still be accessible using other search terms, or by direct access to the publisher's original source."

38. Point 2 highlights the fact that the CJEU regarded the sensitivity of the data in question as an important element in striking the balance. Point 4 explains why it may be misleading to label the right asserted by these claimants as the "right to be forgotten". They are not asking to "be forgotten". The first aspect of their claims asserts a right not to be remembered inaccurately. Otherwise, they are asking for accurate information about them to be "forgotten" in the narrow sense of being removed from the search results returned by an ISE in response to a search on the claimant's name. No doubt a successful claim against Google would be applied to and by other ISEs. But it does not follow that the information at issue
would have to be removed from the public record, or that a similar request would have to be complied
with by a media publisher on whose website the same information appeared. In these proceedings the
claimants are not asking for any such remedy. It is also worth noting here a point that I shall come back
to: a successful delisting request or order in respect of a specified URL will not prevent Google
returning search results containing that URL; it only means that the URL must not be returned in
response to a search on the claimant's name.

Part II of the Working Party's Guideline document sets out 13 "common criteria" for the handling of
complaints by data protection authorities (known in the document as "DPAs"). Each criterion is
accompanied by an extensive commentary. All parties are agreed that it is this Part of the Guideline
document that will be of the greatest use to me in assessing the claims. Although not all of the
"common criteria" are relevant to the present cases, most of them have at least some relevance. I shall
refer to the applicable criteria and relevant commentary when assessing the claims. At this stage it is
useful to note the status and role of these criteria, which are explained in the Guidelines document in
this way:

"... the list of common criteria which the DPAs will apply to handle the complaints, on a
case-by-case basis ... should be seen as a flexible working tool which aims at helping
DPAs during the decision-making processes. The criteria will be applied in accordance
with the relevant national legislations. No single criterion is, in itself, determinative. The
list of criteria is non-exhaustive and will evolve over time, building on the experience of
DPAs."

40. Part II itself further explains that the criteria are based on "a first analysis of the complaints so far
received from data subjects whose delisting requests were refused by the search engines". It goes on to
say that:--

"... In most cases, it appears that more than one criterion will need to be taken into account
in order to reach a decision. In other words, no single criterion is, in itself, determinative.

Each criterion has to be applied in the light of the principles established by the CJEU and
in particular in the light of the "the interest of the general public in having access to [the]
information".

The GDPR

41. Article 17 is in the following terms:

"1. The data subject shall have the right to obtain from the controller the erasure of
personal data concerning him or her without undue delay and the controller shall have the
obligation to erase personal data without undue delay where one of the following grounds
applies:

(a) the personal data are no longer necessary in relation to the
purposes for which they were collected or otherwise processed;

(b) the data subject withdraws consent on which the processing is
based according to point (a) of Article 6(1), or point (a) of Article
9(2), and where there is no other legal ground for the processing;
(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);

(d) the personal data have been unlawfully processed;

(e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;

(f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.

3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:

(a) for exercising the right of freedom of expression and information;

(b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);

(d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or

(e) for the establishment, exercise or defence of legal claims."

Misuse of private information

42. The second cause of action relied on in these cases is misuse of private information. As appears from, among other cases, Campbell, McKennitt v Ash [2006] EWCA Civ 1714 [2008] QB 73 [11] and Vidal-Hall, this is a tort which emerged from the equitable wrong of breach of confidence under the influence of the HRA, and has two essential ingredients: (1) the claimant must enjoy a reasonable expectation of
privacy in respect of the information in question; if that is established, the second question arises (2) in all the circumstances, must the Article 8 rights of the individual yield to the right of freedom of expression conferred on the publisher by article 10? The latter inquiry is commonly referred to as the balancing exercise. It falls to be undertaken in the way set out by Lord Steyn in Re S at [17]:

"First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

43. The authorities provide numerous illustrations of this balancing process, which is of course highly fact-sensitive. The relationship between the laws of misuse of private information and data protection has been discussed on occasion. They are often considered to lead to the same conclusion, for much the same reasons: see, for instance, the Campbell v MGN Ltd litigation, Murray v Express Newspapers plc [2007] EWHC 1908 (Ch) [2007] EMLR 22; but this is not always so: see Mosley v Google Inc [2015] EWHC 59 (QB) [2015] EMLR 11 [8]-[9] (Mitting J). In this case, it is agreed that both deserve consideration.

Convictions, confidentiality and privacy

44. Criminal trials take place in public, and the verdicts returned and sentences imposed are public acts. Historically, it has been lawful to report these matters at the time and subsequently with the benefit of either absolute or qualified immunity from liability, at least in defamation and contempt of court. Statute has imposed or allowed for reporting restrictions in certain circumstances, either to protect privacy interests, or the due administration of justice, or both: see, eg, s 2 of the Sexual Offences Amendment Act 1992, and s 4(2) of the Contempt of Court Act 1981 ("the 1981 Act"). Subject to laws or orders of this kind, however, privileges or immunities for fair and accurate reports have existed at common law, under the Defamation Act 1952, and now the Defamation Act 1996, as well as under s 5 of the 1981 Act. Section 8 of the 1974 Act is an example of a qualified privilege or immunity.

45. The question of whether and if so when information about a conviction can count as an item of confidential information and/or an aspect of an individual's private or family life, the use or disclosure of which may be actionable, has been considered on a number of occasions in the Courts of the United Kingdom since 1974. It has not so far been held capable of being confidential information. It is not until quite recently that there has been an acknowledgment that information of this kind can fall within the ambit of an individual's private life.

46. In Elliott v Chief Constable of Wiltshire, (The Times, 5 December 1996), Sir Richard Scott V-C struck out a claim in breach of confidence, describing the suggestion that a conviction announced in open court could be confidential as "absurd". In R (Pearson) v DVLA [2002] EWHC 2482 (Admin) Maurice Kay J rejected a submission that continued reference to a spent conviction on the paper driving licence of a professional lorry driver represented an interference with his rights under Article 8(1) of the Convention. The Judge held that Article 8 was not even engaged (and that if it was, the applicable regime was justified in pursuit of the legitimate public policy aim of enhancing the efficiency and effectiveness of sentencing in respect of repeat offences). The 1974 Act was held to create no more than "a limited privilege, provided not under the Convention but by domestic legislation."
In *L v Law Society* (above) at [24]-[25] the Master of the Rolls rejected a submission that the protection afforded by the 1974 Act renders details of spent convictions confidential. At [37]-[44] he rejected a submission that the proceedings should be held in private to protect the appellant against disclosure of his "private life" within the meaning of Article 8 of the Convention. As to confidentiality, agreeing with Maurice Kay J in *Pearson*, Sir Anthony Clarke MR held that the Act

"… does not attempt to go beyond the grant of those limited privileges to provide a right of confidentiality in respect of spent convictions. While the 1974 Act in some respects may place an individual with spent convictions in the same position as someone with no convictions, it does not do so by rendering the convictions confidential; it does so simply by putting in place a regime which protects an individual from being prejudiced by the existence of such convictions."

A number of public law cases decided over the last 8 years have recognised that a conviction may, with the passage of time, so recede into the past as to become an aspect of an individual's private life. Three cases in the Supreme Court, one in the Northern Ireland Court of Appeal, and one in the Court of Appeal of England and Wales have touched on the issue.

(1) *R (L) v Comr of Police for the Metropolis (Secretary of State for the Home Dept intervening)* [2009] UKSC 3 [2010] 1 AC 410 ("L") was a case about cautions. At [27] Lord Hope suggested (obiter) that Strasbourg authority showed that information about convictions "which is collected and stored in central records can fall within the scope of private life within the meaning of article 8(1), with the result that it will interfere with the applicant's private life when it is released." Although in one sense public information because the convictions took place in public "… As it recedes into the past, it becomes a part of the person's private life which must be respected".

(2) *R (T) v Chief Constable of Greater Manchester Police* [2014] UKSC 35 [2015] AC 49 ("T") was also about cautions. As Lord Wilson said at [18], the appeals did "not relate to the disclosure of a spent conviction that will have been imposed in public", but he referred to Lord Hope's observation in *L* and adopted the suggestion of Liberty, an intervenor, that "the point at which a conviction … recedes into the past and becomes part of a person's private life will usually be the point at which it becomes spent under the 1974 Act". The rest of the Justices agreed at [158].

(3) In *Gaughran v Chief Constable for the Police Service of Northern Ireland* [2015] UKSC 29 [2016] AC 345 [37] the majority held that "the fact that a conviction may become spent is a potentially relevant but by no means decisive factor in considering where the balance lies", between the privacy rights of convicted persons and the public policy justifications for retaining biometric data.

(4) In *CG v Facebook Ireland Ltd* [2016] NICA 54 [2017] EMLR 12 [44] the NICA referred to *T* and agreed that with the passage of time the protection of an offender by prohibiting the disclosure of previous convictions may be such as to outweigh the interests of open justice. On the facts that information, in conjunction with other information, gave rise to a reasonable expectation of privacy. The Court held, however, that the open justice principle and the public's right to know about convictions and have information about what happened in open court could "only be outweighed in the most compelling circumstances" by the Article 8 rights of the individual in freedom from intrusion. It is right to mention that this was a case about disclosures on Facebook in 2013 of convictions for sexual offending in 2007 for which the claimant had been sentenced to 10 years' imprisonment. The rehabilitation regime was not in play.
(5) In R (P) v Secretary of State for the Home Department [2017] EWCA Civ 321 [2017] 2 Cr App R 12 the Court of Appeal considered the lawfulness of the scheme for the disclosure of convictions, in its revised form following the Supreme Court's decision in T. The Court concluded that the vice identified by the Supreme Court was that the scheme required the indiscriminate disclosure of convictions, without proper safeguards to allow adequate examination of the proportionality of the interference with Article 8 rights that it involved. The balance that the law requires was identified by the Court of Appeal at [63]: the "balance between the rights of individuals to put their past behind them, and what is necessary in a democratic society". Factors identified as relevant in striking that balance included "the nature of the offence, the disposal in the case, the time which has elapsed since the offence took place, or the relevance of the data to the employment sought": [41].

49. So much for the potential for information about convictions to be or become confidential or private. The question of whether the common law of misuse of private information should afford reporting privileges akin to those established by the common law, and extended by statute, in defamation and contempt of court has been discussed in at least one text, which has suggested that the law would be likely to follow the same contours (see Tugendhat and Christie, The Law of Privacy and the Media, 3rd edition at paras 11.64ff). Some cases have come close to addressing the question (see not only CG but also Crossley v Newsquest (Midlands South) Ltd [2008] EWHC 3054 (QB) [58] (Eady J), citing R v Arundel Justices ex parte Westminster Press [1985] 1 WLR 708), but the issue has never arisen directly for decision by the Court in a context such as the present.

The E-Commerce Directive and Regulations

50. There is one other feature of the legal landscape that I should mention, if only to clear it out of the way for the record: Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, of 8 June 2000 ("the E-Commerce Directive"), and its corresponding domestic implementing legislation, The Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013) ("the E-Commerce Regulations"). At the start of this trial it was Google's case that the activities undertaken by Google Search amount to "caching" so that it was entitled to an exemption from any obligation to pay compensation unless and until the underlying material had been removed from the third-party website or the Court had ruled on the issue, pursuant to Article 13 of the Directive and the corresponding Regulation 18. That was disputed by the claimants and the ICO, and was to be one of the issues for resolution by me. But after hearing the ICO's submissions on this issue Google withdrew its reliance on those provisions in this case. Mr White explained that whilst the company still considered the argument to be correct in law, it had considered in particular the submissions of Ms Proops as to the burden of regulatory oversight which Google's legal analysis would place on the ICO. It had decided that it should give further consideration to the issue, and in particular the relationship between these provisions of the E-Commerce Directive and Regulations and s 13 of the DPA.

THE NT1 CASE

The issues

51. It is now possible to define more precisely the claims and issues.

Data protection

52. The claimant contends that by operating its Search facility in such a way as to return the offending URLs Google acts as the data controller of information that is personal data relating to the claimant, and is processing such personal data within the meaning of the Directive and DPA. Accordingly, says
the claimant, Google owes him the statutory duty provided for in s 4(4) of the DPA.

53. Google admits that its presentation of search results as a consequence of a search being carried out on the name of the data subject involves the processing of personal data of which it is the data controller, and that it owes this statutory duty in respect of such processing. Google makes no admissions in respect of any operations prior to presentation of search results, such as finding or indexing information. For the purposes of this action, and the claim of NT2, it is unnecessary to go further. Nor is it necessary to determine an issue raised by Google as to when its activities involve the processing of sensitive personal data. Google admits that the offending URLs contain information that falls within the categories of sensitive personal data mentioned above, and that its post-notification activities involve the processing of such data. Subject to an issue I shall come to, concerning the Journalism Exemption, Google accepts that upon receipt of a delisting request it is obliged to conduct the balancing exercise prescribed by Google Spain. As already noted, the issue that did arise as to the formal or substantive validity of NT1's original request under s 10 of the DPA has fallen away.

54. The main issues as to liability in relation to the data protection claims can be defined under two heads as follows:

(1) "The Inaccuracy Issues". Is there information in any of the three third-party publications which is inaccurate, in breach of the Fourth Data Protection Principle, in a way or to an extent that requires or should lead the Court to grant the blocking, erasure and injunctive remedies sought?

(2) "The Privacy Issues". The arguments give rise to four inter-related questions, which it will be convenient to consider in the following order:

a) Is Google entitled to rely on the Journalism Exemption? ("the Exemption Issue")

b) At what point in the legal analysis should the Court assess the compatibility of Google's processing of the offending links with the principles in Google Spain ("the Structure Issue")? There are three competing arguments on this question.

c) Does Google's processing comply with its obligations under DPA s 4(4) ("the DPA Compliance Issue")?

d) Does Google's processing comply with the requirements of Google Spain ("The Google Spain Issue")?

Misuse of private information

55. I can shortly summarise the issues in this respect ("the Misuse Issues"): (1) Does the claimant enjoy a reasonable expectation of privacy in respect of any of the information at issue?; if so (2) how, on the particular facts of the case, should the balance between the rights of privacy and freedom of expression be struck?

Damages

56. If the claimant succeeds on liability in respect of the Inaccuracy and/or Privacy Issues, and/or misuse of private information the question arises of what damages or compensation should be awarded ("The Damages Issue").
The Abuse Issue

57. Logically prior to all of the above is the issue that arises from one of Google's submissions: is this action in substance a claim to protect reputation, cast as a claim under the DPA and/or the law of misuse of private information, in an illegitimate attempt to circumvent the procedural and substantive law that applies to claims in defamation? ("The Abuse Issue").

The Abuse Issue

58. Google submits that NT1's claims are an abuse of the Court's process as they "amount in substance to claims for damage to reputation which are intended to outflank the limits on reputation claims in the law of defamation and section 8" of the 1974 Act. Although this is advanced as a "further reason" for dismissing the claims, it is in reality a threshold issue. If the point is sound, it should result in the dismissal of the claims.

59. At the heart of Google's argument is the proposition that the claims are "in essence" complaints about the damage caused to NT1’s reputation by the continued availability of the URLs complained of. From that starting point, it is argued that a claimant such as NT1 has no right to by-pass the protections which the law of defamation affords to the right of freedom of expression by framing his case in a cause of action other than defamation, and using this as a vehicle for recovering essentially the same relief on the same grounds. In support of his argument, Mr White relies on some of the well-known jurisprudence in this area, which includes Woodward v Hutchins [1977] 1 WLR 760, Gulf Oil v Page [1987] Ch 327, Lonrho v Al Fayed (No 5) [1993] 1 WLR 1489, Service Corporation International plc v Channel Four Television [1999] EMLR 83, 89, McKennitt v Ash ([42] above), Terry (previously LNS) v Persons Unknown [2010] EMLR 16 [95] and Tillery Valley Foods Ltd v Channel Four Television Corpn [2004] EWHC 1075 (Ch) [21].

60. Mr White also emphasises that on two recent occasions the Supreme Court has warned against using torts other than defamation to obtain relief that would not be available in that tort. In O (A Child) v Rhodes [2015] UKSC 32 [2016] AC 219 [111] Lord Neuberger cautioned against attempts to "extend or supplement" defamation law by resort to a different tort (in that case, intentional infliction of psychological harm). In Khuja v Times Newspapers Ltd [2017] UKSC 49 [2017] 3 WLR 351 Lord Sumption took the point further, emphasising the need for "coherence" in the law. The claimant, who had been anonymised as "PNM", sought to prevent publication of information disclosed in open court at a criminal trial. For that purpose, he relied on the tort of misuse of private information, emphasising the impact that publication would have on private and family life, and in particular the effect on his immediate family. The Supreme Court upheld the decision of the judge at first instance and the Court of Appeal to refuse an injunction. Giving the judgment of the majority, Lord Sumption said at [34(3)]:

"A party is entitled to invoke the right of privacy to protect his reputation but, as I have explained, there is no reasonable expectation of privacy in relation to proceedings in open court. The only claim available to PNM is based on the adverse impact on his family life which will follow indirectly from the damage to his reputation. It is clear that in an action for defamation no injunction would issue to prevent the publication of a fair and accurate report of what was said about PNM in the proceedings. It would be both privileged and justified. In the context of the publication of proceedings in open court, it would be incoherent for the law to refuse an injunction to prevent damage to PNM's reputation directly, while granting it to prevent the collateral impact on his family life in precisely the same circumstances."
I am not persuaded that these high authorities, or the earlier cases I have cited, provide a justification for dismissing the claims of NT1 as an abuse of process. As a general rule, it is legitimate for a claimant to rely on any cause of action that arises or may arise from a given set of facts. This is not ordinarily considered to be an abuse just because one or more other causes of action might arise or be pursued instead of, or in addition to, the claim that is relied on. Indeed, the Supreme Court did not hold that Mr Khuja's application was an abuse of process, but rather that it failed because he could offer nothing that would outweigh the importance of free reporting of proceedings in open court. His own reputation could not, in that context, support his claim to enjoy a reasonable expectation of privacy; although the impact on his family life could serve that purpose, it could not suffice. As Lord Sumption said at [34(2)]:

"[PNM] … is entitled to rely on the impact which publication would have on his relations with his family and their relations with the community in which he lives. I do not underestimate that impact. … But … the impact on PNM's family life of what was said about him at the trial is no different in kind from the impact of many disagreeable statements which may be made about individuals at a high profile criminal trial … the collateral impact that this process has on those affected is part of the price to be paid for open justice and the freedom of the press to report fairly and accurately on judicial proceedings held in public."

These are powerful considerations that might have provided an overwhelming answer to the present claims if they lacked their defining characteristic, namely that NT1's conviction is spent. But these considerations would still not have rendered the present claims an abuse of process. The touchstone for identifying this kind of abuse was perhaps best expressed by Buxton LJ in McKennitt. That was a claim for breach of confidence which the defence characterised as an abuse because the Court had held the information in question to be false. At [79], Buxton LJ said this (emphasis added):

"79 If it could be shown that a claim in breach of confidence was brought where the nub of the case was a complaint of the falsity of the allegations, and that that was done in order to avoid the rules of the tort of defamation, then objections could be raised in terms of abuse of process. That might be so at the interlocutory stage in an attempt to avoid the rule in Bonnard v Perryman [1891] 2 Ch 269: a matter, it will be recalled, that exercised this court in Woodward v Hutchins [1977] 1WLR 760."

80 That however is not this case. …".

In the present case, I accept that the protection of reputation is a significant and substantial element of NT1's claim and of his motivation. That is an inevitable conclusion, given his pleaded case and his own evidence as to the damage which concerns him. Paragraph 12.1 of NT1's Final Amended Particulars of Claim asserts that he " has been and continues to be treated as a pariah in his personal, business and social life", and complains that he lives in fear that anyone he meets will find the URLs via Google "and subsequently and as a result shun him." NT1's witness statement reaffirms these points, talking of his being a "pariah" who is and has been "shunned". This is undoubtedly the classic language of reputational harm. That said, it would be wrong to draw too sharp a distinction between the protection of reputation on the one hand and private life on the other. The authorities show that injury to reputation can engage the protection of Article 8 of the Convention: see, for instance, McKennitt [80], Gulati v MGN Ltd [2015] EWHC 1482 (Ch) [168] (Mann J) (appeal dismissed, [2015] EWCA Civ 1291), and Khuja ([61] above).
64. Nor do I consider that the protection of reputation is the claimant's only objective or, to use the words of Buxton LJ "the nub" of the claims. The pleading and the evidence in support of his case rely on factors which go beyond mere reputation, and cross over into areas of private life which are distinct from matters of reputation. I do not find that NT1 is seeking to exploit data protection law or the tort of misuse of private information to "avoid the rules" – to get round the obstacles that defamation law would place in his way. He is relying on the new law pronounced by the CJEU. As Mr Tomlinson submits, the Court should not be too liberal in its labelling of prejudice as "injury to reputation", lest it undermine the Google Spain regime.

65. Further, in my judgment it is possible and legitimate to take account in other ways of the fact and extent of the reputational concerns that feature so prominently in NT1's case. As will become clear, I believe they can properly be brought into account when assessing the Inaccuracy Issues, the Google Spain Issue, and the Misuse Issues. All of this applies equally to the impact of s 8 of the 1974 Act, and the policy that underpins that provision: those are factors to which I can have regard, as appropriate, when determining the issues of liability.

The Inaccuracy Issues

The essential facts

66. To set out the facts in detail here would be inconsistent with the aims behind my RRO. The detail is set out in the private judgment. Here, I can only summarise, using ciphers as explained above. Inevitably, something is lost.

67. In the 1980s, when working in sales, NT1 met a Mr Steinbeck. They saw an opportunity in a sometimes controversial business of offering services and credit to consumers and companies in connection with property. Together, they established a company, Alpha, to exploit that opportunity. They had equal shares in the business. The business was successful, NT1 running its marketing and sales operation. A Mr Fitzgerald was the marketing and sales director, with a modest shareholding. After some years, the business having progressed, NT1 decided to move abroad with his family. His evidence was that he left Mr Steinbeck to take over day to day running of Alpha's business. Within a matter of months NT1 became aware of what he calls "a number of issues" with the business. At around this time there were indeed press reports of problems with the sales practices of Alpha, and reports that the Trade Association had fined it a substantial sum. It was also reported that a state regulator had received complaints. NT1 visited the UK to assess the position, and what he saw led him to return permanently.

68. Over the 18 months that followed his return, a number of payments were made by Alpha to Romeo Ltd and Sierra Ltd, offshore companies of which NT1 was the beneficial owner. The total sum involved was well into seven figures. Ostensibly, the payments were made against invoices for services rendered by the two companies. Later, the Inland Revenue alleged that the invoices were bogus and that the payments were made pursuant to a conspiracy to account falsely, with the purpose of evading tax. NT1 and Mr Fitzgerald were charged with participation in that conspiracy. Both pleaded not guilty. Neither gave evidence. Both were convicted. NT1's statement says "However, a jury accepted the prosecution's case and I was convicted" (emphasis added). He admits to finding the sentencing ruling painful to read, as the Judge found he had acted unlawfully and dishonestly. He claims to have "accepted" the findings of the jury but his statement nowhere admits his guilt, and in the witness box he appeared reluctant to concede that the Court's decision in this, and in other respects, was correct. However, the conviction is evidence that NT1 was guilty (Civil Evidence Act 1968, s 11(2)). It may be best to make clear that I am
satisfied that he was guilty, as was Mr Fitzgerald, who was also convicted.

69. During this period, about six months into the false accounting conspiracy, NT1 bought out his partner, Mr Steinbeck. He thereby became the owner of nearly all the shares in Alpha. This was done indirectly, via Sierra Ltd.

70. There was an overlapping dishonest conspiracy, of which Alpha customers were the victims. It had begun some six months before the start of the false accounting conspiracy, and it went on well beyond the end of that conspiracy. Some years later, NT1 and Mr Fitzgerald were both indicted in respect of this conspiracy, along with a number of others. The prosecution did not proceed against NT1, and the charge was ordered to lie on the file. Mr Fitzgerald was tried and convicted. Another Alpha employee pleaded guilty.

71. Over the years between NT1's buy-out of Mr Steinbeck and the mid-1990s, Alpha's business suffered a series of setbacks. A substantial number of consumer complaints were made to Alpha and its subsidiaries, to a trade body, and to regulators including state regulators, about its business conduct. A substantial number of these were considered to be well-founded. Civil claims were brought. Subsidiaries of Alpha were subjected to regulatory sanctions by the state. Alpha's offices and NT1's home were raided by the police. Alpha was then placed in compulsory winding-up, on the petition of November Ltd and a supporting creditor. NT1 and Mr Fitzgerald were individually required to and did give extensive formal undertakings as to their future conduct. Some of these events were the subject of comments in Parliament.

72. NT1 (via Sierra Ltd) and Mr Fitzgerald put up some money ("the Fund") to pay off November Ltd and any other creditors of Alpha and get the company out of liquidation. A third party intervened with an application to freeze the Fund so that its provenance could be scrutinised. The Fund was alleged to represent or include the proceeds of the second conspiracy. The application failed for legal reasons. In due course the winding up came to an end with payments out of the Fund to November Ltd and other creditors.

73. At around the same time, NT1 was arrested and charged. Funds held by him in foreign banks were frozen at the instigation of the Crown Prosecution Service. The Inland Revenue's claims were settled, but NT1 and Mr Fitzgerald were prosecuted, as I have said. NT1 did not give evidence at his trial. He and Mr Fitzgerald both appealed unsuccessfully against conviction. Sentence was adjourned to await the outcome of the trial in respect of the second conspiracy. Reporting restrictions were imposed meanwhile under s 4(2) of the 1981 Act. After Mr Fitzgerald's conviction, the Judge sentenced him and then NT1. Mr Fitzgerald received a total of 5 years' imprisonment, comprised of two consecutive sentences of 30 months each. NT1 received a sentence of four years' imprisonment. Each also received a disqualification from acting as a company director and a costs order.

74. A detailed account of the Judge's sentencing remarks is contained in the private judgment (at [49]-[56]). The remarks explain how the Judge arrived at his sentences, including his findings about the roles of the two men. Most of the detail cannot be given without imperilling NT1's anonymity, but it is relevant to record two particular matters. One is that the Judge found NT1 to have been the boss, who had to shoulder the major share of the blame for the dishonest conspiracy. The second is that the Judge made clear that one specific matter of personal mitigation meant that the sentence was less than the Judge would otherwise have imposed.

75. The first third party publication complained of is a media report of the sentencing of NT1 and Mr
Fitzgerald, consisting of a headline and 16 paragraphs of text. This ("the First Article") was published in the financial pages of a national newspaper within a few weeks of the sentencing hearing. The second third party publication complained of also appeared in a national newspaper. This publication ("the Second Article") first appeared some months later. It was an item within a longer column concerned with consumer affairs. It consists of a headline and 13 paragraphs of text. It begins with a query raised by a reader, the rest of it comprising the journalist's response.

76. NT1 and Mr Fitzgerald both appealed unsuccessfully against sentence. The key parts of the Court of Appeal's judgment are set out or summarised in the Private Judgment (at [59]-[66]), and cannot be repeated here lest they serve to identify NT1. But it is fair to say that the Court accepted the trial Judge's view of the roles of NT1 and Fitzgerald, and found that NT1 was the principal actor in the false accounting conspiracy, which had involved "the corruption of others". The Court of Appeal, reducing Mr Fitzgerald's sentence, found that he had been a young second-in-command to NT1.

77. The third URL complained of by NT1 takes one to an extract from a book ("the Book Extract") first published some two years after the Court of Appeal decision. The Book Extract comprises a headline and 6 paragraphs of text. The content is similar to that of the First and Second Articles.

78. A recent Google search, a copy of which is in the papers, throws up a snippet from each of the First Article, the Second Article and the Book Extract. Snippets from the Articles appear as items one and two on the first page of the search. A snippet of the Book Extract is item eight on page two. The snippets are set out in the Private Judgment (at [67]-[68]). They were the subject of some submissions by Mr Tomlinson in closing, but as the pleaded complaint is one of inaccuracy in the underlying publications, not the snippets, I do not consider it would be right to assess the snippets.

The complaints

79. Six complaints of inaccuracy are made. They are not all in the same form, but the commonest format adopted is to pick out some word(s) or phrase(s) from one or more of the three URLs complained of and assert baldly that "The claimant did not ['QUOTE WORD(S)/PHRASE(S)']". The pleaded case does not identify which of the URLs contains the alleged inaccuracy. No particulars of inaccuracy are provided. This is not especially transparent or helpful. It has required me to carry out an analysis of where the alleged inaccuracies are to be found. That analysis suggests that there are three complaints about the First Article, five about the Second Article (three of which relate to that article only), and two about the Book Extract. The claimant's approach also seems to beg the question of what sense a given word or phrase bears, when read in its context. I cannot help feeling that in a context such as the present – where the claimant sues in respect of media publications – he should be expected to specify the meaning(s) he attributes to particular words or phrase, and which he says is inaccurate. A claimant should also give particulars of inaccuracy. Those are well-established requirements of a statement of case in a defamation or malicious falsehood claim, which are surely appropriate in this context for the same reasons. It is after all NT1 who alleges inaccuracy, and so the burden of proof rests on him, as Mr Tomlinson accepts.

The right approach in principle

80. NT1's case is that there have been breaches of the first part of the Fourth Principle: the requirement that personal data "shall be accurate". The requirement that data be "kept up to date" does not have any application in this context. There has been some dispute about how to decide whether a published article is "inaccurate" for this purpose. Two sources of law have been addressed.
81. First, there is data protection law itself. DPA s 70(2) contains a "supplementary definition" which explains that "For the purposes of this Act, data are inaccurate if they are incorrect or misleading as to any matter of fact." This does not take the matter much further, though the reference to fact emphasises that this Principle is not concerned with matters of comment, opinion or evaluation. The reference to "misleading" indicates that the Court should not adopt too narrow and literal an approach. The Working Party's comments on its criterion 4 are helpful:

"In general, 'accurate' means accurate as to a matter of fact. There is a difference between a search result that clearly relates to one person's opinion of another person and one that appears to contain factual information.

In data protection law the concepts of accuracy, adequacy and incompleteness are closely related. DPAs will be more likely to consider that de-listing of a search result is appropriate where there is inaccuracy as to a matter of fact and where this presents an inaccurate, inadequate or misleading impression of an individual. When a data subject objects to a search result on the grounds that it is inaccurate, the DPAs can deal with such a request if the complainant provides all the information needed to establish the data are evidently inaccurate."

82. A second source of possible guidance is the domestic law of defamation. Although the DP Directive must be given an autonomous interpretation, it may be legitimate to draw on national legal traditions when implementing the broad principles established by European law. In a libel action, where truth is in issue, the Court will first determine the single natural and ordinary meaning which the words complained of would convey to the ordinary reasonable reader. It is that which the defendant must then prove to be true. A claim for libel cannot be founded on a headline or other matter, read in isolation from the related text; the Court must identify the single meaning of a publication by reference to the response of the ordinary reader to the entire publication: Charleston v News Group Newspapers Ltd [1995] 2 AC 65.

Mr Tomlinson initially submitted that the position is or should be different in the present context. Unlike the position in a libel case, he argued, the court looks not at the "natural and ordinary meaning" of the article read as a whole, but at each discrete "item of information" which it contains. Mr White contends that any factual statement contained in the Articles or the Book Extract must be read in its proper context, and that any complaint of inaccuracy must be assessed in the light of the ordinary and natural meaning of the Article or Book Extract of which the offending statement is part.

83. By the end of the trial, Mr Tomlinson had moved in this direction, accepting that words must be read and interpreted in context, but he still resisted the introduction of the defamation principles as to meaning, suggesting that they contained "artificial" restrictions. As I have indicated, I prefer Mr White's submissions. I do not regard the principles identified in Charleston as artificial. Nor do I think them inapspotite in the present context. They have been developed over centuries to meet the needs of a cause of action that addresses issues arising from the publication of words and their impact on reputation. Mr White's submissions also have two other virtues. They find support in domestic authority. In Lord Ashcroft v Attorney-General [2002] EWHC 1122 (QB) [22] Gray J held it arguable that ostensibly innocent words might convey a secondary, inferential meaning which embodied sensitive personal data about an individual to the effect that he was involved in money laundering (see Tugendhat & Christie, op cit at 7.25). In Quinton v Peirce [2009] EWHC 912 (QB) [2009] FSR 17 [27]-[29], [92] Eady J applied the single meaning rule when assessing whether data were inaccurate within the meaning of the Fourth Principle. In addition, the defamation rules seem well-adapted to
testing whether the words satisfy the Working Party criterion of giving "an inaccurate, inadequate or misleading impression of an individual".

84. There is a further dimension to this. The law of defamation contains a rule (the "repetition rule") which recognises that an accurate report of what a third party has said about a person may convey an inferential defamatory meaning which is false. The ordinary meaning of the statement, "The prosecutor alleged that the defendant had defrauded the Revenue" is that the claimant is guilty of fraud. That could turn out to be untrue. The same is true of the statement that "The Jury found him guilty of fraud". The policy of defamation law is to hold the publisher responsible for the inferential meaning, whilst protecting those who report accurately on court proceedings, and on certain other kinds of proceeding or statement such as Parliamentary proceedings, even if the report conveys a false or inaccurate inferential meaning. The protection is absolute or qualified, according to the context. Some accurate reports are privileged "subject to explanation or contradiction". The interpretative provisions of DPA Schedule 1 Part II contain some apparently relevant provisions for qualified exemption from the strict requirements of accuracy. They state:

"7. The fourth principle is not to be regarded as being contravened by reason of any inaccuracy in personal data which accurately record information obtained by the data controller from the data subject or a third party in a case where

(a) having regard to the purpose or purposes for which the data were obtained and further processed, the data controller has taken reasonable steps to ensure the accuracy of the data, and

(b) if the data subject has notified the data controller of the data subject's view that the data are inaccurate, the data indicate that fact."

85. It is noteworthy that the remedial provisions of the DP Directive and DPA afford the Court a discretion, and considerable latitude. DPA s 10(4) gives the Court a discretion to require a data controller to take "such steps... as the court thinks fit". Section 14 provides that if the Court is satisfied that personal data are inaccurate it "may" order the data controller to rectify, block, erase or destroy those data. Sections 14(2) and (3) contain further provisions, some of which build on the requirements of Sch 1 Part II paragraph 7, quoted above:

"(2) Subsection (1) applies whether or not the data accurately record information received or obtained by the data controller from the data subject or a third party but where the data accurately record such information, then-

(a) if the requirements mentioned in paragraph 7 of Part II of Schedule 1 have been complied with, the court may, instead of making an order under subsection (1), make an order requiring the data to be supplemented by such statement of the true facts relating to the matters dealt with by the data as the court may approve, and

(b) if all or any of those requirements have not been complied with, the court may, instead of making an order under that subsection, make such order as it thinks fit for securing compliance with those requirements with or without a further order requiring the data to be supplemented by such a statement as is mentioned in paragraph (a)."
(3) Where the court—

(a) makes an order under subsection (1), or

(b) is satisfied on the application of a data subject that personal data of which he was the data subject and which have been rectified, blocked, erased or destroyed were inaccurate,

it may, where it considers it reasonably practicable, order the data controller to notify third parties to whom the data have been disclosed of the rectification, blocking, erasure or destruction."

86. It is clear from these provisions that even where data are found to be inaccurate the Court has a toolbox of discretionary remedies that can be applied according to the circumstances of the individual case. Indeed, the Court may grant a remedy even if by virtue of paragraph 7 of Sch 1 Part II the data are not found to be inaccurate. At one extreme, the Court may deem it appropriate to order a data controller both to block and erase data, and to tell third parties to whom the data have been disclosed that this has been done. At the other extreme, the Court may conclude that no order should be made. Between those two extremes lies a variety of options. The Court's order will need to be tailored to the circumstances, having regard to the effect a particular remedy would have on the parties and on the wider public. Some options might be excessive. If a long article on a matter of public interest containing a substantial amount of information about the claimant was found to contain one inaccuracy, of a relatively minor nature, the knock-on effects of blocking access via an ISE such as Google might make it hard to justify the grant of that remedy. Rectification, or an order under s 14(2) might be a more appropriate course. Such an option might not be available on the facts of a given case. It could be, for instance, that an ISE lacked the technical ability to add to an individual search result or snippet an indication of "the data subject's view that the data are inaccurate", or a supplementary statement of "the true facts". The evidence in this case does not tell me anything about that, probably because the claimants have not sought rectification or any lesser remedy than blocking and erasure.

87. It seems to me legitimate to have regard in this context also to the contours of the English law of defamation, which has always allowed a generous latitude to those reporting proceedings in Court or in Parliament, going so far as to permit reporting which conveys the "impression" of the journalist (see, eg, *Cook v Alexander* [1974] 2 QB 279, CA). It would be wrong to treat the two branches of the law as co-terminous, as they not only have different origins but also serve different purposes. It is possible to give more weight to literal accuracy in the context of data protection law, with its broader aims and its wider and more flexible range of remedies. It is appropriate, however, to bear in mind domestic principles in order to ensure, as far as possible, that the law has the "coherence" to which Lord Sumption referred in *Khuja*.

The evidence

88. Google's case depends on documentary evidence, and such support as it can derive from answers given by the claimant under cross-examination. The hearsay rule has been abolished for civil proceedings so there is no difficulty, generally, about reliance on statements of fact contained in third party documents. Among the documents relied on here, however, are transcripts of the Judge's sentencing remarks, and of the Court of Appeal's judgment dismissing the appeal of NT1 and allowing that of Mr Fitzgerald. That prompted a discussion of whether Google's case was in any way limited by *Hollington v F Hewthorn & Co Ltd* [1943] KB 587. Nobody doubts that convictions are admissible as evidence of
guilt. Section 11 of the 1968 Act provides for that. Nor is there room for doubt that judgments or sentencing remarks (which are a form of judgment) are admissible as hearsay evidence of the facts of the case, subject always to the requirements of s 4 of the Civil Evidence Act 1995 regarding the evaluation of hearsay: see Hourani v Thomson [2017] EWHC 432 (QB) [21]-[22]. Section 11(2) of the 1968 Act plainly contemplates that evidence can be adduced of the facts on which a conviction is based. But I wondered whether Hollington v Hewthorn might be an impediment to reliance on the Court's conclusions or findings on contested issues of fact, whether made at first instance or on appeal, if those go beyond the facts leading to the conviction. In the end I do not think this is a problem.

89. As Tugendhat J pointed out in Director of Assets Recovery Agency v Virtosu [2008] EWHC149 (QB) [2009] 1 WLR 2808 [39]-[40], Hollington v Hewthorn is distinguishable where, as here, the previous judgment that is placed before the Court enables it to link up the conduct found proved by the previous court and the conduct to be proved in the instant case, and the issue for consideration is identical. As further pointed out in Virtosu at [41], it has been held by the Court of Appeal that Hollington v Hewthorn "does not purport to be an authority" on the matter of "raising in a civil action the identical question that had already been decided in a criminal court of competent jurisdiction". It is fair to mention that Mr Tomlinson did not seek to exclude reliance on the sentencing remarks in reliance on Hollington v Hewthorn, perhaps in part because his client's case relies in part on findings made by the Courts, which are said to exculpate NT1. Further, it is for the claimant to prove inaccuracy. I agree with Mr White that, on the face of it, an attempt to do so in reliance on a proposition contrary to the findings of a criminal court of competent jurisdiction would be an abuse of process (cf. Hunter v Chief Constable of West Midlands Police [1982] AC 529).

90. It is not an inherently easy task to determine the truth or falsity of statements published nearly 20 years ago about events that were older still, following two lengthy trials. The evidence I have to help me in that task is limited and far, far less than was before the trial Court or the Court of Appeal. NT1 has chosen, as is his right, to place relatively little evidence before the Court on the inaccuracy issues. The documents all come from Google. NT1's witness statement is less than comprehensive in its explanation of why the offending publications are inaccurate. It deals with the First and Second Articles in two relatively short paragraphs. It does not deal with the Book Extract at all. Granted, those two paragraphs of the witness statement are preceded by an account of the factual background, but that account itself is fairly superficial and the two elements are not clearly linked to one another. Moreover, (as explained in the Private Judgment) there are aspects of the inaccuracy complaint which are not addressed at all by the statement. As a result, much of the claimant's response to the documents relied on by Google emerged for the first time under cross-examination.

91. He did not perform well, and made a bad impression on me. He began by giving long-winded and elaborate answers to simple questions, showing a tendency to make speeches rather than give answers. He tended to evade, to exaggerate, to obfuscate, and worse. Examples of such behaviour which can be given in this public judgment include the following.

(1) At an early stage in his cross-examination it was put to the claimant that his business had been "repeatedly prosecuted by trading standards authorities … and sued by victims of its deceptive and misleading sales practices …", he flatly denied it as "absolutely untrue". Confronted with a newspaper report from the 1990s asserting that Alpha had a specified number of criminal convictions for trading standards offences, and a larger specified number of civil claims standing against it, the claimant said it was a long time ago and he could not be expected to comment on "unparticularised allegations like that".
(2) Shown a letter from a Mr Updike, the head of a Consumer Group, which gave detailed particulars of such convictions and civil claims, which matched the content of the newspaper article, the claimant embarked on an attack on Mr Updike's motives, and questioned the authenticity and reliability of the list. He then suggested that the cases had "been encouraged and built up by" Mr Updike. When I asked if he was therefore accepting that there were such cases he said no, he did not have enough information to accept this.

(3) Google has produced contemporaneous cuttings to support the existence of several of the convictions. The list of civil claims was detailed enough to give a Court, an action number, and a specific figure for each judgment or claim. It indicated whether the judgment had or had not been satisfied. Cuttings and other evidence also support the existence of civil claims. The evidence overall makes it clear enough that a substantial number of criminal prosecutions and a substantial number of civil claims were brought with success, and I find that Mr Updike's lists were substantially accurate. I am by no means convinced that the claimant's memory was so bad that he could not recall such matters. Maybe his memory of the detail is poor, but I am confident that he had not forgotten these matters altogether and that his evidence was not frank. He was equivocating, dissembling, and blustering.

(4) The claimant repeatedly used extravagant language to denounce suggestions, courteously put to him by Mr White, that he was involved in the management of Alpha. He rejected these as variously "bizarre", "ridiculous" or "palpable nonsense". Although he also gave reasons for rejecting such suggestions, such persuasive force as they had was undermined by the exaggerated language used. The impression conveyed was of an attempt to make a case by (metaphorically) shouting. After all, it does not seem inherently ridiculous to suggest that a person who returns from abroad to deal with a crisis, owns nearly all the shares in a company, and is able to move over £6m out of the company to his personal accounts in Switzerland has a good measure of knowledge of the company's day to day business and practical control over its conduct. Nor does it seem immediately obvious that, as NT1 would have it, the business was in fact under the effective control of a man in his early 20s who held a tiny minority stake in the company.

(5) Also significant, in my judgment, was the claimant's evidence about the formal undertakings given by him and Mr Fitzgerald. In form, those undertakings embodied admissions by each man that he had previously consented to or connived at a course of conduct involving a raft of criminal offences, and a promise that he would not continue to do so. There was a formal announcement which described each man as a present or former executive of Alpha. The claimant told me that all he could now recall was that he gave the undertakings. He did not accept that he had in fact consented to or connived at any of the offences listed in the undertakings, or that the document setting them out was evidence that he had done so:

"I, as I said, was not the author of the list and do not remember the list. [but] I accept that I signed the document. I do not accept that the semantic point of referring to "continuing to consent to or connive at the course of" means that I accept that I had previously been involved in any of those practices or activities."

The claimant agreed that there were steps he could have taken, but did not take, to head off the regulator's demand for such undertakings. He said he had chosen not to challenge the demands because he was trying to resolve the problems not add to them.
I found this part of the claimant's evidence most unconvincing. I do not accept that he could not recall the process. I do not believe that he gave what on any view were important formal undertakings without reading or understanding them. I am not persuaded by his evidence that he signed simply to make things easier for himself and the company. I regard the undertakings as reliable admissions which form an important element of the evidence in this case. I regard the claimant's unreliable evidence about the undertakings as a factor that undermines his credibility.

Some of the evidence given by the claimant in relation to other parts of the case further undermined his credibility: see in particular [123] below. Overall, I find myself unable to accept much of the claimant's evidence on the inaccuracy issue and, as a rule, where that evidence conflicts with contemporary documents, and the inferences that can fairly be drawn from those documents, I accept the latter. I should add two further comments on aspects of the claimant's oral evidence.

(1) NT1 made clear that he did not accept every finding of the sentencing Judge. He attempted twice to persuade me that the Judge's findings about his role in Alpha were mistaken, using the same unmeritorious argument on both occasions. First, he said that the Judge had never heard from him, and so "I never had the opportunity" to present to the court "anything to contradict the judge's impression". It was, naturally enough, pointed out to him that he had had every opportunity to explain, but had chosen not to give evidence. He appeared to accept that. But when another of the Judge's observations about his role was put to him a little later, he denied it was correct and said: "... I would remind you, my Lord, of my previous comment, that neither myself nor [Fitzgerald] gave evidence during the trial and, therefore, the judge's conclusion is somewhat subjective." This is a most unattractive line to take, and I disagree with the claimant's assessment of the Judge's findings. They were based on the evidence given at the trial over which he presided. They are consistent with evidence that has been adduced in this trial, and I consider them to be reliable.

(2) NT1 also sought to persuade me that the Court of Appeal had taken a mistaken view of the settlement with the Inland Revenue, and that the sum paid had represented the full amount of the tax which the Revenue considered had been evaded. He described the calculation adopted by the Court as "subjective". That was in my judgment an untenable position, given the conclusions of the Court and the facts recorded in the Court of Appeal judgment. The attempt to quarrel with this part of the reasoned judgment of the Court of Appeal (on other aspects of which he seeks to rely) was, in my view, another illustration of an obstinate tendency on NT1's part to reject adverse Court findings, however well-founded.

Assessment of the six complaints

93. For the following reasons, and further reasons given in detail in the Private Judgment, I reject all six complaints of inaccuracy.

(1) The main complaint is that the headline of the First Article suggested that the claimant had been convicted of the second conspiracy. The Amended Defence admitted this alleged inaccuracy but asserted it was immaterial. In his written opening, Mr White argued that position on the basis that the offence of which NT1 was convicted was "very closely connected" to the other offending, and so serious that "the said inaccuracies would have no greater adverse impact on the claimant's reputation than the true facts summarised in the" URLs. That argument is redolent of the somewhat complex statutory provisions of s 2(3) of the Defamation Act 2013, and I would have had to think hard before accepting it. In oral argument and in closing, however, Mr White put his client's case rather differently, submitting that this article is not capable of bearing the meaning complained of, and that (having
regard to the s 4(2) order postponing reporting) the First Article was "a classic contemporary court report". I broadly agree with that. The claimant's argument depends on taking the headline out of context in a way that is contrary to principle. Even if that was wrong, I would still not exercise my discretion to grant an order for the blocking or erasure of the URLs on this ground alone. The most that could be justified, assuming either to be practicable, would be a limited order for rectification or the addition of a notation. Neither of those remedies has been claimed. In so far as this complaint applies to the Second Article and/or the Book Extract it fails for essentially the same reasons. Both, when read as a whole, gave a clear enough account of what it was that the claimant was convicted of.

(2) The second complaint is that the First Article and Book Extract gave a false impression of the claimant's role in the management of Alpha. The claimant has not established that these publications are inaccurate in this respect. If this complaint is meant to include a claim that the publications falsely implicated him in the second conspiracy, he has not adequately pleaded that case and he has failed to persuade me that the publications were inaccurate in this respect: see (4)-(6) below.

(3) The third complaint relates to an assertion about Alpha's fate which featured in both Articles and in the Book Extract. The claimant's case is that this is inaccurate as Alpha "was placed temporarily in administration, the only creditor was then paid in full and the company was reinstated." I do not accept that account of events. I reject the complaint on the further grounds that the information is not personal data of the claimant; the claimant has fallen a long way short of showing that the wording used was, in context, inaccurate or misleading; and for the reasons given at (1) above I would not have ordered blocking or erasure anyway, as a matter of discretion.

(4) (5) & (6) These three complaints can conveniently be taken together. They all relate to the Second Article, and only that article. Each complaint asserts that specific wording contained in that article was inaccurate. The complaints have a common underlying theme, namely that the Second Article meant that the claimant was guilty of the second conspiracy. I agree that it did. The article made it clear to any reasonable reader that the claimant was convicted of the false accounting conspiracy, and not convicted or even tried for the second conspiracy. But it implied that he was guilty of that crime, and that he had got away with the proceeds of that crime. That was certainly not accurate court reporting within paragraph 7 of DPA Sch 1 Part II. The question is one of substance. The claimant has not persuaded me that the Second Article was inaccurate in any of these respects. He was not convicted of participation in the second conspiracy. But nor was he acquitted. He was charged. The CPS considered it had a realistic prospect of securing a conviction. He was not tried, but for reasons that have no bearing on his guilt or innocence. The absence of a conviction does not tilt the balance in his favour. I find that he had sufficient control of Alpha's affairs to cause millions to be transferred to his offshore companies commencing shortly after his return from abroad. The second conspiracy was already under way at that time, which makes it more likely than not that the funds that went to the offshore companies included the proceeds of fraud. The second conspiracy continued for a long while thereafter. The claimant's increased shareholding after the buy-out of Mr Steinbeck gave him legal and, in my judgment, practical control of Alpha. That view is supported by the conclusions reached by the sentencing Judge and the Court of Appeal, which I consider to be both admissible and reliable for present purposes. The business carried on a good deal more than a year after NT1 took control of it. I do not accept the claimant's case that in this period others were doing the dirty work, without his knowledge or involvement, whilst he tried to clean up behind the scenes. An important element here is of course the undertakings he gave, and my assessment of their significance and the claimant's evidence about them. I also see force in Mr White's point, that I should draw an adverse inference against the claimant from his repeated failures over the years to take the opportunity to challenge allegations made against him. He made no
representations to the regulator, despite the gravity of the steps being taken or threatened, he put in no evidence in response to the serious allegations made in the winding-up proceedings, he elected to remain silent at his criminal trial, and in response to the Revenue.

94. In the words of the Working Party's commentary, NT1 has failed to "provide … all the information needed to establish the data are evidently inaccurate."

The Privacy Issues

(1) The Exemption Issue

95. The domestic provision relied on by Google is the so-called "Journalism exemption" contained in DPA s 32. The exemption in fact applies to processing for what are called the "special purposes", which is a rather broader notion encompassing "journalism, literature and art". An exemption in respect of data processed for these purposes is authorised by Article 9 of the DP Directive, which is headed "Processing of personal data and freedom of expression", and provides as follows:

"Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression."

96. Section 32(1) of the DPA provides that:

"Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if -

(a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,

(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and

(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes."

97. The provisions to which s 32(1) relates – that is, the requirements from which exemption may be claimed – include all the data protection principles with which this action is concerned, as well as s 10 (the right to prevent processing) and s 14 (the right to blocking, erasure, etc.).

98. The first issue is whether s 32 is engaged at all; put another way, have the personal data at issue been processed or will they be processed "only for the special purposes"? Closely associated with that question is the issue of whether processing by Google is undertaken "with a view to" publication for journalistic purposes. In my judgment, Google's case on the Exemption Issue fails at this threshold stage. I can accept the starting point of Google's argument, that the concept of journalism in EU law is a broad one. The concept extends beyond the activities of media undertakings and encompasses other activities, the object of which is the disclosure to the public of information, opinions and ideas: see, eg *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy* Case C-73/07 [2010] All ER (EC) 213 [61].
But the concept is not so elastic that it can be stretched to embrace every activity that has to do with conveying information or opinions. To label all such activity as "journalism" would be to elide the concept of journalism with that of communication. The two are plainly not the same, and I do not consider that Google's own activity can be equated with journalism.

99. Nor can I agree with the narrower version of Mr White's submission, which asserts that the concept of journalism is apt to cover, at least in the present cases, the purpose of the service provided to internet users by Google's search engine. It is submitted that the process of making search results available is "for the purpose of" enabling users to access third party publishers' content which discloses information, opinions and ideas. Mr White is quick to emphasise that Google is not a publisher of the material at the URLs; it is only a facilitator: see Metropolitan International Schools Ltd v Designtechnica Corpn [2009] EWHC 1765 (QB) [2011] 1 WLR 1743. But he points out, fairly, that this is not in itself an obstacle to its reliance on s 32. The scope of the exemption is not confined to processing which consists of journalistic publication by the person relying on the exemption; it extends to processing "undertaken with a view to the publication by any person" of any journalistic material (emphasis added). The argument is that the information available at the URLs complained of in this case consist of journalistic material published by third parties, and Google's role is undertaken "with a view to" such publication, facilitating publication by the third parties. This narrower argument can be characterised, without meaning to disparage it, as parasitic. It depends upon the character of the underlying publication, and can only be relied on where that publication is for purposes properly characterised as journalism, or for one of the other special purposes. Much material that people want to have delisted will not be within those confines.

100. There may be a range of support or ancillary activities that are undertaken by those who are not themselves publishers, but which involve processing the sole and exclusive purpose of which is to enable third parties to publish journalistic material. Processing by a printer to which a newspaper has outsourced its production might qualify. But I do not consider that this can fairly be said of an ISE such as Google. Its activities are not exclusively subsidiary, subservient, or ancillary to those of any publisher. The reality, as is clear from the evidence of Ms Caro and common knowledge, is that the processes of obtaining, indexing, storing, and making available information that are engaged in by an ISE are automated, and governed by computer-based algorithms. The "All" search function is carried out indiscriminately, in the sense that the search criteria have no regard to the nature of the source publications. Searches for "news" may target a narrow range of sources. But whatever the nature of the search in question, when Google responds to a search on an individual's name by facilitating access to journalistic content about that individual, this is purely accidental, and incidental to its larger purpose of providing automated access to third party content of whatever nature it may be, that it has identified and indexed and meets the search criteria specified by the user. That is a commercial purpose which, however valuable it may be, is not undertaken for any of the special purposes, or "with a view to" the publication by others of journalistic material within s 32(1)(a). Such processing is undertaken for Google's own purposes which are of a separate and distinct nature.

101. In my judgment, both versions of the argument would fail on the alternative ground that the processing involved when Google Search makes available third party content that happens to be of a journalistic nature is not properly regarded as processing undertaken "solely" or "only" for journalistic purposes, as required by Article 9 and s 32. In Google Spain, the Grand Chamber indicated at [85] that it did not consider an ISE would process solely for journalistic purposes, and although that was not an integral part of the Court's reasoning I consider it is true. I also accept the argument of Ms Proops, for the ICO that Google's approach to the journalism exemption is to be resisted because it would have
consequences that cannot have been intended by the legislators. The argument, shortly stated, is that the effect of ss 3, 45 and 46 of the DPA is to impose severe constraints on the ICO's powers of enforcement where data are processed for the special purposes. If Google's activities fall within that description, it would be able to operate the "right to be forgotten regime" without regulatory oversight and control. I consider my conclusions to be consistent with the stricture contained in Article 9 of the DP Directive, that Member States may provide for journalistic exemptions "only if they are necessary to reconcile … privacy with … freedom of expression" (emphasis added).

102. I would in any event have rejected Google's case on the Exemption Issue, for these reasons. Each of s 32(1) (b) and (c) has a subjective and an objective element: the data controller must establish that it held a belief that publication would be in the public interest, and that this belief was objectively reasonable; it must establish a subjective belief that compliance with the provision from which it seeks exemption would be incompatible with the special purpose in question, and that this was an objectively reasonable belief. That is the ordinary and natural meaning of the words used (and of the somewhat similar provisions of s 4 of the Defamation Act 2013, discussed in Economou v de Freitas [2016] EWHC 1853 [2017] EMLR 4 [136], [139(2), (3)]). There is no evidence that anyone at Google ever gave consideration to the public interest in continued publication of the URLs complained of, at any time before NT1 complained. I accept that consideration was given to that issue after complaint was made. It was part of the process of assessment that Google undertook, as described by Ms Caro. Thus far, there might be something in Google's argument, that it should be exempt if the view it took on the public interest was a reasonable one. But it would still have to go on to show that it held a belief, that was reasonable, that it would be incompatible with the special purposes for its continued processing of the data to be carried out in compliance with the DPA. There is no evidence of that at all. Google's "right to be forgotten" assessment process is not designed or adapted for that purpose. That may be because it has not considered until recently that the journalism exemption might be available to it. It certainly did not suggest this in the Google Spain case. Google's reliance on s 32 would therefore have failed at the s 32(1)(b) stage in any event.

(2) The Structure Issue

103. There are three competing arguments on this question. Mr Tomlinson submits that the Google Spain balance falls to be struck at the remedial stage, after a conclusion has been reached on liability. Mr White argues that I should adopt a staged approach, deciding first whether there is a prima facie obligation to the erasure of personal data and then, if so, considering whether the obligation is avoided because the processing is necessary for the exercise of the right of freedom of expression. He submits that "the lack of a lawful basis for the processing of sensitive personal data merely gives rise to the qualified right to be forgotten". Mr White relies on the structure of Article 17 of the GDPR, which he submits is in this respect a "setting out" of the law as declared by the CJEU in Google Spain, and should be applied by this Court. The ICO rejects both these approaches as both wrong and unprincipled. She contends that the issue is a straightforward question of liability, which calls for a decision on whether Google has complied with its duties under the DPA, as interpreted in the light of the DP Directive and the Charter. She argues, however, that for this purpose the requirement of the First Principle, that the processing comply with at least one condition in Schedule 3, should be disapplied, if the circumstances are such that, on an application of the Google Spain criteria, the balance tips against delisting. The basis for disapplication would be the same as that adopted by the Court of Appeal in Vidal-Hall ([32] above).

104. The existence of this last-mentioned argument betrays the fact that the various approaches adopted by
the parties are all at least partly driven by a view (on the part of the ICO and the claimants) and/or a concern (on the part of Google) that on a straightforward application of the DPA and/or the DP Directive Google is, or may be, unable to demonstrate that any Schedule 3 condition is met. On the face of it, that would lead inevitably to a conclusion that it is in breach of statutory duty. All agree that this is not a tenable approach; the reasoning process involved would be too mechanistic to be compatible with the requirements of the Charter and the Convention. It would afford no recognition to the fact, acknowledged by the CJEU in Google Spain, that there may be free speech justifications for disclosing sensitive personal information, even if the data subject does not consent.

105. These are not easy questions. Now that I have resolved the Exemption Issue against Google, I am not sure that the answers matter, either for this case or more generally. Everyone agrees that I must address the Google Spain balancing exercise at some point, with due regard to the Working Party criteria. And this case is being determined in the twilight of the DP Directive regime, with the first light of the GDPR already visible on the horizon. It seems unlikely that my decision will have an impact on other cases. In deference to the arguments, and recognising that this case may be considered by another court, I will nonetheless state my conclusions, with brief reasons.

(1) I reject Mr White's submission. I am unable to identify any principled basis on which I can use the GDPR as an aid to the interpretation of Google Spain or to the identification of the legal principles that apply to events, some of which occurred before the enactment of the GDPR, and all of which (so far) have taken place before it has effect. I do not myself detect such an approach as explicit or implicit in Google Spain.

(2) I also reject Mr Tomlinson's approach. As indicated when dealing with the Inaccuracy Issue, I do consider the flexibility of the remedies provided for by the DPA and DP Directive to be an important feature of the law in this area. But it would be unsatisfactory, and I think Ms Proops is right to say unprincipled, to leave so much to the discretion of the Court.

(3) The solution that fits best with the structure of the law and the decision of the CJEU is, in my judgment, the one advocated by the ICO. But I am reluctant to take the radical step of disapplying any part of the DPA. There is a powerful argument that the scheme of the DPA is incompatible with fundamental rights, as it fails to recognise any possibility of a free speech justification for the processing of sensitive personal data without consent. But the same would seem to be true of the DP Directive which, in this respect, the DPA merely mirrors. The CJEU did not need to confront this issue in Google Spain, as the data in that case, though "sensitive" in the colloquial sense as they concerned personal financial matters, were not "special category data" within Article 8 of the DP Directive. In my judgment, it is not necessary to go as far as the ICO contends. On the facts of this case, at least, I need not confront the question of disapplication. I consider that a Schedule 3 condition is met.

(3) The DPA Compliance Issue

106. **The First Principle.** On the facts of this case, the general requirements of this Principle, that processing be "fair and lawful" add nothing to the particular requirements, that processing comply with at least one Schedule 2 condition and, if the data are sensitive personal data, at least one condition in Schedule 3. Most of the personal data with which I am concerned are sensitive personal data and it is convenient to start with Schedule 3.

107. **Schedule 3.** I reject most of Google's arguments that its processing was compliant with Schedule 3. The processing of NT1's data by making them available to those who search on his name was not, nor
is it, "necessary for the purposes of exercising legal rights" within Condition 6(c) of Schedule 3. The rights relied on those of internet users under Article 10 of the Convention and Articles 8 and 11 of the Charter, as well as the Article 16 freedom of Google to conduct a business. I do not consider that broad interpretation can stand. As Ms Proops and Mr Tomlinson submit, this condition must be applied in conformity with Article 8.2(e) of the DP Directive, which uses the terms "legal claims"; its "focus is on the protection of underlying rights": R (British Telecommunications plc) v Secretary of State for Culture, Olympics, Media and Sport [2012] EWCA Civ 232 [2012] Bus L R 1766 [74].

108. Google's reliance on paragraph 7A of Schedule 3 is close to unarguable. That condition applies to processing of information "disclosed by an anti-fraud organisation". It is said that this paragraph should be given a wide interpretation, encompassing both public and private sector organisations concerned with exposing and preventing wrongdoing. I have seen nothing to warrant such a broad interpretation of wording which, on its face, appears to be specific and relatively narrow in ambit.

109. Nor can Google rely on Condition 10 of Schedule 3 and paragraph 3 of the Schedule to the Data Protection (Processing of Sensitive Personal Data) Order 2000 (SI 2000/417), made by the Secretary of State pursuant to Condition 10. That condition is, in substance, a narrower version of DPA s 32. It lays down a set of requirements which are cumulative (see Campbell v MGN Ltd [2002] EWHC 499 (QB) [121] (Morland J)). Among the requirements are that the processing in question is "for the special purposes", and "with a view to the publication of … data by any person". Whatever else might be said about the application of this Condition to the facts of this case, the existence of those two requirements means that Google's argument is unsound, for the reasons I have given in deciding the Exemption Issue.

110. The Schedule 3 condition that I do find satisfied is Condition 5: that "the information contained in the personal data has been made public as a result of steps deliberately taken by the data subject". In reaching that conclusion I am following a path already trodden by Stephens J in Townsend v Google Inc [2017] NIQB 81, and a principle that seems to be logical, and well-established in domestic and European law. In Townsend, Stephens J refused an application for leave to serve proceedings on Google in California, claiming remedies under the DPA in respect of the processing of information about the convictions of a prolific offender. (By the age of 24 the plaintiff had accumulated 74 convictions, of which only 2 were spent). One of Stephens J's conclusions was that Sch 3 Condition 5 was so clearly satisfied that the contrary was not arguable, so there was no triable issue. He reasoned, at [62], that "legally as a consequence of the open justice principle by committing an offence [the offender] is deliberately taking steps to make the information public". Mr Tomlinson quarrels with this analysis. He argues that the Claimant took no steps, deliberate or otherwise, to "make the information contained in the data" public. Condition 5, he says "requires some act of dealing with information". An offender such as NT1, who commits an offence in private, is by no means deliberately making his conduct public. I do not believe this reasoning is sound.

111. First of all, the wording of condition 5 is important. It does not require a deliberate decision or "step" by the data subject "to make" the information public, but rather (a) the taking by him of a deliberate step or steps, as a result of which (b) the information is "made public". A person who deliberately conducts himself in a criminal fashion runs the risk of apprehension, prosecution, trial, conviction, and sentence. Publicity for what happens at a trial is the ordinary consequence of the open justice principle:

"An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offences should not be concealed. Uncomfortable though it may frequently be for the defendant that is a normal consequence
of his crime:

Re Trinity Mirror plc [2008] EWCA Crim 50 [2008] QB 770 [32] (Sir Igor Judge P). The same must be true of the details of the offending, and other information disclosed in open court, including information about himself which a criminal reveals at a trial or in the course of an application. The European Court of Human Rights was making a related point, I think, in Axel Springer AG v Germany 32 BHRC 493 [83]. The applicant complained of sanctions imposed for reporting information about a celebrity's arrest, conviction, and sentence for possession of cocaine. Finding a violation of Article 10, the Court observed that, whilst reputation is protected by Article 8 of the Convention, it "cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence…" (emphasis added).

112. The argument in favour of the application of Condition 5 would be stronger, if one was dealing with a person who committed a crime in public; someone who does that has "placed himself in public view": see In re JR38 [2015] UKSC 42 [2016] AC 1131 [32], citing Higgins LJ (sitting in the Divisional Court of the Queen's Bench Division in Northern Ireland). But it would be wrong, as well as impracticable, to draw a distinction of principle for these purposes between information about crimes committed in public and those committed in private. The place for drawing that distinction is in weighing up the competing considerations of privacy and publicity.

113. Mr Tomlinson is entitled to point to the wording of Article 8.2(e) of the DP Directive, from which Sch 3 Condition 5 derives. Article 8.2(e) exempts the processing of "special category data" from the general prohibition in Article 8.1 where it "relates to data which are manifestly made public by the data subject" (my emphasis). This however is rather obscure language. I do not think it provides a sufficient reason to depart from the ordinary meaning of Condition 5 itself. I attach weight to the fact that a narrow interpretation would tend towards the unacceptable conclusion discussed above. I see a good deal of force in the point made by Mr White, that if this condition were not available in respect of processing of this nature it is hard to see how ordinary members of the public could lawfully discuss online the convictions (whether recent or historic) of those appearing before the courts.

114. Schedule 2. The fact that a Schedule 3 Condition is satisfied means that it is not necessary to consider the disapplication of that part of s 4(4) that requires this to be so. It is by no means the end of the matter, of course. A Schedule 2 Condition must also be met. This can be dealt with shortly. It is agreed on all sides that in principle Sch 2 Condition 6(1) is capable of application to this case. It reads as follows:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

115. In general terms, Google plainly has a legitimate interest in the processing of third party data in pursuit of its business as an ISE, and third parties have a legitimate interest in receiving information via Google or other ISEs. These obvious propositions are bolstered by the authority of the CJEU which, in paragraphs [73-74] of Google Spain, agreed with the Advocate-General's submissions on the point. The A-G had said that internet intermediaries "act as bridge builders between content providers and internet users …" playing a role that "… has been considered as crucial for the information society": see [36]. The vital questions are whether, on the facts of this case, the particular processing at issue is "necessary" for the purposes of such interests, or is "unwarranted" for any of the reasons specified in
Condition 6(1). This condition clearly calls for the conduct of a balancing exercise. Authority to date is that the exercise the Court must undertake in this context is an assessment of proportionality (see Morland J in Campbell v MGN Ltd (above), [116-117]) involving essentially the same Article 8/Article 10 "ultimate balancing test" as prescribed by In re S (Murray v Express Newspapers [2007] EWHC 1908 (Ch) [2008] 1 FLR 704 [76] (Patten J)). It must form part of the balancing process mandated by Google Spain. Indeed, as Ms Proops points out, the CJEU's analysis was heavily reliant on Article 7(f) of the DP Directive, which is the analogue of Condition 6(1).

116. **The Second to Sixth Principles.** I have already dealt with NT1's case under the Fourth Principle. Otherwise, in my judgment, the question of whether Google's processing of the claimant's personal data was in breach of or in compliance with these Principles is subsumed by or, in Mr White's phrase, "collapses into" the Google Spain balancing exercise. It does not require separate consideration.

(4) **The Google Spain Issue**

**Facts**

117. The facts I need to consider for this purpose are not only those of and surrounding NT1's conviction, but also the other matters that have already been examined when dealing with the Inaccuracy Issue. Google contends that NT1's business career since his imprisonment and his social media profile both support its case that the processing complained of was and is compliant with Google's statutory duty under the DPA, and its obligations under Google Spain. I must therefore summarise this part of the case and my findings.

**NT1's subsequent business career**

118. Google relies on publicly available documents relating to business activities of NT1, which it describes as "indicative of the nature of his ongoing business activities". The documentation evidences a variety of business ventures stretching over some 15 years, as well as a demand made by the Inland Revenue for information about NT1's affairs, a High Court ruling on the validity of that demand, and a decision by the OFT refusing an application by NT1 for a consumer credit licence. NT1 was cross-examined at some length about these documents, and what they did or did not show about his behaviour. As before, the details appear in the Private Judgment, and this judgment can only summarise; parts of what follows are undisputed, but there are disputes. To the extent there is dispute these are my findings.

119. Around the turn of this century, for a period of some years, NT1 obstructed an Inland Revenue investigation into his tax affairs by steadfastly failing and refusing to provide any of the information which had been requested. When the Revenue made a statutory demand for that information, under s 20 of the Taxes Management Act 1970, NT1 mounted a flimsy and deservedly unsuccessful legal challenge. A High Court Judge dismissed six grounds of challenge advanced on a renewed judicial review application. The Judge held that NT1 and his solicitors had put forward any possible pretext to avoid giving the information, which was at all times within his reach. In his evidence to me, NT1 sought to distance himself from the conduct of the legal proceedings. I was not persuaded that he had left this to his lawyers. He put forward additional reasons to justify his failure to provide the information. I do not accept those reasons, which I regard as unconvincing and unmeritorious. I accept the Judge's assessment.

120. After his release from prison, NT1 made an application to the OFT for a Consumer Credit Licence, without disclosing his previous association with a credit licensee whose licence was revoked. His
application was refused on the grounds that he was not fit to hold such a licence, because of his conviction (which was not "spent" at that time), and because of his failure to declare the previous association. In his evidence to me, NT1 described the reasons for refusal as "somewhat disingenuous". He claimed that it was the fact of his association with a business that had a consumer credit licence revoked that had led him to make the application in the first place and that, if he had not made reference to the prior association in the written application, he had done so orally. I do not accept any of NT1's evidence on this aspect of the case. I accept and adopt the findings of the OFT.

121. NT1's post-prison business career has included lending money to business and individuals over the last 15 years or so. The money lent came from the profits of Alpha, of which NT1 had "siphoned off" several million pounds in the false accounting conspiracy, and taken a further £3m by way of the funds frozen in Switzerland. This much NT1 accepted in cross-examination. He did not accept that any of the money he lent represented the proceeds of frauds on consumers. I do, however, conclude that this was the case. I accept NT1's case, that Alpha's business was not fraudulent from the outset. I also accept that the scale of the fraud was modest in comparison to the number of transactions undertaken by companies in the Alpha group. The Court of Appeal made that observation. But the scale of the fraud was not negligible, and it was profitable, and on the balance of probabilities the profits contributed to the sums that NT1 took out of the business.

122. Google relies on lending activities involving three companies (Oscar Ltd, Charlie Ltd, and Victor plc), and a group of companies owned or controlled by a Mr Twain, his family or associates ("the Twain Companies"). Google also relies on a number of other, smaller loan transactions. This activity started in the early years of the present century, shortly after the expiry of NT1's prison sentence but at a time when he was disqualified from acting as a company director. My findings as to the lending activity undertaken during this period are set out and explained in detail in the Private Judgment. The main findings are these.

(1) Between his release from prison and about 2015 the claimant used the monies to which I have referred above to engage in substantial commercial lending activities. Some of this was done via a Bahamian company, Charlie Ltd. I reject Google's case that there was a related Swiss company called Charlie AG or similar, and that NT1 engaged in consumer lending. His lending was to businesses. I do not accept Google's case that Charlie AG or Charlie Ltd lent at "extremely high rates of interest". The scant evidence on the point is insufficient to support that case.

(2) In the early 21st century, Charlie took a stake in an English private company called Bravo, to which it lent about £300,000. At the same time, NT1 entered into a 15-year consultancy agreement with Bravo, by which he was to provide up to 3 days a month of consultancy services for a fee. That fee was to increase by 10% each year. Within 2 years it had reached £66,000 per annum, which greatly exceeded the remuneration due to any director of the company. By that time, Charlie's stake in Bravo had increased to about a quarter of the issued share capital. I do not accept NT1's evidence that the consultancy fee was not paid. Having considered other possibilities, I accept Google's case that NT1 was acting as a shadow director of Bravo during this period.

(3) However, I do not accept Google's case that there were serious failures of disclosure about NT1, when Oscar Ltd issued a prospectus for the takeover of Bravo and the listing of the business on the London Stock Exchange. The plan was for Oscar Ltd to acquire the entire issued share capital in Bravo, then change its name to Bravo plc, which would be the listed entity. Google's case is that the representations in paragraph 7.6 of the Prospectus were false because they said that none of the
"Directors expected nor any of the Proposed Directors" had any unspent convictions in relation to indictable offences, or had been a director of a company that had been placed in compulsory liquidation, or been criticised by any regulator, or disqualified from acting in the management or conduct of the affairs of a company. NT1 had acted as a shadow director of Bravo. If he thereby counted, or should have been counted, as one of the "Directors" or "Proposed Directors" those representations would have been false or misleading. Google's case is that he did. It says the quoted terms referred to "the directors of [Bravo] or proposed directors of [Bravo plc]." I do not agree.

(4) The term "Directors" was defined on p4 of the Prospectus to mean the directors of "the Company", which was in turn defined to mean Oscar Ltd (Bravo plc, as it was to become). The Prospectus went further, and identified the Directors as those named on p3 of the Prospectus. The names that appeared there were those of directors of Oscar Ltd. The term "Proposed Directors" was also defined in the Prospectus, to mean six named individuals. These were men whom, it was proposed, would become directors of the listed company. It arguably might have been better, perhaps, if disclosure had been made about NT1, because he was a significant figure in the business of Bravo. But he was not a director or shadow director of Oscar Ltd. His role as an active "consultant" to, and shadow director of Bravo did not make him so. I am not persuaded by his evidence that he had nothing to do with the Prospectus; I rather doubt that is true. But given my conclusions on the allegations of misrepresentation it does not matter.

(5) Over about 8 years after its flotation, Bravo plc raised some £16m in various tranches. It eventually went into insolvent administration with a deficiency estimated at over £14m.

(6) Charlie lent a six figure sum to Victor plc, under a short-term loan agreement which provided for interest and a substantial "repayment premium". Less than a year later, the parties agreed to convert this premium into equity, as a result of which Charlie owned over a quarter of the issued share capital of Victor plc, as well as being owed the amount of the original loan and interest. The evidence about this transaction is fairly scant, and rather unclear. The transaction documents themselves are not available, only descriptions of them. It is hard to know what to make of Google's contention that the loan involved a "repayment premium" that was equal to the amount of the loan. My conclusion is that this was the case. The probable explanation is that the loan was a very high risk transaction, undertaken without any or any valuable security, to fund a speculative property development opportunity. I am not persuaded by Google's case that this was an investment transaction on the part of Charlie. It took an equity stake because the property transaction did not come to fruition, Victor plc had no funds available, and to swap debt for equity was to make the best of a bad job.

(7) NT1, via corporate vehicles, lent seven figure sums to Mr Twain, a former bankrupt, via the Twain Companies, which were property development businesses selling to consumers and investors. The main purpose of the loans was to fund the buy-out of someone who had been a partner of Mr Twain in the businesses. I am not persuaded by Google that this activity was investment, as opposed to lending. NT1 took a stake in the main corporate vehicle of the Twain Companies’ business, but that was by way of security for a relatively short period. Nor do I accept Google's case that these business activities involved NT1 in some way in the conduct of a business similar to that of Alpha, which engaged in comparable sales practices towards consumers and investors. His role was as a lender not a participant in the business. A sales brochure for one of the Twain Companies that was put to NT1 in an attempt to support that case post-dated his involvement with the businesses, and did not support the comparison other than in a very broad fashion.

(8) Other loans. Google has not established out its case that NT1 made other loans to consumers.
Google referred to the activities of three companies, Zebra Ltd, Tango Ltd, and Uniform Ltd, in or between June 2011 and May 2015. Google had little information about these companies, relying on what NT1 fairly described as "generic descriptions that are so often provided in ... accounts ... when filed." In this regard, I accept NT1's evidence about the activities of the three companies, and that they were not dealing or proposing to deal with consumers.

123. I should set out here one finding on a point of detail, as it does not tend to identify the claimant and goes to credibility. The claimant initially said that Charlie Ltd was owned by a family trust of which he was a beneficiary, which may be correct. He was asked, "It is a company controlled by you as well as owned by your family trust?" His prompt answer was "No. The arrangements with the family trust do not allow me control." Shortly afterwards, he admitted that he was able to use the company as his lending vehicle, and accepted that his earlier point had been "in that context … an artificial point." This is an illustration of two more general features of the claimant's evidence: its unreliability on quite important points of detail, despite the emphatic way was is given; and his reluctance to make an unequivocal concession. His patent unreliability in this regard is obviously relevant when assessing his evidence about the control of Alpha, and about his role in respect of Bravo.

NT1’s online profile

124. For a period, over recent years, NT1 caused online postings to be made which spoke positively about his business experience, standing and integrity. Google describes these online postings – now removed – as "boasts". It says they included claims that are "thoroughly misleading [and] dishonest", and which need to be corrected by the true information which is, and for this reason should remain, available at the URLs complained of. The principal vehicle for these postings was a WordPress blog, though a variety of social media were also used. On the blog and at least one of the social media sites, claims were made that NT1 had gained recognition for his flawless professional integrity, few being better known for this characteristic. The social media sites also stated that NT1 had earned recognition for his business expertise gained over 25 years in consulting businesses. The actual wording used is set out in the Private Judgment. It clearly promotes the idea that NT1 is a man of unblemished integrity, with a longstanding reputation as such.

125. All this material came to be published as a result of instructions given by NT1 to a reputation management business, Cleanup. NT1's evidence was that the only reason he consulted Cleanup was the continual availability of the URLs complained of. He had heard of adverse Google Search results being successfully removed by organisations such as Cleanup, whom he retained "in order to create material online that would detract from the negative postings". The aim was to "demote" the negative material.

126. NT1 equivocated about his personal responsibility for the published content. In his witness statement he said that the postings were "material I have authorised to be published about me", but went on to say that the sites were "designed and written by [Cleanup] with no input from me save that I approved the content and supplied the background information that they had requested from me." He was, naturally, questioned about this account. At first, he claimed never to have seen a blog. Later, he conceded that he had been sent the wording to be posted online, but he never unequivocally admitted that he had read and approved any such wording.

127. The true position emerges with tolerable clarity from the documents. By email of 22 May 2014, Ms AF of Cleanup sent NT1 a questionnaire, in order to obtain information about him, on which to base the content which Cleanup was to prepare. He was urged to provide as much information as possible, included "achievements, accolades, …" The plan that AF set out in this email was for "our journalists"
to use the questionnaire to create content which would then be sent back to NT1 "for approval". The email made clear that "I will always make sure to send you all and any content before we put it live on the internet". When this email was put to him NT1 started by answering evasively: "She doesn't actually say it is for me to approve." When shown the full wording of the email again, he eventually agreed that it did say the wording was to be sent to him for approval, but qualified his admission by saying that it was a URL that was sent. That may be true. The papers include an undated Progress Report with URLs linking to the blog, and to postings at Smore and Livejournal. But I have no doubt the links were sent to NT1 before the posts went live, as well as afterwards. It is not credible that NT1 failed to follow those links on either occasion. He must have read what was to be posted, and approved it in both the formal and the substantive sense. The evidence suggests to me that the wording is in part standard-form, "boilerplate", rather than tailored to the specific facts and circumstances of NT1’s career. But I have no doubt that it was put together in reliance on information provided by NT1 in response to Cleanup’s questionnaire, and that he knew of and approved the wording before it was posted.

128. NT1 did ultimately accept that he had omitted from these blogs, or allowed to be omitted from them, any reference to a criminal conviction. Leaving aside for the present any question of rehabilitation, it seems to me indisputable that the quoted statements about NT1’s integrity and reputation are false or at best highly misleading. The fact of his conviction for criminal dishonesty involving a £3.3m fraud is enough to falsify the assertions of integrity. There is however a good deal more that casts a long and dark shadow over his integrity, as set out in this judgment above. Moreover, it is his own case that his reputation has been injured by reporting of his conviction, and by reporting connecting him with the business of Alpha. The claims on the blog and social media are inconsistent with his own evidence in this case which, in this respect, I believe to be true. I also find that the blogs and social media presented a misleading picture of his business career, taken as a whole.

129. NT1’s case is not that these representations about him, his character, conduct and reputation were true. He denies, however, that the public was misled. He was not seeking to attract business or work, or otherwise addressing the public. He denounced as "dishonest and dishonest" any suggestion that he was marketing himself. His evidence is that he was just seeking to demote the harmful information in the URLs complained of, by putting other positive information "out there". His case is that he was justified in the attempt. Mr Tomlinson describes this as "an attempt at self-help", which did not work in this case.

130. I have no evidence as to the extent of publication of the blog or the social media posts, but the more important question is whether they were aimed at the public. It is obvious that they were. It may well not have mattered to NT1 whether he gained business, but that is not really the issue; it was not put to him that he was marketing himself. His objectives could only be achieved by putting out messages about himself on public platforms which were then picked by by Google's web crawlers. He was content to do this using messages that he knew to be false and misleading. That is, however, subject to this point: I recognise a risk that Google's criticisms are circular. If harmful information about a person is being made available to the public in a way that is unlawful, it might be unjust - without more - to criticise person for using self-help methods of removing that information from the public domain by demoting it in ISE search results. The claimant's dealings with Cleanup began two months after his conviction became retroactively spent. Whether, paying due regard to the principle of rehabilitation, the claimant is still to be criticised for making these representations is a matter I will have to address in my overall assessment of where the balance lies.
Law

131. Two further points of dispute about the nature of the balancing exercise need to be addressed before I carry out that exercise. The first concerns the state of the scales, at the outset: are they tilted in favour of the data subject, as a matter of principle, as Mr Tomlinson submits? The second point concerns the boundaries to be observed in making my assessment. Google relies on a number of factors that are not, or not in terms to be found in the Working Party criteria: the nature of the third party publishers; the public availability of the information; the nature of the information and the alleged inaccuracies; the claimant's business activities and their relationship with the information published at the URLs complained of; and the claimant's own online descriptions of himself. Mr Tomlinson derides this as a process of Google "inventing its own criteria". He argues that those factors partly overlap with the Working Party criteria, but also go beyond them; that some are irrelevant, or of little weight; and that the exercise is "unhelpful".

132. In my judgment, the balancing process in any individual delisting case is ordinarily, as a matter of principle, to be entered into with the scales in equal balance as between delisting on the one hand and continued processing on the other. I say that on the basis that such cases will ordinarily engage the rights protected by Articles 8 and 10 of the Convention and, for so long as European law is part of our domestic law, their counterparts under the Charter, as well as the right to freedom of information contained in Article 11 of the Charter. Accordingly, with appropriate adaptation, the In re S approach must be followed: neither privacy nor freedom of expression "has as such precedence over the other"; the conflict is to be resolved by an "intense focus on the comparative importance of the specific rights being claimed in the individual case".

133. I do not read Google Spain as inconsistent with this. What the CJEU was saying, in the passages at [81] and [97] on which Mr Tomlinson relies, is that in the majority of cases of this kind the facts will be such that the factors in favour of delisting will outweigh those in favour of the continued availability of the data, via an ISE. The "general rule" to which the court was referring was a descriptive, not a prescriptive one. One factor in that conclusion was that the economic interests of an ISE are not of equal inherent weight or value to the privacy or data privacy rights of an individual. But the Court was not saying the same thing about the rights of the public to receive information and opinions. That would seem to be at odds with principle and authority.

134. Mr Tomlinson has not cited any authority to support the two propositions of law which he offers by way of explanation: that the right to receive information is inherently less weighty than the right to impart it; and that Google's activities do not even involve the exercise of the right to freedom of expression. The second of these propositions would appear to be at odds with Google Spain in which, at [73-74], the CJEU agreed with the suggestion made by the Advocate-General (at [95]), that the legitimate interests pursued by ISEs include two, "namely (i) making information more easily accessible for Internet users; (ii) rendering dissemination of the information uploaded on the Internet more effective", which "relate respectively to … fundamental rights protected by the Charter, namely freedom of information and freedom of expression (both in article 11)". I would regard the CJEU's references to a "general rule", and its observation that a claim to delist sensitive or other private information may be defeated by a "preponderant" interest of the general public in having access to that information, as descriptions of how cases of this kind are most likely to work out in practice; but not as tantamount to a declaration that the public's interest in access to information is inherently of lesser value than the individual's privacy rights. I note that the Working Party commentary seems consistent with my assessment. It suggests that "In determining the balance ... the jurisprudence of the [ECtHR] is
especially relevant”.

135. As for the criteria relied on by Google, some may go a little outside the Working Party criteria, but there is nothing wrong in principle there. The criteria were created over three years ago, within seven months of the Google Spain decision, on the basis of the early experience of the new regime. They are expressed to be flexible, non-exhaustive, and liable to "evolve" over time on the basis of experience. The factors relied on by Google in this case all seem to me to have some bearing on the issue for decision, and in particular on the question of whether the data remain "relevant", or are "excessive", or have been "kept for longer than is necessary" within the Third and Fifth Principles. I shall aim so far as possible to weave my consideration of Google's points into my review of the 13 Working Party criteria. For consistency with the DPA, I shall refer to data in the plural.

Application of law to facts

(1) Does the search result relate to a natural person – i.e. an individual? And does the search result come up against a search on the data subject's name?

136. Yes. This is the starting point, without which no delisting claim would be viable.

(2) Does the data subject play a role in public life? Is the data subject a public figure?

137. NT1 has never been in politics, or held any public office, or played a role in public affairs. Nor has he been a sportsman, entertainer, or engaged in other highly public areas of life. He is and has always been in business. But the Working Party commentary on this criterion suggests a broader meaning for the term "public figures": "individuals who, due to their functions/commitments, have a degree of media exposure." The criterion of "playing a role in public life" is broader still. The Working Party offers illustrations which include "business-people and members of the (regulated) professions", explaining that the key factor is the potential relevance of information about the individual: "A good rule of thumb is to try to decide where the public having access to the particular information – made available through a search on the data subject's name – would protect them against improper public or professional conduct."

138. By these standards, NT1 was a public figure, with a role in public life, in the closing years of the last century, and the early years of this one. He was reasonably well-known to the public at large as a person who played a leading role in a controversial property business, who was tried, convicted, and sentenced for criminal conspiracy in connection with that business and charged but never tried for another conspiracy. His name appeared in public statements, such as from the regulator, and in reports of the criminal proceedings. The "rule of thumb" would have favoured the continued availability of accurate information about his conduct and in particular his misdeeds. Since he left prison over a decade ago, he has played a role in business, but he has not been a public figure. Mr Tomlinson accepts that he has "played a role in public life" for present purposes but describes this as "extremely limited". That is a fair point. NT1’s business role has not been a leading or prominent one. His social media postings are misleading in that respect. Plainly, therefore, the argument that the public needs to know about his past to guard against impropriety has gradually weakened over time.

139. But as the Working Party commentary on this criterion makes clear, the degree of privacy that attaches to the information is also a relevant factor. Another Working Party "rule of thumb" is that "if applicants are public figures, and the information in question does not constitute genuinely private information, there will be a stronger argument against de-listing". Mr Tomlinson has reminded me in this context of
the well-known passage in *von Hannover v Germany (No 1)* (2005) 40 EHRR 1 [63] which identifies a "fundamental distinction ... between reporting facts capable of contributing to a debate in a democratic society and reporting details of the private life of an individual who does not exercise such functions." The passage is cited by the Working Party. Mr Tomlinson argues that there is no current debate to which NT1's past behaviour has any relevance. That may be true. But the criterion does not require an extant debate; the test is whether the information is "capable of contributing" to a debate of the kind referred to. More importantly, the principle is concerned with "details of the private life of an individual". Mr White submits that the information in this case is not of that kind, or that most of it is not. It relates wholly or mainly to the claimant's criminal conduct in a public role in the management of a company selling services to the public, not to his private or personal life. He invites comparison with *Yeo v Times Newspapers Ltd* [2015] EWHC 3375 (QB) [2017] EMLR 1, and *Axon v Ministry of Defence* [2016] EWHC 787 (QB); [2016] EMLR 20. In the former case, I held at [147] that information about a politician's offer to help a company by using his public office was of such a nature that it fell outside the ambit of his private or personal life. In the latter case, at [41]-[49], Nicol J reached a similar conclusion about information relating to the events leading to the removal of a Royal Navy warship commander from that role.

140. I agree with Mr White. The information here includes some about NT1's health ("the health information"). This is intrinsically private in nature but it is vague, and historic, and it was made public in the course of the proceedings. For those reasons, and others I shall explain, it could not justify a stand-alone delisting claim and adds little if any weight. The rest of the information ("the crime and punishment information") is "sensitive", but it is not intrinsically private in nature. The criminal behaviour has a private aspect in that it was undertaken in secret, and not intended for public view. But it was not intimate or even personal. It was business conduct, and it was criminal. Having been identified and then made the subject of a public prosecution, trial and sentence, it all became essentially public. The authorities do show that information that begins as public may become private, and that Article 8 may be engaged by dealings with information, of whatever kind, that have a grave impact on the conduct of a person's private life - for instance by undermining their "personal integrity" - or by interfering with their family life: see the discussion in *Yeo* at [141]-[146]. But the essential nature of the crime and punishment information in this case was public, not private. The claimant did not enjoy any reasonable expectation of privacy in respect of it during the process of trial, conviction, and sentencing. If the right to respect for private or family life interest had been engaged at that time there is no room for doubt that the open justice principle would have roundly trumped it, for the reasons given in *CG v Facebook, Khuja, and Re Trinity Mirror* ([49(4), [61] and [111] above). One key question in this case is how that position is affected by the passage of time.

(3) *Is the data subject a minor?*

141. No. He was and has remained at all material times a mature adult. He has full capacity.

(4) *Are the data accurate?*

142. For the reasons I have given, I do not consider that the information has been shown to be inaccurate in any material way.

(5) *Are the data relevant and not excessive? (a) Do the data relate to the working life of the data subject? (b) Does the search result link to information which is allegedly constitutes hate speech/slander/libel or similar offences in the area of expression against the complainant? (c) Is it clear that the data reflect an individual's personal opinion or do they appear to be verified fact?*
143. The crime and punishment information is not hate speech, or libel. It does relate to the claimant's working life, and appears to be (and is) factual. The sub-questions do not, however, exhaust the factors that bear on whether data are relevant or excessive. On the facts of this case, I do not believe that anything turns on the requirement that data be not "excessive". No fine distinctions are to be drawn. When it comes to relevance, the question begged is of course "relevant to what?" The Working Party commentary identifies the "overall purpose of these criteria". It is "to assess whether the information contained in a search result is relevant or not according to the interest of the general public in having access to the information" (emphasis added). Relevance is "closely related" to the age of the data, so that "Depending on the facts of the case, information that was published a long time ago, e.g. 15 years ago, might be less relevant than information that was published 1 year ago." The commentary goes on to observe that:

"Data protection - and privacy law more widely - are primarily concerned with ensuring respect for the individual's fundamental right to privacy (and to data protection). Although all data relating to a person is personal data, not all data about a person is private. There is a basic distinction between a person's private life and their public or professional persona. The availability of information in a search result becomes more acceptable the less it reveals about a person's private life."

Both the example and the statement of principle are pertinent in this case. The information was in the main not private, and it was relevant; its relevance has faded, but the essentially public character of most of the information has not altered. One factor, naturally, is whether (as the Working Party put it) the data subject is "still engaged in the same professional activity". NT1 is not, but he is still in business. Customers and others are affected by his activities, but not consumers. His impact on the world of business and that of consumers is much reduced from what it was. Again, attention is directed to what has changed with the passage of time.

144. Google advances two further factors in support of its case on relevance: (i) it is said that those who deal or might deal with companies associated with NT1 need to know about his business background, including his conviction and sentence; (ii) NT1's social media profile shows that there is a need to correct the record. I shall return to these points when I consider criterion 13.

(6) Is the information sensitive in the meaning of Article 8 of the Directive?

145. The reference is to data in "special categories", for which "sensitive" is the English term. For practical purposes, all the information qualifies as sensitive. The significance of this is explained in the Working Party commentary:

"As a general rule, sensitive data ... has a greater impact on the data subject's private life than 'ordinary' personal data. A good example would be information about a person's health, sexuality or religious beliefs."

The health information in this case is not of any great weight, however. It is old. It is "out of date". But that does not of itself demand de-listing. Not all disclosures of health data call for the same treatment. As Lady Hale said in Campbell v MGN Ltd [2004] UKHL 22 [2004] 2 AC 457 [157], "The privacy interest in the fact that a public figure has a cold or a broken leg is unlikely to be strong enough to justify restricting the press's freedom to report it. What harm could it possibly do?" The health information in this case is different, but the same can be said. NT1's evidence contains no complaint of any separate or distinct harm that is said to result from the disclosure of that information, which would
surely not have been complained of in isolation. It is an incidental but integral part of the overall story. It is the crime and punishment information about which there is a real issue. If the balance is struck in favour of delisting that information, it will disappear from search results, and the health information will disappear with it. But the reverse would plainly be unjustifiable.

(7) Are the data up to date? Are the data being made available for longer than is necessary for the purpose of the processing?

146. The Working Party identifies the objective of this criterion as ensuring that "information that is not reasonably current and that has become inaccurate because it is out-of-date is de-listed". The health information is not current. It is out of date and in that sense inaccurate; but it is an accurate picture of the historic position and does not purport to be anything more. Its disclosure is trivial. All the crime and punishment information is historic, but it is not for that reason inaccurate. Whether that information is being made available for longer than necessary is the main issue in the case. This criterion offers no separate guidance.

(8) Is the data processing causing prejudice to the data subject? Do the data have a disproportionately negative privacy impact on the data subject?

147. The CJEU made clear in Google Spain that the claimant in a delisting case does not need to prove prejudice (or harm, as I shall call it). But it is not controversial that, as the Working Party commentary puts it, "where there is evidence that the availability of a search result is causing prejudice to the data subject, this would be a strong factor in favour of de-listing". The Working Party identify the criterion for justified objection that appears in Article 14(a) of the DP Directive (the origin of DPA s 10): "compelling legitimate grounds relating to his particular situation". An illustration is given, which does not fit the present case, but has some relevance:

"The [processing of the] data might have a disproportionately negative impact on the data subject where a search result relates to a trivial or foolish misdemeanour which is no longer – or may never have been – the subject of public debate and where there is no wider public interest in the availability of the information."

I have added the words in brackets, as they must be implied. Information does not harm a person, only what is done with it.

148. The claimant's case on harm is pleaded in paragraph 12 of his Particulars of Claim, and the evidence of harm is to be found in his witness statement. There are no other statements, nor is there any other evidence of harm. The evidence does not reveal how many searches have been or are being made using the claimant's name. No allegation as to the extent of disclosure was made in the Particulars of Claim, and nobody seems to have thought of investigating the issue.

149. Paragraph 12 of the Particulars of Claim alleges that the processing has caused the claimant "substantial damage and distress" under three main headings.

(1) Treatment as a pariah in his personal, business, and social life with a consequent significant effect on his previously outgoing personality. He is said to live "in fear that anyone he does meet will inevitably look him up using the Defendant's search engine and subsequently and as a result shun him."

(2) Threats made in public places by "people referring to the content still linked by the Defendant's search engine and seeking to extract money from him in consequence."
(3) Disruption of his family life by the effect of the Defendant's search engine results. NT1 says that his wife has become withdrawn and insecure and faced questions from her friends about the search results. This in turn has affected adversely the quality of the Claimant's personal, private and family relationships with each of his children and his wife."

150. Some further information is provided in the Confidential Schedule to the Particulars of Claim, and ten paragraphs of the claimant's witness statement are devoted to the topic of the impact of the continued availability of the information. These reiterate the above and provide some elaboration. As Mr Tomlinson points out, none of this was challenged in cross-examination. But that does not prevent me from making my own assessment of the evidence. Adopting the criterion specified in Article 14(a) of the DP Directive. I find that the claimant's case on harm is for the most part a legitimate one, though not entirely so; and it is not, overall, a particularly compelling one.

151. There are causation issues here, of course. The relevant harm is that which is being or will be caused by the processing which the claimant seeks to prevent. He cannot place any great weight on harm which would result in any event. So this, it seems to me, is one context in which I need to consider Google's "public domain" argument: the issue of harm needs to be considered in the light of the fact that the information in question will continue to be available on the source websites, and in a number of other locations on the internet. I am not greatly impressed by this argument. Accessibility is not the same thing as actual access. The CJEU was surely right to point out in Google Spain that information distribution via ISEs is inherently different from and more harmful than publication via source websites. The reality is that few are likely to locate the crime and punishment information otherwise than through a search engine. That raises the question of what a Google search on the claimant's name would look like if the three URLs complained of were removed. Nobody has led evidence on that issue. But I can infer, from the two pages of snippets from a search in mid-February 2018 that are in evidence, that the other third party websites would not feature on the first two pages of a search. That said, it is also true that NT1 cannot rely on any harm that results from legitimate processing in the past. As his witness statement concedes, "up to a point the fact of my conviction is to blame" for the harm to personal and professional relationships of which he complains. It is not just that his own conduct is one cause of that harm. Many will have got to know the crime and punishment information as a result of earlier, legitimate, communication via Google or otherwise, at a time when the conviction was not spent. This is particularly true of pre-existing contacts, both business and personal.

152. This is pertinent when I consider the evidence in support of the pleaded complaint of "threats". The only such evidence relates to incidents when NT1 was in prison, serving his sentence, and some incidents shortly after he was released. This is all significantly more than 15 years ago, well over a decade before NT1's first complaint, and over 7 years before his conviction became spent. This is significant harm, but it cannot count as harm that resulted from any illegitimate processing by Google.

153. Nor can the only specific incident recounted by NT1 in which a business deal was expressly hindered by the counterparty's knowledge of his conviction. This was some 9 years ago and, as NT1 acknowledges, this too was before the conviction became spent. There is evidence that two bank accounts were closed in 2013. NT1, in a single sentence, attributes this to the availability of information about the conviction. That may be so, but the bank did not say so, there has been no disclosure nor any other evidence about the matter, and I am unable to draw that inference. The other evidence of business harm is vague in the extreme, with no names, dates, or details. NT1's evidence is that he has never been offered employment since he left prison. But he does not say that he has applied for employment, and I do not consider I would be justified in drawing the inference that his lack of an
employed job, as opposed to self-employment, is due to processing by Google since the conviction became spent. I would accept that knowledge of the claimant's conviction has affected his business life to some degree, and the continued availability of the crime and punishment information since the conviction may have had some impact; but in the end, it is really impossible to reach a conclusion on the evidence before me that this aspect of his life has been significantly prejudiced by the continued availability of the crime and punishment information via Google search in recent years.

154. Turning to the claimant's private and family life, the evidence that he has been "treated as a pariah" in his social life is entirely general in nature. It amounts to little more than a reiteration of the pleaded case. No specific incidents of any kind are recounted, despite the lengthy period with which we are concerned. The position is similar so far as the claimant's evidence about the impact on his family life is concerned. Indeed, it is less satisfactory. No specific mention is made of the claimant's wife, so the evidence falls short of the pleading. The evidence consists largely of generalities about the impact on the claimant's adult children, and the effect on him of their distress. Details of specific incidents, or even of the nature of the impact, are lacking. As Mr Tomlinson acknowledges, impacts on relationships with adult children who are not part of the claimant's household do not engage "family life" within Article 8; in this context, "... neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, in my judgment enough to constitute family life": Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 [19] (Sedley LJ), [30]-[31] (Simon Brown LJ). The impact on the rights of persons other than the claimant is a legitimate consideration, when assessing the legitimacy of a communication. The claimant's distress at the impact on others, or "reflexive" distress, is also a legitimate head of harm, properly to be considered under the heading of interference with his private life. But the absence of statements from any of the family members themselves is surprising. It is well-established that where a party seeking to restrain freedom of expression wishes the Court to give weight to the impact on others, he will generally be expected to adduce evidence from those others, or explain why such evidence is not before the Court: YXB v TNO [2015] EWHC 826 (QB) [18].

155. Standing back from the detail, a substantial part of the claimant's evidence and, in my judgment, a major part of his concern, about the continued availability of this information is business-related. But much of this is of some age; the evidence is for the most part general; and there are real causation issues. I accept that the continued availability of the information via Google Search in recent years has had some impact on the claimant's private life, of the kinds that he identifies. But much of that impact will inevitably have been felt as a result of earlier, legitimate communications. As for the present and future, the impact appears to me to be mainly consequential on the impact on the feelings of the claimant and his family of the fact that the crime and punishment information is "out there", available to anybody who searches on the claimant's name. There is clearly a real concern that the claimant and his family will be shunned and avoided by those who, now and in the future, come to learn via Google of the crime and punishment information. That is a natural and reasonable concern, given the nature of the information. It can easily be inferred that some adverse impact of that kind will result. But it remains the fact that there is nothing concrete to which the claimant can point; there is no corroborative evidence from the family members whom the claimant prays in aid; and there are again causation issues. In short, this case is not closely comparable to the illustration given by the Working Party, and the evidence of harm or "prejudice" does not add great weight to the case in favour of delisting.

(9) Does the search result link to information that puts the data subject at risk?

156. No.
In what context was the information published? (a) Was the content voluntarily made public by the data subject? (b) Was the content intended to be made public? Could the data subject have reasonably known that the content would be made public?

157. The Working Party commentary on this criterion focuses on consent, suggesting that if this was the only justification for the original processing, revocation of consent may make delisting appropriate. Those considerations are not directly relevant here. The claimant did not consent, and the initial publication had a different justification. But it is relevant that the information was published in the national media, in substantially fair and accurate reporting of legal proceedings held in public, and related reporting which has not been shown to be inaccurate. The legal proceedings, and the media coverage of them, were both natural and probable and foreseeable results of the dishonest criminal conduct in which the claimant deliberately engaged. Again, one is brought back to the question of what has changed with the passage of time.

158. One factor that I do not consider this claimant can legitimately pray in aid is any legitimate expectation of rehabilitation, enjoyed when he left prison. His witness statement asserts that "When I left prison, I looked towards completing my rehabilitation and being able to start over. I understood that the law recognises this, in that my conviction would eventually become "spent" (which it did on …) …". He was not challenged about this, but it cannot be true - unless he misunderstood the law or had a crystal ball. As explained above (at [16(1)]), if the law had remained as it stood when NT1 left prison, his conviction would never have become spent. He cannot have had any legitimate expectation that this would occur until the changes wrought by LASPO came into effect, which was well over a decade after he left prison.

159. Yes, though Mr Tomlinson submits that the Book Extract is for advertising purposes. This issue has received little attention, and I treat the information as journalistic in its origin and at least predominantly journalistic in its overall character. "The fact that information is published by a journalist whose job is to inform the public is a factor to weigh in the balance", says the Working Party commentary. It is a factor of some weight, in particular because of the subject-matter: crime, and related legal proceedings. But the fact that the information is a media report of that kind is not of itself enough, because the Google Spain ruling "clearly distinguishes between the legal basis for publication by the media, and the legal basis for search engines to organise search results based on a person's name".

160. There is no obligation, of course. The question of whether the publishers have a legal power to continue publishing has not been debated. It is no part of Mr Tomlinson's case that it does not. A delisting claim does not require a claimant to advance or establish such a contention. That is clear from Google Spain. It is common ground that the newspaper publisher has received and rejected a complaint, and that no proceedings have been brought against it. I proceed on the basis that the publisher will continue to make the information publicly available on its website, and that it would be entitled to do so. I also take into account, to the limited extent I have already identified, that access to the information is and will continue to be available via a number of other websites.

(10) In what context was the information published? (a) Was the content voluntarily made public by the data subject? (b) Was the content intended to be made public? Could the data subject have reasonably known that the content would be made public?

(11) Was the original content published in the context of journalistic purposes?

(12) Does the publisher of the data have a legal power – or a legal obligation – to make the personal data publicly available?

(13) Do the data relate to a criminal offence?
161. This, in my view, is the single most important criterion in the present case. The Working Party commentary says this about it:

"EU Member States may have different approaches as to the public availability of information about offenders and their offences. Specific legal provisions may exist which have an impact on the availability of such information over time. DPAs will handle such cases in accordance with the relevant national principles and approaches. As a rule, DPAs are more likely to consider the de-listing of search results relating to relatively minor offences that happened a long time ago, whilst being less likely to consider the de-listing of results relating to more serious ones that happened more recently. However, these issues call for careful consideration and will be handled on a case-by-case basis."

162. A review of the rehabilitation laws of Member States conducted by Google's solicitors, Pinsent Masons, has been put before me. It suggests that there is indeed a diversity of approach across the EU. The existence of a rehabilitation law of some kind would appear to be universal, but there seem to be a variety of methods and criteria for establishing when a given conviction should become spent, and some differences in the consequences when it does. The methods include rehabilitation based on sentence, the passage of time, and individual judicial assessment. The review is at a high level of generality, and has been subject to some mild criticism by Mr Tomlinson. It is certainly not admissible evidence of foreign law. What is clear, however, is that the Working Party considered it to be consistent with Google Spain for individual jurisdictions to apply their own domestic rehabilitation laws, even if these diverge from those of other Member States. That is consistent with the margin of appreciation afforded to states when implementing the DP Directive, the Convention, and Charter. National laws must be interpreted and applied consistently with those instruments. But nobody in this case suggests that there is any single, transnational, rule or set of rules to which resort can be had to provide an answer in this context. With that in mind, I shall aim to follow the guidance of the Working Party by identifying the relevant domestic principles, and applying them to the particular facts of this case.

163. The starting point has to be the 1974 Act. The high point of the claimant's case, as presented by Mr Tomlinson, is couched in the language of s 4 of the 1974 Act: in opening it was submitted that the claimant "is entitled to be treated for all purposes as a person who has not committed or been charged with or prosecuted for or convicted of or sentenced for the offence or offences which were the subject of" the conviction. Mr Tomlinson must be right when he relies on s 4 to show that there is a strong public policy in favour of the rehabilitation of criminal offenders. For the ICO, Ms Proops has offered some support for that approach, submitting that the public policy principle underpinning the Act is that, "once a criminal has served his or her time, it is important that the ability of that individual to rehabilitate themselves is not unduly prejudiced". But Ms Proops does not go all the way with Mr Tomlinson's opening submission. In her submission, in a delisting case involving a spent conviction, it would be wrong automatically to assume that the balance tips in favour of continued indexation or alternatively in favour of de-indexation. Rather each case must turn on its own individual facts, albeit that "the fact that the conviction is spent ought generally to weigh heavily in the balance in favour of de-indexing the relevant website." By the end of the trial, Mr Tomlinson had adopted that line of argument. His case is that "the fact that a conviction is spent is not determinative" but it is weighty.

164. For Google, Mr White acknowledges that the fact that the claimant's conviction is spent is a relevant factor, but he argues that for a variety of reasons it carries relatively little weight on the particular facts of the case. As a fall-back from his "abuse of process" argument ([58-60] above), Mr White relies on s 8 of the 1974 Act as an important statement of Parliamentary policy which points in the opposite
direction from s 4 and, he argues, is weighty in this case. That submission is resisted by Mr Tomlinson and Ms Proops, on the basis that s 8 is irrelevant given that this is not a claim for libel or slander.

165. Behind these competing submissions lie some obvious difficulties. It is not a simple matter of applying s 4 of the 1974 Act, without regard to other factor or considerations. Such a hard-edged approach would be incompatible with human rights jurisprudence, and the fact-sensitive approach that is required. The argument for the ICO, and the argument with which Mr Tomlinson ended up, acknowledge as much. The Court's task is to interpret and apply the will of Parliament as expressed in a statute passed some 25 years before the advent of the internet, to a set of facts of a kind that Parliament cannot then have foreseen; to do so consistently with the will of Parliament as expressed via the HRA in 1998; and to do so in the light of the fact that it was not until 2004 that the Courts identified the existence of the common law tort of misuse of private information. The conclusions arrived at then have to be fitted into the scheme of the "right to be forgotten", first authoritatively recognised in a CJEU judgment of 2014 by which this Court is bound, by reason of the 1972 Act.

166. Without attempting to be exhaustive I have arrived, for the purposes of these cases, at the following reconciliation:

(1) The right to rehabilitation is an aspect of the law of personal privacy. The rights and interests protected include the right to reputation, and the right to respect for family life and private life, including unhindered social interaction with others. Upholding the right also tends to support a public or societal interest in the rehabilitation of offenders. But the right is not unqualified. It will inevitably come into conflict with other rights, most notably the rights of others to freedom of information and freedom of expression. It is not just legitimate but clearly helpful for Parliament to lay down rules which clearly prescribe the point at which a given conviction is to be treated as spent. But such rules, depending simply on the offender's age and the nature and length of the sentence, can only afford a blunt instrument. Parliament has legislated for exceptions, but these cannot be treated as necessarily exhaustive of the circumstances in which information about a spent conviction may be disclosed. More subtle tools are needed, if the court is to comply with its duty under the HRA to interpret and apply the law compatibly with the Convention. Section 4 of the 1974 Act must be read down accordingly as expressing a legal policy or principle.

(2) The starting point, in respect of information disclosed in legal proceedings held in public, is that a person will not enjoy a reasonable expectation of privacy (Khuja, [61] above). But there may come a time when they do. As a general rule (or "rule of thumb", to adopt the language of the Working Party), the point in time at which Parliament has determined that a conviction should become spent may be regarded as the point when the convict's Article 8 rights are engaged by any use or disclosure of information about the crime, conviction, or sentence (see T, [49(2)] above). But this does not mean that in 1974 Parliament enacted a right to confidentiality or privacy from that point on (Pearson, L v The Law Society, [47-48] above). Still less does it follow that the convict's Article 8 rights are of preponderant weight, when placed in the balance. As a matter of principle, the fact that the conviction is spent will normally be a weighty factor against the further use or disclosure of information about those matters, in ways other than those specifically envisaged by Parliament. The starting point, after all, is the general policy or principle in favour of that information being "forgotten", as expressed in s 4 of the 1974 Act. That policy has if anything become weightier over time. It is likely that in many cases the particular circumstances of the individual offender will support the application of that general principle to his or her case. But the specific rights asserted by the individual concerned will still need to be evaluated, and weighed against any competing free speech or freedom of information...
considerations, or other relevant factors, that may arise in the particular case.

(3) Part of this balancing exercise will involve an assessment of the nature and extent of any actual or prospective harm. If the use or disclosure causes, or is likely to cause, serious or substantial interference with private or family life that will tend to add weight to the case for applying the general rule. But where the claim relies or depends to a significant extent upon harm to reputation, the Court is in my judgment bound to have regard to s 8 of the 1974 Act. It is possible to identify a public policy that underlies that section, and which qualifies the public policy that underpins s 4. It is that offenders whose convictions are spent should not be able to obtain remedies for injury to their reputation (or consequent injury to feelings) resulting from the publication in good faith of accurate information about the spent conviction, or the related offending, prosecution or sentence. It is not a satisfactory answer to this point to say that the causes of action relied on are not libel or slander, but data protection and/or misuse of private information. That is too narrow and technical an approach, which ignores the fact that neither cause of action was known to Parliament when it legislated. The fact that, as I accept, reputational harm can support a claim under those causes of action tends, in fact, to undermine the force of that argument. I therefore do not accept that the policy that underlies s 8 falls to be disregarded merely because the claim is not framed in defamation. Again, there can be no bright line, because Convention jurisprudence shows that reputational harm can be of such a kind or severity as to engage Article 8 (Yeo, [140], above); but subject to considerations of that kind I would consider that this statutory policy or principle falls to be applied by the Court.

(4) Another aspect of the proportionality assessment will be the nature and quality of the societal benefits to be gained in the individual case by the use or disclosure in question. Freedom of expression has an inherent value, but it also has instrumental benefits which may be weak or strong according to the facts of the case. The fact that the information is, by its very nature, old will play a part at this stage also.

(5) Most, if not all, of these points about spent convictions are likely to be relevant in more than one context. Where a spent conviction is the subject of a de-listing claim, the Court will need to weave its evaluation according to domestic principles into the overall Google Spain balancing exercise. The Working Party criteria are a key tool for this purpose. One matter that Ms Proops rightly identifies as needing due weight at this stage is fact that de-indexation does not per se remove the source websites containing the relevant data from the online environment. It merely makes that data harder for the public to find.

167. In this case, the following factors from the domestic legal context would appear to be of some importance. First, NT1's case lies at the very outer limit of the statutory scheme. His sentence was such that, under the law as it stood from 1974 to 2014, it would never have become spent. Thanks to the LASPO amendments, since March 2014 his case has been positioned on the very cusp of the scheme. If his sentence had been one day longer, it would still be disqualified from ever becoming spent. Moreover, the fact that the sentence qualifies for rehabilitation is adventitious. The sentencing remarks make clear that the sentence would have been longer but for a matter of personal mitigation, which had no bearing on culpability, and no longer applies. Secondly, NT1's case on harm is not especially compelling. It is largely to do with harm to reputation. The policy of the 1974 Act militates against granting a remedy to prevent harm of that kind. There is of course no question of Google acting maliciously. Factors that might prevail over the statutory policy are absent. Much of the evidence of harm is to do with harm to business reputation, and business activity. This does not engage Article 8. The claimant's case on interference with family life is very weak, and his case on interference with
private life is not strong.

168. On the other side of the equation, I would accept Google's case on relevance, to this extent. For a period of time after the date on which NT1's conviction is to be treated as spent, it has been of some relevance to a relatively limited number of people with whom this claimant had business dealings to know about his dishonest criminal past; there were people who had a legitimate interest in having that knowledge, in order to make informed decisions about dealing with him. His criminal past was also relevant, during that period, to anybody who read or might read the blog and social media postings which the claimant, via Cleanup, put out about himself. Those postings were false or misleading, and in my judgment unjustifiably so. It was quite unnecessary, in order to achieve the claimant's stated objective of demoting the offending URLs, to put forward such clear and gross misrepresentations of his business history and his actual or reputed integrity. The fact that the claimant took down the posts after Google served a Defence relying on the misrepresentations they contained, is telling. The inference I draw is that he was reacting to what, having taken legal advice, he saw as a criticism of some merit. His attempts to offer other explanations were unconvincing. The continued accessibility of substantially fair and accurate information to the contrary served the legitimate purpose of correcting the record. These purposes might perhaps have been served by means other than making the information available via Google or another ISE, but it is not easy to see how.

169. That said, Mr Tomlinson has a point when he argues that, if there was ever any need for anyone to know these matters for these reasons, it has been met, because HMRC know about it all, and the information has been available to others via Google. The issue that is relevant to the delisting claim is whether, even if the information ever was relevant in these ways, its relevance has now been exhausted. Mr Tomlinson argues that it has. I am not so sure. A number of factors seem to me in combination to make the crime and punishment information of some continuing relevance to the public's assessment of the claimant. His conviction was for serious dishonesty, on a substantial scale. He has very obvious difficulties in acknowledging his guilt, as opposed to the fact of his conviction. My assessment is that he does not consider himself to have been guilty, and that the conviction and the sentence both still rankle with him. He has not persuaded me that it was inaccurate to implicate him in the further fraud of which others were convicted. In recent years, he has engaged in crude attempts to re-write history, via his blog and social media postings. The content was clearly misleading, and he approved it. He was initially evasive and at all times quite unapologetic about this. I found him to be an unreliable witness, whose evidence was not always honest. He remains in business, dealing with large sums. He is not, in that respect, by any means a recluse. It may be that delisting would not present a risk to the public revenues but the dangers do not in my judgment end there. I accept Mr White's submission that the claimant's conduct, including his evasive and dishonest conduct in the witness box, demonstrates that he cannot be trusted to provide an accurate account of his business background or credentials to those with whom he comes into contact in the course of business now and in the future.

**Overall assessment**

170. The key conclusions I have drawn are these. Around the turn of the century, NT1 was a public figure with a limited role in public life. His role has changed such that he now plays only a limited role in public life, as a businessman not dealing with consumers. That said, he still plays such a role. The crime and punishment information is not information of a private nature. It was information about business crime, its prosecution, and its punishment. It was and is essentially public in its character. NT1 did not enjoy any reasonable expectation of privacy in respect of the information at the time of his prosecution, conviction and sentence. My conclusion is that he is not entitled to have it delisted now. It
has not been shown to be inaccurate in any material way. It relates to his business life, not his personal life. It is sensitive information, and he has identified some legitimate grounds for delisting it. But he has failed to produce any compelling evidence in support of those grounds. Much of the harm complained of is business-related, and some of it pre-dates the time when he can legitimately complain of Google's processing of the information. His Article 8 private life rights are now engaged, but do not attract any great weight. The information originally appeared in the context of crime and court reporting in the national media, which was a natural and foreseeable result of the claimant's own criminal behaviour. The information is historic, and the domestic law of rehabilitation is engaged. But that is only so at the margins. The sentence on this claimant was of such a length that at the time he had no reasonable expectation that his conviction would ever be spent. The law has changed, but if the sentence had been any longer, the conviction would still not be spent. It would have been longer but for personal mitigation that has no bearing on culpability. His business career since leaving prison made the information relevant in the past to the assessment of his honesty by members of the public. The information retains sufficient relevance today. He has not accepted his guilt, has misled the public and this Court, and shows no remorse over any of these matters. He remains in business, and the information serves the purpose of minimising the risk that he will continue to mislead, as he has in the past. Delisting would not erase the information from the record altogether, but it would make it much harder to find. The case for delisting is not made out.

The Misuse Issues

(1) A reasonable expectation of privacy?

171. My conclusions on this and the next issue have already been substantially identified. The information at issue is public not private in nature. At the time of his prosecution, conviction and sentence Article 8 was not engaged and the claimant had no reasonable expectation of privacy. That has changed with the passage of time, the fact that recent amendment of the 1974 Act has made his conviction spent, and the impact on his private life of the continued accessibility of the crime and punishment information. Although the claimant's main concern is reputation, and primarily business reputation, there is enough to engage Article 8. Whether the claimant enjoys a reasonable expectation of privacy in respect of the information is I believe a separate question, which I would answer in the negative. It is probably unhelpful to enumerate the reasons here, as they also come into play at the next stage.

(2) Striking the balance

172. Assuming that I am wrong in the conclusion just stated, I find that the result of the In re S balancing process is the same as that of the Google Spain process. The impact on the claimant's business reputation of the continued accessibility of the crime and punishment information is not such as to engage Article 8. The evidence fails to establish any material interference with his right to respect for family life. I am not persuaded that there is anything more than a modest interference with his private life. The information has been legitimately available for many years. It continued to be relevant to the assessment of the claimant by members of the public, after the conviction became spent, by reason of his business activities. The information has continued relevance in view of the claimant's continued role in business, in conjunction with his past dishonesty, failure to acknowledge guilt, and his mis-statements to the public and this Court. Delisting would very significantly impede, even if it would not altogether block, public access to that information in respect of an untrustworthy businessman who poses some risk to the public. The Article 8 factors do not have sufficient weight to make that interference a proportionate response. Looked at from the opposite perspective, the interference with Article 8 that continued processing by Google represents is justified by, and proportionate to, the
factors that favour the Article 10 right to receive information in this case. Having reached these conclusions it is not necessary to address, in this context, Mr White’s submission that the processing complained of does not qualify as a “misuse” of private information.

The Damages Issue

173. Since I have found Google's continued processing to have been and to be justified according to the Google Spain test, there is no basis for any award of compensation under DPA s 13. No damage has been suffered "by reason of any contravention … of this Act." It is not necessary to evaluate Google's defence under s 13(3). It is I think in that connection that I might have found Ms Caro's evidence helpful. Nor can any question arise of damages for misuse of private information.

THE NT2 CASE

174. The issues in this case are, with minor modifications, the same as those in the NT1 claim ([54-57] above). This claimant complains of links to eleven source publications, though it seems that two of the source publications have been taken down since the claims were made. There is one inaccuracy complaint, which relates to an item in a national newspaper of relatively recent date. That item, and the URLs that link to the other remaining sources, are relied on in support of this claimant's Google Spain delisting claim. That claim concerns information about the claimant's crimes, his conviction and his sentence for them (again, "the crime and punishment information").

175. I heard oral evidence from NT2 himself, who was cross-examined. Witness statements from two other witnesses were filed on behalf of NT2, and taken as read because their contents were undisputed: a Mr Heller, a director of a number of the claimant's companies, and Mr Wolfe. Ms Caro's two witness statements did not call for cross-examination, her answers in the NT1 case being taken as her evidence in this action. I had four lever arch files of documentary material.

176. I found the claimant to be an honest and generally reliable witness who listened carefully to the questions put to him, and gave clear and relevant answers. He was on occasion somewhat guarded, but I did not interpret his occasional hesitation in giving an answer as an indication that he was bluffing or playing for time. Nor did his reluctance to engage (for instance) in analysis of what may have lain behind the wording of the sentencing remarks in his case, undermine his credibility in my view. Some witnesses are unnecessarily wary of Counsel's questioning, and may appear unduly careful as a result. My assessment is that NT2 was such a witness. As will appear, I accept his evidence on most of the points of dispute.

Abuse of process

177. I have explained above Google's argument that the NT1 case is an abuse of process, and my reasons for rejecting it: see [58-65]. The same submissions were advanced by Google in respect of NT2’s claim. They fail for the same reasons.

Data protection

The facts

Delta and the conspiracies

178. NT2 started his career in the property business. By the early years of this century he had become a senior executive and a shareholder in Delta, a company engaged in a controversial business that was the subject of public opposition over its environmental practices. There were protests by individuals,
local authorities became involved, and so did a national regulator. Delta's business was the subject of some nuisance-making interventions, together with some criminal conduct. NT2 received death threats.

179. He formed the view that this was all associated with the campaigns against the company. With the support of Delta's board, he engaged an investigations firm to find out who was engaged in hostile activity. He did not initially expect the firm to engage in unlawful activity for that purpose, but when it identified unlawful methods that it planned to use, NT2 agreed and authorised it to do so. The firm used phone tapping and computer hacking.

180. At some stage thereafter, the claimant moved abroad. Some months later, the business of Delta was sold to XRay, for a very large sum. The claimant received some tens of millions of pounds for his share in the business. I reject Google's case that NT2's authorisation of the investigations firm was motivated by concern that the protests might scupper or hinder the sale of the business to XRay.

181. The hacking and phone tapping was later discovered by the authorities, and prosecutions followed. NT2 pleaded guilty at a relatively early stage. Some three years after he instructed the investigations firm, he was sentenced with a number of others, including a Mr Roth, another Delta executive. The sentence on the claimant was one of 6 months' imprisonment.

182. The Judge's sentencing remarks, and my analysis of their significance, are set out in the Private Judgment. Key points are that the Judge's starting point, for a sentence after a trial, was 12 months. He identified that as a deterrent sentence. He reduced it, to account for the plea of guilty, and some personal mitigation. The sentence was imposed, I find, on the factual basis put forward by NT2 and agreed by the prosecution. This did not involve any allegations of financial gain. I find that this was not industrial espionage of the cliched kind, directed at competitors or customers. NT2 had a commercial motivation, to protect the business of which he owned a share. But he made no direct personal gain from his crime. I also reject Google's case that NT2 was motivated by a desire to prevent legitimate protest. I accept his evidence that he wished to identify and take action against the perpetrators of the activities outlined above.

183. The claimant did not seek to appeal against sentence. He spent some weeks in custody, most of it in an open prison, after which he was released. His evidence is that "Prison was not pleasant. I did naively think that maybe when I came out I could make a fresh start". That was a legitimate viewpoint, given the state of the law on the rehabilitation of offenders as it then stood, so far as it affected this claimant: see [16(2)] above.

**Zodiac**

184. After he moved abroad, NT2 took financial advice from Zodiac, a financial firm based in that country.

**The URLs complained of**

185. Details of the eleven URLs complained of are set out in the Private Judgment at [35]. Their nature can be fairly summarised by reference to three categories. Five are contemporary reports in the national and local news media of the claimant's conviction and sentencing, and the underlying offending. There are two interviews given by the claimant, over 7 years ago now, about his conviction and his business plans. Then there are various other articles, spanning a decade, which include reference to his offending, conviction, and sentence.

**The inaccuracy issue**
The national newspaper article

186. The one article, or item, which the claimant complains was inaccurate was not a contemporary report of the conviction or sentencing. It first appeared in a national newspaper a few years ago, over eight years after the claimant was sentenced. The item was a small component of one part of a more substantial article or feature, with a financial theme, which referred to other individuals and companies, including Zodiac, and ran to several pages. It is difficult to deal with this part of the case in anything other than these broad terms, in this public judgment. Full details of the item complained of and the feature of which it formed part are to be found in the Private Judgment.

The complaint

187. The gist of the complaint is that the item is misleading as to the nature and extent of the claimant's criminality, and that it suggests that he made criminal proceeds from it with which, with the aid of Zodiac, he dealt dishonestly and sought to shield from creditors.

Evidence and submissions

188. NT2's evidence is that he made no profits or proceeds from his crime, and engaged in no such dishonest dealings as the item suggested. Mr Tomlinson suggests that the claimant has found himself, quite inappropriately, portrayed as one of a rogues' gallery of serious criminals. Google accepts that the item did convey serious imputations against "suspected criminals" but that these parts of the item would not have been taken to refer to NT2. Google has not sought to accuse the claimant of dishonest dealings with any proceeds of any crime, or attempts to shield assets from creditors.

Assessment

189. I apply the principles identified at [80-87] above. In this case there is a further issue, namely whether the words complained of in the newspaper article refer or would be understood to refer to the claimant. That is the language of defamation law. But data protection law only applies to data that relate to an identifiable individual. In this case, the claimant's case on reference or identifiability is built simply on the content of the offending item. There seems to me to be no material difference, at least for the purpose of this case, between defamation and data protection. Nobody has suggested any such difference. A person is referred to, or identifiable, if the words complained of would be taken by the reasonable reader of the article or item as a whole to refer to the claimant.

190. For reasons set out in detail in the Private Judgment at [49-53], I find that the article complained of is inaccurate, in that it gives a misleading portrayal of the claimant's criminality and conveys imputations to the effect of which he complains.

Remedies

191. In the light of these conclusions I shall make an appropriate delisting order, in respect of the URL for the national newspaper article, in its current form, on the grounds that the article is inaccurate in the respects I have identified, contrary to the Fourth Data Protection Principle, so that continued processing by Google would represent a breach of duty under DPA s 4(4). I will hear argument on the form of order. Of course, if the underlying article were at any stage amended so as to remove the sub-section which leads to the complaint, the need for any relief might disappear.

192. I shall deal separately with the question of compensation or damages.
The Privacy Issues

193. The arguments in NT2's case also give rise to the Exemption Issue and the Structure Issue. I have already set out my conclusions on those matters, all of which apply equally to the present case: see [95-102], [103-105]. On the DPA Compliance Issue in this case, the reasoning in NT1 applies ([106-116] above), though there is one difference, in that two of the articles complained of were published with the claimant's consent; it is that which satisfies a DPA Schedule 3 requirement. That leaves the Google Spain issue.

**Google Spain: legal principles**

194. Everything that I have said already about the applicable legal principles, when dealing with the case of NT1, applies to the present case. That includes the legal discussion between [136] and [164] above, in relation to the Article 29 Working Party criteria. What remains is to summarise the relevant facts and to apply the principles to those facts.

**Further facts**

195. Google relies on some further facts, in support of its case that the personal data contained in the third party publications accessible via the URLs complained of remain adequate and relevant, and their continuing availability serves a legitimate purpose and is in the public interest. The facts relied on fall into two main categories: (1) facts about additional business activities in which he has engaged since his conviction and sentence; (2) public statements made by the claimant.

**Additional business activities**

196. The claimant's uncontradicted evidence is that, since selling his stake in Delta, he has not been involved in the same controversial industry. He has been involved in other business activities, to which Google maintains the crime and punishment information in his case is relevant. Those activities have been undertaken through a corporate vehicle, Echo, and companies in the Echo group. Google's case concerns the Echo group's role in turning around struggling businesses; in the letting and sale of property; and in a sports marketing company, which is involved in sponsorship and large-scale property development.

197. It is Google's case, put broadly, that those who were or might become involved or concerned in or affected by such business activities "should readily be able to find out the truth about the Claimant's previous business activities including [the crime and punishment information], including by carrying out searches on search engines such as" Google's Search service. The emphasis in this quotation is mine.

**Public statements**

198. Google relies on two press interviews given by the claimant some 7 or more years ago, in which he discussed the crime and punishment information. Google says that the claimant has thereby "since the conviction became spent", discussed it and the criminal proceedings leading to it in interviews with national media. Google's case is that these "were clearly intended to be used to exculpate any damage caused to the claimant's reputation by his conviction and guilty plea" and to create favourable publicity for himself and his business interests.

199. Google also relies on the fact that the claimant has in other ways sought, and continues to seek to promote himself as a successful businessman with (says Google) "a particular emphasis on his alleged
experience in financial investment and corporate environmental policies". Reliance is placed on the claimant's personal website, a blog he ran some 7 or 8 years ago, and four instances of online news reports of similar vintage.

200. Google's case is that it is "plainly in the public interest" that current clients of the claimant's businesses or potential clients, and various other categories of person "should readily be able to find out [the crime and punishment information], including being able to find it by carrying out a search on search engines" such as Google Search.

Assessment

201. There is one general point to make about these aspects of Google's case: that their formulation in the Defence is in part over-broad, and rather woolly. I am not concerned with the merits of people being able to find out "the truth about the claimant's business activities including ..." his role in the conspiracies of 2004, or his sentence, or other aspects of the crime and punishment information. It is the crime and punishment information that is at issue.

202. As indicated above (at [86]), the fact that a delisting order would or might make other, relevant information about the claimant unavailable to those searching on the claimant's name would be a material consideration when exercising a discretion. But the fact that a publication at a given URL might contain some relevant information about the claimant cannot confer relevance on the crime and punishment information, that it would not otherwise possess. Much of the cross-examination was tied to this unduly vague and blurred version of the case. That is understandable, given that this is the way the case was pleaded. However, (a) as Mr White acknowledged, I am not bound by admissions extracted in cross-examination, on issues which are for me to determine; (b) as it is, some apparent concessions extracted as a result of this broad-brush approach seem to me to be near valueless.

203. The nature of the conviction seems to me to be a significant factor in my evaluation. It is a conviction for invasion of privacy, not for any form of dishonesty. The claimant did not contest the charges, but pleaded guilty. My conclusions as to the claimant's state of mind are also relevant. If he acted in good faith, believing the company's business to have been targeted by malign actors, that reduces his culpability and the impact on his integrity. If his principal motivation was, as I find, to identify those responsible for trespass, criminal damage, and death threats and to take action against them, then the case for suggesting that his past crimes undermine his present environmental credentials, or his more recent claims about his commitment to environmental principles, is threadbare. The claimant's current attitude to his criminality is also material. In oral evidence he said "It was a cataclysmic mistake, for which I pleaded guilty and took full responsibility for. I do not know what else I can say about it." He does not cavil; his attitude is one of remorse, which I assess as genuine.

204. In the Private Judgment, the matters I have outlined above are further detailed, considered, and evaluated. For the reasons just given, and the other reasons given in the Private Judgment, I have concluded that the relevance of the crime and punishment information to any decisions that might need to be made by investors in, staff of, or customers of the businesses referred to by Google is slender to non-existent.

205. As for the claimant's public statements, the changes wrought by LASPO have – perhaps understandably - caused some difficulty. Retrospective changes in the law are unusual, and can be confusing. The interviews were given as a result of advice, at a time when the Claimant's convictions were not spent. It was only later that they became spent, with effect from an earlier date. NT2's
interviews were given in that context, in order to give his own account of events. That is understandable, and not a matter for condemnation. It seems to me that Mr Tomlinson is right to submit that, having mentioned the conviction, NT2 cannot be accused of seeking to conceal it from the public. The position has now changed as the conviction is spent – and would have become spent even if LASPO had not changed the law. The claimant's consent has been withdrawn. In his interviews, he did not seek to evade or escape from the factual basis of his conviction. He sought to put that in context.

206. As for the website and blog, the content relied on was also published before the claimant's conviction became spent. The claimant's evidence is that the purpose was not to promote new business, but rather, on advice, to counter the numerous references to his conviction that appeared in prominent webpages in Google's Search results against his name. I accept his evidence on this point. To that extent, his case resembles that of NT1. Unlike NT1, however, this claimant made no claims that were inconsistent with the evidence or findings against him, or extravagantly beyond what might have been justified by reference to the principle of rehabilitation. NT2 had not contested, but had admitted, the prosecution allegations. Neither his postings nor his interviews made false claims to have or to deserve a long-standing reputation for integrity.

207. I accept Mr Tomlinson's submission that the evidence in this case does not support Google's case that the claimant's business activities or his public statements mean that any of the categories of people identified should (as Google maintains) "readily have been able to find out the truth" about the crime and punishment information, or that this ought to be the case in the future. The case on relevance is a weak one at best.

Application of law to facts

208. Having already set out the full wording of each of the Working Party criteria, I shall use shorthand on this occasion.

209. (1) *Does the information come up on a search on the claimant's name?* Yes.

210. (2) *Public life, public figure?* NT2's position is akin to that of NT1 in this respect. He was a public figure, with a role in public life, as a result of his crimes. That public role is now much reduced, but not wholly eliminated. The fact that he referred to his conviction and sentence in his interviews is neutral, because it was motivated by a desire to minimise the impact of the crime and punishment information.

211. (3) *Maturity/capacity.* The claimant was not a minor, nor did he lack capacity at any relevant time. He was a mature adult at all material times, in full possession of his faculties.

212. (4) *Accuracy.* The national newspaper article was inaccurate in the respects specified above, and in the Private Judgment. Otherwise, it is not alleged by the claimant that any of the data were inaccurate. I proceed on the footing that the publications at the other URLs were, as Google asserts, substantially accurate accounts of events so far as the claimant is concerned. The key issue is whether it remains legitimate for Google to return links to the source publications, given the passage of time, the impact on the claimant, and other material considerations.

213. (5) *Relevance.* The data do not amount to hate speech, nor – with the possible exception of the newspaper article – do they represent "offences" against the claimant "in the area of expression". To a limited extent, the data reflect opinions, but the gist of the complaint concerns those parts that appear to be verified fact. With the exception, again, of the newspaper article, they are verified fact. I have dealt
with relevance above and in the Private Judgment. It may not be necessary to reach any further conclusions about the relevance of the newspaper article, given my finding of inaccuracy and the relief that will follow. If necessary, however, I would find that the article in its current form – that is, including the sub-section at which the complaint is directed - lacks any or any sufficient relevance to justify its continued accessibility in response to a search on the claimant's name. By that token, and to that extent, the continued availability of the data via Google is excessive so far as the claimant is concerned.

214. (6) Sensitivity The data are sensitive. The points made in this regard when dealing with the claim of NT1 hold good in the present context.

215. (7) Made available for longer than necessary? This is the main issue on this part of the case, and this criterion does not add anything of value in the present context.

216. (8) Prejudicial/harmful? And/or (9) dangerous? Clearly, the continued accessibility of the data is not dangerous; it does not expose the claimant to a risk of personal injury. As to other prejudice or harm, NT2's case is that the availability of the data has had "a profound adverse impact on the Claimant and his business and personal life, including on members of his close family and school-age children." His evidence is that he has frequently been called on to give explanations about his conviction and has had difficulty with finding banking facilities. This is corroborated by the unchallenged evidence of his witnesses. It has not been challenged but I still need to evaluate it.

217. For reasons given above, the claimant's relationship with his grown-up children is not relevant, save marginally; and he gives no detailed evidence about it. He has not established any impact on a family life enjoyed with his adult children. He has a second family, with school-age children. The impact on that family is material, but I have hardly any evidence about it. As with NT1, a lot of the evidence is about the impact of the information on the claimant's business. He says, "I feel that I am put at a disadvantage in securing banking facilities or business opportunities as a consequence of the information about me that is accessible through Google Search, and I believe this will simply continue unless Google "delists" the links about which I have complained." His supporting witnesses corroborate that.

218. But his evidence does go beyond this, to an extent. He says, "Members of my close family have told me that they have been questioned about their association with me, which I have found very distressing. Some people just ask me straight out what it was like in prison.". This is vague, lacking in detail. There are no statements from the family members, nor any explanation of why not. Nonetheless, it does go rather beyond the evidence in the case of NT1.

219. (10) Context/consent and (11) journalistic purposes? The position differs somewhat, in relation to the three categories of publication. Like NT1, this claimant did not consent to the contemporaneous reporting of the criminal proceedings against him, but such reporting was a natural, probable, and foreseeable consequence of his offending and those elements of the information in question have been placed in the public domain as a result of steps deliberately taken by the claimant. So was subsequent fair and accurate reporting of the same information, in the context of the remaining publications.

220. The two interviews which NT2 now seeks to delist were given and published with his actual consent. That consent has now been withdrawn. It is not suggested that there is any legal obstacle to the claimant validly revoking his consent, for the future – such as a contractual obligation, or an estoppel, or the like. The claimant's evidence is that he gave the interviews on advice in order to limit the impact
of other reports of the conviction. No other particular circumstances have been identified, which would make it legitimate to continue processing personal data which the claimant once put into the public domain, but now wishes to withdraw from that context, to the extent of having it delisted by Google.

221. (12) **Legal power or obligation to make the data publicly available?** None of the publishers has any obligation. Whether any of them has the power has not been debated. I proceed on the basis that, with the exception of the sub-section of the national newspaper article that refers to this claimant, the source publishers have the legal right to make the data available.

222. (13) **Do the data relate to a criminal offence?** The answer of course is yes. As in the case of NT1, I regard this as the most important criterion. A number of obvious distinctions are apparent.

(1) NT2's conviction was always going to become spent. It was firmly within the scheme of the 1974 Act, as originally enacted. Although the sentence would have been longer but for personal mitigation, it would still have been a sentence capable of becoming spent. The LASPO changes came in a matter of months before it would have been spent anyway.

(2) Much of NT2's case is about business reputation, as opposed to private or family life. However, unlike NT1, he has given credible detail in support of the case on damage to business.

(3) Moreover, unlike NT1, this claimant has a young family, and the impact of disclosure of his old conviction is capable of having an adverse impact. His case on interference with family life is stronger.

(4) As to relevance, the conviction in this case was not one involving dishonesty, and it was based on a plea of guilty. This claimant acknowledges his guilt and expresses genuine remorse. I also see considerable force in Mr Tomlinson's submission, that NT2's conviction did not concern actions taken by the claimant in relation to "consumers, customers or investors" but rather in relation to the invasion of the privacy of third parties. There is no plausible suggestion, nor is there any solid basis for an inference, that there is a risk that this wrongdoing will be repeated by the claimant. The information is of scant if any apparent relevance to any business activities that he seems likely to engage in.

**Overall assessment**

223. My key conclusions in respect of NT2's delisting claim are that the crime and punishment information has become out of date, irrelevant and of no sufficient legitimate interest to users of Google Search to justify its continued availability, so that an appropriate delisting order should be made. The conviction was always going to become spent, and it did so in March 2014, though it would have done so in July of that year anyway. NT2 has frankly acknowledged his guilt, and expressed genuine remorse. There is no evidence of any risk of repetition. His current business activities are in a field quite different from that in which he was operating at the time. His past offending is of little if any relevance to anybody's assessment of his suitability to engage in relevant business activity now, or in the future. There is no real need for anybody to be warned about that activity.

**Misuse of private information**

224. As in NT1’s case, the information is essentially public, not private. But the position has changed. With the passage of time and in all the circumstances, Article 8 is now engaged, and the presence of a young family in this claimant's life is a distinguishing factor. I would accept that the claimant enjoys a
reasonable expectation of privacy in respect of the information, for the reasons given below.

(2) A "misuse" of the information?

225. Mr White submits that proof of misuse is a separate and independent requirement of this tort. The argument did not go far on this issue, but I am not persuaded. I am content to deal with the case on the conventional two-stage test.

(3) Striking the balance

226. The impact on the claimant is such as to engage Article 8. The business prejudice does not suffice for that purpose, but there is just enough in the realm of private and family life to cross the threshold. The existence of a young, second family is a matter of some weight. Even so, the evidence does not, in the end, demonstrate a grave interference. But it is enough to require a justification. Google's case on relevance is very weak. The claimant's evidence suggests that he has acknowledged his past error. The claimant's current and anticipated future business conduct does not make his past conduct relevant to anybody's assessment of him, or not significantly so. Continued accessibility of the information complained of is hard to justify. The factors that go to support that view are weak, by comparison with those that weigh in favour of delisting.

Remedies

227. A delisting order is appropriate. As to compensation or damages, the main issue would seem to be the conduct of Google. Was it reasonable and, if so, does that excuse the company from liability for damages? These are difficult issues, on which I have reached firm conclusions only after a trial lasting several days. It would be hard to say, by reference to the terms of DPA s 13(3), that Google failed to take "such care as in all the circumstances was reasonably required" to comply with the relevant requirements.

228. True it is, that the burden of proof lies on Google. Mr Tomlinson makes the point that Ms Caro's evidence is hearsay. She was not directly involved in the relevant decision-making. He invites me to treat her evidence as worthless. But Ms Caro has credibly explained Google's processes, and I accept her evidence on this issue, so far as it goes. This is an enterprise that I accept is committed to compliance with the relevant requirements. In the current legal environment, it would be harsh to say that it had failed to take reasonable care to do so. For similar reasons I conclude that no damages are payable for misuse of private information.

OVERALL CONCLUSIONS

229. My conclusions are:-

(1) The delisting claim is not an abuse of the court's process, as alleged by Google.

(2) The inaccuracy complaint is dismissed. The First Article was a substantially fair and accurate report of legal proceedings held in public. The Second Article was not, but the claimant has failed to prove that the information in the Second Article was inaccurate in any material respect. Similar conclusions apply to the similar information in the Book Extract.

(3) The remainder of the delisting claim is also dismissed.
(4) The claim for misuse of private information fails.

(5) The claims for compensation or damages do not arise.

NT2

230. My conclusions are:-

(1) The delisting claim is not an abuse of the court's process, as alleged by Google.

(2) The inaccuracy complaint is upheld, and an appropriate delisting order will be made, its terms to be the subject of argument.

(3) The remainder of the delisting claim also succeeds. An appropriate order will be made, in terms to be the subject of argument.

(4) The claim for misuse of private information succeeds.

(5) But Google took reasonable care, and the claimant is not entitled to compensation or damages.
Reporting Restrictions in the Criminal Courts

April 2015

(Revised May 2016)
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1. The open justice principle

The general rule is that the administration of justice must be done in public, the public and the media have a right to attend all court hearings and the media is able to report those proceedings fully and contemporaneously. The public has the right to know what takes place in the criminal courts and the media in court acts as the eyes and ears of the public, enabling it to follow court proceedings and to be better informed about criminal justice issues.

The open justice principle is reflected in rule 6.2 of the Criminal Procedure Rules 2015, which requires the court, when exercising its powers in relation to reporting and access restrictions, and when furthering the overriding objective, to have regard to the importance of dealing with criminal cases in public and allowing a public hearing to be reported to the public.

The open justice principle is central to the rule of law. Open justice helps to ensure that trials are properly conducted. It puts pressure on witnesses to tell the truth. It can result in new witnesses coming forward. It provides public scrutiny of the trial process, maintains the public’s confidence in the administration of justice and makes inaccurate and uninformed comment about proceedings less likely. Open court proceedings and the publicity given to criminal trials are vital to the deterrent purpose behind criminal justice. Any departure from the open justice principle must be necessary in order to be justified.

Parliament has recognised the importance of contemporaneous media reports of legal proceedings by giving protection from liability for contempt of court and defamation to fair, accurate and contemporaneous reports of court proceedings. The important role of the media as a public watchdog is also recognised under the right to freedom of expression guaranteed by Article 10 of the European Convention of Human Rights.

As public authorities under the Human Rights Act, courts must act compatibly with Convention rights, including the right to freedom of expression under Article 10 ECHR and the right to a public hearing under Article 6 ECHR. While Article 10 and Article 6 are both qualified rights and permit of exceptions. In some cases, the right to privacy under Article 8 may be engaged and need to be weighed in the balance. However, any restriction on the public’s right to attend court proceedings and the media’s ability to report them must fulfil a legitimate aim under these provisions and be necessary, proportionate and convincingly established. It is for the party seeking to derogate from the principle of open justice to produce clear and cogent evidence in support of the derogation.

### The open justice principle

- The general rule is that the administration of justice must be done in public
- The public and the media have the right to attend all court hearings and the media is able to report those proceedings fully and contemporaneously
- Any restriction on these usual rules will be exceptional. It must be based on necessity
- The burden is on the party seeking the restriction to establish it is necessary on the basis of clear and cogent evidence
- The terms of any order must be proportionate – going no further than is necessary to meet the relevant objective
Courts are required to hear the media’s representations in relation to a proposed reporting restriction or restriction on public access to proceedings before making any order. Exceptionally this may not be possible where an unexpected issue arises; in such circumstances the media should be invited to make representations at the first available opportunity.

The courts and DPP have highlighted the role of the prosecution in safeguarding open justice in the Instructions to Prosecution Advocates. The Instructions state that prosecutors should not apply for reporting restrictions themselves unless they feel that they are essential. Where the defence applies for reporting restrictions, the Instructions state that prosecutors should oppose reporting restrictions they do not consider necessary for a fair trial. In addition to the Instructions to Prosecution Advocates the CPS has published general guidance for prosecutors on contempt of court and reporting restrictions and specific guidance relating to reporting restrictions concerning children and young persons.

The open justice principle is subject to common law exceptions and to statutory exceptions, including those relating to Youth Court proceedings, which are addressed in the following sections.

2. Hearings from which the public may be excluded

2.1 Trials in private: all criminal courts

In accordance with the open justice principle, the general rule is that all court proceedings must be held in open court to which the public and the media have access. The common law attaches a very high degree of importance to the hearing of cases in open court and under Article 6 ECHR the right to a public hearing and to public pronouncement of judgment are protected as part of a defendant’s right to a fair trial.

The court has an inherent power to regulate its own proceedings, however, and may hear a trial or part of a trial in private in exceptional circumstances. The only exception to the open justice principle at common law justifying hearings in private is where the hearing of the case in public would frustrate or render impractical the administration of justice. The test is one of necessity. The fact, for example, that hearing evidence in open court will cause embarrassment to witnesses does not meet the test for necessity. Neither is it a sufficient basis for a hearing in private that allegations will be aired which will be damaging to the reputation of individuals. The interests of justice could never justify excluding the media and public if the consequence would be that a trial was unfair.

Rules 6.6 to 6.8 of the Criminal Procedure Rules 2015 govern procedure “where a court can order a trial in private”. A party who wants the court to hear a trial in private must apply by notice in writing not less than 5 business days before the start of the trial. The application must be displayed within the vicinity of the courtroom and give notice to reporters. The media should be given an opportunity to make representations in opposition to the application. If the order is made, the court must not commence the trial in private until the following business day or until any appeal against the order has been disposed of (if later).

Hearing a case in private has a severe impact upon the general public’s right to know about court
proceedings, permanently depriving it of the information heard in private. It follows that if the
court can prevent the anticipated prejudice to the trial process by adopting a lesser measure e.g. a
discretionary reporting restriction such as a postponement order under s.4(2) Contempt of Court
Act, it should adopt that course. In making an application for a case to be heard in secret, a party
must explain why no measures other than trial in private will suffice.20

Often the adoption of practical measures such as allowing a witness to give evidence from behind
a screen or ordering that a witness shall be identified by a pseudonym (such as by a letter of the
alphabet) and prohibiting publication of the witness’s true name by an anonymity order under s.11
CCA (see below), will remove the need to exclude the public. Another possibility, where only a small
part of the witness’s evidence is sensitive, is to allow that part to be written down and not shown to
the public or media in court. However, measures such as these are also exceptional and stringent tests
must be satisfied before they are adopted.

The necessity test requires that even where a court concludes that part of a trial should be heard in
private, it must give careful consideration as to whether other parts of the same case can be heard in
public and must adjourn into open court as soon as exclusion of the public ceases to be necessary.

Circumstances which may justify hearing a case in private include situations where the nature
of the evidence, if made public, would cause harm to national security e.g. by disclosing sensitive
operational techniques or identifying a person whose identity for strong public interest reasons
should be protected e.g. an undercover police officer. The application to proceed in private should be
supported by relevant evidence and the test to be applied in all cases is whether proceeding in private
is necessary to avoid the administration of justice from being frustrated or rendered impractical.
Disorder in court may also justify an order that the public gallery be cleared. Again the exceptional
measure should be no greater than necessary. Representatives of the media (who are unlikely to have
participated in the disorder) should normally be allowed to remain.

The Court has a discretion under s.37 Children and Young Persons Act 1933 to exclude the public
but not bona fide representatives of the media during the testimony of witnesses aged under 18
in any proceedings relating to an offence against, or conduct contrary to decency and morality. At
common law, the court can exclude the public but allow media representatives to remain when
considering exhibits in obscenity trials.

Section 25 of the Youth Justice and Criminal Evidence Act 1999 permits the court to exclude
persons of any description from the court during the evidence of a child or vulnerable adult witness
in cases relating to a sexual offence or where there are grounds for believing that a witness has been,
or may be, intimidated. However, it was not envisaged that the media should routinely be excluded
alongside the rest of the public, even in such exceptional cases. Even where the media generally are to
be excluded, one nominated representative of the media must be permitted to remain.21

Under the Serious Organised Crime and Police Act 2005 a court may review the sentence of a
defendant who has assisted the police, or previously obtained a reduced sentence having agreed to
assist the police but reneged on the agreement. Pursuant to s.75 of the Act the court may exclude the
public and media from such proceedings, where satisfied that this is necessary to protect any person
and is in the interests of justice.22
The Administration of Justice Act 1960 s.12 defines a number of specific situations where publication of information about proceedings in private of itself constitutes a contempt of court e.g. in matters relating to national security. In all other cases, to publish what has occurred in private is not a breach of confidence or a contempt of court unless it causes a substantial risk of serious prejudice to the administration of justice.\textsuperscript{23}

The Criminal Justice and Courts Act 2015 creates an exception to the open justice principle by allowing a single magistrate to sit anywhere out of court and decide and sentence certain cases on the papers in the event of a guilty plea or a failure to respond to the statutory notification.\textsuperscript{24} In addition, the Deregulation Act 2015 removes the presumption that written witness statements should be read aloud in open court unless the court directs otherwise.

Decisions by magistrates to hear trials in private may be challenged through judicial review proceedings.

### 2.2 Youth Courts

Section 47 of the Children and Young Persons Act 1933 is a statutory exception to the open justice principle which generally bars the public from attending Youth Court proceedings.

This prohibition does not extend to court members and officers, the parties, their legal representatives and witnesses, or to representatives of the media or to such other persons as the court may specially authorise to be present.

**Hearings from which the public may be excluded**

- The general rule is that all court proceedings must be held in open court to which the public and the media have access
- The court may hear trials in private in exceptional circumstances where doing so is necessary to prevent the administration of justice from being frustrated or rendered impractical
- Where lesser measures such as discretionary reporting restrictions would prevent prejudice to the administration of justice, those measures should be adopted
- Where it is necessary to hear parts of a case in private the court should adjourn to open court as soon as it is no longer necessary for the public to be excluded
- The embarrassment caused to witnesses from giving evidence in open court does not meet the necessity test
- There is statutory exception to the open justice principle for proceedings in in the Youth Courts, which members of the public are prohibited from attending
3. Automatic reporting restrictions

There are a number of automatic reporting restrictions which are statutory exceptions to the open justice principle. The existence of an automatic restriction may make any further discretionary restrictions unnecessary e.g. there is no need to make a discretionary order in respect of a child victim of a sexual offence because the automatic restrictions as to the identity of any victim of a sexual offence apply. It may be of assistance in some cases for the judge to remind the media of any automatic restriction and to consider whether any guidance will assist the media to keep within such automatic restrictions. Such guidance from the judge is not binding. The statutory provisions give the courts the power to lift or vary the automatic restrictions in specified circumstances if asked to do so by a party or the media or on the court’s own initiative.

3.1 The strict liability rule

The Contempt of Court Act 1981 provides the framework for all reporting of criminal proceedings in England and Wales. Sections 1 and 2 of create the strict liability rule, which makes it a contempt of court to publish anything to the public which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced, even if there is no intent to cause such prejudice. In practice this means that ignorance of the law or of the existence of a reporting restriction or its terms is no defence if contempt is committed.

The strict liability rule applies to all publications, which is defined very widely as including “any speech, writing, programme included in a programme service or other communication in whatever form, which is addressed to the public at large”. Accordingly the strict liability rule is not only of relevance to newspapers and broadcasters but also applies to online media and individual users of social media websites. The strict liability rule only applies once proceedings are “active”, which means that the relevant initial step must have been taken, such as placing a suspect under arrest.

There are three specific defences under the Act. The most important in practice is the defence provided by s.4 for “a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith”. Section 5 of the Act creates a defence which protects publications relating to discussions in good faith of public affairs or matters of general public interest, providing that the risk of prejudice to particular legal proceedings is merely incidental to the discussion. In addition, there is a defence under s. 3 for publishers and distributors who can show that they took reasonable care and did not know or have reason to suspect that proceedings were active (publishers) or that a publication contained matter in breach of the strict liability rule (distributors).

The existence of the strict liability rule is in itself a significant safeguard as it places the media in jeopardy of being in contempt of court when reporting criminal proceedings unless that reporting is fair and accurate and published in good faith. It is important for courts to bear this in mind, particularly when a party seeking discretionary reporting restrictions seeks to argue that absent such additional restrictions media reporting is likely to be inaccurate, biased or otherwise prejudicial. The correct approach is for the court to proceed on the basis that such reporting is not likely and to trust the media to fulfil their responsibilities to report proceedings accurately and make sensible judgments about publications which may cause prejudice.
3.2 Victims of sexual offences

Victims of a wide range of sexual offences are given lifetime anonymity under the Sexual Offences (Amendment) Act 1992.

The 1992 Act imposes a lifetime ban on reporting any matter likely to identify the victim of a sexual offence, from the time that such an allegation has been made and continuing after a person has been charged with the offence and after conclusion of the trial. The prohibition imposed by s.1 applies to “any publication” and therefore includes traditional media as well as online media and individual users of social media websites, who have been prosecuted and convicted under this provision.

The offences to which the prohibition applies are set out in s.2 of the 1992 Act and include rape, indecent assault, indecency towards children and the vast majority of other sexual offences.

There is no power under the 1992 Act to restrict the naming of a defendant in a sex case. Complainants enjoy the protection provided by s.1 of the 1992 Act and it is for the media to form its own judgment as to whether the naming of a defendant in a sex case would of itself be likely to identify the victim of the offence. The same must be true for witnesses other than victims in sex cases.

A defendant in a sex case may apply for the restriction to be lifted if that is required to induce potential witnesses to come forward and the conduct of the defence is likely to be substantially prejudiced if no such direction is given.

There are three main exceptions to the anonymity rule. First, a complainant may waive the entitlement to anonymity by giving written consent to being identified (if they are 16 or older).

Secondly, the media is free to report the victim’s identity in the event of criminal proceedings other than the actual trial or appeal in relation to the sexual offence. This exception caters for the situation where a complainant in a sexual offences case is subsequently prosecuted for perjury or wasting police time in separate proceedings. It appears to have been the intention of Parliament, however, that a complainant would retain anonymity if, during the course of proceedings, sexual offences charges are dropped and other non-sexual offence charges continue to be prosecuted.

Thirdly, the court may lift the restriction to persuade defence witnesses to come forward, or where the court is satisfied that it is a substantial and unreasonable restriction on the reporting of the trial and that it is in the public interest for it to be lifted. This last condition cannot be satisfied simply because the defendant has been acquitted or other outcome of the trial.

3.3. Victims of female genital mutilation

Section 71 of the Serious Crime Act 2015, which came into force on 3 May 2015, introduced a new automatic reporting restriction for the victims of female genital mutilation (FGM).

The reporting restriction applies from the moment that an allegation has been made that a FGM offence has been committed against a person and imposes a lifetime ban on identifying that person as being an alleged victim of FGM.
The court has the power to relax or remove the restriction if satisfied that the restriction would cause substantial prejudice to the conduct of a person’s defence at a trial of a FGM offence, or if the restriction imposes a substantial and unreasonable restriction on the reporting of the proceedings and it is in the public interest to do so.

3.4 Rulings at pre-trial hearings

Crown Court judges may make pre-trial rulings on the admissibility of evidence or on points of law relevant to a forthcoming trial under the Criminal Procedure and Investigations Act 1996, ss.39 and 40 and magistrates have similar powers at pre-trial hearings under s.8A of the Magistrates’ Court Act 1980.

Automatic reporting restrictions under section 41 of the 1996 Act and section 8C of the 1980 Act prevent reporting of these rulings and the proceedings on applications relating to such rulings. These restrictions continue until the trial has been concluded when they automatically cease to apply.

The trial judge or magistrate may lift the restrictions on the application of any person before the conclusion of the trial if satisfied, after hearing any representations from the accused, that it is in the interests of justice to do so. The restrictions will continue to apply, however, to any representations that were made by the accused in relation to the lifting of the restrictions.

3.5 Preparatory hearings

Crown Court judges undertake preparatory hearings in terrorism-related cases and may also order preparatory hearings in other cases such as long, complex or serious cases and serious fraud cases. Automatic reporting restrictions prevent the reporting of these preparatory hearings with the exception of certain specified facts about the proceedings such as the names of the accused and the offences with which they have been charged. These restrictions continue until the conclusion of the trial when they automatically cease to apply.

The trial judge may lift the restrictions on the application of any person before the conclusion of the trial if satisfied, after hearing any representations from the accused, that it is in the interests of justice to do so. The restrictions will continue to apply, however, to any representations that were made by the accused in relation to the lifting of the restrictions.

3.6 Dismissal proceedings

In Crown Court proceedings automatic reporting restrictions prevent the publication of any report of an unsuccessful dismissal application made by an accused person except for certain specified facts such as the name of the accused and the offence.
A dismissal application may be made in respect of any charge brought against a person who has been sent for trial under section 51 or 51A of the Crime and Disorder Act 1998.\textsuperscript{36}

The trial judge may lift the restrictions on the application of any person after hearing representations from the accused.

Successful dismissal applications may be fully reported and the restrictions automatically lapse at the conclusion of the trial. Before the trial concludes the trial judge has a discretion to lift the restrictions if, after hearing representations from the accused where any of them object, he is satisfied that it is in the interests of justice to do so.

### 3.7 Allocation and sending proceedings in Magistrates’ Courts

The procedure by which cases are sent from the Magistrates’ Court to the Crown Court has changed, with allocation and sending proceedings having replaced committal proceedings. Allocation and sending proceedings initially replaced committal proceedings in specific local justice areas but were later extended to the rest of England and Wales.\textsuperscript{37}

There are automatic reporting restrictions that apply to the reporting of allocation and sending proceedings in the Magistrates’ Courts (Crime and Disorder Act 1998, s.52A). These prevent the media from reporting anything except certain specified facts about the case such as the name of the court, names of the accused and the charges they face. The restrictions may be lifted on application by any person but where any of the accused objects to their removal, the court may only do so if satisfied that it is in the interests of justice.

These restrictions cease to apply if the court decides the case is suitable for summary trial and the accused pleads guilty, or after the conclusion of a summary trial.

### 3.8 Prosecution appeals against rulings

In Crown Court, Court of Appeal and Supreme Court proceedings, automatic reporting restrictions apply when the prosecution informs the court of its intention to appeal against the court’s rulings and to the court’s subsequent decision as to whether to expedite the prosecution appeal, or adjourn, or discharge the jury. The restrictions prevent the publication of anything other than certain specified factual information (identification of court, judge, defendant, witnesses, lawyers, offence, bail, legal aid, place and date of adjourned proceedings etc). Subject to consideration of the (unreportable) objections of defendant(s), the courts may order that the restrictions do not apply to any extent, if it is in the interests of justice to do so, otherwise the restrictions automatically lapse at the conclusion of the trial(s) (Criminal Justice Act 2003, s. 71).

### 3.9 Youth Court proceedings

Youth Court proceedings are a statutory exception to the open justice principle as the media, although permitted to attend, are prohibited from publishing the name, address or school or any other matter that is likely to identify a person under 18 as being “concerned in the proceedings” before the
Youth Courts (Children and Young Persons Act 1933, s.49). A child or young person is “concerned in the proceedings” if they are a victim, witness or defendant.

The prohibition on publication also extends to proceedings on appeal from a youth court (including by way of case stated); proceedings in a magistrates’ court for breach, revocation or amendment of a youth rehabilitation order; and on appeal from such proceedings in a magistrates’ court (including by way of case stated).

There are three exceptional situations in which these automatic reporting restrictions may be lifted. First, the court may lift the restriction if satisfied that it is appropriate to do so for avoiding injustice to the child. Secondly, the court may lift the restriction to assist in the search for a missing, convicted or alleged young offender who has been charged with, or convicted of, a violent or sexual offence (or one punishable with a prison sentence of 14 years or more in the case of a 21-year-old offender). Thirdly, the restriction may be lifted in relation to a child or young person who has been convicted, if the court is satisfied that it is in the public interest to do so.

When deciding whether to lift the automatic reporting restriction following conviction, particular considerations relevant to offenders under 18 must be balanced against the open justice principle. The particular considerations relevant to offenders under 18 include the:

- Duty to have regard to the principle aim of the youth justice system to prevent offending by children and young persons as required by s.37 Crime and Disorder Act 1998;
- Obligation to have regard to the welfare of the child or young person as required by s.44 Children and Young Persons Act 1933;
- Right to privacy under Article 8 ECHR (as interpreted through international instruments such as the UN Convention on the Rights of the Child and the Beijing Rules); and
- Jurisprudence requiring the ‘best interests of the child’ to be ‘a primary consideration’ (though not necessarily one that prevails over all other considerations) in accordance with Article 3 of the UN Convention on the Rights of the Child.

It is wrong for the court to dispense with a juvenile’s prima facie right to anonymity as an additional punishment, or by way of ‘naming and shaming’. The welfare of the child must be given very great weight and it will rarely be the case that it is in the public interest to dispense with the reporting restrictions. Where it decides to lift the reporting restrictions, the court must clearly identify the specific public interest which justifies that course.

The Court must offer the parties an opportunity to make representations and take these into account before lifting the restrictions.

The Youth Justice and Criminal Evidence Act 1999, s.44 creates a new automatic reporting restriction
that prohibits the publication of any matter likely to identify a child or young person who is the subject of a criminal investigation and which lasts until the commencement of proceedings. The 1999 Act also makes a number of amendments to s.49 of the 1933 Act. However, s.44 has not been brought into force and it appears that there are no current plans for doing so.

3.10 Special measures and other directions

Section 47 of the Youth Justice and Criminal Evidence Act 1999 prohibits the reporting of special measures directions, directions relating to the use of Live Link for an accused and directions prohibiting an accused from cross-examining a witness in person.

These automatic restrictions may be lifted by the Court and lapse automatically when proceedings against the accused are determined or abandoned.

3.11 Alleged offences by teachers against pupils

Section 141F of the Education Act 2002 as amended introduces an automatic reporting restriction which prevents the identification of any teacher who is alleged by a pupil at the same school (or by someone on the pupil's behalf) to have committed a criminal offence against the pupil. This reporting restriction may be varied or lifted on the application of any person and automatically ends if proceedings against the teacher are instituted. Provision is made for an appeal against such restrictions.

3.12 Indecent material calculated to injure public morals

Section 1 of the Judicial Proceedings (Regulation of Reports) Act 1926 prohibits the publication in relation to any judicial proceedings of any indecent medical, surgical or physiological details which would be calculated to injure public morals.
Automatic reporting restrictions

- There are several automatic reporting restrictions which are statutory exceptions to the open justice principle.
- Victims of sexual offences are given lifetime anonymity which does not apply if they consent in writing to their identity being published. Their anonymity can also be lifted by the court in other limited circumstances.
- Reports of pre-trial hearings in the Crown Court cannot generally be published until after the trial is over.
- Reports of preparatory hearings in the Crown Court in long, complex or serious cases, complex fraud cases and unsuccessful dismissal applications are also prohibited (apart from a limited range of factual matters) until the trial is over.
- Similar restrictions apply in respect of sending and allocation proceedings in the Magistrates’ Courts.
- These restrictions on pre-trial proceedings lapse at the conclusion of the trial and may be lifted earlier where the court is satisfied that it is in the interests of justice to do so.
- Reports of special measures directions and directions prohibiting the accused from conducting cross-examination cannot be published until the trial(s) of all accused are over, unless the court orders otherwise.
- Reports of the prosecution’s notices of appeal against rulings and the courts’ decisions on whether to expedite the appeal, or, if not, to adjourn the proceedings or discharge the jury, cannot be published (apart from a limited range of factual matters) until the trial of (all) the accused are over, unless the court orders otherwise.
- The media is prohibited from publishing the name, address or school or any matter likely to identify a child or young person involved in Youth Court proceedings whether as a victim, witness or defendant.
- The Youth Court may lift the restriction in specified circumstances including where the child or young person is convicted of an offence and the court considers that it is in the interests of justice to do so.
- The court must give great weight to the welfare of the child and it is wrong to dispense with the automatic anonymity for a juvenile as an additional punishment, or by way of “naming and shaming”.

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Reporting Restrictions Guide
4. Discretionary reporting restrictions

4.1 Procedural safeguards common to all discretionary reporting restrictions

Before imposing a discretionary reporting restriction, courts should check that no automatic reporting restriction already applies which would make a discretionary restriction unnecessary.

Where a discretionary restriction is potentially available, courts must ensure that they apply the restriction with care, checking that the relevant statutory conditions have been met. Where the statutory conditions are met, the court must make a judgment, balancing the need for the proposed restriction against the public interest in open justice and freedom of expression. In all cases, courts must be satisfied that the need for the proposed restriction has been convincingly established by clear and cogent evidence and that the terms of the proposed order go no further than is necessary to meet the statutory objective.

The imposition of a reporting restriction directly engages the media’s interests, affecting its ability to report on matters of public interest. For this reason the court should not impose any reporting restrictions without first giving the media an opportunity to attend or to make representations, or, if the Court is persuaded that there is an urgent need for at least a temporary restraint, as soon as practicable after they have been made. The media bring a different perspective to that of the parties to the proceedings. They have a particular expertise in reporting restrictions and are well placed to represent the wider public interest in open justice on behalf of the general public. Because of the importance attached to contemporaneous court reporting and the perishable nature of news, courts should act swiftly to give the media the opportunity to make representations.

Any reporting restriction imposes potential criminal liability on media organisations, journalists or editors who breach it. If a breach occurs, media organisations and their employees may face unlimited fines. For these reasons, it is essential that any reporting restriction should be reduced to writing as soon as possible, clear and precise in its terms and drawn up as a court order as soon as practicable. Once orders have been made, they should be drawn to the attention of the media by being shown on the court list and on the door of the court and wherever possible sent to relevant local and/or national media organisations. Court staff should respond positively to media organisations’ requests for assistance in relation to the existence or terms of reporting restriction orders.
4.2 Protection of under-18s

Summary of new provisions

From 13 April 2015 there are now two main powers to make discretionary reporting restrictions for under-18s. Under s.45 of the Youth Justice and Criminal Evidence Act 1999 (“YJCEA”) a criminal court can grant anonymity to a juvenile defendant, victim or witness in adult criminal proceedings. Such anonymity will last until that person reaches the age of 18. This power is not available to Youth Courts, as s.49 CPYA provides automatic anonymity in those proceedings (see 3.7 above).

In addition, under s.45A of the YJCEA, criminal courts including Youth Courts are given a new power to grant life-long anonymity to juvenile victims and witnesses, bringing the law for under-18s into line with the law for adult victims and witnesses (see 4.3 below). Consistently with the law in relation to adult defendants, there is no power under s.45A to grant life-long anonymity to juvenile defendants.

Section 45 YJCEA replaces s.39 of the Children and Young Person’s Act 1933 (“CYPA”) in relation to all criminal proceedings. However, section 39 continues to apply to civil and family proceedings and to Injunctions and Criminal behaviour Orders (see 4.8 below). Section 39 has been amended so that reporting restrictions made under s.39 now apply to online publications, as well as the print and broadcast media.
The intention of Parliament in enacting these provisions was to widen the scope of protection applying specifically to under-18s. Although the new powers are of broader application than s.39 CYPA 1933, they give rise to similar issues and it has been held that the s.39 case law provides appropriate guidance to the principles and practice to be followed concerning applications under s.45.55

The CPS has produced its own guidance on “Reporting Restrictions – Children and Young People as Victims, Witnesses and Defendants.”54 Owing to the continuing relevance of s.39, further guidance is provided in Appendix 1.

**Reporting restrictions under s.45 of the YJCEA 1999**

The general power to impose a discretionary reporting restriction in relation to a person under aged 18 is now contained in s.45 of the YJCEA. This discretionary power applies to under-18 victims, witnesses and defendants.

Section 45 of YJCEA permits a criminal court to prevent any information being included in a publication which is likely to lead members of the public to identify the under-18 victim, witness or defendant as a person concerned in the proceedings. When deciding whether to make an order under s.45 the court must have regard to the welfare of that person.

As with any departure from open justice there must be a good reason for imposing an order under s.45. The court must be satisfied that, on the facts of the case before it, the welfare of the child outweighs the strong public interest in open justice.55

The reason for the “good reason” requirement is explained in the case law under s.39. The courts have emphasised that Parliament intended to preserve the distinction between juveniles in Youth Courts, who are automatically entitled to anonymity, and juveniles in the adult criminal courts, who are not so entitled and must apply for a discretionary reporting restriction.55 The rule under s.49 is the reverse of the rule under s.33 CYPA and s.45 YJCEA. Under s.49 CYPA 1933 there must be a good reason for lifting the order; under s.45 YJCEA there must be a good reason for imposing it.

In deciding whether to impose an order under s.45, the court must balance the open justice principle against particular considerations relevant to those under 18. The particular considerations include the:

- Duty to have regard to the principle aim of the youth justice system to prevent offending by children and young persons as required by s.37 Crime and Disorder Act 1998;
- Obligation to have regard to the welfare of the child or young person as required by s.44 CYPA;
- Right to privacy under Article 8 ECHR (as interpreted through international instruments such as the UN Convention on the Rights of the Child and the Beijing Rules); and
- Jurisprudence requiring the ‘best interests of the child’ to be ‘a primary consideration’ (though not necessarily one that prevails over all other considerations) in accordance with Article 3 of the UN Convention on the Rights of the Child.
Neither the principle of open justice nor the best interests of the child necessarily dictate the conclusion in a particular case.\textsuperscript{61} The court must weigh the competing public interest factors on the particular facts before it. The case law governing this balancing exercise under s.39 CYPA remains relevant under s.45.\textsuperscript{62}

In summary, the court must balance the interests of the public in the full reporting of criminal proceedings against the desirability of not causing harm to a child concerned in the proceedings.\textsuperscript{63} Among the possible public interests is the public interest in knowing the outcome of court proceedings and the valuable deterrent effect that the identification of those guilty of at least serious crimes may have on others.\textsuperscript{64}

In relation to harm, publication can have a significant effect on the prospects and opportunities of young defendants and, therefore, on the likelihood of effective integration into society.\textsuperscript{65} That the defendant’s identity is already known to some people in the community is not necessarily a good reason for allowing much wider publication.\textsuperscript{66} Prior to and during the trial, the welfare of the defendant is likely to take precedence over the public interest in publication, whereas after conviction, the age of the offender and the seriousness of the crime will be particularly relevant.\textsuperscript{67} The court should give considerable weight to the age of the offender and to the potential damage of public identification as a criminal before having the burden or benefit of adulthood.\textsuperscript{68}

The definition of publication in s.63 of YJCEA is wide and covers the print media, broadcast media and online publications such as Twitter and Facebook.

Section 45(8) of YJCEA identifies particular examples of information that a s.45 reporting restriction may contain, including the child or young person’s name, home address, school, place of work or still or moving image. However, this list is not intended to be exhaustive.

Section 45 orders should be carefully framed, to prevent them from having an overbroad effect. The purpose of a s.45 order is not to prevent the publication of the name, address or other details of the child or young person per se; what a s.45 order seeks to do is to prevent their identification as a victim, witness or defendant in criminal proceedings. For this reason, when making an order under s.45, courts should track the language of s.45(3) YJCEA and make sure to include the qualifying words in italics “if it is likely to lead members of the public to identify him as a person concerned in the proceedings”. Adopting this language prevents media reports of unrelated matters e.g. the same child winning a prize at school, being caught by the restriction.

The s.45 reporting restriction ceases to apply when the young person reaches the age of 18. In these circumstances, the court now has the power to impose life-long anonymity under s.45A YJCEA if the relevant conditions are met.
The court, or an appellate court, may dispense with a s.45 reporting restriction if satisfied that doing so is in the interests of justice or that the restrictions impose a substantial and unreasonable restriction on the reporting of the proceedings and it is in the public interest to remove or relax the restriction. When considering the “public interest” the court should have regard, in particular, to the matters identified in s.52 YJCEA: the open reporting of crime, the open reporting of matters relating to health and safety, the prevention and exposure of miscarriages of justice, the welfare of the child or young person and the views of the child or young person.

The fact that proceedings have been determined in any way or abandoned is not in itself a sufficient reason for dispensing with the reporting restrictions, although it may be a relevant consideration. When deciding whether to relax or remove a restriction, the court must have regard to the welfare of the child or young person concerned.

Breach of a s.45 order is a criminal offence, subject to certain specific defences. Further information is contained MOJ Circular No. 2015/02 “Reporting Restrictions applying to Under-18s: Youth Justice and Criminal Evidence Act 1999 and Criminal Justice and Courts Act 2015”, 23 March 2015.

**Life-long anonymity under s.45A of the YJCEA 1999**

Section 45A YJCEA contains a new power for the criminal courts to impose a life-long reporting restriction in the case of an under-18 victim or witness. This provision brings the law for juvenile victims and witnesses into line with that of their adult counterparts in criminal proceedings.

Section 45A permits a criminal court to prevent any information being included in a publication during the lifetime of a victim or witness which is likely to lead members of the public to identify that under-18 victim or witness as being concerned in the proceedings. The same wide definition of publication in s.63 of YJCEA applies as in s.45 orders and covers the print media, broadcast media and online publications such as Twitter and Facebook.

As with s.45 orders, s.45A identifies particular matters that may be included in a s.45A reporting restriction e.g. the name, address, school etc of an under-18, but the reporting restriction power is not limited to those specific matters. For the same reasons that apply in the case of s.45 orders, care should be taken to ensure that s.45A orders track the statutory language so as to prevent them from having an overbroad effect (see above).

The test for making a s.45A order is that the court must be satisfied that fear or distress on the part of the victim or witness in connection with being identified as a person concerned in the proceedings is likely to diminish the quality of that person’s evidence or the level of cooperation they give to any party to the proceedings in connection with that party’s presentation of its case. Witnesses who could benefit from a s.45A order could therefore be witnesses for the prosecution or the defence.

The applicant for an order under s.45A must explain how their circumstances meet the statutory
criteria and why a reporting restriction would be likely to improve that person’s evidence, or their level of cooperation.¹⁷

When applying the test in s.45A the court is required to take into account certain particular matters: the nature and alleged circumstances of the offence to which the proceedings relate; the age of the victim or witness; their social and cultural background and ethnic origins (if relevant); their domestic, educational and employment circumstances (if relevant); any religious and political beliefs (if relevant); any behaviour towards the victim or witness on behalf of an accused or others and the views expressed by the victim or witness.

In deciding whether to make a reporting restriction, the court must also have regard to the welfare of the child or young person, whether it would be in the interests of justice to make the direction and the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of the proceedings. Section s.45A therefore gives statutory effect to the requirement for the court to take into account the impact on the media’s ability to report the proceedings when considering whether to make an order (and not just when it is being asked to remove or relax a reporting restriction).

The court, or an appellate court, has identical powers to dispense with a s.45A order as apply in the case of s.45 orders (see above) and must take into account the same public interest considerations. As with s.45 orders, the fact that the proceedings have been determined or abandoned is a relevant, but not decisive consideration, and the court, when deciding whether to remove or relax a restriction, must have regard to the welfare of the child or young person concerned.

Breach of a s.45A order is a criminal offence, subject to certain specific defences. Further information is contained MOJ Circular No. 2015/02 “Reporting Restrictions applying to Under-18s: Youth Justice and Criminal Evidence Act 1999 and Criminal Justice and Courts Act 2015”, 23 March 2015.

Protection of under-18s

- Under s.45 of YJCEA a criminal court may make an order preventing the publication of information that identifies a child or young person as being a victim, witness or defendant in the proceedings
- This restriction applies to traditional print and broadcast media as well as online publications
- The court must have regard to the welfare of the child or young person
- A s.45 order ceases to have effect when the child or young person turns 18
- The court may remove or relax the s.45 reporting restriction if satisfied that it imposes a substantial and unreasonable restriction on reporting and that it is in the public interest
- Under s.45A of YJCEA a criminal court may make an order preventing the publication of information that identifies a child or young person as being a victim or witness in the proceedings during the course of their lifetime
4.3 Protection of adult victims and witnesses

Section 46 of the Youth Justice and Criminal Evidence Act 1999 gives the court power to restrict reporting about certain adult witnesses (other than the accused) in criminal proceedings on the application of any party to those proceedings.

The Court may make a reporting direction that no matter relating to the witness shall during his life-time be included in a publication if it is likely to lead members of the public to identify him as being a witness in the proceedings. Again, publication of the name, address, educational establishment, workplace or a still or moving picture of the witness is not of itself an offence, unless its inclusion is likely to lead to his identification as a witness by the public in the criminal proceedings. A s.46 order may also restrict the identification of children where it would lead to the identification of the adult in question.\(^71\)

An adult witness is eligible for protection if the quality of his evidence or his co-operation with the preparation of the case is likely to be diminished by reason of fear or distress in connection with identification by the public as a witness. The applicant for an order under s.46 must explain why a reporting direction would improve the quality of the witness' evidence or level of cooperation.\(^72\) Quality of evidence relates to its quality in terms of completeness, coherence and accuracy. Factors which the court must take into consideration include the nature and circumstances of the offence, the age of the witness, any behaviour towards the witness by the defendant or his family or associates and the views of the witness.\(^73\)

The court must also consider whether the making of a reporting direction would be in the interests of justice and consider the public interest in avoiding the imposition of a substantial and unreasonable restriction on the reporting of proceedings.\(^74\)

The court may give a direction at any time dispensing with the restrictions if satisfied either that

- The court must be satisfied that the fear or distress on the part of the victim or witness arising from such identification would be likely to diminish the quality of their evidence or their cooperation with any party to the proceedings
- The court must also take into account the impact on the media's ability to report the proceedings before making a s.45A order
- The court may remove or relax the s.45A reporting restriction if satisfied that it imposes a substantial and unreasonable restriction on reporting and that it is in the public interest
it is in the interests of justice or that the restrictions impose a substantial and unreasonable restriction on the reporting of the proceedings and that it is in the public interest. Such directions are referred to as “excepting directions”. The fact that the proceedings have been determined in a particular way or abandoned is not a sufficient reason in and of itself to dispense with the restrictions, but will often be a relevant consideration.

Section 52 of the YJCEA 1999 sets out some of the matters to which the court should have regard in determining the public interest, including the interest in open reporting of crime, human health and safety, exposure of miscarriages of justice, as well as the welfare and views of the ‘protected person’, or an ‘appropriate person’ with parental responsibility (as defined).

The subject of a s.46 anonymity direction can also waive his/her anonymity, or in the case of an under-16 year old, their parent or guardian (including a local authority) may waive the young person’s anonymity, by giving written consent to the inclusion of any identifying material otherwise prohibited (subject to safeguards that it was not obtained by interference with the peace and comfort of that person).

The media has a right of appeal against s.46 orders under s.159 of the Criminal Justice Act 1998 even where the restriction on reporting is confined to photographs or film. 75

A court which reviews the sentence of a defendant who has assisted the police, or failed to assist the police after having agreed to do so (under the Serious Organised Crime and Police Act 2005, s.74) may impose a reporting restriction prohibiting the publication of any matter relating to the proceedings including the fact that the reference has been made. 76 The court may make such an order only to the extent that such an order is necessary to protect any person and is in the interests of justice. 77

**Protection of adult witnesses**

- Under s.46 of the Youth Justice and Criminal Evidence Act a court may prohibit the publication of matters likely to identify an adult witness in criminal proceedings (other than the accused) during his lifetime
- The court must be satisfied that the quality of his evidence or his co-operation with the preparation of the case is likely to be diminished by reason of fear or distress in connection with identification by the public as a witness
- In exercising its discretion, the court must balance the interests of justice against the public interest in not imposing a substantial and unreasonable restriction on reporting of the proceedings
- Excepting directions may be given, or the order revoked or varied at any stage of the proceedings, or written consent to identification may be given by the subject or, if under 16, by their parent or guardian.
4.4 Names and other matters withheld in court

Where a court exercises its powers to allow a name or any other matter to be withheld from the public in criminal proceedings, the court may make such directions as are necessary under s.11 of the Contempt of Court Act 1981 prohibiting the publication of that name or matter in connection with the proceedings.

Section 11 can only be invoked where the court allows a name or matter to be withheld from being mentioned in open court. It follows that there is no power to prohibit publication of any name or other matter which has been given in open court in the proceedings. For this reason, applications for an order under s.11 may be heard in private provided there is good reason for doing so.

Section 11 does not itself give the court power to withhold a name or other matter from the public. The power to do this must exist either at common law or from some other statutory provision.

Consistent with the requirement to protect the open justice principle and freedom of expression, courts should only make an order under s.11 where the nature or circumstances of the proceedings are such that hearing all evidence in open court would frustrate or render impractical the administration of justice. It follows that a defendant in a criminal trial must be named save in rare circumstances. It is not appropriate therefore to invoke the s.11 power to withhold matters for the benefit of a defendant’s feelings or comfort or to prevent financial damage or damage to reputation resulting from proceedings concerning a person’s business. Nor can the power be invoked to prevent identification and embarrassment of the defendant’s children, because of the defendant’s public profile.

Where the ground for seeking a s.11 order is that the identification of a witness or a defendant will expose that person to a real and immediate risk to his life engaging the state’s duty to protect life under Article 2 ECHR, the court will consider whether the fear is objectively well-founded. In practical terms, the applicant will have provide clear and cogent evidence to show that publication of his name will create or materially increase a risk of death or serious injury.

In rare circumstances, the right to private and family life under Article 8 ECHR may mean that normal media reporting has to be curtailed, but injunctions to cover these cases are dealt with by the High Court rather than the criminal courts.

The court is required to hear representations from the media about making orders under s.11. In cases of urgency, a temporary order should be made and the media should be invited to attend on the next convenient date. The media have a right of appeal against s.11 orders made in the Crown Court under s.159 CJA and may challenge orders made in the Magistrates’ Courts in judicial review proceedings. A defendant does not have a right of appeal under s.159 against an order refusing to restrict reporting of his identity, but such an order may be challenged by way of judicial review.
4.5 Postponement of fair and accurate reports

Under s.4(2) of the Contempt of Court Act 1981 the court may order the postponement of publication of a fair, accurate and contemporaneous report of its proceedings where that is necessary to avoid a substantial risk of prejudice to the administration of justice in those or other proceedings.

It is now clear that the court has no inherent or common law power to postpone the publication of a report of proceedings conducted in open court.\(^9\) It follows that unless there is a postponement power which may properly be exercised under s.4(2), there is no power to order the postponement of reporting.

It is normally contempt of court under the ‘strict liability rule’ to publish anything which creates a substantial risk of serious prejudice to the administration of justice – see s.2 of the 1981 Act. However, ordinarily fair, accurate and contemporaneous reports of legal proceedings held in public which are published in good faith will not breach the strict liability rule – see s.4(1) of the Act.

The power to make postponement orders recognises that there may need to be exceptions to the general defence under s.4(1). Matters may be discussed in open court, but in the absence of the jury which, if published before the end of the case, could prejudice the proceedings. There can also be circumstances where two or more trials are due to take place which are closely connected and where publication of reports of trial 1 could cause a substantial risk of prejudice to trial 2.

The subject matter of a postponement order under s.4(2) is fair, accurate, good faith and contemporaneous reports of the proceedings. Trial judges have no power under s.4(2) to postpone publication of any other reports e.g. in relation to matters not admitted into evidence or prejudicial comment in relation to the proceedings.\(^9\) Likewise, courts have no power under s.4(2) to prevent
publication of material that is already in the public domain. Such publications may incur liability for contempt of court under the strict liability rule and the media bears the responsibility for exercising its judgment in such cases.\footnote{92}

Where a court is exercising its discretion as to whether to make a s.4(2) postponement order the test to be applied has three stages.\footnote{93}

The first question is whether reporting of the proceedings would give rise to a substantial risk of prejudice to the administration of justice. If not, that is the end of the matter.

If there is a substantial risk of such prejudice, the court must ask whether a s.4(2) order would eliminate that risk. If not, there could be no necessity to impose a ban. Even if a judge is satisfied that the order would achieve the objective, he should still ask whether the risk can be overcome by less restrictive means. If so, a s.4(2) order could not be said to be necessary.

If the judge is satisfied that the order is necessary, he has a discretion and must balance the competing public interests between protecting the administration of justice and ensuring open justice and the fullest possible reporting of criminal trials. An order under s.4(2) should be regarded as a last resort.\footnote{94}

As orders must be proportionate in order to comply with Article 10 ECHR, the court must limit the order to those specific matters that create a substantial risk of prejudice to the administration of justice if published contemporaneously. As s.4(2) is a postponement power, the order should normally identify the specific event or time when the order will come to an end.

The reference in s.4(2) to avoiding a substantial risk of prejudice to the administration of justice referred to the protection of the public interest in the administration of justice rather than the private welfare of those caught up in that administration. Where a defendant argued that the scandalous nature of the allegations would result in members of the public attacking him, he was not entitled to a s.4(2) order as attacks upon the accused by ill-intentioned persons were not to be regarded as a natural consequence of the publication of the proceedings and such dangers should not cause the court to depart from well-established principles.\footnote{95} Besides, s.4(2) only allows a court to postpone reporting, not to ban it indefinitely.\footnote{96} It is rarely appropriate to use s.4(2) to alleviate the difficulties of witnesses giving evidence, when there are other statutory measures designed for that purpose.\footnote{97}

Section 4(2) is regularly invoked in cases involving sequential trials. The aim in those cases is to postpone the reporting of specific parts of the evidence in the first trial to prevent prejudice to the defendants in the second trial. It is generally not appropriate to invoke this power in relation to matters that form part of the evidence in both trials because in those cases prejudice is unlikely to arise. Section 4(2) is also regularly invoked when a retrial is ordered by the Court of Appeal.

Before imposing an order in the context of sequential trials, the judge must be satisfied that there is a substantial risk of prejudice arising from contemporaneous reports of the first trial sufficient to outweigh
the strong public interest in the full and contemporaneous reporting of criminal proceedings. The judge must also bear in mind that the staying power of news reports is very limited. In addition, it has often been said that normally juries can be trusted to follow conscientiously the directions of trial judges to decide cases on the evidence which they have heard in court and to ignore anything they may have read or viewed in the media.\(^8\)

The appellate courts have also emphasised that newspapers and broadcasters should be trusted to fulfil their responsibilities accurately to inform the public of court proceedings and to exercise sensible judgment about the publication of comment which may interfere with the administration of justice. The media has access to the best legal advice and has its own judgments to make. The risk of being in contempt of court for damaging the interests of justice is not one any responsible editor would wish to take. In itself this is an important safeguard and it should not be overlooked because there are occasions in which there is ill-judged publicity in the media.\(^9\)

### Postponement of fair and accurate reports

- Under s.4(2) of the Contempt of Court Act 1981 the court may postpone publication of a fair, accurate and contemporaneous report of its proceedings where that is necessary to avoid a substantial risk of prejudice to the administration of justice in those or other proceedings
- The power is strictly limited to fair, accurate reports and contemporaneous reports of the proceedings
- The court must be satisfied that a substantial risk of prejudice would arise from such reports
- If the concern is potential prejudice to a future trial, in making that judgment, the court will bear in mind the tendency for news reports to fade from public consciousness and the conscientiousness with which it can normally be expected that the jury in the subsequent case will follow the trial judge’s directions to reach their decision exclusively on the basis of evidence given in that case
- Before making a s.4(2) order, the court must be satisfied that the order would eliminate the risk of prejudice and that there is no less restrictive measure that could be employed
- If satisfied of these matters, the court must exercise its discretion balancing the risk of prejudice to the administration of justice against the strong public interest in the full reporting of criminal trials

### 4.6 Quashing of acquittal and retrial: restriction on publication in the interests of justice

Under s.82 of the Criminal Justice Act 2003, if necessary in the interests of justice, the Court of Appeal can make orders to prevent the inclusion of any matter in a publication which appears to it would give rise to a substantial risk of prejudice to the administration of justice in a retrial.\(^9\) Before
the prosecution has given notice of its application for an acquittal to be quashed and a retrial, such an order can only be made on the application of the DPP and where an investigation has commenced. After such notice has been given, the order may be made on either on the application of the DPP, or on the Court of Appeal's own motion. The order may apply to a matter which has been included in a publication published before the order takes effect, but such an order applies only to the later inclusion of the matter in a publication (whether directly or by inclusion of the earlier publication), and does not otherwise affect the earlier publication.

Unless an earlier time is specified, by s.82(8) and (9) CJA 2003 the order will automatically lapse when there is no longer any step that could be taken which would lead to the acquitted person being tried pursuant to an order made on the application, or if he is so tried, at the conclusion of the trial.

4.7 Postponement of derogatory remarks made in mitigation

Section 58 of the Criminal Procedure and Investigations Act 1996 gives courts the power to postpone reports of derogatory assertions about named or identified persons that have been made in mitigation. The court must have substantial grounds for believing that the assertion is derogatory and false or that the facts asserted are irrelevant to the sentence.

This power may be exercised when a court is determining sentence following conviction, when a Magistrates’ Court is determining whether an accused should be committed to a Crown Court for sentence and when a court is considering whether to give permission to appeal against a sentence or hearing an appeal against, or reviewing, a sentence. An interim order can be made as soon as the assertion has been made if there is a real possibility that a final order will be made. A final order (maximum duration 12 months) must be made as soon as reasonably practicable after the sentence is passed.

An order must not be made in relation to an assertion if it appears to the court that the assertion was previously made at the trial at which the person was convicted of the offence or during any other proceedings relating to the offence.\(^\text{101}\)

Such orders may be revoked at any time and orders made after the handing down of a sentence automatically cease to have effect after 12 months.

Home Office Circular 24/3/1997 suggests that the media or other third parties can make applications, perhaps by written submission, for orders to be revoked.\(^\text{102}\)

**Postponement of derogatory remarks in mitigation**

- Section 58 of the Criminal Procedure and Investigations Act 1996 gives courts the power to postpone reports of certain assertions about named or identified persons that have been made in mitigation
- The court must have substantial grounds for believing that the assertion is derogatory and false or that the facts asserted are irrelevant to the sentence
- Orders must not be made in relation to assertions that were made during the trial or any other proceedings relating to the offence

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5.4 Identification of those involved in court proceedings

At common law, it would be considered inimical to the administration of justice to protect the identity of magistrates presiding over proceedings. Their identity should be made known to press and public.\textsuperscript{110}

The media is particularly concerned about accurate identification of those involved in court proceedings. Announcement in open court of names and addresses enables the precise identification vital to distinguish a defendant from someone in the locality who bears the same name and avoids inadvertent defamation. The Home Secretary issued Circular No 78/1967 in response to press concern. In addition to recommending that courts supply the press with advance copies of court lists, the circular encouraged courts to ensure the announcement in open court of both the names and the addresses of defendants. The circular acknowledges that a person’s address is as much a part of his description as his name. It states that there is therefore a strong public interest in facilitating press reports that correctly describe persons involved. Statutory reporting restrictions, even when automatic, provide for the lawful publication of magistrates’ identities and names and addresses of defendants and others appearing before the courts. Common law also restricts the circumstances in which names and addresses can be withheld from the public or reporting restrictions imposed to prevent or postpone their publication (see above).

In \textit{Re Trinity Mirror} [2008] QB 770, [2008] EWCA Crim 50, the Court of Appeal stated: “it is impossible to over-emphasise the importance to be attached to the ability of the media to be able to report criminal trials which represents the embodiment of the principle of open justice in a free country. An important aspect of the public interest in the administration of criminal justice is that the identity of those convicted and sentenced for criminal offences should not be concealed. From time to time occasions will arise where restrictions on this principle are considered appropriate but they depend on express legislation and, where the court is invested with a discretion to exercise such powers, on the absolute necessity for doing so in the individual case.”\textsuperscript{111}

5.5 Committal for Contempt of Court

The Lord Chief Justice has issued a Practice Direction setting out the requirements for open justice in relation to committals for contempt of court.\textsuperscript{112} The Practice Direction applies to all proceedings for committal for contempt of court and to all courts in England and Wales.

The fundamental requirement is that all committal hearings, whether on application or otherwise and whether for contempt in the face of the court or for any other form of contempt, shall be listed and heard in public. If a court is exceptionally considering derogating from the general rule and holding a committal hearing in private, or imposing any other restriction on open justice, it must give advance notice to the national print and broadcast media and hear submissions at the outset of the hearing from the parties and the media. Where the court decides to hold a committal hearing in private, it must first sit in public and give a reasoned judgment setting out the basis for its decision.
The Practice Direction provides that in all cases where a court finds that a person has committed a contempt of court, whether or not the court conducted the hearing in public or in private, the court must at the conclusion of the hearing sit in public and provide information about the case including the name of the person, the nature of the contempt of court in relation to which the committal order is being made and the punishment being imposed. This information must also be provided to the national media and the Judicial Office, for publication on the website of the Judiciary of England and Wales. For the avoidance of any doubt, the Practice Direction states in terms that “There are no exceptions to these requirements”.

In relation to all committal decisions, the court must also produce a written judgment setting out its reasons, or ensure that any oral judgment is transcribed on an expedited basis.

5.6 Unauthorised recording of court proceedings

Unauthorised tape recording of proceedings in court is a contempt of court under s.9 of the Contempt of Court Act 1981 and may be subject to forfeiture. However, courts may at their discretion permit journalists to record proceedings in court as an aide memoire. The recording must not be broadcast or used to brief witnesses: see Criminal Practice Direction 2015 Amendment No 3 [2015] EWCA Crim 430 at Part 16A.2

It is an offence to take photographs or make sketches (with a view to publication) or attempt to do so in court, in respect of a judge, a juror, witness or party if in the court room, court building or court precincts including the cell area. The court can issue guidance on the extent of the precincts of the court buildings e.g. by way of a map. The prohibition on the taking of photographs includes taking pictures on a mobile phone, video recordings, photographs on conventional cameras or by any other means.

The Crime and Courts Act 2013 s.32 empowers the Lord Chancellor to make regulations disapplying the prohibitions in section 41 of the Criminal Justice Act 1925 and section 9 of the Contempt of Court Act 1981, thereby permitting the filming and broadcasting of court proceedings. In July 2013 the first regulations came into effect; they permit the recording and broadcasting, subject to detailed safeguards, of certain proceedings in the Court of Appeal. In addition, any criminal appeals which reach the Supreme Court are filmed and broadcast live on the Supreme Court Live service which applies to all Supreme Court hearings.

5.7 Live, text-based communications from court

In December 2011 the Lord Chief Justice issued guidance on using laptops and hand-held devices to communicate directly from courts in England and Wales e.g. by sending emails or by tweeting. This guidance has now been subsumed into the Criminal Practice Direction 2015 Amendment No 3 [2015] EWCA Crim 430 at Part 16C. The Practice Direction provides that a representative of the media or a legal commentator who wishes to use live, text-based communications may do so without making an application to the court, as it is presumed that they will be doing so for the purpose of preparing fair and accurate reports of the proceedings and that this does not pose a danger of...
interference with the proper administration of justice. A member of the public who wishes to make live, text-based communications from court is required to make an application for permission, which may be done informally by communicating a request to the judge through court staff.

The Practice Direction makes it clear that a judge always retains full discretion to prohibit live, text-based communications from court, the touchstone being whether such communications may interfere with the administration of justice. It states that all electronic devices must be used in silent mode and that the court may limit the use of such devices, e.g. to members of the media only, where there is the potential for interference with the court’s own sound recording equipment. For the avoidance of doubt, the Practice Direction underlines that use of mobile devices for these purposes remains subject to the statutory bans on taking photographs in court and on making sound recordings. Users of electronic devices to make live, text-based communications must also comply with the strict provisions of sections 1, 2 and 4 of the Contempt of Court Act 1981 in relation to the reporting of court proceedings.

5.8 Jury’s deliberations

It is a criminal offence under s20D Juries Act 1974 to obtain, disclose or solicit any details of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings. The prohibition on disclosure binds both jurors themselves and the media in relation to the publication of any such disclosure.  

5.9 Jigsaw identification

Jigsaw identification refers to the phenomenon whereby the identity of a person protected by a reporting restriction order may be inadvertently disclosed as a result of different media reports, none of which breach the terms of any order or statutory provision, but which taken together enable the protected person to be identified. In most cases this is not an issue, but particular difficulties arise in relation to sex offences within the same family. For example, where one report refers to an unnamed defendant convicted of raping his daughter and another refers to the name of the defendant, the daughter will be identifiable to the public in breach of the automatic prohibition protecting victims of sexual offences.

In recognition of these potential difficulties the newspapers and broadcasters have aligned their respective codes so that the media adopts a common approach when reporting sexual offences. Typically the media will name the defendant but not name the victim (this would breach the statutory prohibition) or give any details of his or her relationship with the defendant. It is routine for in-house lawyers to check what information is already in the public domain before advising on whether a report of court proceedings is likely to breach any legal requirement, so even in non-sex cases in practice the media often ends up adopting a common approach.
Are these proceedings in the Youth Court?

Automatic ban on identifying a child under 18 in the proceedings and on publishing name, address, school and photo (except in proceedings for breach of an ASBO) (s49 CYPA 1933)

Is this prosecution for a sexual offence?

Automatic ban on identifying the victim of the offence during their lifetime (s2 Sexual Offences (Amendment) Act 1992)

Are these allocation or sending proceedings in the Magistrates’ Court?

Automatic restriction limits reporting to specified matters until the conclusion of the trial (s52A Crime and Disorder)

Is the hearing a dismissal application in the Crown Court?

If application unsuccessful automatic restriction limits reporting to specified matters until the conclusion of the trial (Various Acts)

Is the hearing a pre-trial hearing in the Crown Court?

Automatic ban on reporting the hearing until the conclusion of the trial (s41 CPIA 1996)

Is the hearing a preparatory hearing in the Crown Court?

Automatic restriction limits reporting to specified matters until the conclusion of the trial (Various Acts)
Reporting Restrictions Guide

Discretionary Reporting Procedures

**Protecting the welfare of Under-18 Witnesses, Victims & Defendants**

1. Is there a child or young person under 18 concerned in the proceedings as a victim, witness or defendant?

2. Is there a good reason for ordering that the child should not be identified having regard to the welfare, privacy and best interests of the child?

3. On the specific facts of this case, do these factors outweigh the strong public interest in open justice?

4. Is the proposed restriction necessary and are the terms of the proposed order proportionate?

The court may order the media and online publishers under s.45 YJCEA 1999 not to publish specific information that is likely to lead members of the public to identify him as being concerned in the proceedings. An order made under s.45 will last until the person reaches the age of 18 and then ceases to have effect.

**Lifetime Anonymity for Witnesses and Victims (Under-18 and Adult)**

1. Is there a victim or witness in the proceedings (other than the accused) whose evidence or co-operation with the case is likely to be diminished by reason of fear or distress in connection with being identified?

2. On the specific facts of this case, do the interests of justice and the welfare of the child in the case of a person aged under-18 favour making the order, or would such an order impose a substantial and unreasonable restriction on the reporting of the proceedings taking into account the open justice principle?

3. Is the proposed restriction necessary and are the terms of the proposed order proportionate?

The court may order the media and online publishers under s.45A JYCEA 1999 (under-18s) and s.46 JYCEA 1999 (adults) not to publish specific information relating to the victim or witness during his lifetime that is likely to lead members of the public to identify him as being concerned in the proceedings. This reporting restriction is not available for defendants.
Names and other matters withheld in court

1. Is there a power, common law or statutory, to withhold the material from the public in open court?

2. On the facts of this case have the criteria for exercising that power been fulfilled? Are the common law conditions satisfied or the statutory terms met?

3. Do the circumstances outweigh the strong public interest in open justice?

4. Has the material been withheld from the public in open court or will it be?

5. Is it necessary and proportionate to prohibit publication by the media?

The court may order the media under s.11 CCA 1981 not to publish the name or matter that has been withheld.

Postponement of fair and accurate reports

1. Would a fair, accurate and contemporaneous report of the proceedings (or part thereof) published in good faith create a substantial risk of prejudice to the administration of justice in those or other proceedings?

2. Is an order postponing the publication of such reports necessary and are its terms proportionate? Would such an order eliminate the risk of prejudice to the administration of justice? Could less restrictive measures achieve the objective?

3. On the specific facts of this case, does the public interest in protecting the administration of justice outweigh the strong public interest in open justice?

The court may order the media under s.4(2) CCA 1981 to postpone publication of such reports until a specific event or for a specific period of time.

All discretionary reporting restrictions should be put in writing and made available to the media.
1 The Contempt of Court Act 1981 applies to all publications and nearly all of the automatic and discretionary reporting restrictions referred to in this guidance would apply in practice to online publishers and individual users of social media websites.
7 Criminal Procedure Rules 2015, rule 6.2(3), Criminal Practice Direction (October 2015), para 6B.4(e).
8 https://www.cps.gov.uk/legal/p_to_r/prosecuting_advocates_instructions
9 CPS Legal Guidance: Contempt of Court and Reporting Restrictions. Available at www.cps.gov.uk/legal/a_to_c/contempt_of_court
10 CPS Legal Guidance: Reporting Restrictions – Children and Young People as Victims, Witnesses and Defendants. Available at: http://www.cps.gov.uk/legal/p_to_r/reporting_restrictions/
12 Scott v Scott [1913] AC 417.
13 Global Torch v Apex Global Management Ltd [2013] 1 WLR 2993 (CA). The court held that hearings in public where integral to open justice and that open justice, Article 10 and Article 6 ECHR would generally trump the Article 8 rights to reputation of parties and witnesses in a civil case. The same considerations in favour of open justice would carry even greater weight in a criminal case.
15 Criminal Procedure Rules 2015, rule 6.6(1).
16 Ibid, r.6.6(2).
17 Ibid, r.6.6(5).
18 Ibid, r.6.7.
19 Criminal Procedure Rules 2015, r.6.6(8).
20 Criminal Procedure Rules 2015, r.6.6(3)(c).
21 Youth Justice and Criminal Evidence Act 1999, s.25(3).
22 Ibid, s.75(3).
23 Hodgson v Imperial Tobacco [1998] 1 WLR 1056, per Lord Woolf at p.1072C.
24 The Government has said that the HMCTS Protocol on supply of court registers to the local press and the Criminal Procedure Rules relating to access to court documents will continue to apply to such cases, although
27 For example individuals who posted on social network websites revealing the identity of a victim of rape by the former footballer Ched Evans were convicted of offences under this provision. See e.g. www.theguardian.com/uk/2012/nov/05/ched-evans-rape-naming-woman
29 It is a defence to an offence of publishing identifying matter under s.5 of the Sexual Offences (Amendment) Act 1992 to show that the complainant gave written consent to the publication: see s.5(2).
30 Ibid, s.1(4).
31 “Report of the Advisory Group on the Law of Rape” (The Heilbron Committee), Cmnd. 6352, paragraphs 168-172. As the purpose of the anonymity provision is to encourage complainants in sexual offences cases to come forward, it would be inconsistent with the statutory purpose if dropping a sexual offence charge during the course of proceedings had the effect of removing anonymity. In addition, any interpretation that anonymity automatically falls away in such circumstances creates problematic conflicts e.g. it could lead to sexual offences charges being maintained in order to ensure continued anonymity, in circumstances where dropping the charge (e.g. in a negotiated plea) was in the interests of justice.
32 Ibid, s.3.
33 Ibid, s3(3).
34 Criminal Procedure Rules, rule 15.1.
Criminal Procedure and Investigations Act 1996, s.37; Criminal Justice Act 1987, s.11.

Criminal and Disorder Act 1998, Schedule 3.

The new regime began in specific local justice areas on 18 June 2012 and was extended to the whole country on 28 May 2013 by the Criminal Justice Act 2003 (Commencement No 31 and Saving Provisions) Order 2013/1103.

Children and Young Persons Act 1933, s.49(2)

The UN Convention on the Rights of the Child 1989 has been ratified by the United Kingdom and applies to all children under the age of 18. Article 40(2)(b)(vii) entitles every child ‘accused of having infringed the penal law…[t]o have his or her privacy fully protected at all stages of the proceedings.’

The UN Standard Minimum Rules for the Administration of Justice 1985 (the Beijing Rules) are not binding. Rule 8 invites States to protect the privacy of defendants and offenders under 18. In particular, rule 8.1 indicates the ‘juvenile’s right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling’ and rule 8.2 indicates ‘no information that may lead to the identification of a juvenile shall be published’.


McKerry v Teesdale and Wear Valley Justices [2001] EMLR 5, per Lord Bingham CJ at [17].

McKerry v Teesdale and Wear Valley Justices [2001] EMLR 5, per Lord Bingham CJ at [17].

Children and Young Person’s Act 1933, s.49(4B).

Criminal Procedure Rules 2015, r.6.2(3).

Criminal Procedure Rules 2015, r.6.2(3).

In R v Clerkenwell Metropolitan Stipendiary Magistrate, ex parte The Telegraph Plc [1993] QB 462, May LJ held at p.462 that a court contemplating making a s.4(2) order should receive assistance from those who would, absent the order, have a right to report the proceedings and that the media is “the best qualified to represent that public interest in publicity which the court has to take into account in performing any balancing exercise which has to be undertaken.”

Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into force on 12 March 2015, provides that following commencement of that provision fines which would, on summary conviction, have been punishable by a maximum fine at Level Five on the Standard Scale (£5,000) shall in future be punishable by a fine of any amount. As pointed out in MOJ Circular No 2015/02 at para 32, courts will continue to set fines according to the seriousness of the offence and the means of the offender.

This change follows the judgment of Mr Justice Tugendhat in MXB v East Sussex Hospitals Trust [2012] EWHC 3279 (QB), where he held that s.39 CYPA only applied to reports of court proceedings in newspapers and broadcast services and did not cover online publications. The same finding was made by Sir Brian Leveson in JC & RT v Central Criminal Court [2014] EWHC (1041). This deficiency was remedied by an amendment to s.39 CYPA in s.79(7) of the Criminal Justice and Courts Act 2015, widening the definition of publication in s.39.

R v H [2015] EWCA Crim 1579, per Treacy LJ at [8].

http://www.cps.gov.uk/legal/p_to_r/reporting_restrictions/

R v H [2015] EWCA Crim 1579, per Treacy LJ at [7].


The UN Convention on the Rights of the Child 1989 has been ratified by the United Kingdom and applies to all children under the age of 18. Article 40(2)(b)(vii) entitles every child ‘accused of having infringed the penal law…[t]o have his or her privacy fully protected at all stages of the proceedings.’
The UN Standard Minimum Rules for the Administration of Justice 1985 (the Beijing Rules) are not binding. Rule 8 invites States to protect the privacy of defendants and offenders under 18. In particular, rule 8.1 indicates that the juvenile’s right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling and rule 8.2 indicates that ‘no information that may lead to the identification of a juvenile shall be published’.


R(A) v Lowestoft Magistrates’ Court [2014] 1 WLR 1489, per Kenneth Parker J at [10].

R v H [2015] EWCA Crim 1579, per Treacy LJ at [8].

Ex parte Crook [1995] 1 WLR 139.

R(Y) v Aylesbury Crown Court [2012] EWHC 1140 (Admin), per Hooper LJ at [44].

R(Y) v Aylesbury Crown Court [2012] EWHC 1140 (Admin), per Hooper LJ at [42].

R(Y) v Aylesbury Crown Court [2012] EWHC 1140 (Admin), per Hooper LJ at [19].

R(Y) v Aylesbury Crown Court [2012] EWHC 1140 (Admin), per Hooper LJ at [46].


R(Y) v Aylesbury Crown Court [2012] EWHC 1140 (Admin), per Hooper LJ at [46].

Criminal Procedure Rules 2015, r.6.4(3)(e).


Criminal Procedure Rules 2015, r.6.4(3)(f).

See Youth Justice and Criminal Evidence Act 1999, s.46(4).

See Youth Justice and Criminal Evidence Act 1999, s.46(8).


Serious Organised Crime and Police Act 2005, s.75(2)(b).

Ibid, s.75(3).

Re Trinity Mirror [2008] 2 Cr.App.R. 1, CA.


R v Marines A, B, C, D & E [2013] EWCA Crim 2367, para 84.


R v Dover JJ ex parte Dover District Council 156 JP 433, DC.


In re Officer L [2007] 1 WLR 2135.

R(M) v The Parole Board [2013] EWHC 141 (Admin).

Re Trinity Mirror [2008] 2 Cr.App.R. 1, CA (and any such injunction ought not restrain the publication of the defendant’s name or nature of his/her conviction, on the basis that his/her children would thereby be harmed).


Independent Publishing Co Ltd v AG of Trinidad and Tobago [2005] 1 AC 190.


R v B [2007] EMLR 5. (A case where the DPP supported the media’s appeal against reporting restrictions imposed in a terrorism case.)


Application for leave to appeal by MGN Limited [2011] EWCA Crim 100, para 15.


Re Times Newspapers Ltd [2008] 1 WLR 234.

Application for leave to appeal by MGN Limited [2011] EWCA Crim 100, para 23.


See s.58(5) Criminal Procedure and Investigations Act 1996

The Home Office Circular also provides guidance to court staff on: the prompt notification of the media when an order has been made; the display and content of notices on court premises and the availability of more detailed information; the entry into the court register of the dates on which the order commences and ceases to have effect; its statutory basis; whether interim or final; names of the defendant and the third party protected; and the derogatory assertions.
See Anti-social Behaviour, Crime and Policing Act 2014, s.17.

https://www.courtservice.net/


Criminal Procedure Rules 2015, r.5.8(9)-(11).

See http://www.lawcom.gov.uk/project/contempt-of-court-reporting/. While the recommendation of a reporting restriction website is very welcome there seems to be no good reason in principle why such a website should be restricted to s.4(2) orders, as the same difficulties regarding accessibility and notification apply to all discretionary reporting restrictions.


https://www.cps.gov.uk/publications/agencies/mediaprotocol.html


Practice Direction: Committal for Contempt of Court – Open Court, 26 March 2015.

Criminal Procedure Rules 2015, r.6.10.

See ibid, r.6.9.

See Criminal Justice Act 1925, s.41.

Court of Appeal (Recording and Broadcasting) Order 2013, SI 2013/2786.

See Supreme Court Practice Direction 8, paragraph 8.17.1.


Section 39(3) was introduced by s.79(7) of the Criminal Justice and Courts Act 2015.

R v Jolleys; Ex parte Press Association [2013] EWCA Crim 1135, paras 12-13; cf a case brought “in respect of” a child, which may be sufficient for s.39: R(A) v Lowestoft Magistrates’ Court [2013] EWHC 659 (Admin), paras


R v Jolleys; Ex parte Press Association [2013] EWCA Crim 1135, para 19.


Ibid.


Ex parte Crook [1995] 1 WLR 139.


See e.g. R(A) v Lowestoft Magistrates’ Court [2014] 1 WLR 1489 at [24]-[26].

R v Central Criminal Court ex parte S [1999] 1 FLR 480, DC.

JC & RT v Central Criminal Court [2014] EWHC (1041) (Divisional Court).