MAX MOSLEY –v– UNITED KINGDOM

RESPONSE TO THE SUBMISSIONS OF BOTH THE UNITED KINGDOM GOVERNMENT AND THE THIRD PARTY INTERVENERS

A. Introduction

1. This is the Applicant's response to the submissions which the Government were invited to make by the Court, as well as to the submissions made by a number of third party interveners.

2. There is a fundamental misconception which underlies many of those submissions. The Applicant fully accepts that Article 10 and the right of freedom of expression constitutes one of the essential foundations of a democratic society. This has been repeatedly stated in Strasbourg jurisprudence. However, the protection of private life, enshrined in Article 8, has also been recognized as of enormous importance.

3. As in the instant case, these two essential rights often conflict and must be balanced against each other. Neither has presumptive authority and both are qualified in their terms[1]. The real issue therefore is where a threatened publication raises such a conflict, what is the right way to resolve it.

4. The Applicant's case is simple. It is for the court to resolve the conflict, and not for the newspaper itself. However, a court only has the opportunity to do so if the individual whose Article 8 right to respect for his private life is affected has the opportunity to bring it to the court's attention. To do this he has to be notified in

[1] Resolution 1165 of the Parliamentary Assembly of the Council of Europe (1998) paragraph 11 states that "*these rights are neither absolute nor in any hierarchical order, since they are of equal value in a democratic society*".

advance of this threatened publication. Whilst the individual may choose not to apply to the court, if deprived of any such opportunity there is no effective protection for his privacy. The reason being that once privacy is breached, it can never be regained. As has been universally recognized, an injunction to prevent publication is the only real 'remedy'. Damages after the event can never be an effective remedy in these circumstances[2].

5. The problem as identified in this case is that without an obligation to warn the individual in advance, and give him an opportunity to satisfy the court that such an injunction should be granted, it is the editor or journalist who unilaterally strikes the balance between these competing rights. The flaw in this position could not be clearer.

6. Not only is there an obvious bias inherent in such a situation but there are compelling commercial reasons why the editor or journalist would choose to ignore the Article 8 right. The instant case is a perfect example. It was admitted at trial by the newspaper (as it had to) and accepted by the Judge that the primary reason for not notifying the Applicant was the justifiable fear that he would obtain an injunction from the court to prevent the unlawful disclosure of his private information[3]. This situation cannot be right, nor can it guarantee an effective protection for an individual's Article 8 right.

7. Whilst the existence and content of these third party interventions, as well as the Government's observations, only serve to underline the importance of the point which is raised in this Application, the startling feature of all of the submissions is that nowhere do they provide an answer to this issue of principle. There is nowhere to be found

[2] See paragraphs 33 to 36 below.
[3] See paragraph 57 below, as well as supplemental statement paragraph 27 and paragraphs 47 to 49.

amongst the volume of arguments raised by these interested parties any explanation as to why in such a situation, by not warning the victim in advance, a newspaper should be able deliberately to by-pass the only effective remedy for revealing deeply intimate and embarrassing material about the victim's personal life, namely an opportunity to seek an injunction from the court. Indeed, there can be no principled objection to it since the logical need for prior notification is unassailable.

B. An Overview of the Response to the Application

8. The response to the Application appears to be three-fold. Firstly, a fear that the judiciary striking the balance between these competing interests will not give sufficient weight to the importance of Article 10. Secondly, a claim that there are insuperable practical difficulties with implementing any system which requires prior notification. Thirdly, the suggestion that there is no consensus amongst Member States relating to this requirement. All of these objections are misplaced.

The fear there would be insufficient protection for Article 10

9. There can be no legitimate fear that a court (rather than an editor) striking the balance between conflicting Convention rights would give insufficient weight to the importance of Article 10. The Human Rights Act 1998 (HRA), which introduced the Convention Articles into domestic law, has deliberately built into specific protection in this respect. The Act expressly requires by section 12 (4) that "*the court must have particular regard to the importance of the Convention right to freedom of expression*"[4].

[4] Section 12(4) HRA.

10. Furthermore, the threshold test which must be met by any applicant seeking "*to restrain publication before trial*" is higher where Article 10 is engaged than in any other form of injunctive relief[5]. Unlike the hurdle in other areas, "*no such relief is to be granted unless the court is satisfied that the applicant is likely to establish [at trial] that publication should not be allowed*"[6], as opposed merely to showing "*a seriously arguable case*"[7]. These provisions were deliberately implemented to meet the media's concerns in this regard[8].

11. In the circumstances, there is no good reason to suppose that the United Kingdom courts will not ensure full compliance with Article 10, as well as with Article 8, as they are obliged to do under section 6 of the Act as a 'public authority', in terms both of the procedural timetable they adopt and the substantive content of their judgments.

12. As to the former, concerns about the time which a process of notification and any application to court will take fall squarely within the court's duty to ensure Article 10 considerations are fully taken into account, such as the perishable nature of certain news stories or those with a strong public interest dimension.

13. The same is true as to the substantive content of the court's judgment. Domestic law requires not only that an applicant satisfies the threshold test of s12(3) of the HRA, but also that even if the court is so satisfied, an "*intense focus*" must still be applied to the "*comparative*

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[5] In *Douglas v Hello! Limited* [2006] QB 125 at ¶258, the Court of Appeal remarked that "*a claimant seeking an interlocutory injunction restraining publication [now] has to satisfy a particularly high threshold test*".
[6] Section 12(3) Human Rights Act 1998.
[7] *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.
[8] As Lord Nicholls observed in the House of Lords in *Cream Holdings v Banerjee & ors* [2005] 1 AC 258 at ¶15: "*section 12(3) was enacted to allay [the media's] fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage*".

importance of the specific rights being claimed in the individual case"[9].

The claim that there are insuperable practical difficulties

14. As to practicalities, it is accepted that the precise mechanics and scope of the system through which the obligation of prior notification is put into effect is a matter for the discretion of the Member State, within its wide margin of appreciation.

15. However, the question for the Court to determine is whether as a matter of principle, domestic law has failed to provide effective measures to protect the Applicant's Article 8 rights in this case where there is no requirement of prior notification at all. Again, it is striking that there is no answer of principle anywhere to be found in the lengthy submissions either of the Government or the third party interveners.

16. In reality, despite a number of hypothetical examples, the media's concern about insuperable practical difficulties is illusory, or certainly highly exaggerated for self-serving purposes. In his evidence to the House of Commons Culture, Media and Sport Parliamentary Select Committee ("the Select Committee"), the Chairman of the Editor's Code Committee of the Press Complaints Commission[10] explained that prior notice is already given "ninety-nine times out of hundred". Where the very head of the print media's self-regulatory body confirms that in his many years of experience such warning is in fact given in all bar a handful of cases, there can be no tenable claim that insuperable practical difficulties would arise from imposing this by way of a

[9] *In re S (a Child)* [2005] 1 AC 593 per Lord Steyn at ¶17.
[10] Mr Paul Dacre, who is also the Editor of the Mail on Sunday, and one of the most outspoken critics of UK privacy laws. See paragraph 29 below.

legal or regulatory obligation, as opposed to merely an instance of responsible journalistic practice.

17. The obvious conclusion is, as the Chairman himself admitted to the Select Committee, that the real reason why it is not given in the small percentage of remaining cases is the concern that if notified, the subject of the story would apply for and obtain an injunction to prevent it being published[11]. Of course, this is precisely what happened in the Applicant's case[12].

18. It is to deal with this handful of cases where no warning is given that the Court is asked to extend the principle to impose a legal obligation on the media. This is necessary since the lack of any effective measure to protect the individual is most acute in that very scenario, where a deliberate decision is made to deprive him of any opportunity to protect his Article 8 right. Clearly, the imposition of such an obligation on the media could have no practical impact on responsible journalism.

19. A further point which is raised is the fear that there would be no exceptions to this obligation. This concern is also misconceived. It is obvious that any system implemented by the Member State will require an exception in certain circumstances to allow for a number of legitimate situations where it would either be impractical or contrary to public interest for the media to notify an individual in advance. There is no conceptual difficulty in devising such an exception. For example, the HRA already requires an applicant to notify the media in advance of an application to restrain their freedom of expression by way

[11] Minutes of the Oral Evidence taken before the Culture, Media and Sport Committee on Thursday 23 April 2009, Question 595 and Answer of Paul Dacre.
[12] See footnote 3 above.

of an interim injunction[13], which is subject to exception for good reason. Applied in this context, the sanction on the media for failing to notify would not apply in circumstances where they had either taken all practicable steps to notify the subject of the article in advance or there were compelling reasons why the subject should not be notified.

20. Plainly, this would rightly allow for those justifiable circumstances where notification would be contrary to the public interest, for example the risk that the subject would destroy incriminating material if given warning of an impending article. However, this should not include or be confused with situations where the real fear is that the individual will seek and obtain an injunction from the court to prevent publication of unlawful material, as the newspaper feared in the instant case.

The fact that there is no uniform obligation in other States means it is not necessary

21. Finally, reliance appears to be placed on the absence of a uniform system of prior notification in other Member States. It is accepted that there is no such system across Europe. However, there are two main reasons for this, neither of which undermines the need for such an obligation in situations such as here. The first is the importance of consent as a substantive requirement in European privacy law. The second is the unique nature of the tabloid press in the United Kingdom.

[13] Section 12(2) provides that no such interim relief will be granted where the defendant is neither present nor represented "*unless the court is satisfied that the applicant has taken all practicable steps to notify the respondent or (b) there are compelling reasons why the respondent should not be notified*"

22. In most Member States, the criminal or civil law protecting private life provides that consent is a necessary (or crucial) ingredient of any justification for disclosing private facts about an individual. This is true, for example, in Germany, Spain, Portugal, Luxembourg, Italy, Greece, Poland and Russia where the presence or absence of consent is often a determinative factor in whether disclosure of such information is lawful or not.

23. In France, the issue of consent is a key feature of the protection of private life, and is interpreted by the courts in a restrictive manner. In the Marlene Dietrich case regarding the publication of her personal memoires in a weekly magazine, France Dimanche, the French court found in favour of the applicant, concluding that an important feature was the failure to obtain consent: anecdotes and stories about private life, especially those concerning intimate life, could only be published with the consent of the person.[14]

24. Similarly, in a case brought by the well-known singer Jean Ferrat, the Court awarded damages on appeal for the publication of his real name, his address and phone number, as well as some indication of the location of his country house. The appeal judges ruled that it did not matter that some of this information had previously been disclosed with his consent. In other words, prior consent did not mean that the singer had given up the right to oppose any publication about his private life. The obligation to obtain specific consent still prevailed[15].

[14] *Cour d'Appeal Paris 16 Mars 1955, Marlene Dietrich c Soc France Dimanche (1955) Dalloz 295*: "Mais considérant surtout, ce qui est très important qu'il appert des documents fournis à la cour d'appel que Marlène Diétrich n'a jamais donné la moindre autorisation à France Dimanche pour publier ses soi-disant souvenirs…. Considérant.. Que les anecdotes et les récits de la vie privée, surtout ceux touchant à la vie intime, ne peuvent être écrits qu'avec le consentement de l'intéressé".

[15] *Cour d'appel Paris 15 mai 1970, Soc FEP c Epoux Tenenbaum (1970) Dalloz 466*: "Considérant que c'est fort justement que les premiers juges ont fait observer qu'il importait peu que certains renseignements ou clichés eussent antérieurement été divulgués dans la presse, même avec l'accord de l'intéressé, dès lors que la société FEP ne justifiait pas avoir obtenu de lui une autorisation expresse et spéciale pour faire paraître l'article

25. The fact that consent lies at the heart of substantive privacy law in most other Member States, as well as the general European ideology on privacy, is not surprising. In the *Resolution of the Parliamentary Assembly of the Council of Europe on the right to privacy* (Resolution 1165 of 1998), clause 5 states that "*in view of the new communication technologies which make it possible to store and use personal data, the right to control one's own data should be added to this definition*". The definition referred to therein is the one set out in clause 4 which states "*The right to privacy, guaranteed by Article 8 of the European Convention on Human Rights, has already been defined by the Assembly in the declaration on mass communication media and human rights, contained within Resolution 428 (1970), as "the right to live one's own life with a minimum of interference""*.

26. By contrast, in the United Kingdom, although relevant to a possible defence, the absence of consent does not make disclosure of private information unlawful per se. Whilst the requirement of consent as part of substantive law goes far further than an obligation to warn an individual in advance (as is sought here by the Applicant), this may well explain why there is no such need to impose an additional obligation on the media in other Member States to put the story to an individual prior to publication.

27. The other reason why there is no uniform requirement in other Member States is the uniquely intrusive and aggressive nature of the tabloid press in the United Kingdom (particularly the Sunday tabloid press). This view is widely held throughout the British media, and even by former tabloid journalists. One such example is the well-

litigieux…: que ce n'est pas, en effet, partce que Jean Ferrat avait autorisé expressément ou tacitement les publications antérieures qu'il avait ce faisant renounce au droit de s'opposer à toute publication ultérieure".

known media commentator, Professor Roy Greenslade. In his inaugural lecture at City University, London in January 2004, Professor Greenslade observed as follows:

> "Intrusions into privacy, bias and misrepresentation have been a continual feature throughout Britain's press history. But a poor record doesn't excuse the iniquities of the present. And it certainly doesn't justify what I believe has become a far worse situation than existed before – in spite of self-regulation and, maybe, even because of it.
> …
> While holding aloft the banner of press freedom to justify their unwarranted intrusions into people's lives, they show no balancing sense of responsibility. The freedoms they exercise are the freedom to titillate, the freedom to terrify, the freedom to taunt.

He also gave a telling (and reliable) insight into the mindset of the British tabloid press:

> "At a Media Society debate last year, the News of the World's chief reporter, openly boasted that he and his colleagues didn't think personalities deserved any privacy or public sympathy. They had wealth and fame and should be happy to pay the price for it. They're fair game."

28. None of this will come as a surprise. The Court has only to look at the way in which the tabloid press reported the decision of the United Kingdom court in the instant case to see the attitude of the tabloid press in this country, in comparison to the European attitude to the respect for private life. On the day of the judgment in this case , 24th July 2008, the Editor of The News of the World criticized the court in the following terms:

> "Unfortunately, our press is less free today after another judgment based on privacy laws emanating from Europe. English judges are left to apply those laws to cases here using guidance from judges in Strasbourg who are unfriendly to freedom of expression. The result is that our media are being strangled by stealth."

These anti-Strasbourg sentiments were repeated in its sister paper, The Sun, on the following day, complaining that "*yesterday was a dark day for British freedom*":

> "While MPs sit on their hands, judges like Mr Eady are using EU laws to destroy British press freedoms… Papers like The Sun will only be able to report what judges allow us to tell you. As the Editor of the News of the World said, papers are being strangled to death by stealth. The Sun has no intention of surrendering its right to tell you honestly and fearlessly what we believe it is in the public interest to print. What matters is not what a lofty and privileged judge thinks should be printed in papers."

29. The evidence given to the Select Committee by the PCC Chairman, Mr Dacre, shows the universality of such views amongst the British press, and in particular the editors who (without such requirement for prior notification) bear the sole responsibility of weighing up competing Convention rights[16]:

> "By passing the Human Rights Act Parliament surrendered legal sovereignty over any case that anyone claims involves a human right, such as privacy, to the ultimate decision of a European Court staffed by judges, appointed by the very many countries, many of them former Communist regimes, which are nowadays signatories to the Convention.
>
> The experience of such judges and the societies in which they have been brought up are in many cases radically different from the experiences of our own judges and the norms of our own society, yet our own judges are now duty bound by law loyally to follow the decisions of the Strasbourg Court, many of whose members come from countries that have no traditions of respecting the right to free speech, and others of whom come from countries whose traditions are far more repressive than our own.
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> The upshot is that British notions of where the proper boundaries lie between privacy rights and the right of the public to be informed about the weaknesses and failings of our leaders and other public men and women are gradually being usurped by different and foreign ideas which, if left unchecked, risk the creeping and insidious destruction of ancient and hard won freedoms ..."

30. It should be remembered that News Group Newspapers, the publishers of both these newspapers, and Associated Newspapers, the publishers of the Mail and Mail on Sunday (the PCC Chairman's own newspaper), were found to be amongst the principal offenders in the unlawful trade in private information following a report by the Information Commissioner ("Operation Motorman") in 2006. In addition, it was the News of the World's Royal Editor, Clive Goodman, who was sentenced to four months imprisonment for illegally accessing private phone messages in 2007. The editor and head of legal affairs for this newspaper were specifically called to account for this criminal conduct before the Select Committee.

31. With this introduction, the Applicant will now respond in turn to the observations of both the Government and the third party interveners in relation to the three questions posed by the Court:

1) Having regard to the award of GBP 60,000 can the applicant still claim to be a victim in respect of his Article 8 complaint?

2) Has there been a failure to protect the applicant's right to respect for his private life, contrary to Article 8 of the Convention? In particular:

a) Did the Government have a positive obligation to protect the applicant's privacy by providing a legal duty (a "notification requirement") on the *News of the World* to warn him in advance of publication in order to allow him to seek an interim injunction?

b) Would such a positive obligation and corresponding duty on newspapers and other media strike the correct balance between the interests protected under Article 8 and freedom of expression as guaranteed by Article 10 of the Convention?

3) Did the applicant have at his disposal an effective domestic remedy for his complaint under Article 8 as required by Article 13 of the Convention?

C. Question 1: Having regard to the award of £60,000 damages, can the Applicant still claim to be a 'victim'?

32. The Applicant is still a victim because his grievance is that he was unable to prevent the publication in breach of his right to privacy under Article 8 before it occurred. This is the only effective remedy for invasion of privacy. Once highly intimate or embarrassing personal facts are disclosed they cannot be put back into the private domain.

Damages are not an adequate remedy

33. As already explained in the Supplement Statement dated 14th January 2009, the inadequacy of damages as a remedy is

[16] Minutes of the Oral Evidence taken before the Culture, Media and Sport Committee on Thursday 23 April

supported by academics as well as the highest levels of the judiciary in this country:

1) As Professor Barendt, one of the leading UK academics on freedom of speech, succinctly stated:

> "if the publication disclosed material which an applicant was entitled and wanted to keep fully confidential or private… an injunction would then be the only effective remedy"[17].

2) In *Douglas v Hello Limited*, the Court of Appeal in 2006 explained that the claim was so strong that the injunction originally sought by Mr and Mrs Michael Douglas from an earlier Court of Appeal in 2000 should never have been refused. Victory at trial and an award of damages some six years later was found not to be an effective remedy for the unjustified invasion of their privacy. Lord Phillips, Master of the Rolls, held that:

> "257. ...damages, particularly [a modest] sum, cannot fairly be regarded as an adequate remedy…Particularly in the light of the state of competition in the newspaper and magazine industry, the refusal of an interlocutory injunction in a case such as this represents a strong potential disincentive to respect for aspects of private life, which the Convention intends should be respected.
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> …
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> 259. … The award of damages eventually made to the Douglases, although unassailable in principle, was not at a level which, when measured against the effect of refusing them an interlocutory injunction, can fairly be characterised as adequate or satisfactory. Only by the grant of an interlocutory injunction could the Douglases' rights have been satisfactorily protected. Further, the interests of Hello! at the interlocutory stage, which were essentially only financial, could have been protected by an appropriate undertaking in damages by the Douglases."[18]

3) In *A v B plc*, Lord Woolf CJ explained the relevant factors which the court should consider when deciding

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2009, Answer of Paul Dacre to Question 503.

[17] *Freedom of Speech,* (Oxford University Press, 2006) p137.

[18] [2005] EWCA Civ 595 at ¶[255; [2006] QB 125.

whether to grant interim injunctions to prevent publication of private information:

> "the fact that the injunction is being sought to protect the privacy of the claimant, and if the injunction is not granted, the claimant may be deprived of the only remedy which is of any value is a relevant consideration"[19].
>
> "if an interim injunction is to be granted it is essential that it is granted promptly because otherwise the newspaper will be published and then, from the claimant's point of view, the damage will have been done."[20]

34. The position is not confined to this jurisdiction. For example, in France, one of most highly regarded commentators on French Law stated[21]:

> "In most cases, plaintiffs prefer to prevent or to stop a breach to their 'intimate private life' happening. As a result, this emergency remedy has become the general remedy for the protection of private life, as opposed to normal procedures where judges award damages after the breach has happened."

35. Whilst the sum of damages the Applicant received was significant, it does not and cannot be regarded as an effective remedy for the wholly unjustified invasion of his private life. The hugely private and embarrassing personal facts and intimate photographic images which were deliberately exposed to the public through the pages of the newspaper, as well as on its internet website, could never be satisfactorily remedied by a monetary award.

36. The simple truth is that there is no way of curing the unlawful invasion of the Applicant's privacy since the information can never be expunged from the minds of the millions of people who read or saw this material. Neither the final outcome of court proceedings, however favourably determined, nor any award of damages, can restore privacy in the way it can restore an individual's reputation.

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[19] [2003] QB 195 at ¶11(ii) p204
[20] (*Ibid)* at ¶7.
[21] C. Dupre, "The Protection of Private Life Against Freedom of Expression in French Law" (2000) 6 EHRLR 642.

37. As the authorities recognize, the only effective remedy would have been an injunction (which the court accepted he would have been entitled to obtain) or at least the opportunity to obtain an injunction to prevent publication in the first place. This is precisely what he was denied by the newspaper, for which there is currently no sanction in the UK, whether criminal, civil or regulatory.

38. As already explained in the Supplemental Statement, the Applicant contends that UK law is obliged to impose a legal duty to comply with Article 8 and that can only be achieved by way of a prior notification requirement. If the Applicant is correct that Article 8 so demands then he is an obvious victim of such a breach, regardless of what compensation he obtained from the court after the event.

Actions brought in other jurisdictions

39. Similarly any remedies the Applicant has received in other jurisdictions are not relevant to the issue. It is crucial to remember that the only reason why the Applicant has had to take proceedings in other countries is because of the original publication in The News of the World. It was this article which irreparably destroyed his privacy and has led to repeated publications throughout the world.

40. By way of example only, in Germany, the Applicant has had to contact in excess of 100 media and internet websites in order to remove explicit or highly personal information which has been repeated or lifted from The News of the World's original publication. There have been around 50 websites in Spain which contain similar material that needs to be removed.

41. In the United Kingdom itself, the Applicant has been forced to contact Google on a regular basis to identify websites or links where this material has re-appeared. Of course, given

the nature now of the internet, this is a persistent problem since the material remains accessible unless and until it is removed.

42. Clearly, the actions which the Applicant has been forced to take in various jurisdictions around the world, and any remedies he has received as a result, relate to the profound and continuing consequences which have flowed from repetition of the newspaper's material. However, they do nothing to provide an effective remedy against the original invasion of his privacy.

43. It is impossible to see therefore how the need to take steps to deal with the negative impact of these ongoing publications in other jurisdictions can make the Applicant any less a 'victim' (indeed, quite the opposite since it shows the global scale of the effect shattering his privacy has had) or, as is implicit in the tone of the Government's observations, the subject of legitimate criticism. The actions taken by him are entirely appropriate, and would be unnecessary but for the original publication by the News of the World.

The suggestion the Applicant has not really suffered

44. The Government suggest that the Applicant has not suffered as greatly as he claims. This suggestion is as absurd as it is offensive. It was the trial Judge who having heard the evidence in a five day trial concluded at [236] that "*no amount of damages can fully compensate the Claimant for the damage done. He is hardly exaggerating when he says that his life was ruined*".

45. The irreparable nature of the damage he personally suffered as a result of the newspaper's article published without any warning was clear from his evidence at the trial:

"Having had my dignity and public standing destroyed by the publication of the activities in which I fulfill my most private fantasies, I will never be able to recover what I have lost. My life can never be put back in the position it was before such deeply private matters were disclosed to the public in such an appalling way. In one weekend they have destroyed everything. It is difficult to describe how public this humiliation has been."

46. The impact on his wife and children (whom he described as "*very private*") of this extremely public and sensational disclosure was perhaps more devastating.

"It had more of an effect on my family than it did on me because my wife and I have been married for 48 years and together for more than 50 years. We met as teenagers, and she never knew of this aspect of my life. So that headline in the newspaper was completely and totally devastating for her, and there is nothing I can say that can ever repair that, but also for my two sons."

47. In particular, the Applicant drew attention to the considerable effect the publication had on one of his sons:

"My two sons are both in their 30s, neither lead high-profile lives. One of my sons is receiving medical treatment for depression and I was extremely concerned for him when the Article was published.
…
I do not think there is anything worse for a son than to see in a newspaper, particularly a newspaper like the News of the World, pictures of the kind that they printed. I can think of nothing more undignified or humiliating than that, and if I put myself in their position to see my father in that situation I would find devastating. For me myself, I am a fairly robust person. I have had various times in my life when I have been subject to various verbal attacks, and so I can deal with that and also I am able to retaliate. At least I can bring an action here. I can bring an action on the Continent. I can do something. My family can do nothing except suffer the consequences for something of course for which they have no responsibility whatsoever."

48. In fact, the Applicant's son tragically died from a drug overdose in May 2009 following treatment for depression.

49. The plain facts are that the Applicant was the victim of a gross invasion of his personal privacy in breach of Article 8 and for which Article 10 provided no defence. That he managed to avoid losing his marriage (due to the loyalty of his wife) and his job (due to the loyalty of his colleagues) cannot mitigate the seriousness of the breach of Article 8.

50. Similarly, the fact that the Applicant has devoted much of his time to seeking reform of English law, and has sought and gained publicity in that context, cannot seriously be said to be relevant to whether he is a victim.

51. His privacy was irretrievably destroyed by the publication of the News of the World article without any warning in March 2008. Since then, he has sought to ensure a change in the law to establish that there should have been a duty on the press to give prior notification, and to prevent such an event occurring again. The notoriety which he has achieved, whether as a result of the expose or through his subsequent activities in highlighting the failure of the United Kingdom properly to protect the right to respect for private life in this way, is not something he wished for.

52. However, the Applicant has his own right of freedom of expression. He cannot be fairly criticized for exercising this right in order to seek a change in the law.

The availability of exemplary damages

53. The Government suggest that the Applicant failed to exhaust an effective remedy since he should have pursued his claim for exemplary damages, despite it being struck out by the Judge. Again, this is misconceived.

54. The Applicant's aim is not to "punish" the newspaper and journalist (as the Government wrongly suggests). This is a basic misunderstanding of his claim. The purpose is to establish that the law must impose an obligation to introduce an effective remedy to enable the victim to prevent publication.

55. Exemplary damages would not provide him with the remedy he seeks. The effective remedy – and the only effective remedy,

as explained above – would be a pre-publication obligation to notify, enforceable by criminal or regulatory sanctions.

56. Furthermore, exemplary damages suffer from the same defect as ordinary damages in this respect: they would only deter the media if there is a real risk of civil proceedings being brought after the event. But where the newspaper has published a story revealing embarrassing or damaging personal information, the last thing most victims want (as the newspapers know well) is to revive the public's recollection of such events by further publicity for a lawsuit and trial. The Applicant was very unusual in being prepared to sue.

57. The trial Judge expressly recognized this in his judgment[22]:

> "209. It is also clear that one of the main reasons for keeping the story "under wraps" until the last possible moment was to avoid the possibility of an interlocutory injunction. That would avoid delaying publication and, in a privacy context, would generally mean that a potential claimant would not trouble to institute any legal proceedings at all. Once the cat is out of the bag, and the intrusive publication has occurred, most people would think there was little to gain."
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> "230. … Whereas reputation can be vindicated by an award of damages, in the sense that the claimant can be restored to the esteem in which he was previously held, that is not possible where embarrassing personal information has been released for general publication. As the media are well aware, once privacy has been infringed, the damage is done and the embarrassment is only augmented by pursuing a court action. Claimants with the degree of resolve (and financial resources) of Mr Max Mosley are likely to be few and far between. Thus, if journalists successfully avoid the grant of an interlocutory injunction, they can usually relax in the knowledge that intrusive coverage of someone's sex life will carry no adverse consequences for them and (as Mr Thurlbeck put it in his 2 April email) that the news agenda will move on."

58. The force of this point has also been recognized in academic circles. Professor Wacks, a leading privacy expert, commented on the importance of injunctive relief in the following terms:

[22] (*Ibid*) at ¶210.

> "In many cases, in exercising its discretion not to grant the plaintiff interim relief, the court is effectively deciding the substantive issue. This is particularly so in personal information actions…Because the plaintiff's only concern is usually to prevent the information from being disclosed at all, the plaintiff will rarely proceed to trial after failing to gain interlocutory relief".[23]

59. In any event, the trial Judge in this case decided not only that exemplary damages were not available in a privacy claim as a matter of law but also went further by making a finding of fact that there was no basis (on the evidence before him) for exemplary damages because neither the editor nor the journalist stated that they knew at the time that the publication was unlawful and they were not indifferent as to whether there was a public interest defence[24].

60. As the Applicant was advised, there was therefore no realistic prospect of ever succeeding on an appeal in relation to exemplary damages, nor is there any suggestion by the Government that the Judge erred in this respect whether as a matter of fact or law. It cannot possibly be said in such circumstances that he failed to exhaust his domestic remedies. There is no requirement under Strasbourg jurisprudence to pursue a hopeless claim. In *Micallef v Malta* (15 October 2009), the Grand Chamber of the Court stated at paragraph 55 that the duty is to exhaust remedies which are "*sufficiently certain not only in theory but in practice, failing which they will lack the necessary accessibility and effectiveness. There is no obligation to have recourse to remedies which are inadequate or ineffective*".

61. Furthermore, not pursuing an appeal in relation to (exemplary) damages cannot be seen as a failure to exhaust domestic remedies if damages are not an effective remedy in any event. Whilst the sum awarded (and paid to charity in this case) was significant, no figure for damages whether general or aggravated, exemplary or punitive, can ever be a

[23] *Privacy and Press Freedom* (Blackstone, 1995) p156.
[24] at ¶208

remedy for a claimant whose privacy has been unjustifiably breached without any warning since his privacy cannot be re-established.

62. The Government also refer to the remedy of an account of profits. They observe that the Applicant elected to claim for compensatory damages rather than an account of profits. As explained in the Supplemental Statement, this alternative remedy (involving the disgorgement of the profits obtained by a publisher from the unlawful publication) is highly unsatisfactory. For example, it has never been successfully obtained against a newspaper or other media organisation[25]. In this case (as in *Douglas v Hello!*), once disclosure was provided by the defendant, it became clear that no real or significant profit had been made. The Applicant therefore elected for compensatory damages instead. There can be no criticism of this.

63. In any event, the most important point once again is that an account of profits suffers from the same problem as compensatory damages (or any other post-publication remedy), since it is incapable in principle of rectifying the wrong which has been done. Such a remedy does not, and cannot, restore the privacy of the Applicant.

D. <u>Question 2a</u>: Does the Government have a positive obligation to protect the Applicant's privacy by providing for a notification

[25] One of the leading textbook on equitable remedies, *Goff & Jones* on Restitution, 7th Edn at ¶34-021 demonstrates that there is almost no guidance on how such an account might be taken. Even in the field of intellectual property, this remedy is regarded with trepidation: See Lindley LJ in *Siddell v Vickers* (1892) 9 RPC 152 at pp.162-3.

"… I do not know any form of account which is more difficult to work out, or may be more difficult to work out than an account of profits. One sees it – and I personally have seen a good deal of it – in partnership cases where the capital of a deceased or outgoing partner has been left in the trade; an account has been directed of the profits made in respect of his capital, which is something like the profits made in respect of an invention, and the difficulty of finding out how much profit is attributable to any one source is extremely great – so great that accounts in that form very seldom result in anything satisfactory to anybody. The litigation is enormous, the expense is great, and the time consumed is out of all proportion to the advantage ultimately attained; so much so that in partnership cases I confess I never knew an account in that form worked out with satisfaction to anybody. I believe in almost every case, people get tired of it and get disgusted. Therefore, although the law is that a patentee has a right to elect which course he will take, as a matter of business he would generally be inclined to take an inquiry as to damages, rather than launch upon an inquiry as to profits."

requirement to warn him in advance of publication in order to allow him to seek an interim injunction against the newspaper?

64. The Applicant contends that in this case a positive obligation does arise on the part of the Government to protect his privacy by providing for a notification requirement to warn him in advance of publication.

65. In suggesting a negative answer to the Court's question, the Government contend at paragraph 2.5 of their Observations that:

> "The positive obligation tends to be more readily invoked in cases where the applicant suffers directly from state inaction or refusal to act ... [T]he extent of the obligation is at its weakest where what is required is positive action by private persons, which is exactly what the applicant proposes here".

66. However, as the Court stated in *Cumpana v Romania* (2005) 41 EHRR 14, at paragraph 91, it is recognized, even in the context of a publication covered by Article 10, that Article 8 "*may require the adoption of positive measures designed to secure effective respect for private life even in the sphere of the relations of individuals between themselves*".

67. In *KU v Finland* (2008) 48 EHRR 1237, the applicant, a child of 12 years old complained about having unwittingly become the subject of an advertisement placed on an internet website of a highly sexual nature. The Court stated at paragraph 43, in relation to this positive duty imposed under Article 8 "*in the sphere of the relations of individuals between themselves*", that the State may have a duty to impose criminal sanctions:

> "While the choice of the means to secure compliance with Article 8 in the sphere of protection against acts of individuals is, in principle, within the State's margin of appreciation, effective deterrence against grave acts, where fundamental values and essential aspects of private life are at stake, requires criminal-law provisions".

68. It is striking that both the Government and the third party interveners say so little about the relevant Strasbourg case-law about positive duties imposed on Member States under Article 8. It is equally remarkable that all of them seek to argue this case in a manner entirely divorced from the context and subject-matter of the newspaper article which has led to these proceedings.

69. This is unsurprising given the indefensible nature of the article in question. The Applicant contends that Article 8 requires a pre-publication duty of notification in cases such as his, which are (sadly) typical of the News of the World and other British tabloid newspapers (as explained above). A newspaper can publish a gross intrusion into a person's private life, with no conceivable justification and where the only reason for failing to follow the general practice of giving prior notice is the concern that this would result in an application for an injunction that is bound to succeed. The concern arises from the newspaper's knowledge that the article is a gross and obvious breach of Article 8 incapable of justification under Article 10.

70. There is a positive duty to introduce a pre-publication duty of notification because without such a duty the individual has no effective means to protect his privacy. As already explained, neither the Government's observations nor the third party interventions address the essence of the Applicant's complaint:

    1) The refusal of a newspaper (or other media) to give prior notification means the subject has no opportunity to preserve his privacy, and the court has no opportunity to make an effective order, however strong the claim that the article is an unjustified invasion of privacy, and however probable it is that the court would

have granted an injunction were an application to have been made to it prior to publication.

2) Unless the newspaper has a duty to give prior notice to the subject, the maintenance of the Article 8 right to privacy of that subject is dependent on the unilateral decision of the editor (or other person responsible for the publication) whether to notify the subject in advance. Indeed, the greater the prospects of the subject seeking and obtaining an injunction, the less likely it may be that the editor will give such prior notice. The newspaper decides unilaterally whether it is appropriate for the privacy of the subject to be destroyed. It may well be motivated by commercially-driven considerations. Perhaps it may also mistake or confuse its own interest with the public interest[26].

3) Because privacy is inherently perishable, it cannot be restored by a judgment in favour of the claimant after publication has occurred. The private information, once published, cannot be put back into the private domain where it should have remained. By contrast, a libel can be remedied by a (public) finding that the publication was false and by the award of damages. That is primary purpose of a libel action, namely "vindication". That is why, contrary to the submissions of the third party interveners, the Applicant's contention that there should be a duty of pre-publication notification applies to privacy claims but not to defamation claims. This critical distinction between these two conceptually very different types of action has long been recognized by

[26] As Sir John Donaldson MR observed in *Francome v MGN* [1984] 1 WLR 892 at 898: "The media are peculiarly vulnerable to the error of confusing the public interest with their own interest".

the United Kingdom courts[27] (if not by some of the media interveners).

4) Newspapers know they can publish information which destroys privacy in breach of Article 8 without legal redress in many cases because once the information is made public, the victim is unlikely to want to bring proceedings attracting further publicity to what are invariably embarrassing or damaging details about his private life[28]. Indeed, the more intrusive the publication, and the grosser the breach of Article 8, the less likely it is that the victim will wish to bring legal proceedings and make his private life the subject of further press reporting (for which there would be absolute immunity).

5) If United Kingdom law had imposed a duty (enforceable by criminal or regulatory standards) to give prior notice of the publication, the newspaper would certainly have had to notify him in advance (since there was no compelling reason or impracticality for not doing so) and the Applicant would have sought an injunction prior to publication, which would have been granted, and his right to private life would not have been irretrievably breached.

6) It is certain that the court would have granted a pre-publication injunction in this case. This is obvious from the fact that on the interim application for an injunction[29], several days after the original article appeared, the only reason the Applicant was refused injunctive relief (albeit reluctantly) by the Judge

[27] See, for example, Lord Justice Brown in *Greene v Associated Newspapers* at ¶81: "Once again we need to stress the distinction between a defamation case (where the claimant's right to reputation has been put in issue and the issue cannot be effectively resolved before the trial) and a case which raises direct issues of privacy or confidentiality." See also ¶78.
[28] See paragraphs 56 to 58 above.
[29] [2008] EWHC 687 QB

was because of the extent to which the material had already been and would in any event continue to be publicly available; the court did not regard an injunction as likely to have any effect by that stage since the continuing availability of the material rendered granting this relief "*a futile gesture*":

> "34. The Court should guard against slipping into playing the role of King Canute. Even though an order may be desirable for the protection of privacy, and may be made in accordance with the principles currently being applied by the courts, there may come a point where it would simply serve no useful purpose….
>
> "36. In the circumstances now prevailing, as disclosed in the evidence before me, I have come to the conclusion that the material is so widely accessible that an order in the terms sought would make very little practical difference….. The dam has effectively burst. I have, with some reluctance, come to the conclusion that although this material is intrusive and demeaning, and despite the fact that there is no legitimate public interest in its further publication, the granting of an order…at the present juncture would merely be a futile gesture."

7) Interestingly, whilst at the conclusion of the trial, the Judge granted a final injunction against the newspaper, it still contained a public domain provision which allows, amongst other things, for the republication of the original article, which was the very subject matter of the complaint. This was inevitable by reason of the Applicant's inability to obtain an injunction prior to the article being published, as well as the fact that the trial was held largely in public, thereby predictably attracting enormous publicity. This proves that a final injunction and an award of damages (however significant) provide no effective remedy at all for the invasion of privacy.

8) The current state of domestic law means that a newspaper or other media can avoid an injunction and publish in breach of Article 8 even where the newspaper can have no doubt that (a) the publication is a gross breach of

Article 8 (b) there is no Article 10 protection (c) an injunction would have been granted if only the victim knew and (d) the newspaper deliberately decides not to inform the victim in advance because the newspaper knows he will seek and obtain an injunction. Both the Government and the third party interveners seek to justify the perpetuation of such a system, which plainly involves no satisfactory balance between Article 8 rights and Article 10 rights.

71. Even if (as the Government contend in their Observations) there is no consistent pattern amongst Member States as to the provision of a pre-publication notification requirement, that cannot possibly be determinative of this issue. In fact it merely reflects two distinct differences between the United Kingdom and other Member States, already explained above, neither of which undermines the need for such a requirement in situations such as the present.

72. The first is the importance of consent as a substantive requirement in European privacy law[30]; the need to obtain consent before publishing can be lawful is a far more onerous requirement than one simply to notify in advance.

73. The second reason is the unique nature of the tabloid press in the United Kingdom, not just because of its highly intrusive nature, but also its self-proclaimed lack of respect for the Convention rights embodied in Article 8 which it regards as "*different and foreign ideas which, if left unchecked, risk the creeping and insidious destruction of ancient and hard won freedoms*".[31] The nature of the problem was specifically recognized by the Select Committee in their Report in the very context of this case. After

[30] See paragraphs 27 to 30 above.
[31] See paragraphs 22 to 26 above.

interviewing the Editor of the News of the World, they concluded at [56] that:

> "A culture in which the [blackmail] threats made to Woman A and B could be seen as defensible is to be deplored. The fact that News of the World executives still do not fully accept the inappropriateness of what took place is extremely worrying. The "choice" given to the women by Neville Thurlbeck was in fact no choice at all, given the threat of exposure if they did not co-operate….
>
> We found the News of the World editor's attempts to justify the Max Mosley story on "public interest" grounds wholly unpersuasive".

74. Of course, it is precisely the same attitude that has fostered or encouraged criminal activities such as phone hacking or paying for illegally obtained information, as revealed by Operation Motorman and the prosecution of Mr Goodman, the News of the World Royal Editor. The Select Committee condemned this, as well as the general feeling of unaccountability which pervades the tabloid press, in the strongest possible terms (although they were unable to impose any sanction)[32]:

> "a culture undoubtedly did exist in the newsroom of the News of the World and other newspapers at the time which at best turned a blind eye to illegal activities such as phone-hacking and blagging and at worst actively condoned it. We condemn this without reservation and believe it has done substantial damage to the newspaper industry as a whole…
>
> In seeking to discover precisely who knew what among the staff of the News of the World we have questioned a number of present and former executives of News International. Throughout we have repeatedly encountered an unwillingness to provide the detailed information we sought, claims of ignorance or lack of recall, and deliberate obfuscation. We strongly condemn this behaviour which reinforces the widely held impression that the press generally regard themselves as unaccountable and that News International in particular has sought to conceal the truth about what really occurred."

75. The margin of appreciation, on which the Government rely, provides no answer of principle to the failure to impose any obligation to give pre-publication notification. It might be

[32] See Select Committee Report, [493], [495].

relevant if the Government imposed such an obligation in some circumstances and the dispute were as to its scope or efficacy. However, that is not the case here. The Applicant's complaint is not that he received some warning but not enough warning. He received none at all, nor was the newspaper obliged to give it despite the gross and unjustified invasion of privacy which this unlawful disclosure caused. Without the pre-notification requirement, there is therefore a complete absence of any effective measure in this situation. The margin of appreciation cannot cover this.

E. Question 2b: Would such a positive obligation, and the corresponding duty on newspapers and other media, strike the correct balance between interests under Article 8 and Article 10?

76. This question can be answered quite simply: yes, because a court, rather than the newspaper or other media, would decide whether an injunction should be granted to prevent publication. Under section 6 of the HRA, the court would be bound by Article 10 in doing so, as well as Article 8. Over the ten years since the introduction of the Act, the court has now become extremely familiar with applying the Convention Rights, and carrying out the appropriate balancing exercise in situations where (as they often do) competing rights come into conflict.

77. By contrast, the editor of a newspaper or journalist is under no such obligation. Not only is he not required to give effect to Article 8, as well as Article 10, and is unaccountable in any way, there are strong commercial reasons why he would be motivated to deliberately ignore them, as happened in this case.

78. The introduction of this statutory duty under the HRA in 1998 (which came after Resolution 1165 was adopted by the Council of Europe), requires the court to enforce Convention Rights, and in particular the importance of freedom of expression[33], both in relation to the content of any judgment, if an injunction was applied for prior to publication, but also the speed and nature of the process with which this is done.

79. The Government's suggestion that the United Kingdom legislation or common law complies with the guidelines of Resolution 1165 is misconceived. Whilst paragraph 14vii is quoted in their Observations at paragraph 2.13, with emphasis given to "*anyone who knows*" that private information is about to be disclosed, it surely cannot be the desired effect of this guideline, intended to "*guarantee the right to privacy*", that the exercise of this right could be avoided by the sort of steps taken by the News of the World in this case: the deliberate decision not to let the Application "know" because it was rightly feared that the newspaper's unlawful disclosure would be prevented[34] by the successful application for an injunction.

80. It is accepted that despite concluding that pre-notification is the "*norm across the industry*" and is "*often crucial to fair and balanced reporting*", the Select Committee did not recommend a legal obligation. Instead, it recommended that "*the Ministry of Justice should amend the Civil Procedure Rules to make failure to notify an aggravating factor in assessing damages for a breach of Article 8*". The flaw in

[33] Section 12(4) HRA.

[34] The only example given of an 'undesirable situation' is *LNS v Persons Unknown* [2010] EWHC 119 QB. The crucial feature of that case is that if a pre-notification obligation existed, the claimant would not have had to seek an injunction against circulating rumours by unidentified individuals since he would have been confident that he would have been notified once a newspaper or other media if they decided to publish them. He therefore would not have needed some (pre-emptive) comfort against a story appearing in the press without the proper *opportunity* to protect his rights, whether the court ultimately granted an injunction or not. Surely the interests of Article 8 and 10 would be better served with a fully argued hearing on notice rather than an emergency without notice application which happened in that case.

this recommendation is obvious. As already explained, damages after the event (whether slightly enhanced by this 'aggravation' or not) provide no effective remedy for the original invasion of privacy, nor, as is clear from experience, any deterrent for a newspaper confident in the justified belief that:

> "if [they] successfully avoid the grant of an interlocutory injunction, they can usually relax in the knowledge that intrusive coverage of someone's sex life will carry no adverse consequences for them and …that the news agenda will move on."[35]

81. The Government (at paragraph 2.19 of their Observations) and the media interveners complain that there would be practical problems posed by a pre-publication notification duty. The Applicant responds:

    1) These practical problems are greatly exaggerated. As the Select Committee noted at paragraph 90 of its Report, the media do "*generally*" contact "*the people they are writing about*". The Head of the PCC Editorial Code Committee himself admitted that this already happened in 99% of cases[36]. The question of principle is whether the media should be able to decide unilaterally when not to follow that practice, even in a case of gross intrusion into private life, and even when there is no conceivable reason not to follow the normal practice other than to avoid a successful application for an injunction.

    2) Article 10 rights are not absolute and their scope and extent and the balance between them will depend on the particular circumstances of the case. . As the Court stated in *Armoniene v Lithuania* (2008) 27 EHRR 389, paragraph 39:

[35] *Mosley v NGN* [2008] EWHC 1777, QB, Eady J at ¶230
[36] See paragraph 16 above.

> "a fundamental distinction needs to be made between reporting facts - even if controversial - capable of contributing to a debate in a democratic society and making tawdry allegations about an individual's private life ... . As to respect for the individual's private life, the Court reiterates the fundamental importance of its protection in order to ensure the development of every human being's personality".

3) In any event, as already explained, the Applicant recognizes that the Government would enjoy a discretion in the drafting of a statutory duty to impose a pre-publication notification requirement. The complaint is that there is no such statutory duty, and there is no good reason why such a duty should not have applied in the circumstances of the present case, where the publication was by a national newspaper, involved material which was plainly destructive of the personal privacy of the Applicant, when that information had not previously been disclosed publicly in any part of the world, and when there was no good reason for the newspaper not to notify the Applicant in advance other than to prevent him from seeking and obtaining an injunction. It does not assist the Government and the Interveners to point to theoretical difficulties which might arise in cases which are much more difficult than the present case. The Applicant's submission is that Article 8 requires the United Kingdom to impose a statutory duty to respect a pre-publication notification requirement in cases such as this (with criminal or regulatory sanctions), whether or not the legislation recognizes exceptions which would address difficulties which may arise in other cases.

4) The Government (paragraph 2.19(1)-(5) of their Observations) and third party interveners fear that there would be more applications for interim injunctions, heard in private, leading to restraints on publication. But such events involve no breach of

Article 10. The court would only grant an interim injunction when it was appropriate to do so in the circumstances of the individual case, and consistent with Article 10 to do so. The interim injunction would only be maintained for such length of time as was consistent with Article 10. Furthermore, as already explained[37], section 12 of the HRA already provides considerable protection for the newspaper or other media when an application for an interim injunction is made. Sections 12(3) and (4) state as follows:

> *(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.*
>
> *(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—*
>
> *(a) the extent to which—*
>
> *(i) the material has, or is about to, become available to the public; or*
>
> *(ii) it is, or would be, in the public interest for the material to be published;*
>
> *(b) any relevant privacy code.*

The present case is concerned with whether the newspaper or other media invading privacy may, by refusing to notify the subject of the article or broadcast, prevent an application for an injunction being made at all.

5) If pre-publication notification is already the norm, practical difficulties cannot be insuperable. In any event, the Government would have a broad discretion in deciding on the scope of the provisions introduced to impose an obligation to secure such pre-publication notification, including a discretion as to the nature and content of appropriate exceptions. In relation to the specific points raised, the Applicant responds: :

[37] See paragraph 10 above.

a) The focus of the obligation requirement is on the media because they are the ones with the power, by their publications, to destroy the privacy of the individual. The Applicant recognizes that the Government would have a broad discretion in defining the scope of the pre-publication notification obligation to confine the duty to such persons.

b) It is accepted that there would be exceptions to this requirement in cases (such as advanced by the media interveners) where pre-notification was impractical or there were compelling public interest reasons for not doing so, such as because if notified in advance the subject may destroy evidence, or the public need to be notified urgently of a grave matter. As already explained above[38], this involves no practical difficulty. However, these exceptional cases do not remove the need for a general pre-publication notification duty when, as in the present case, there is no good public interest reason not to notify and the newspaper does not inform the subject of the material simply because it does not wish to run the risk of a successful application for an injunction.

c) As to when it would be engaged, this is again a matter within the scope of the discretion of the Government in introducing legislation. However, at the very least, the obligation should arise where there are reasonable grounds to believe that the publication would infringe the right to private life under Article 8, having regard to all the circumstances of the case (including any public interest defence). There is nothing unfamiliar with the legal concept of 'reasonable belief'. It is a

test for example already enacted in section 32 of the Data Protection Act 1998, which contains the specific 'media' exemption to unlawful processing of personal data. It would then be for the Applicant to decide whether to seek an injunction, and if such a claim is made, for the court to decide whether to grant an interim injunction by balancing such Convention Rights as are in play.

d) The fear expressed by the media interveners that there would be problems where the information has already been widely published elsewhere in the world is not a realistic one. No English court would grant an injunction in such circumstances, applying Article 10. Not only does section 12(4)(a)(i) of the HRA specifically require the Court to consider "*the extent to which…the material has become available to the public*" but the European Court has ruled that to grant an injunction in such circumstances would be inappropriate: *Editions Plon v France* (2004) 42 EHRR 705. It could not seriously be suggested (to take an example given by the interveners) that a newspaper would have a duty to contact President Clinton and Monica Lewinsky before publishing details of their affair, once it had been reported in the USA. There would be no reasonable grounds for believing that such a publication would be a breach of Article 8.

e) As to sanctions, the Government suggest that criminal sanctions might be inappropriate because questions would arise about arresting an editor, and publicising the criminal proceedings. But these problems do not prevent criminal proceedings against newspapers and editors for alleged contempt of court, obscenity or breaches of the Official Secrets Act. As

[38] See paragraphs 19 to 20 above.

explained above, in *KU v Finland* (2008) 48 EHRR 1237, the Court required criminal sanctions for a breach of Article 8. The Government suggests that "reasonable notice" could not form the basis of criminal liability. But there are many criminal offences, including offences in the context of freedom of expression, which are just as dependent on the maintenance of proper standards: for example, the law of obscenity. See the judgment of the Court in *Muller v Switzerland* (1988) 13 EHRR 212, 226 (paragraph 29):

> "The Court has, however, already emphasised the impossibility of attaining absolute precision in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague. Criminal law provisions on obscenity fall within this category".

82. For all these reasons, the Applicant submits that the objections raised by the Government and the media interveners do not address the typical case (as opposed to hypothetical exceptions) where the editor or journalist responsible for a proposed publication plainly believes that it would or may infringe the subject's Article 8 rights, and yet decides not to notify the subject because of a fear that an injunction may be sought and obtained. In such circumstances, the publisher is making itself the sole judge of whether the subject's Article 8 rights should be irreparably damaged. The Applicant's case, which neither the Government nor the media interveners properly address, is simple: it is the court, not the publisher, which should be the judge of whether publication should occur, with the court applying Article 8 and Article 10 as it is statutorily required to do.

F. Question 3: Did the Applicant have an effective remedy under Article 8 as read with Article 13?

83. The Applicant answers this question 'no' for the reasons already set out in answer to Question 1 above.

84. The Government contend (at paragraphs 3.2-3.3 of their Observations) that it is often the case that the legal remedy for a wrong consists of damages. If a person suffers a physical injury, the court awards damages even though it cannot restore the missing limb. This is, of course, correct. But it ignores two fundamental points:

    1) Firstly, the Convention does, where appropriate, impose duties on the Member State to take positive action to prevent injury to one person caused by another private person, even though such injury (where it occurs) may be compensated in damages. There are many such cases under Articles 2 and 3.

    2) Secondly, in the context of Article 8, the Court has specifically recognized that because of the importance of private life and the impossibility of restoring privacy once it has been breached, the Member State has obligations to prevent the disclosure of information, and not just a duty to ensure that adequate compensation is paid if private information is disclosed[39].

85. The Government suggest (paragraph 3.4 of their Observations) that the damages to be paid, plus the costs, deter wrongdoing by newspapers. This ignores the fact, as recognized by both judges and academics alike[40], that a person whose privacy has been invaded by the publication of embarrassing and damaging personal information is most unlikely to want to bring further legal proceedings which will remind the public of the subject matter and further

[39] See *Armoniene v Lithuania* (2008) 27 EHRR 389; *I v Finland* Applic no.20511/03 (17 July 2008); *KU v Finland* (2008) 48 EHRR 1237.

damage his private life. Newspapers are well aware of this, as the Judge held in this case:

> "It is also clear that one of the main reasons for keeping the story "under wraps" until the last possible moment was to avoid the possibility of an interlocutory injunction. That would avoid delaying publication and, in a privacy context, would generally mean that a potential claimant would not trouble to institute any legal proceedings at all. Once the cat is out of the bag, and the intrusive publication has occurred, most people would think there was little to gain…if [they] successfully avoid the grant of an interlocutory injunction, they can usually relax in the knowledge that intrusive coverage of someone's sex life will carry no adverse consequences for them and …that the news agenda will move on."

86. The former Chairman of the PCC, Sir Christopher Meyer, confirmed this in his evidence to the Select Committee[41]:

> The great deterrent on a privacy case…is because you are concerned that… the very sin of which you were complaining…is then thrown into open Court where every nook and cranny and crevice – almost literally in Mr Mosley's case – is then exposed to the public gaze over and over as the prosecution and defence throw the shaved buttocks backwards and forwards across the courtroom".

87. The Government suggest (at paragraphs 3.5-3.13 of their Observations) that there is a possible 'effective' remedy under the Data Protection Act 1998 ("the DPA") which the Applicant could have sought. However, as is obvious from the facts of the case, that Act offers the Applicant no greater protection or remedy for invasion of privacy in the present circumstances.

88. Firstly, it would not have provided him with any larger sum in damages (or compensation under section 13 of the DPA) than he obtained in his claim for invasion of privacy (and nor does the Government suggest that it would). As Lindsay J stated in *Douglas v Hello! Ltd* [2003] EWHC 786 (Ch) at [239], despite his finding that the defendant had breached the Data Protection legislation in publishing (or "processing") unauthorised photographs of the claimant's wedding:

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[40] See paragraphs 56 to 58 above.
[41] Minutes of the Oral Evidence taken before the Culture, Media and Sport Committee on Thursday 23 April 2009, Answer of Sir Christopher Meyer to 346.

"Thus although I hold there to have been a breach of the requirements of the Data Processing Act, I do not see it as adding a separate route to recovery for damage or distress beyond a nominal award, which I shall make"

Of course, compensation or damages is not an effective remedy for the reasons already explained.

89. As to the provision for rectification or destruction of inaccurate personal data under section 14 of the DPA, this entirely misses the point of the Applicant's complaint. His concern was not that the newspaper still possessed inaccurate material but that they had published to the world material which destroyed his personal privacy. It would also not stop the huge proliferation and repetition of this material throughout the world, which is the subject of his actions in other jurisdictions as already explained.

90. Critically, the DPA did not impose any duty on the newspaper to give pre-publication notification to the Applicant of the intention to publish the material which damaged his privacy, and nor did it create any criminal or regulatory sanctions for a failure to do so. Any 'additional' relief available under the DPA could not possibly constitute an effective remedy for the complaint which the Applicant makes to this Court, nor is it seriously suggested by the Government that it does.

G. JUST SATISFACTION

91. As already stated, the Applicant does not seek compensation from the Court for the breach of his Article 8 rights. He brings this application to establish that he is the victim of a breach of Article 8 in that English law imposed no obligation on the newspaper (supported by criminal or regulatory sanctions) to give him pre-publication

notification of its intention to publish information which would or might breach his right to privacy under Article 8, so that he could seek an injunction to protect that right and so a court would have the opportunity to decide how to balance his Article 8 rights against the Article 10 rights of the newspaper, a balancing exercise which the court decided (after publication) in his favour, and when there was no good reason for the newspaper not to give such pre-publication notification. The Applicant seeks to ensure a change in English law so that such events do not recur, either to his detriment or to the detriment of anyone else.

92. For this reason, the Applicant seeks the following by way of just satisfaction:

(a) A finding by the Court that the United Kingdom is in breach of Article 8 by failing to impose a duty on newspapers and other media to comply with a pre-publication obligation to give notice to a person when there are reasonable grounds for believing that the newspaper or other media intends to publish information which will infringe their Article 8 rights, such an obligation being enforceable by criminal or regulatory sanctions.

(b) The payment by the Government of the Applicant's costs and expenses in bringing this claim before the Court. A separate schedule of these costs is attached hereto.

Lord Pannick QC

David Sherborne

Declaration and Signature

I hereby declare, that to the best of my knowledge and belief, the information I have given in this Response is correct.

Signature:……

Dominic Crossley (Representative)

Place: Collyer Bristow LLP, 4 Bedford Row, London, WC1R 4DF

Date: 1st June 2010