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Case No: VARIOUS AS ON THE REGISTER

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS LIST (ChD)**

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

Date: 02/08/2019

**Before** :

**MR JUSTICE MANN**

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**Between :**

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|---|---|
| **VARIOUS 3RD WAVE CLAIMANTS** | **Claimants/ Respondents** |
| **- and -** | |
| **MGN LIMITED** | **Defendant/ Applicant** |

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**David Sherborne** and **Julian Santos** (instructed by **Shoosmiths LLP** and **Clintons Solicitors**) for the **Claimants/Respondents**
**Richard Spearman QC** and **Richard Munden** (instructed by **RPC LLP**) for the **Defendant/Applicant**

Hearing dates: 5th & 6th June 2019

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# Approved Judgment

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

**Mr Justice Mann**

# MGN STRIKEOUT JUDGMENT

## Introduction

1. This is a combined summary judgment and strikeout application made by the defendant in this managed litigation in which large numbers of individuals sue the defendant for invasions of their privacy by unlawful information gathering. The prime techniques of unlawful information gathering alleged against the defendant are voicemail interception ("phone hacking") and instructing private investigators to obtain information such as phone records, credit card details, car registration details and other private information. The general activities have been the subject of my prior judgment in *Gulati and others v MGN Ltd* [2015] EWHC 1482 (Ch) to which reference should be made for further background.

2. The litigation has proceeded in waves, in which timetables operate in relation to cases gathered within a given current period, with later cases being stayed until the preceding wave has been dealt with. So far large numbers of cases have settled, with only 8 ever having been tried (in the *Gulati* trial). The settlement dynamic is very important to the proper management of this litigation. The defendant has often said that it will settle all justifiable claims and various steps in the action (such as a regime for early disclosure) have been devised in order to facilitate settlement.

3. The damages claims of the claimants in this case centre on two matters - the publication of articles as a result of unlawful information gathering, and the invasion of privacy from the unlawful information activities themselves. Both were held by me in *Gulati* to give rise to damages claims, that is to say a claimant is entitled to claim damages in respect of the unlawful information gathering and phone hacking of themselves, whether or not a published article results, and for the published article as well if it contains or is founded in wrongfully acquired private information (making adjustments to make sure that there is no double counting). Typically, the pleaded cases of claimants claim both types of damage.

4. The present applications turned primarily on the content of pleaded articles. The number of articles pleaded by claimants varies from between 10 or 20, to, in some cases, many dozens. The principal difference between cases in the current Wave (Wave 3) and the cases that were dealt with in the *Gulati* decision is that in the latter case the defendant

accepted that (in respect of practically all the articles in dispute) the articles contained private information and that that private information was the result of unlawful information gathering. In later cases the posture of the defendant has changed. It disputes that many articles contain private information, and it disputes, or at least does not accept, that the articles were the result of unlawful information gathering. In the normal run of litigation those key areas of dispute would be dealt with at a trial. However, the defendant maintains that many articles are articles in respect of which there cannot realistically be said to be a claim, on the footing that either the articles manifestly do not contain private information and/or the claimants will not be able to prove that the articles were published as a result of unlawful information gathering, principally on the basis that the information in the articles was the subject of prior publication in other mass circulation media.

5. In these applications the defendant seeks to demonstrate that in relation to a large number of articles in the interests of what it would describe as proper case management. It complains that claimants tend to plead what it regards as hopeless articles (alongside articles which do not attract that adjective) and those articles run up costs unnecessarily and get in the way of the settlement process. It says that in order to deal with the claims, once the articles are pleaded the defendant has to carry out its own researches and it finds, as it says the claimants could find, that the content of some articles were the subject of prior publication, and ought never to have been pleaded as resulting from unlawful information gathering. The exercise of the defendant having to research those matters for itself is said to increase costs unnecessarily and take time, effort and delay, and negotiating about the hopeless articles adds further complexity to settlement negotiations. The principal objects of complaint are articles pleaded by one of the several solicitors' firms who act for claimants. The accusation of pleading clearly hopeless articles is not levelled against all solicitors. The defendant seeks to bring about a situation in which such articles are no longer pleaded so that the dispute can be concentrated on what the defendant would say are properly arguable articles.

6. In order to achieve that end the defendant brings the present applications. Their original object was to demonstrate its point by taking a sample of 50 articles, taken as samples from a wide range of claimants, and to make its point in relation to those articles. As a matter of case management it seemed to me that that was an unnecessary number of articles to take, at least in the first instance, in order to make the point. Accordingly, last December, when the matter was originally going to come on for hearing, I required the defendant (at a directions hearing) to reduce the number of articles to 20, which I considered to be a reasonable number for the defendant to take in order to make good its point that there was a problem. For reasons I do not need to go into, the matter was not heard at that point and it comes on now for hearing, some six months later. As will appear, when I saw how the case was developed, I felt able to reduce a consideration of the point, at least initially, to 10 articles chosen by the defendant. I considered that those 10 articles ought to suffice to enable the defendant to make its point on the poverty of any

pleading, though it would not necessarily demonstrate the scale of the problem. Questions of scale could come later. In the end it transpired that even taking 10 articles took up a large part of the time which had originally been allocated to dealing with 20.

**The point of the applications**

7. The applications before me are unusual in that they are test applications. That was the case even when there were 50 of them. The defendant seeks to make its point in relation to the sample articles without saying that the articles in question are all those which currently offend. The question inevitably arises as to what should be done if the defendant succeeds. If the defendant succeeds on the sample articles that does not, of itself, have any effect on existing pleaded articles outside the scope of the samples, which would then need to be dealt with separately. Obviously it would not have any direct effect on cases yet to be pleaded. One therefore has to wonder what the point of the exercise is. That was not developed at the time I gave directions for the hearing of the applications, but I did give a strong indication that I would be most unlikely to entertain a range of future striking out applications targeting all potentially suspect articles in all cases, both present and future. That would be likely to lead to an unacceptable amount of interlocutory litigation. If it would not deal with all existing pleadings, or future pleadings, on a clear basis, then one has to ask what the point of the exercise would be.

8. The answer to that has not been fully addressed, and I did not require that to be done before I heard the application, although I confess to having misgivings all along as to where the process might lead. Since it seemed to me to be so unlikely that it would be justifiable to allow a series of detailed striking out applications on a number of articles on a claimant by claimant basis, it was not immediately apparent what useful result could be achieved by considering a more limited number of instances (whether 10, 20 or 50) in an application such as the present. However, it did not seem to me to be right, without considering the substance of the application at all, to refuse to consider the defendant's complaints at all. As Mr Spearman QC for the defendant said, if there is a serious problem then it would be very unfortunate if it could not be addressed by case management or otherwise. There is something in that.

9. Accordingly, with some misgivings about the wisdom of the expenditure of time and effort involved, I allowed the application to proceed so that it could be determined whether there was anything in it and, if so, whether useful work could be done in relation to other articles and other cases (both present and future), particularly with a view to the settlement dynamic of the litigation.

**Normal principles of striking out/summary judgment**

10. I do not need to dwell much on this point. Nor do I need to dwell on the technical differences between striking out under CPR 3.4(2) and summary judgment under CPR 24. Each side rounded up some of the usual suspects in terms of the applicable authorities, and emphasised the principles which benefited them. Thus, for example, the claimants emphasised the undesirability of having a mini-trial (which they said the present application was) and the justification of taking a case to trial so that the court has the full picture on the basis of full evidence; and the defendant emphasised the need for a court to address the questions put before it as to the real prospects of success for any given part of the claim so that a bad claim can be disposed of at an early stage. It suffices for me to set out the principal authorities which I consider express the principles which are most useful to the present applications. I can confine myself to the following citations.

11. So far as summary judgment is concerned it is appropriate to proceed on the basis set out by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch):

> 15 … i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: *Swain v Hillman* [2001] 1 All ER 91 ;
>
> ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8];
>
> iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain v Hillman;*
>
> iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at [10];
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> v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550;
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> vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial

> than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63;
>
> vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.

12. In *Calland v Financial Conduct Authority* [2015] EWCA 192 Lewison LJ summarised other facets of the inquiry (with reference to other authority) as being the following:

> " 28 …The fact that some factual or legal questions may be disputed does not absolve the judge from her duty to make an assessment of the claimant's prospects of success…
>
> 29. In evaluating the prospects of success of a claim or defence the judge is not required to abandon her critical faculties…"

13. Those are really the key principles which I will have to apply.

14. Mr Spearman also relied on *Jameel v Dow Jones & Co Inc* [2005] QB 946 as justifying striking out in this case if the claim is too trivial to be worthy of court and party resources to resolve it. In some instances Mr Spearman did indeed rely on the apparent triviality of the privacy allegation as being not worth litigating over. If it were the case that there was such a level of triviality, and if the instance were a standalone case without the alleged context of serial infringements which are alleged by the claimants then the point might arise. However, none of the cases have that quality. The allegations are made as part of a pattern, and it may be (I do not need to decide it in any given case) that apparently

trivial cases have a signficance as part of a pattern so that, even though they might not justify significant sums in damages, the pattern is important for wider claims made by the claimant in question. So the role of *Jameel* may be rather less significant in this sort of litigation.

15. Having said that, I bear in mind the fact that it is said that in some cases the alleged private matter is so trivial as not to attract privacy at all. That is a different point. Were that to be the case there would be a case for striking out or summary judgment on the basis that damages could not be claimed for the article at all. It would not be simply that the article was not worth suing on; such a case would be an instance of an article that could not, in law, be sued on (or not without more). I bear that distinction in mind.

16. Since it is unnecessary to distinguish between summary judgment and striking out for the purposes of these applications, any reference hereafter to the one should be taken to include the other.

**Relevant aspects of the law of privacy**

17. There were various common themes relating to the law of privacy running through the attacks on the various articles, extracted from a number of authorities. In this section of this judgment I shall set out the basic principles which I find to be applicable, though when considering some of the articles I shall have to consider some aspects of the law again in order to consider what is said to be the proper application of the law to the particular facts. In considering the legal points that arise I bear in mind that an application of this nature is unlikely to be an appropriate vehicle for deciding legal subtleties, especially where the subtleties arise out of particular facts of uncertain scope.

18. Whether a person has a reasonable expectation of privacy under Article 8 of the Human Rights Convention, enacted in the Human Rights Act 1998, in relation to a given activity or disclosure is dependent on all the circumstances of the case. The position can now be taken to be that set out in *Murray v Express Newspapers* [2009] Ch 481 (and followed or approved in several cases thereafter):

> "35. In these circumstances, so far as the relevant principles to be derived from *Campbell v MGN Ltd* [2004] 2 AC 457 are concerned, they can we think be summarised in this way. The first question is whether there is a reasonable expectation of privacy.

> This is of course an objective question. The nature of the question was discussed in Campbell v MGN Ltd . Lord Hope emphasised that the reasonable expectation was that of the person who is affected by the publicity. He said, at para 99:
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> "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity."
>
> We do not detect any difference between Lord Hope's opinion in this regard and the opinions expressed by the other members of the appellate committee.
>
> 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."

19. In making an assessment of whether there is a legitimate expectation of privacy the court may have to assess whether information is too trivial to attract protection - see the following passages from *Ambrosiadou v Coward* [2011] EWCA Civ 409:

> "28. For the claimant, Mr Richard Spearman QC understandably concentrated on unredacted passages in the latter category, as they referred to personal matters. However, to put it at its lowest, the Judge was, in my opinion, entitled to take the view that those passages contained information of a trivial nature, of a low level of personal significance, in respect of which the claimant did not really have any expectation of privacy, and which therefore did not attract art.8 protection.

…

> 30. In my view, these statements are of a nature which should not normally be protected by the courts, because they do not appear to contain information in respect of which the claimant had a

> reasonable expectation of privacy, and, in this case, a judge could reasonably have formed such a view. Just because information relates to a person's family and private life, it will not automatically be protected by the courts: for instance, the information may be of slight significance, generally expressed, or anodyne in nature. While respect for family and private life is of fundamental importance, it seems to me that the courts should, in the absence of special facts, generally expect people to adopt a reasonably robust and realistic approach to living in the 21st century."

20. The same point is made in *McKennitt v Ash* [2008] QB 73 at para 12. I am invited to apply this principle to some of the articles which are the subject of the present applications. However, it must be applied with care because apparent triviality, taking a particular item in isolation, may not be a complete answer. In *McKennit v Ash* at para 22 the Court of Appeal approved the cautious approach of Eady J at first instance in giving protection to what might seem, in isolation, not particularly significant aspects of home decoration and furnishing. And in *Browne v Associated Newspapers Ltd* [2008] QB 103 the Court of Appeal said:

> "33. The nature of the relationship is of considerable importance. For example, the mere fact that the piece of information can be regarded as trivial does not seem to us to be decisive against answering Lord Nicholls's question [namely, whether, on the disclosed facts, the claimant had a reasonable expectation of privacy - see para 32] in the affirmative. As the passage quoted above from para 135 of Eady J's judgment in *McKennitt v Ash* [2006] EMLR 178 shows, it may or may not be. We agree with the general proposition advanced by Ms Sharp that the question whether any particular piece of information qualifies as private and the claimant has a reasonable expectation of privacy in respect of it, requires a detailed examination of all the circumstances on a case by case basis. The circumstances include the nature of the information itself and the circumstances in which it has been imparted or obtained. We will return to this consideration in the context of the facts."

21. As will become apparent, one of the factors relied on by the defendant in many of these applications is a prior publication of what is said to be the same information. It is said that a privacy claim cannot be maintained in those circumstances. In considering that claim it is necessary to have in mind that in a privacy case, unlike a confidentiality case,

privacy is not necessarily lost by a prior revelation of the same material. In *PJS v News Group Newspapers Ltd* [2016] AC 1081 Lord Neuberger said:

> "57. If PJS's case was simply based on confidentiality (or secrecy), then, while I would not characterise his claim for a permanent injunction as hopeless, it would have substantial difficulties. The publication of the story in newspapers in the United States, Canada, and even in Scotland would not, I think, be sufficient of itself to undermine the claim for a permanent injunction on the ground of privacy. However, the consequential publication of the story on websites, in tweets and other forms of social network, coupled with consequential oral communications, has clearly resulted in many people in England and Wales knowing at least some details of the story, including the identity of PJS, and many others knowing how to get access to the story. There are claims that between 20% and 25% of the population know who PJS is, which, it is fair to say, suggests that at least 75% of the population do not know the identity of PJS, and presumably more than 75% do not know much if anything about the details of the story. However, there comes a point where it is simply unrealistic for a court to stop a story being published in a national newspaper on the ground of confidentiality, and, on the current state of the evidence, I would, I think, accept that, if one was solely concerned with confidentiality, that point had indeed been passed in this case.
>
> 58. However, claims based on respect for privacy and family life do not depend on confidentiality (or secrecy) alone. As Tugendhat J said in *Goodwin v News Group Newspapers Ltd [2011] EMLR 27* , para 85, "the right to respect for private life embraces more than one concept". He went on to cite with approval a passage written by Dr Moreham in The Law of Privacy and the Media , 2nd ed (2011), (eds Warby, Moreham and Christie), in which she summarised "the two core components of the rights to privacy" as "unwanted access to private information and unwanted access to [or intrusion into] one's … personal space" —what Tugendhat J characterised as "confidentiality" and "intrusion".
>
> 59. Tugendhat J then went on to identify a number of cases where "intrusion had been relied on by judges to justify the grant of an injunction despite a significant loss of confidentiality …
>
> 60. Perusal of those decisions establishes that there is a clear, principled and consistent approach at first instance when it comes to balancing the media's freedom of expression and an individual's rights in respect of confidentiality and intrusion."

22. Whether privacy has effectively been destroyed, or reduced to such an extent to make the subsequent publication one which becomes immaterial in intrusion terms, will depend on the facts of each case, but the important point is that the prior publication does not automatically destroy a privacy claim. This is made clearer by the judgment of the House of Lord in *Douglas v Hello! Ltd* [2008] 1AC 1 (to use the case's more familiar parties' names). At para 255 Lord Nicholls made the position clear:

> "255. As the law has developed breach of confidence, or misuse of confidential information, now covers two distinct causes of action, protecting two different interests: privacy, and secret ("confidential") information. It is important to keep these two distinct. In some instances information may qualify for protection both on grounds of privacy and confidentiality. In other instances information may be in the public domain, and not qualify for protection as confidential, and yet qualify for protection on the grounds of privacy. Privacy can be invaded by further publication of information or photographs already disclosed to the public. Conversely, and obviously, a trade secret may be protected as confidential information even though no question of personal privacy is involved. This distinction was recognised by the Law Commission in its report on Breach of Confidence (1981) (Cmnd 8388), pp 5–6."

The same point was made by Eady J in *McKennit v Ash* at first instance [2006] EMLR 10 at para 81.

23. One further point taken by Mr Spearman in relation to one of the articles was whether there can ever be a right of privacy in relation to something said in open court. That, he said (and as will appear) was sufficient to despatch at least one of the claimed articles in the 10 argued before me.

24. As a prima facie position Mr Spearman would seem to be right. In *Khuja v Times Newspapers Ltd* [2019] AC 187 the Supreme Court considered a claim to restrain the reporting of the identification in open court of a man investigated for sexual abuse but who was not charged. He sought the restraint by invoking Article 8. Lord Sumption embarked on a comprehensive analysis of the principle of open justice and restrictions of it, and reached the following conclusions about the reporting of open court matters:

> "34(1) PNM's application is not that the trial should be conducted so as to withhold his identity. If it had been, the considerations urged by Lord Kerr and Lord Wilson JJSC in their judgments in this case, might have had considerable force. But it is now too late for that. PNM's application is to prohibit the reporting, however fair or accurate, of certain matters which were discussed at a public trial. These are not matters in respect of which PNM can have had any reasonable expectation of privacy. The contrast between this situation and the case where a newspaper responds to a tip-off about intensely personal information such as a claimant's participation in private drug rehabilitation sessions could hardly be more stark …
>
> (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."

25. To the same effect is the prior case of *Crossley v Newsquest (Midlands South) Ltd* [2008] EWHC 3054 (QB) (Eady J):

> "58. The first question always is whether or not there would be a reasonable expectation of privacy. While I would accept that ordinarily people may expect their financial affairs to be accorded privacy, once information of that kind has entered the public domain it may very well be, depending on the particular circumstances, that such protection has been lost. Unfortunately, once something is mentioned in open court, it is difficult to see how there can any longer be such an expectation. The basic rule is that anything said in open court may be reported: see e.g. *R v Arundel Justices, ex parte Westminster Press Ltd* [1985] 1 WLR 708."

This is a powerful point, to which I will return when considering the articles to which it relates.

**General points applicable to various of the articles**

26. There are one or two evidential and other matters which are capable of being relevant to various of the articles and which it is convenient to gather under one heading so that they can be referred to below as necessary.

27. The first is evidence given by two former journalists at the Mirror group, namely Mr Dan Evans and Mr Graham Johnson. They have provided witness statements which give evidence as to the use that journalists would or might have made of information gathered from phone hacking. That included using it (and other techniques) to develop new angles on a story that had already been published, particularly to find an exclusive angle. It also included those techniques to check a story even if the resulting information was not published.

28. Second, the evidence supporting the applications comes from Mr Mathieson, who is the partner at RPC, solicitors to the defendant. He produces documentary material (usually articles which precede the offending article) and makes averments, but insofar as he proposes sources for a story he does not claim to have done to so on the basis of information provided by any journalist involved in it. He is essentially the producer of documentary material and purveyor of inferences, not the conveyer of information from individuals. That is a point frequently relied on by Mr Sherborne.

**The relevant claims - form of pleading**

29. The individual claims which are the subject of these applications all have a similar structural form of pleading, though the details obviously differ. In order to save having to set it out in each case I can summarise it here. Unless the contrary appears, the following description applies to the Particulars of Claim behind all 10 articles.

30. The Particulars start with a description of the parties; then they all have a section which describes the "Targeting of the claimant" - basically, a section describing why the

claimant was of frequent interest to the tabloids. There is then a section describing the significance of the mobile phone usage of each claimant and of his/her associates (persons with whom they frequently dealt by mobile phone, such as friends, relatives or business associates), in each case stating the frequent use of voicemail messages. There follows a pleading of privacy for mobile phone communications followed by a section entitled "MGN's widespread and habitual unlawful newsgathering activities". Under this latter section the claimants plead the use of mobile phone hacking techniques across the newspapers in the Mirror group, the use of private investigators and deliberate attempts at concealment, by reference to the generic facts found by me in my judgment in the *Gulati* case. Then there is a section pleading unlawful acts particular to the claimant in question, usually in the form of unlawful activities of private investigators and interception of mobile phone messages, so far as the claimant can particularise those acts before disclosure, before pleading the actual publications relied on.

31. There is then a section headed "Publications in MGN's newspapers" (or the like) and it is necessary to set out some of the relevant paragraphs verbatim (the paragraph numbers actually vary slightly from case to case, but the content is the same):

> "22. By way of example of MGN's misuse of his private information through the accessing of his voicemail messages and/or the blagging or unlawful obtaining of personal information relating to him, the Claimant will refer to the articles set out in Part C of the Schedule which appeared in MGN's newspapers ("the Articles") and which contained private information about the Claimant and his private life, as further set out therein.
>
> 23. The Claimant will contend that the Articles were derived from or based on or sought to be corroborated by material obtained through accessing his voicemails, and would not have been published but for the voicemail interception or unlawful obtaining of personal information.
>
> 24. The Articles contained the private information set out in Part C of the Schedule which the Claimant contends originated from or was based on or corroborated by information obtained through voicemail interception or the unlawful obtaining of private information, as opposed to a legitimate means…"

32. A further paragraph makes it clear "For the avoidance of doubt" that the publication of the Articles (as opposed to the unlawful information gathering techniques) was the

product of the misuse of private information (deliberately concealed), that it increased the distress and damage suffered by unlawful interception of voicemails or obtaining of personal information by unlawful means, and as giving rise to a free-standing cause of action for misuse of private information in which the circumstances of the publication and the information obtained for it were deliberately concealed, both at the time and subsequently.

33. The significant point emerging from this way of putting the cases is that there were three separate, but related, overall types of infringement of privacy right - first, the unlawful information gathering techniques themselves, second, the use of the fruits of those activities in the publication of articles, and third the publication of the articles themselves.

34. The next section, entitled “Remedies”, pleads that "By reason of the above matters" the claimant had suffered considerable distress and the like as a result of the misuse of his private information. The last section is a section on "Concealment" which is not relevant to the present applications.

35. I can now turn to the articles. I shall take them in the order in which they were advanced before me. The numbers given against the articles are the numbers allocated to them for the purposes of the litigation. In order not to clutter up the reasoning in this judgment, the text, or the relevant parts of the text, of each article appear in an Appendix to this judgment.

**John Hartson - Article 50**

36. Mr Hartson is a professional footballer and this article is about his receiving a diagnosis of testicular cancer. Its details appear in the Appendix. In the Schedule to the Particulars of Claim the private information said to have been obtained and/or contained in the article is pleaded to be: “Details of the Claimants’ cancer diagnosis”. The Defence denies that this article is the product of unlawful information gathering, and pleads that the information was put into the public domain by an interview that he gave to The Sun, which was widely reported in The Sun and elsewhere prior to the defendant’s publication, on 13th July 2009. It pleads that there are no “proximate” call data or invoices which suggest unlawful activity and the publication took place 3 years after hacking had stopped “or was largely cut back”.

37. The basis of the strikeout/summary judgment application is set out in evidence filed by the defendant. That evidence repeats that the information in the article was put into the public domain by the claimant himself, and refers to its appearance in other reports, which were more numerous than those pleaded. The other publications are exhibited, and they show similar disclosures, including (in the case of some of them) a statement apparently by Mr Hartson's oncologist, and information attributed to friends and family. Based on that considerable amount of detail the defendant maintains the following:

> (a) Mr Hartson had no reasonable expectation of privacy in respect of the matters disclosed in the article.
>
> (b) Mr Hartson has not put any evidence before the court to sufficient to establish any real prospect of succeeding on a claim that the contents of the article supported a case of unlawful information gathering.
>
> (c) In his oral submissions Mr Spearman went so far as to suggest that his evidence showed that the Mirror article came from the information in the preceding articles. In particular he relied on the stated source of part of the material - Glasgow Celtic Football Club's spokesman and Mr Hartson's oncologist. He also pointed out that one of the preceding articles (on the BBC website) had the same journalist's byline as the Mirror article (Karl Mansfield).

38. Mr Sherborne's riposte was to point out that the application was not based on any positive evidence as to the source of the article, from any journalist or anyone who took part in the publication of the story. Mr Spearman's case as to the source was in effect speculation, and he did not actually have any evidence that the story was put into the public domain by Mr Hartson himself. Through a solicitor, Mr Hartson gave evidence that he was far too ill at the time to be able to speak to journalists himself. He believes that his cancer will have been the subject of voicemails left by and for his wife. In the case of the preceding Sun article, Mr Sherborne points out that it contains some remarks attributed to a "pal", which is a known way in which journalists disguise the illegal source of information; and that, Mr Sherborne says, undermines the suggestion that all the preceding information was put in the public domain by Mr Hartson or others. Furthermore, the mere fact that there was information in the public domain did not mean that there was not also unlawful activity to further or corroborate the story - see the evidence of Mr Johnson and Mr Evans.

39. The pleaded case that Mr Spearman seeks to knock out is the case that this article was "derived from or based on or sought to be corroborated by" unlawfully gathered information, and that it "originated from or was based on or corroborated by" such activity (my emphasis). The emphasised words mean that it is not a necessary part of the claimant's case that the whole of the articles embodied unlawfully acquired information.

The pleading allows for a different connection, of the kind that Mr Evans and Mr Johnson refer to. It is therefore not an inevitable inference that, since the articles reproduced material which had appeared elsewhere, they cannot have been, in any way, the fruit of unlawful information gathering.

40. Mr Spearman's attack on the article can be distilled to two points. First, that the articles can be plainly seen, on the evidence, not to be the fruit of unlawful information gathering in the manner pleaded. Second, there is no privacy in the information because of the prior publicity.

41. So far as the first is concerned, there may well be something in the point. However, it would not be fair or right to reach that conclusion on the evidence currently available. There is a shortcoming in the defendant's evidence in that the defendant has not produced any positive evidence as to how the article was produced. No journalist has provided a witness statement, and Mr Mathieson (who is not even the main in-house lawyer) has not got information from any journalist about the source. No explanation is given for that omission. He simply produces the prior articles and suggests that their content means that the allegedly private information "can … be shown not to have been obtained by such [illegal] methods". In his third witness statement provided in support of the defendant's application he takes up a challenge made to him on the basis that he has not produced any journalist or disclosure evidence to show the actual source of an article and he says (para 33):

> "It is not necessary to provide disclosure or witness evidence from journalists detailing the source of the articles in order to tell that the claims that these articles were based on unlawful activity have no real prospect of success and should not have been pleaded in the first place. Deploying this evidence now would not only exponentially increase the costs of this application but would also misunderstand its nature: namely that it is obvious on the face of the articles, when considered in the context of what had already been published by others, that they are not based on any unlawful activity by the Defendant. In such circumstances, any journalistic evidence at this stage would simply lead to more wasted costs and wasted Court resources."

42. I disagree. It is not safe, at this stage of the proceedings, to find, merely on the basis of the production of the prior articles, that unlawful information gathering activities were not involved. In a case such as this the claimant is unlikely to have his or her own positive evidence, and will ultimately be dependent on what all the rest of the evidence

and the probabilities show. But that "ultimately" will include, critically, disclosure from the defendant, and that has not yet taken place. Disclosure is obviously relevant, and the defendant's pleading that there are no "proximate invoices" implicitly acknowledges that. The worth of that particular averment is, in any event, limited, because the defendant has apparently only searched the invoices of a limited number of the private investigators who were engaged by the defendant - it might be thought that a proper pleading ought to reflect the limited searches actually made, in which case the averment would be of much less significance. The claimant is entitled to have the inquiry carried out on the basis of all the evidence, including the fruits of disclosure which might reveal some unlawful information gathering. That is not speculation. It is a fair implementation of the litigation process, if one is inquiring into where the information came from. At a trial it would be relevant to consider the presence or absence of any journalist giving evidence, and any explanations given (evidentially) for the absence of such evidence. To say at this stage, as Mr Spearman and Mr Mathieson do, that it can now plainly be shown that on the balance of probabilities these articles did not come from unlawful information gathering, on the basis of what he produces (and does not produce), is a little ambitious. It suggests a very mini-trial on the basis of very little evidence, which is in no way appropriate on these applications.

43. As will appear, this becomes a recurring theme in these applications.

44. It must also be remembered that the claimant's case does not turn on the reproduction of unlawfully acquired information in the offending articles. It includes an allegation that the story was "corroborated" (or "stood up", in the parlance of this case) by unlawful techniques. That remains a possibility in this case, though it might be thought that the prospects are not good.

45. In short, while this does not look to be a particularly strong case of an article arising from misuse of private information, it is not possible to dismiss it at this stage on these applications. To do so would be not so much conducting a mini-trial as conducting an incomplete trial.

46. For the sake of completeness, I should say that I have taken into account a point made generally in relation to all applications by Mr Mathieson in his first witness statement provided in support of his applications, namely that even if the claimant were to establish that private material contained in the article was obtained or corroborated by unlawful information gathering activities, the damages resulting from this separate publication would be nil or "derisory". Again, there may be a lot to be said for this point, but again it is one for trial, and it also has to be observed that the carrying out of the unlawful

activities would itself attract damages which would not necessarily be so low even if the publication itself added little - again, a matter for trial.

47. Mr Spearman's next point is that there was no privacy in the information in any event. That is because it was put into the public domain by (presumably) those with authority to do it, and the extent of the publication has destroyed it in any event. Once again, at present it frankly does not look as though the claimant's case is too strong on these points, but that remains a speculative assessment at the moment and the case is not sufficiently clear to justify summary judgment or striking out. It might be thought to be unlikely that a consultant would issue a detailed statement about Mr Hartson's condition (more than one of the prior articles contains attributed quotations) without his consent, but that is a matter of evidence, and there is no statement from the consultant. The emanations from friends and family are less clear in terms of the likely authority with which they were issued. All in all, it is not possible to say, with sufficient clarity at this stage, that the claim is sufficiently bad and sufficiently obviously doomed to failure to justify the remedies sought.

48. I therefore refuse to strike out this article or grant summary judgment in respect of it.

**Kieron Dyer Article 30**

49. Mr Dyer is a well-known professional footballer with an international as well as a club career. His private life was of interest to the tabloid press. On 5th October 2008 The People published an article about the seizure of a car belonging to his sister after a drugs-related prosecution of her. The text of the article appears in the Appendix below. The pleaded private information is: "Alleged incident concerning C's sister".

50. The pleaded defence is that the information came from a news agency which is said to have confirmed that it followed up on a Court report published in the Ipswich Star; there are no proximate invoices or call data which support unlawful activity and the date was in a period when phone hacking had ceased or largely ceased; the information was not private; and the information was entirely in the public domain by virtue of the publication of the prior article in the Ipswich Star. The basis of the summary judgment application is that the private information complained of is not that of the claimant, that it had already been placed in the public domain by a third party or was aired in open court, and that it had been placed in the public domain by other publications.

51. The other publication was the Ipswich Star on 2nd October 2008, though the article in its web version (which is what was in evidence) was said to have been updated on 10th March 2010. The nature of the updating was not clear.

52. Mr Mathieson's evidence produces the updated article. It does not produce any evidence of supply of information by an agency or the original form of the article; nor does he produce (even by hearsay) any evidence of actual sourcing.

53. Evidence filed by Mr Dyer, via his solicitor, refers to evidence of the Mirror newspapers' great interest in him, and references to call data and private investigator invoices which suggest unlawful activity was carried out in relation to him, but does not identify any particular entries which might be referable to this article. His solicitor conveys that the circumstances of his sister's conviction and sentence were the subject of phone calls and voicemails involving his mother. It is suggested that unlawful activities will have been used to boost the story.

54. Mr Sherborne pointed to differences between the article in The People and the article in the Ipswich Star. While most of the information in the former is in the latter, the latter is fuller in terms of detail, and lengthier, but the reference to heroin and to ferrying dealers is absent from the latter. That is the sort of material which he says would support the notion that at least some information was obtained from elsewhere, that is to say from unlawful information gathering (probably voicemail interception). He emphasised a submission that the fact that the information was said to have been aired in open court did not necessarily mean it could not be treated as private information for the purposes of this action if knowledge of it, or corroboration of it, or a decision to publish it, was derived from phone hacking (say). He also relied heavily on the suggestion that it was not sufficiently apparent what actually occurred in open court, so it was not necessarily demonstrated that the published information could be justified by being aired in open court on the facts, assuming that to be a defence.

55. It seems to me that this article, so far as it is relied on as publishing private information of Mr Dyer and as a publication infringing his privacy rights, as a publication taken by itself, cannot be relied on in that way. I reach that decision by combining four factors. First, there is the nature of information said to be private; second, there is the question of whose privacy would be infringed if the information were private; third, there is the fact that I find that the article is likely to have repeated what was said in open court; and fourth, if there is any residual privacy after all that, the publication by itself would not attract any worthwhile damages worthy of maintaining an action.

56. So far as the first and second are concerned, the pleaded private information is rather general - "Alleged incident concerning the C's sister". While there must be some sensible limits as to the degree of particularisation required as to what private information is relied on, that is something of an over-generalisation in the context of this particular article. It does not make it clear what the "incident" is, nor (given that a conviction is prima facie obviously not private) does it indicate what particular sub-aspects of the story attract privacy. When asked in argument what the private information was said to be, Mr Sherborne said it was the information that his sister had been given her car by him, and that the car was used to ferry dealers in crack cocaine and heroin, for which she was jailed. It does not seem to me that there is an arguable case for saying that that information, as such, is information in which anyone, let alone Mr Dyer himself, had a legitimate expectation of privacy, and it does not take a trial to decide that. Apart from the car, the rest of the information is about his sister, and not about him. So far as the car is concerned, in these circumstances I do not consider that that really attracts any significant privacy expectations even if one looks at it from Mr Dyer's point of view. I think that the pleading of the matter in this way tends to demonstrate a less than appropriately rigorous consideration of the claim based on this article.

57. So far as the third is concerned, the first point that has to be considered is whether the relevant information appearing in either article was information disclosed in open court. Mr Sherborne questions that, but he does not do so on the basis of any evidence. The defendant has advanced a case based on the articles, and particularly the Ipswich Star article, being a fair report of court proceedings. Mr Sherborne has advanced no case for saying that it was not; he has not raised any evidential doubts. It would have been open to him to adduce some evidence of inaccuracy (presumably Mr Dyer or his sister would know about that), but he has not done so. I therefore take the material as being, in substance, material disclosed in open court. At that point Mr Sherborne runs up against the clear terms of the authorities referred to above. Such information is not capable, in itself, of being information in respect of which any individual has a legitimate expectation of privacy because of the principle of open justice. He had a sophisticated argument that ostensibly open information could acquire a quality of privacy in this area if a publisher found out about it by privacy-infringing means, and I do not propose to make any findings about such an argument. A summary judgment application on less than the full facts is not the place to do that. But if there is anything in it, it is not, in my view, easy to apply as against the open justice principle, and it is not sufficient to overcome the difficulties posed by the first and second considerations dealt with in the preceding paragraph.

58. So far as the fourth consideration is concerned, if I am wrong about the above, and there is a legitimate expectation of privacy in respect of the limited points relied on by Mr Sherborne, then in the context of this litigation the damages arising from the publication

of the article itself would be likely to be minimal. I am prepared to take that view even on an application such as the present.

59. Combining all those factors I find that the publication of the article itself is not something capable of giving rise to a cause of action, or a cause of action which justifies making a claim.

60. However, I should make it clear how far I am going, or more particularly how far I am not going, in this respect. I have made my findings about the publication of the article and the claim that the publication itself was an actionable invasion of privacy giving rise to worthwhile damages. I am not making adverse findings about the publication's being an occasion of or stimulus for other invasions of privacy. Part of Mr Sherborne's case is that there were unlawful acts which underpinned the publication even if they did not result in the obtaining of any information which was subsequently published. His journalist witnesses give evidence of the sort of activities which they say would typically happen when a story was regurgitated (if that is what happened here) in order to stand it up or get a new angle on it. It is possible that that sort of activity occurred in this case, bearing in mind Mr Dyer's interest to the press and the evidence relied on as showing potential unlawful activity on other occasions. If that happened prior to the publication of this article then Mr Dyer may have a claim in respect of that activity - see my judgment in *Gulati* which allowed damages for activity which did not lead to the publication of an article. I would not grant any form of summary judgment (or striking out) which prevented Mr Sherborne from running that sort of case. My finding is limited to the article as one which per se published information in respect of which Mr Dyer had any reasonable expectation of privacy. I think it likely that Mr Sherborne's pleading, though geared towards the publication, would still allow him to run that sort of case without amendment, though I have not heard Mr Spearman on that point.

61. To that limited extent, therefore, I would give the defendant summary judgment. Whether that is ultimately a useful finding remains to be seen. I do, however, repeat my concern that the pleading of this article as the centre of one of the claims seems to me to demonstrate a less than rigorous approach to what should be claimed in litigation such as this.

**Kieron Dyer Article 27**

62. This article reports an eye injury to Mr Dyer while in training. The content appears in the Appendix. The pleaded privacy is "Details of the Claimant's eye injury in training". In

argument Mr Sherborne relied on the fact of the injury and the possibility of wearing googles for protection as being the pieces of private information.

63. Mr Spearman accepted that the category of the information revealed, namely medical matters, was inherently capable of attracting an expectation of privacy. The basis of the summary judgment application is that the information came from an interview with a third party, and the information had already been placed in the public domain by other publications. The third party in question was Mr Roeder, the manager of Mr Dyer's club at the time (Newcastle United), whose statement is recorded in the prior publication (the Daily Mail) on 4th November 2006. He is recorded as narrating the circumstances of the injury and that Mr Dyer might have lost the sight of one eye. He is recorded as ending by saying that thankfully Mr Dyer was fine and was so motivated that he had asked whether there was the possibility of his coming back and wearing goggles. Mr Spearman says there is no evidence to support the case that the information in the article was derived from or corroborated by unlawful information gathering.

64. As referred to above under Mr Dyer's preceding article, Mr Sherborne's evidence relied on material showing that the press, and the Mirror group newspapers, were apparently consistently interested in the activities of Mr Dyer, and his case is that the incident in question would have been the subject of voicemail messages. He points out again there is no actual evidence that the actual source was the Daily Mail article, and the section in which the Mirror article appeared was headed "Hottest Gossip", suggesting some sort of special hotline for the information inconsistent with its having been sourced from another newspaper. He also relies on a difference in the wording about the goggles –"may wear goggles" vs "asked about whether there was a possibility of coming back and wearing goggles", which pointed away from copying the Mail article.

65. So far as the source is concerned, the summary judgment application suffers from the same difficulties as Mr Hartson's article. The defendant has not produced any evidence of what the source was. Nor is there any explanation as to why there is no evidence. It merely presents an earlier article and invites a finding that that was the source. That is not sufficient for a finding that the earlier article was the source. The complaint that the claimant has not produced evidence that unlawful activity was the source is a weak one in the circumstances of cases like these where, absent disclosure, the claimant has little or no direct evidence. To make the finding that the defendant invites would involve the conduct of a mini-trial, and one without disclosure and other material from which the claimant would seek inferences to be drawn.

66. So far as the reasonable expectation of privacy point is concerned, this has two elements. The first is the fact of prior publication. That does not necessarily assist the defendant for

the reasons already given above. The second is the disclosure of the material by the manager, which is said to mean that there can be no privacy claim. The mere fact that Mr Roeder disclosed the facts (if he did) does not, of itself, seem to me to remove any reasonable expectation of privacy. If, however, he was somehow authorised as manager to make these sort of disclosures then it would seem to me that that would remove Mr Dyer's expectation of privacy in those matters. This sort of line of argument was not developed before me, and probably appropriately so, because it would be a matter of evidence and a trial. In those circumstances the disclosure by Mr Roeder is not a reason for striking out this claim.

67. No point was taken about the triviality of any part of the disclosure, though the "goggles" part would not seem to me, at first sight to be particularly significant in terms of damages.

68. In the circumstances I decline to strike out or grant summary judgment on this article. I will resist the temptation to comment further on its merits in the overall scheme of this litigation.

**Mr Paul Merson Article 6**

69. Mr Merson is another well-known footballer who can be seen from previous articles and disclosures to have been someone in whom the Mirror group newspapers would be and were interested.

70. On 14 January 2002 (a Monday) the Daily Mirror published an article about the birth of twins to Mr Merson and his wife. The text appears in the Appendix. The publication is said to contain private information insofar as it provides "Details of the Claimant's partner giving birth to twins". Mr Merson believes that the birth of his children was discussed or referred to in voicemails that he left at the time. The birth took place on the previous Friday.

71. The basis of the strike-out application is that the subject matter had already been placed in the public domain by previous publications. The prior publication relied on is the Sunday Mercury (a Birmingham newspaper) which published the story on 13th January 2002. That article contains a lot more detail than the Mirror article - for example the weight of the children, the time of their birth, and the name of the hospital. It records Mr

Merson as speaking "exclusively" to the Sunday Mercury and contains purported quotes from him citing the names of the twins, and also says that the birth was announced over the tannoy at a football match at Villa Park in which Mr Merson was playing on 12th January (Saturday).

72. The defendant also relies on a brief reference to the birth in the Sunday Times on the preceding day, in a report of the match, and an article by the Daily Star on the same day as the Mirror publication. That latter article, though not a preceding article, is relied on as demonstrating that the story was picked up by other national newspapers which, it was said, tended to negate hacking as a source.

73. For the reasons given above, this application cannot succeed on the basis of prior publications alone. Such publications may be a reason for an inference, but only as part of an overall evidential picture. It is not "obvious" (to use Mr Mathieson's word) that the article was the source, at least not on an application such as the present one.

74. In his submissions in reply, but not until then, Mr Spearman sought to rely on the fact that Mr Merson had apparently put the information in the public domain himself, and referred to the statements he is said to have given the Sunday Mercury. I have found that part of the prior article more troubling. The question is what reliance can I put on it. If the point had been taken originally as part of the basis of the applications so that Mr Merson knew it was coming, and if Mr Merson had not met it in evidence, then there would have been a good evidential case for saying that there was no legitimate expectation of privacy. But it was not, and in fact the point is not even pleaded in the Defence. In the circumstances it would be wrong to rely on it. Nor are the present applications brought on the basis that the birth of twins is not capable of attracting privacy anyway (a point which is taken in the Defence, where it is described as trivial). So that point was not met either. If those points in combination had been taken properly on this application then the application might have had a rather better chance of success (depending on what Mr Merson said when challenged about his own statements). But they were not.

75. In the circumstances this part of the application fails too, though I am left with the strong impression that this is a rather ambitious part of Mr Merson's claim (he has other articles) which might have merited more attention before it was pleaded.

**Carl Cort Article 10**

76. Mr Cort is another professional footballer and the offending article (about a row in a supermarket) appeared in the Daily Mirror on 26th January 2001. He has adduced or referred to evidence that was of interest to the tabloid press, as demonstrated by articles published about him, by information about Mirror group journalists, such as Mr Nick Buckley who had Mr Cort's agent's and an associate's mobile number in his Palm Pilot, and by private investigator invoices apparently relating to Mr Cort. The private information relied on is: "Details of the Claimant and his wife getting into an argument in a supermarket". The Defence pleads that a news agency was paid for the story and that there were no proximate invoices. Somewhat oddly, it also pleads that the article pre-dates the period for which call data is available - I do not see how that can be material for a defence, but I need not dwell on that.

77. The basis of the summary judgment application in relation to this article is that the private information had been placed in the public domain in prior publications, and/or by third parties or were aired in open court. There were no date proximate private investigator invoices. The "open court" allegation is curious because there is no evidence that it was referred to in court, or that there were court proceedings about it. Mr Spearman developed these points in argument by saying that there was no reasonable expectation of privacy in an item revealing anti-social behaviour in a public place, and that the idea that any if it came from phone hacking is fanciful because none of the information is the sort of information that would be revealed in voicemail messages.

78. Mr Sherborne took now familiar points - there was no positive evidence of payment to a news agency, either from a journalist (or other staff member) or in the form of a disclosed document. The absence of proximate invoices is not significant in the light of the incomplete set of invoices searched, and differences between the prior publication and the Mirror article suggested that there was not just straight copying. It is wrong to say that a public row could not attract privacy.

79. The prior article is dated 24th December 2001 (updated in its internet form on 28th February 2013). It is a much longer article than the Mirror article with more quotes from witnesses. The only additional material that the Mirror article adds is the name and age of Mr Cort's wife and that a Newcastle United spokesman said the club had not heard about the incident. Mr Sherborne says that this indicates that the Mirror was getting its own information about the incident and not simply relying on a previous publication. And this was the sort of case where, on the evidence of Mr Johnson and Mr Evans, journalists would be likely to dig around in things such as voicemails in order to expand or corroborate the story even if it started life elsewhere. He disputes the assertion that it

would be fanciful to say that there was no possibility of unlawful information gathering being involved in this story.

80. In my view this story survives, but I confess that yet again I have serious misgivings about it. The point made above about proving that the prior article was the source applies as before, in the absence of some positive evidence from the defendant, as does the point about the non-destruction of privacy by prior publication alone. Rather more troubling is the question of whether the subject matter (a row in a public place) can attract privacy at all, but that was not the subject of argument (as opposed to assertion) and once again I do not consider a summary judgment application is the appropriate place to decide that point (though I confess there seems to me to be much to commend it). I also think that there is much to commend the idea that the information in the article would not, of itself be likely to have been the subject of voicemails left by or for Mr Cort, though Mr Sherborne would be left with his "corroboration" point. But at the end of this particular day these seem to me to be matters more appropriate for trial.

81. I therefore dismiss the applications in relation to this article.

**Titus Bramble Article 14**

82. Mr Bramble is yet another professional footballer in whom the evidence suggests that the Mirror group may have had a particular interest. There is apparently call data to his mobile phone and the mobile phones of associates, and there are private investigator invoices emanating from the pool which has been searched. His number was in Mr Evans' Palm Pilot, which points to the fact of the interest in him as a subject of phone hacking.

83. On 12th July 2003 the Daily Mirror published a story about his forthcoming appearance in the magistrates' court on driving charges. Its text appears in the Appendix. The allegedly private information is said to be: "Details of the Claimant being required to attend court charged with driving offences." Mr Bramble considers that the subject matter of the article would have been likely to have been the subject of voicemail messages left by and for him.

84. The basis of the summary judgment application is the fact that the information had previously been placed in the public domain by prior publications, that it had been placed in the public domain by a third party, and it was information aired in open court.

85. The prior publication is the Evening Star of 11th July. It gave a bit more detail than the Mirror article - that there were 3 offences; Mr Bramble's partial address; the road where the offences occurred; details of a third offence not referred to in the Mirror article (driving otherwise than in accordance with a licence), and (importantly for present purposes) the fact that there was apparently a court hearing at South East Suffolk Magistrates on that day at which Mr Bramble did not appear and that he would be required to appear before Ipswich magistrates on August 1st.

86. The prior publication point fails for the same reason as it has failed in the earlier articles referred to in this judgment. Copying as a sole source is not obvious, nor does it necessarily destroy privacy. However, there is more in the "open court" point. There was no challenge to the apparent fact that all relevant details were the subject of disclosure in open court on a non-private occasion. That being the case, for the reasons given above, that material cannot, in my view, at least in the circumstances of these publications, amount to information in respect of which the claimant has a legitimate expectation of privacy.

87. Accordingly, this article, as an article which is said to reveal private information, cannot be sued on as such. It does not do so. However, once again one has to distinguish the nature and content of the publication as giving rise to a claim, on the one hand, from underlying activities which may give rise to a separate invasion claim on the other. The article, or its underlying events, may have been the occasion of unlawful activity which could attract a claim. As before, the facts underlying the article might have been the trigger for further investigations to stand the story up or to get a further angle on it. In addition, there are three entries in Mr Buckley's Palm Pilot (an ostensible repository for material used for hacking) which could support a case of unlawful activity at this time - there is an entry which refers to his appearing at Ipswich Magistrates' court to answer bail, there is his date of birth (sometimes used to guess PIN codes) and the name and telephone number of his lawyer. That underlying activity, if unlawful, might attract a claim, but the publication of the article, as an article publishing private information, cannot.

**Sarah Harding - Article 17**

88. Ms Harding is a singer-songwriter, dancer, model and actress. She was of interest to MGN's journalists, as is demonstrated by articles published about her, call records showing calls to her and some of her associates and private investigator invoices. Two of her associates, with their telephone numbers, appear in Mr Buckley's Palm Pilot, and like many of the claimants she was the victim of what she says are suspicious activities by journalists and photographers in terms of door-stepping and being approached outside her property, which are said to be consistent with unlawful information gathering.

89. The particular article in question in the present application appeared in the People on 10th September 2006, and its short text appears in the Appendix to this judgment. The private information relied on is: "Details of the Claimant's earnings/contract with Ultimo." Ms Harding believes that the deal will have been the subject of telephone conversations and voicemail messages involving her manager (who has brought her own phone hacking claim).

90. The pleaded defences are the familiar ones - the information "came from" previous reports, there are no proximate invoices or call data suggesting unlawful activity and it was after hacking generally had stopped or been largely cut back.

91. The summary judgment application is based on the fact that the allegedly private information had already been placed in the public domain by other publications. The other publications are The Sun on 5th September 2006, and the Daily Star on 7th September, both of whom reported the same short details, with some journalistic embellishment and additional double entendres.

92. The answer to this part of the application is the same as to previous parts. No evidence of actual sourcing is produced by the defendant, and the disclosure by itself does not destroy privacy rights. I shall therefore not grant judgment or strike it out. I will, however, express the view (in the hope that it assists the parties) that I doubt if this article, as an article, will add much to such valid claims as arise out of the other 86 articles as Ms Harding relies on.

**Peter Crouch - Article 43**

93. Mr Crouch is another professional footballer in whom the tabloid press had found an interest. He makes a claim relying on 49 articles. Early disclosure has apparently not

revealed any suspicious mobile phone calls or private investigator invoices but Mr Crouch claims to have experienced the same suspicious activities involving journalists and photographers as other claimants - for example, when they managed to be at places at which Mr Crouch had arranged to meet his now wife Abby Crouch (then Abby Clancy) when few people knew of the relationship, and found journalists or photographers waiting for them.

94. This article appeared in the Daily Mirror on 5th October 2006 and concerns the theft and retrieval of Mr Crouch's car. The text appears in the Appendix. The private information contained in it is said to be: "Details of the Claimant's vehicle being stolen, including details of C's telephone call with the Police confirming that the vehicle had been found." The pleaded defences are that the information had previously appeared in the public domain, there were no proximate invoices or call data suggesting unlawful activity, an absence of evidence that the claimant was the subject of such activity and the article was published 2 months after hacking had stopped or was largely cut back.

95. The basis of the summary judgment application as it is categorised in Mr Mathieson's supporting evidence is that the information had been put into the public domain by the claimant himself. It is said to have been provided by him at a press conference on 4th October 2006 between England matches in which he was playing. The evidence for this is said to be derived from various articles. Those prior articles are not relied on by the defendant as being the source of the Mirror article or as destroying privacy by virtue of the publication; they are relied on as showing that Mr Crouch himself disclosed the allegedly private matters. In his submissions Mr Spearman sought to reintroduce the more familiar use of prior articles, somewhat elided with points about disclosure by Mr Crouch himself, and it is questionable whether he should be allowed to rely on those matters in the light of the way in which the formal application was presented, but since he succeeds on the basis of what I will call self-disclosure (as a sort of shorthand) I do not need to consider that point.

96. A number of other articles refer to the theft and recovery of the car, some of them with the same quotations (or very similar versions) as appear in the Mirror article. Some of them pre-date the press conference and do not contain the same quotations. It is apparent from a short offering on gettyimages.co.uk, from a photo caption in the Daily Star dated 5th October and from a report in the Daily Express of the same date, that Mr Crouch participated in a press conference on 4th October. The Daily Star article contains all sorts of quotations, apparently from that conference, including, at the end a reference to the burglary, the recovery of "most of my stuff", the theft of the car (identified as an Aston Martin) and its return and his need to get a cab to "this press conference" (in an apparent quote from him). The Daily Express refers to the burglary and the theft and return of the car, with no quotes and no further details. In this application Mr Crouch has not dealt

with the existence or content of the press conference at all despite clear reliance on it in the defendant's evidence. Although the respondent is not obliged to advance his full case in an application such as this, if Mr Crouch did not accept that the press conference took place, or that it did not contain a reference to the theft of the car, one would have expected him to mount a challenge, even if briefly. In that state of the evidence I find that there was press conference and that Mr Crouch disclosed the burglary and theft of his car there. It was apparently a small part of the press conference, most of which focused on footballing matters.

97. Other publications at the time report those events without attributing them to a press conference. Some of them have quotes which are the same as, or similar to those in, the Mirror article. There is a Press Association report timed at 10.30pm on 4th October which contains more extensive quotations, and which refers to his need to take a taxi to the press conference. Mr Spearman suggested that that material could have been the source of the Mirror article. That is speculation. What is more significant is that, as I find, that material reflects the content of the press conference. Great care does, of course, have to be taken before reaching such conclusions on an interim application such as the present, but I consider that the case is clear enough on the evidence to allow me to reach that conclusion.

98. It follows from that that Mr Crouch put the material into the public domain so that when the Mirror reported it it was not reporting private information, whatever the source was (and it is overwhelmingly likely to have been something other than unlawful information gathering). The only additional piece of information that the Mirror had and which does not seem (at the moment) to have its source in the press conference is the value of the car (£100,000). Mr Sherborne suggested that this was private information that could have come from phone hacking - perhaps the "additional angle" that was used to stand up a story. That is, I suppose, possible, but in my view the information is sufficiently trivial as not to lead to any significant damages <u>for the publication</u> if that is what indeed happened. It does not present a sufficiently good candle-game ratio for the purposes of the *Jameel* principle. Once more, however, that does not rule out the story behind the article from being the occasion of unlawful activity, and I do not say that such activity, if established, could not give rise to claim for invasion of privacy. My finding relates to the legal effect of the article, and no more.

99. That means that the publication of this article does not attract a claim insofar as it is said to publish private information and summary judgment should be given to the defendant so far as the claimant claims in respect of that publication itself.

**Peter Crouch and Abby Clancy - Articles 44/48**

100. Abby Clancy is now the wife of Peter Crouch. She is a model and TV personality and her relationship with Mr Crouch is said to have attracted media interest.

101. The article in question (set out in the Appendix) concerns primarily the purchase of a large bed for the couple (Mr Crouch is very tall). It was published in the Daily Mirror on 24th October 2008. The private information pleaded as being contained in this article is: "Details regarding the [two Claimants'] plans to have a seven-foot bed custom made." Claims are made by both Mr Crouch and Ms Clancy.

102. Summary judgment is claimed on the basis that the information had already been placed in the public domain by a third party, and that it had been placed in the public domain by the claimants themselves. The prior disclosure is said to be interviews on BBC Radio 1 and ITV1's This Morning programme the day before, on 23rd October 2008. Reliance is also placed on a similar disclosure (which in terms was expressed to be derived from the ITV programme) on 24th October.

103. I was not given access to the BBC Radio interview, but I was given access to a clip showing part of the interview on the ITV1 programme. In that interview she freely mentions the couple's move down south (but not the county), the fact that they were doing up a house (specific mention made of a kitchen) and then freely discloses the acquisition or intended acquisition of a 7 foot bed and its accommodation of Mr Crouch's feet. It was the same disclosure as was made by the offending article. The only additional matters were that the house was in Surrey and that she and Mr Crouch were really happy, but those are not the privacy matters complained of.

104. It is quite plain to me, on this material, that the disclosure about the bed was made by Ms Clancy herself. The information cannot therefore be regarded as private. Mr Sherborne sensibly did not suggest that that was not necessarily a disclosure by Mr Crouch as well for these purposes. That is an end of the claim on this article. I would add that the disclosure would also seem to me to be too trivial to attract a sensible claim for damages in any event, and I would have been prepared so to hold had it been necessary for my decision.

105. For the sake of completeness, I do not think that the additional two additional points appearing in the article are capable of attracting a worthwhile privacy claim either. I also add the point made above, which is that it does not follow that this article was not the occasion of unlawful information gathering which might itself give rise to a claim, and Mr Sherborne pointed to suspicious telephone calls earlier in the year. My ruling concerns a claim based on the article as an alleged publication of private information.

106. I also add that this article gives rise to particular concern as to the judgment which was brought to bear when it was pleaded. I would have thought that the privacy disclosure relied on would have struck the claimant's advisers as being hardly worth claiming as an article, and it is surprising that it was pleaded in the face of Ms Clancy's disclosures on national broadcast media. It is surprising to a further degree that the claim was maintained in the face of the application to strike out. It is understandable that the defendant would be concerned if significant numbers of other claims demonstrated those features.

**Glenn Hoddle - article 20**

107. Mr Hoddle is a former professional footballer and football manager, and is now a broadcaster and pundit. Like the other claimants, his interest to the media is demonstrated by the stories published about him, and it is said in the case of the Mirror group that is also demonstrated by phone calls to his phone and those of associates and by private investigator invoices. One particular suspicious call is said to be shortly before the article complained of here (on 7th December 2004).

108. This article was published in The People on 19th December 2004, and it concerns his interest (in his then position as manager of Wolverhampton Wanders) in a footballer called Alexander Aas. The text appears in the Appendix. The private information relied on is: "Details of potential transfers during his management of Wolverhampton Wanderers".

109. The basis of the striking out that the information had been placed in the public domain by prior reports. The same information is said to have appeared in the Daily Express, Daily Mail and The Sun on the day before (18th December).

110. The answer to this is the same as the answer appearing above. The prior appearance does not negate hacking as a source, or as a means of corroboration, and the evidence in support of the application does not produce any evidence of copying from the prior articles, though it has to be said that the correspondence of the wording between the offending article and the Daily Express article is striking. However, that does not make it appropriate to strike out the claim based on this article as an article containing private information, even though the impression given at this stage is that this is unlikely to be one of Mr Hoddle's best instances (to put it mildly).

**Two further articles**

111. Mr Sherborne proffered two further articles from the 50 (then 20) chosen by the defendant for its applications, in order to demonstrate what he said was the poverty of the defendant's complaints and the need to take articles to trial. They were articles about Ms Harding getting a part in the BBC's Dr Who programme, and an article about Frank Sinclair (another footballer) and his conditions in a Spanish prison. The nature of the attack on the pleaded article is familiar - prior disclosure by a third party (another news organisation) or disclosure in open court. The claimants' answer is effectively the same - prior disclosure does not necessarily affect privacy, and no actual source is specified by anyone who would know. In these cases Mr Sherborne points to aspects of the Mirror group articles which do not appear elsewhere and which (he says) would be likely to be attributable to phone hacking to corroborate the story or provide another angle to it.

112. My answer is the same too. These are more articles in respect of which it can be said that the defendant has not demonstrated an actual source or an absence of privacy sufficiently to enable the article, as an article of claim, to be struck out now. The application was not in fact advanced by the addition of these cases.

**Conclusions and the way forward**

113. The result is that some of the articles fall to be struck out as articles said to containing and publish private information. The other articles survive, though some are not really impressive as claims even as part of the tapestry which the claimants seek to weave. Carrying out the exercise has confirmed my view that the next step is not to carry on with the exercise across another 10, or another 40, articles, let alone more. That would not be a sensible way of conducting or managing this litigation. There may, however, be other ways of benefiting from the lessons that have been learned from this exercise. I will leave it to the defendant to propose any steps which it thinks can usefully be taken, and the claimants (and especially the firm or firms from which the offending claims emanate) need to reflect on the need not to make pretty obviously bad or worthless claims. For my

part I shall say no more until the hearing at which such matters can be worked out other than to say that I consider that there are legitimate causes for concern.

## Appendix - the text or substance of articles

**John Hartson - Article 50**

Publication: Irish Daily Mirror

Date 14th July 2009

Byline: by Karl Mansfield

Text:

CELTIC STAR HAS CANCER

CELTIC Football Club pledged its support yesterday for one of its former players after reports he is fighting cancer.

Former Hoops striker John Hartson is believed to have been diagnosed with testicular cancer which has now spread to his brain.

The 34-year old was given the news at the weekend following tests after complaining of severe headaches, a newspaper claimed. A Celtic spokesman told the Glasgow club's website: "John Hartson is a man whom Celtic Football Club has immense respect and affection for.

"He has served the club, and the game of football in general, with distinction over many years.

"It is very difficult for us to understand what John is going through at the moment, but we will offer any support we can to a great Celtic player.

"The thoughts and prayers of the entire Celtic family are with John at this time."

Hartson was signed to the Glasgow club by Martin O'Neill in 2001 and was a popular figure with fans during his five years at Parkhead.

Dr Gianfilippo Bertelli, consultant medical oncologist at ABM University NHS Trust in Swansea, said: "We are awaiting the results of further tests to establish a full picture of Mr Hartson's diagnosis."

**Kieron Dyer Article 30**

Publication: The People

Date: 5th October 2008

Byline: None

Text:

DYER'S DRUG CAR IS SEIZED

ENGLAND star Kieron Dyer's sister has had her car confiscated by a judge after she was jailed for supplying drugs.

Kirsha Dyer, 20, used her £3,000 Peugeot to ferry heroin and crack cocaine dealers from London to Ipswich for the J Business network. Clients included hookers killed by Suffolk Strangler Steve Wright, 49.

Dyer was jailed for five years in June after admitting supplying drugs.

Her car was seized last week but a judge at Ipswich Crown Court returned her personalised plate K18 DVR, a gift from West Ham ace Keiron, 29.

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**Kieron Dyer Article 27**

Publication: The People

Date: 5th November 2006

Byline: None

Text:

NEWS FLASH – TOON ACE KIERON

TOON ace Kieron Dyer may wear googles to speed up his return from injury after he ran into a pole in training and almost lost the sight in one eye.

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**Paul Merson Article 6**
Publication: Daily Mirror
Date: 14th January 2002 (Monday)
Byline: None
Text:

MERSE IS A DAD AGAIN

ASTON Villa star Paul Merson was celebrating last night after his girlfriend gave birth to twins. The former England ace was delighted when Louise Hunt, 35, gave birth to girls Maisie and Molly on Friday. Merson, 33, also has three children by his ex-wife Lorraine.

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**Carl Court Article 10**

Publication: Daily Mirror

Date: 26th January 2001

Byline: by Paul Byrne

Text:

STAR CARL IN TROLLEY RAGE ROW

NEWCASTLE United footballer Carl Cort and his wife have been banned from a supermarket after a trolley rage row.

Striker Cort, 24, and his wife Melissa, 21, were accused of queue-jumping by angry shoppers.

A customer said: "Cort's wife was screaming and swearing at the top of her voice. She was shouting; ‘Don't you know who I am?’ It was disgusting."

The manager of Tesco Extra in Kingston Park, Newcastle had to stand between Cort's wife and another woman and security guards had to help.

Another witness said: "The manager told Cort and his wife they were not welcome, and that they shouldn’t come back."

Northumbria Police said: "We sent two special constables to Tesco after reports of a disturbance. Police are not going to take any further action."

Tesco said: "A woman has been banned for upsetting customers."

A Newcastle United spokesman said he hadn't heard about the incident and had no comment.

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**Titus Bramble - Article 14**

Publication: Daily Mirror

Date: 12th July 2003

Byline: None

Text:

TITUS FACES SPEED RAP

FOOTBALLER Titus Bramble is to appear in court charged with three driving offences.

The 21-year-old defender who transferred to Newcastle United from Ipswich Town for £4.5million will appear before Ipswich magistrates on August 1.

He allegedly broke the 70mph speed limit in Ipswich in January. Ho is also accused of not producing a licence and not driving in accordance with the licence.

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**Sarah Harding - Article 17**

Publication: The People

Date: 10th September 2006

Byline: by Eamonn Holmes

Text:

BRA-VO GIRL

GIRLS Aloud singer Sarah Harding seems to have landed a nice little earner after signing a £100,000 deal to be the face of Ultimo.

But given that Ultimo are best known for racy lingerie, I don't reckon it was actually her face they were looking at – but rather a busty star to "front" their ads.

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**Peter Crouch - Article 43**

Publication: Daily Mirror

Date: 5th October 2006

Byline: by John Cross

Text:

CROUCH IS BACK ON THE ROAD

PETER CROUCH had to hail a cab to keep himself on the road to Euro 2008 after his car was stolen.

The Liverpool striker finally got a phone call from police to say they had found his £100,000 Aston Martin which had been taken by thieves.

Crouch was busy scoring twice for Liverpool - including a spectacular overhead kick - in the Champions League win over Galatasaray when the thieves struck at his house in Alderley Edge, Cheshire.

The beanpole striker has spent the last few months stealing victories for club and country - including an amazing run of 11 goals in 14 games for England - but the boot was definitely on the other foot last week.

"I've just had a call and I've got most of my stuff back," said Crouch. "They got my car. That wasn't too pleasing so I had to get a cab here but I've got it back now.

"I scored two goals against Galatasaray and I was on a massive high when I got home but then I realised that my car wasn't there.

"It's not the nicest thing to come home to but it's one of those things. Other than that it wasn't too bad but it was frustrating. They robbed a few things but nothing too major."

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**Peter Crouch/Abby Clancy Articles 44/48**

Publication: Daily Mirror

Date: 24th October 2008

Byline: None

Text:

CROUCH BED A TALL ORDER

BEANPOLE striker Peter Crouch is having a special seven-foot bed made - to stop his feet poking out.

The Portsmouth star has never been able to sleep with his 6ft 7in frame completely covered, girlfriend Abbey Clancy revealed yesterday.

She said: "We're getting a special bed made. It will be the first time Peter will be able to sleep with his feet not hanging out the end."

England ace Crouch, 27, and Abbey have just moved into a new mansion in Surrey.

The 22-year-oid model said: "We are really happy."

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**Glen Hoddle - Article 20**

Claimant: Mr Glen Hoddle

Publication: The People

Date: 19th December 2004

Byline: None

Text:

HOTLINE SPECIAL: AAS IS A SHORE BET

GLENN Hoddle wants to bring Norwegian right-back Alexander Aas to Wolves in a bid to solve the clubs defensive problems. The new Wolves boss is desperate to strengthen his leaky back-line which has just one clean sheet in 15 games. Aas, 26, is out of contract and Hoddle is keen to sign him on a free transfer after he impressed on trial.