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

Case No: HC-2016-002849

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	**Claimant**
- and -	
The British Broadcasting Corporation	
The Chief Constable of South Yorkshire Police	**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.

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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 ex post facto 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.

75. In a further attempt to make contact, Miss Kitterick emailed Mr Hall at 11:00am 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.

76. 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.

77. 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).

78. 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.

79. 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.

80. 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 1215 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 an 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

to face similar treatment at an airport on a public flight, he chartered a plane back to England.

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 cldn'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 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."

187. 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.

188. 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.

189. 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 renege 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 <u>not</u> 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 co-operation. 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 co-operating, 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 thoughout 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.
(b) If he prima facie had such rights, was the BBC nonetheless justified in publishing by virtue of its rights of freedom of expression?
(c) If he had those rights, was there an infringement, and if so what damages flow from that?
(d) If the BBC is liable to Sir Cliff, what rights of contribution exist as between the BBC and SYP.

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:

> "People in the public eye may, in some circumstances, have a lower legitimate expectation of privacy."

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.

322. 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

323. 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

324. 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.

325. 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 world-wide 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 *Khuja* 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 Milllar 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.

359. 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

360. 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.

361. 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 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.

> "51. Section 2 of the 1978 Act is not expressed exclusively in terms of causative responsibility for the damage in question, although obviously the court must have regard to this, as the section directs, and it is likely to be the most important factor in the assessment of relative responsibility which the court has to make. But in the result the court's assessment has to be just and equitable and this must enable the court to take account of other factors as well as those which are strictly causative. Such an assessment made by a trial judge will only be altered on appeal if it is clearly wrong." (*Re-Source America International Ltd v Platt Site Services Ltd* [2004] EWCA Civ 665 per Tuckey LJ).

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 pre-supposes 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 Niedersachsiches Oberverwaltsungericht* [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

[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 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 manoeuvered 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.