IN THE MATTER OF THE UNDERCOVER POLICING INQUIRY

OPEN WRITTEN SUBMISSIONS ON BEHALF OF THE DESIGNATED LAWYER OFFICERS:

THE LAMBERT REPORT

Filed pursuant to Inquiry direction dated 28 February 2018

For hearing: 21 March 2018

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1. Introduction

1.1 These submissions are filed on behalf of the DL officers pursuant to the abovementioned Inquiry direction inviting submissions on the following question of law:

> *whether or not Rob Evans and Paul Lewis are entitled, as a matter of the civil law of confidence or misuse of private information, to publish further extracts from the report, in particular those which name individuals.*

1.2 The abbreviations "CL", "CP", "DL", "GNML", "HRA", "MPS", "NPOIU", "NSNP", "PF", "PII" and "SDS" are adopted herein, the 45 page 1994 report by Bob Lambert referred to in the direction is referred to as "the report", Rob Evans and Paul Lewis are referred to as "RE" and "PL" respectively and references to numbered articles relate to articles of the ECHR.

1.3 So far as concerns the legal expectations and obligations of confidentiality and privacy attaching to the identities of undercover police officers and the public interest in and importance of their protection, the written submissions on behalf of the DL officers dated 6 November 2017 are repeated (see esp. pts 5-6).

2. Summary

2.1 On the above question of law, it is submitted that:

(1) if and to the extent that RE and PL have access to a copy of the report, they are not necessarily entitled to publish further extracts from it simply by virtue of having such access;

(2) those parts of the report which name or contain information about individuals contain information which is *prima facie* confidential and private and whose publication and misuse is therefore actionable in breach of confidence and misuse of private information;

(3) the entitlement of RE or PL lawfully to publish, or of any other person lawfully to restrain publication, would depend on a consideration of the information in question, any public interest in its publication or non-publication, the rights of RE or PL under art.10, the application of HRA, s.12 and the rights of those concerned under arts 2-3 and 8.

2.2 The Inquiry has not invited submissions on whether and to what extent the answer to the above question of law could be said to relevant to its determination of any restriction order applications. The DL officers reserve their position on this accordingly subject to the points made in outline in part 8 below.

3. The report

3.1 The report contains the names of and private information about a number of CP and non-CP individuals, including former police officers, NSNP activists, campaigners and protestors (one of whom had a relationship with an undercover officer and has been designated as a CP under a pseudonym) and a third party.

3.2 So far as concerns restriction orders granting real name protection to those named in the report: an application on behalf of the abovementioned relationship-partner has been intimated; the Inquiry has indicated that it is or would be minded to make such orders in relation to four DL officers; and the applications of a further two DL officers are pending.

3.3 The above provisional decisions rest on findings that protection of the relevant real names is in the public interest and publication would be incompatible with the art.8 rights of those concerned. Furthermore, in connection with more than one of the DL officers named in the report, the application is or will be supported by expert medical

evidence and/or an argument that publication would be incompatible with their rights under arts.2-3.

3.4 RE and PL's book "Undercover" quotes and draws on the report extensively and contains information about three of the DL officers named and referred to therein. One of these is named in the book and will not be the subject of a restriction order. Two are not named and the Inquiry has said it is or would be minded to withhold and protect their real names.

4. Practical considerations

4.1 The Inquiry's description of RE and PL as responsible journalists is not disputed and it gives rise to a number of important points.

4.2 Even assuming that one of them has an unredacted copy of the report and has not undertaken to refrain from further publication of its contents, it is unthinkable that either would consider publishing any further names or information therein without prior notice:

(1) if and to the extent that RE and PL considered there was a sufficiently strong public interest in information or a name contained in the report, they would, presumably, have included it in their book;

(2) to the extent that they refrained from doing so, this, presumably, reflected an assessment that there was not a sufficiently strong public interest to justify publication;

(3) nothing has happened since publication of the book to elevate the public interest in the contents of the report, indeed a public inquiry has been instituted to investigate its subject matter and this has been provided with an unredacted copy of the report;

(4) RE and PL know very little, if anything, about the deployments or private lives of the police officers named in the report, their Operation Herne numbers or the consequences or risks to them of their public identification;

(5) RE and PL are aware of the Inquiry's assessment that publication of at least some of the names in the report would not be in the public interest and would be incompatible with the art.8 rights of those concerned and of the fact that arts 2-3 rights are also said to be engaged in some cases.

5. Breach of confidence

5.1 The ingredients of this cause of action are set out in *Coco v A.N. Clark (Engineers) Ltd* [1969] RPC 41, per Megarry J at p.47 and *Attorney General v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109 ("*Spycatcher No.2*"), per Lord Goff at pp.281B-281F and 282C-282F, per Lord Keith at pp.255E, 260A and 261D-261F and per Lord Griffiths at pp.268A-268G.

5.2 In *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, Lord Walker described Lord Goff's speech in *Spycatcher No.2* as "the most important single step in the course of the law's recent development" and explained that it "was not in terms concurred in by other members of the appellate committee but Lord Goff's exposition has commanded general acceptance" ([272], dissenting but not on this issue). The authorities contain numerous similar affirmations and endorsements of the same passages including the speech of Baroness Hale in *OBG Ltd* at [307], "*Spycatcher* expanded liability for failing to keep a secret beyond the person to whom it had originally been confided to the person who knowingly took advantage of the secret".

5.3 Each ingredient of the cause of action is made out in connection with the thus far unpublished parts of the report which name or relate to former members of the SDS:

(1) The relevant information is not trivial and it is confidential in the sense that it has the "necessary quality of confidence about it", i.e. it is not "generally accessible" to the public (*Spycatcher No.2*, per Lord Goff at p.282C). In this regard, the fact that the report or its contents have been accessed by non-police personnel away from police premises does not mean they are "in the public domain". Even prior publication online does not necessarily put information "in the public domain" or deprive it of the quality of confidence and this has not

happened (*Barclays Bank Plc v Guardian News and Media Ltd* [2009] EWHC 591 (QB), per Blake J at [22]-[25]).

(2) Anyone obtaining information from an unauthorised copy of the report would inevitably be subject to an obligation of confidence. The report and its contents are self-evidently confidential. Indeed, RE and PL describe it as "highly confidential" in their book (p.82). The report is classified "Top Secret" and headed with a "circulation note" requiring that it "be passed by hand under secure cover at all stages and retained by DCI [] in the SDS Office". Anyone given access to or coming into possession of a copy, other than through some official channel, would know that its disclosure was unauthorised and must have involved or originated in misconduct and a breach of the standards of professional behaviour at Sch.2 to the Police (Conduct) Regulations 2012 ("Police officers treat information with respect and access or disclose it only in the proper course of police duties"). This would be sufficient to import an obligation of confidence on the grounds that further unauthorised disclosure or use of the contents would be unconscionable. See *Spycatcher No.2*, per Lord Goff at pp.281B-281F:

> *I start with the broad general principle (which I do not intend in any way to be definitive) that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others. I have used the word "notice" advisedly, in order to avoid the (here unnecessary) question of the extent to which actual knowledge is necessary; though I of course understand knowledge to include circumstances where the confidant has deliberately closed his eyes to the obvious. The existence of this broad general principle reflects the fact that there is such a public interest in the maintenance of confidences, that the law will provide remedies for their protection.*
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> *I realise that, in the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties - often a contract, in which event the duty may arise by reason of either an express or an implied term of that contract. It is in such cases as these that the expressions "confider" and "confidant" are perhaps most aptly employed. But it is well settled that a duty of confidence may arise in equity independently of such cases; and I have expressed the circumstances in which the duty arises in broad terms, not merely to embrace those cases where a third party receives*

> *information from a person who is under a duty of confidence in respect of it, knowing that it has been disclosed by that person to him in breach of his duty of confidence, but also to include certain situations, beloved of law teachers - where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by. I also have in mind the situations where secrets of importance to national security come into the possession of members of the public - a point to which I shall refer in a moment.*

See also *Imerman v Tchenguiz* [2010] EWCA Civ 908, [2011] Fam 116, per Lord Neuberger MR giving the judgment of the court at [64] (saying that the above authoritatively extended the law of confidence to cases where the defendant had come by the information without the consent of the claimant) and at [68]-[69] and [74]:

> *68. If confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant had an expectation of privacy, it must, a fortiori, extend to a defendant who intentionally, and without authorisation, takes steps to obtain such information. It would seem to us to follow that intentionally obtaining such information, secretly and knowing that the claimant reasonably expects it to be private, is itself a breach of confidence. The notion that looking at documents which one knows to be confidential is itself capable of constituting an actionable wrong (albeit perhaps only in equity) is also consistent with the decision of the Strasbourg court that monitoring private telephone calls can infringe the article 8 rights of the caller: see Copland v United Kingdom (2007) 45 EHRR 858.*
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> *69. In our view, it would be a breach of confidence for a defendant, without the authority of the claimant, to examine, or to make, retain, or supply copies to a third party of, a document whose contents are, and were (or ought to have been) appreciated by the defendant to be, confidential to the claimant. It is of the essence of the claimant's right to confidentiality that he can choose whether, and, if so, to whom and in what circumstances and on what terms, to reveal the information which has the protection of the confidence...*
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> *74. ... But, as we have noted, where the confidential information has been passed by the defendant to a third party, the claimant's rights will prevail as against the third party, unless he was a bona fide purchaser of the information without notice of its confidential nature.*

See also *Matalia v Warwickshire CC* [2017] EWCA Civ 991, per David Richards LJ at [29].

(3) Unauthorised disclosure of the relevant information would breach the above obligation of confidence.

6. Misuse of private information

6.1 As set out above, the Inquiry has already recognised that information naming or identifying an individual as a former undercover police officer is *prima facie* private information which is subject to reasonable expectations of privacy and, therefore, art.8 protection.

6.2 Accordingly, this is information whose misuse is actionable in tort and may be restrained by injunction following *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457, *OBG Ltd* and *Vidal-Hall v Google Inc* [2015] EWCA Civ 311, [2016] QB 1003.

6.3 Furthermore, it is well established that the tort of misuse of private information operates to protect private information notwithstanding that it is "in the public domain" where its further or repeat disclosure will have the effect of further interfering with art.8 rights. See *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1, per Lord Nicholls at [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.*

6.4 See also *PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081, per Lord Mance at [30]-[32] and [35] and per Lord Neuberger at [57]-[62], including:

> *30. The same theme was developed by Tugendhat J in the second CTB judgment [2011] EWHC 1334 , which followed the naming in Parliament by an MP of the footballer: Tugendhat J said, at para 3:*

> *"It is obvious that if the purpose of this injunction were to preserve a secret, it would have failed in its purpose. But in so far as its purpose is to prevent intrusion or harassment, it has not failed. The fact that tens of thousands of people have named the claimant on the internet confirms that the claimant and his family need protection from intrusion into their private and family life. The fact that a question has been asked in Parliament seems to me to increase, and not to diminish the strength of his case that he and his family need that protection. The order has not protected the claimant and his family from taunting on the Internet. It is still effective to protect them from taunting and other intrusion and harassment in the print media."*
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> *31. Tugendhat J's reasoning in JIH and Eady J's reasoning in CTB were cited with approval by MacDonald J in H v A (Family Proceedings: Reporting Restrictions) [2016] 1 FCR 338 , para 47. In so far as it is likely that the defendant in the present case would wish to accompany any stories with pictures of the relevant individuals, it is also consistent with the Leveson Inquiry's conclusion (An Inquiry into the Culture, Practices and Ethics of the Press (November 2012) (HC 780), vol II, ch 7, p 737, para 3.4) that:*
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> > *"There is a qualitative difference between photographs being available online and being displayed, or blazoned, on the front page of a newspaper such as the Sun . The fact of publication in a mass circulation newspaper multiplies and magnifies the intrusion, not simply because more people will be viewing the images, but also because more people will be talking about them. Thus, the fact of publication inflates the apparent newsworthiness of the photographs by placing them more firmly within the public domain and at the top of the news agenda."*
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> *32. It is right that the Supreme Court should on the present application express its own view on the correctness of the approach taken in the authorities discussed in the preceding paragraphs: paras 26–31. In my opinion, the approach is sound in general principle...*

7. Countervailing considerations

7.1 It is, of course, accepted that RE or PL or another third party attempting to publish information from the report and resisting a claim in breach of confidence and/or misuse of private information might seek to raise arguments about the public interest, art.10 and HRA, s.12 by way of defence (see *Spycatcher No. 2*, per Lord Goff at pp.282F-283B and *In Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593, per Lord Steyn at [17]).

7.2 However, in circumstances where the Inquiry has decided or would be minded to make a restriction order in relation to such information, particularly having regard to arts 2-3 or 8, it is submitted that there is every reason to think that such arguments would not succeed.

7.3 Certainly, a civil court faced with such arguments would place considerable weight on the Inquiry's expert assessment of the competing public interest and ECHR arguments in play and the fact that the proper and orderly progression of its investigation represents the best and fairest means of getting to the truth about undercover policing.

8. The question posed is irrelevant to the restriction order process

8.1 When determining restriction order applications, the Inquiry is considering whether to protect or release information contained in evidence or documents given, produced or provided to it. It does not have power to grant injunctions or regulate the independent publication or disclosure of information by or between private individuals: those are matters for the ordinary courts. In this regard, it is important to appreciate that the function of the Inquiry when considering a restriction order application is materially and qualitatively different to the function a court considering an application for injunctive relief. The Inquiry, as a public authority and emanation of the state, is effectively deciding whether to release information that would not otherwise be released, possibly at all and certainly not by the state. It is not adjudicating on the competing rights of independent legal persons claiming an entitlement to do or prevent this.

8.2 It is submitted that the Inquiry should determine restriction order applications according to principle and in accordance with its *Restriction Orders: Legal Principles and Approach Ruling* dated 3 May 2016. Speculation about the possibility of future publication of the information under consideration should not form part of this process or be allowed to dictate the outcome of applications. These are legally irrelevant matters.

8.3 In the event that information subject to a restriction order is lawfully or unlawfully published by a third party, this may justify the variation or discharge of that order, but the possibility of this happening cannot legitimise the refusal of an order in the first place. If publication would be incompatible with a Convention right, the Inquiry may not lawfully publish, regardless of whether a third party may infringe that right at some point in the future. This is the effect of HRA, s.6(1) which does not allow public

authorities to breach human rights simply because a third party will or may do this in due course.

8.4 Furthermore, if the leaking of the report and the fact its contents may be known to RE and PL were of any relevance to the restriction order process, the same would have to follow for any other confidential and private information in their hands or in the hands of others. In this regard, there are numerous other third parties who are privy to information contained in the report and/or other confidential and private information which will be the subject of restriction orders, e.g. former police officers such as the DL officers, the Slater & Gordon officers and PF. It is submitted that the theoretical possibility of unlawful disclosure of confidential or private information by any such party cannot dictate the outcome of restriction order applications. The logic of this would lead not only to the public identification of every police and NSNP individual named in the report, it would also lead to the public identification of every undercover officer, activist, campaigner and protester named in any evidence or document given, produced or provided to the Inquiry.

8.5 Finally, even if, contrary to the above, it were relevant to consider whether RE or PL might publish information contained in the report, it is submitted that it would be unlawful for the Inquiry to speculate about this and that it should first establish directly with RE and PL whether either of them: (1) has a copy of the report and, if so, whether this is full / unredacted or partial / redacted; (2) claims to have a right to publish any so far unpublished parts; (3) has any intention of exercising any such claimed right.

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