Neutral Citation Number: [2011] EWHC 1314 (Admin)

Case No: CO/9710/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2011

Before :

MR JUSTICE FOSKETT

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Between :

THE QUEEN ON THE APPLICATION OF

(1) CHRIS BRYANT, MP **Claimants**
(2) BRENDAN MONTAGUE
(3) BRIAN PADDICK
(4) LORD PRESCOTT

- and -

THE COMMISSIONER OF POLICE OF THE METROPOLIS **Defendant**

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- -

HUGH TOMLINSON QC and **ALISON MACDONALD** (instructed by **Bindmans LLP**) for the **Claimants**
JAMES LEWIS QC and **EDWIN BUCKETT** (instructed by **Solicitor for the Metropolitan Police**) for the **Defendant**

Hearing dates: 12 May 2011

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Approved Judgment

Mr Justice Foskett :

Introduction

1. This application came before me by way of a renewed application for permission to apply for judicial review, permission having been refused on the papers by Mitting J on 3 February.

2. The hearing had been listed for 1½ hours and I heard oral submissions for a little over that period from Mr Hugh Tomlinson QC for the Claimants and Mr James Lewis QC for the Defendant. I had been provided beforehand with detailed Skeleton Arguments on both sides and a good deal of written material, most of which I had read before the hearing.

3. The Claimants are Mr Chris Bryant, Member of Parliament for the Rhondda, Mr Brendan Montague, a freelance journalist, Mr Brian Paddick, a former Deputy Assistant Commissioner of the Metropolitan Police and Lord Prescott, formerly Mr John Prescott, Member of Parliament for East Hull from 1970 to 2010 and Deputy Prime Minister from 1997 to 2007.

4. I was made aware of the civil proceedings in the Chancery Division brought by a number of claimants (of which Mr Bryant, the First Claimant in these proceedings, is one) against News Group Newspapers Ltd (the proprietor of the *News of the World* newspaper) which Vos J is case-managing towards a trial intended for early next year. I have had the advantage of reading his judgment concerning certain disclosure issues raised by the Commissioner in those proceedings given on 18 March: see *Skylet Andrew v News Group Newspapers Ltd and anor* [2011] EWHC 734 (Ch). I have been told that the Commissioner has decided not to appeal against that decision.

5. For reasons I will summarise later (see paragraphs 34-50), the factual situation has changed very significantly since Mitting J had to consider this application on the papers. Furthermore, it is clear that, although certain of the matters I will mention in due course had occurred before his decision was made, his attention had not been drawn to them before he did so. It is, in those circumstances, inevitable that I must approach this renewed application largely afresh, although I will, of course, where appropriate bear in mind the views expressed by Mitting J.

General observations

6. Because of the widespread interest that there is in (a) what is often referred to as "the *News of the World* phone hacking affair", (b) the identities of some of those who claim to have been victims of the alleged affair and, of course, (c) the current general debate about privacy matters and press freedom generally, I think there are one or two

observations I ought to make about the nature of these judicial review proceedings and the nature of the application I have been asked to consider.

7. First, self-evidently this is not a claim against the *News of the World* itself. It is a claim for judicial review arising from the conduct of the Metropolitan Police Service (the 'MPS') in its investigation in 2005/2006 of alleged phone hacking activities by certain people associated with the *News of the World*. Two of those definitely involved at the time were Mr Glenn Mulcaire, a private investigator, and Mr Clive Goodman, then the Royal editor of the *News of the World*. I will say a little more of their activities shortly, but it is common knowledge that they were prosecuted for conspiracy to intercept telephone calls without lawful authority and for unlawful interception of communications contrary to s. 1(1) of the Regulation of Investigatory Powers Act 2000.

8. They pleaded guilty to the unlawful interception of telephone voicemail messages received by three members of staff at Buckingham Palace. Mr Mulcaire also pleaded guilty to the unlawful interception of the voicemail messages of five other individuals - Max Clifford, Simon Hughes MP, Skylet Andrew, Elle MacPherson and Gordon Taylor. When sentencing Mr Mulcaire and Mr Goodman on 26 January 2007, Gross J, as he then was, said that the case "was not about press freedom", but about an "illegal invasion of privacy". Those comments are equally applicable to this case.

9. Second, the issue I have to decide is whether the Claimants have an "arguable" case for seeking the relief by way of judicial review that they claim. Although I did have the advantage of receiving the submissions and material to which I referred in paragraph 2 above, all somewhat more detailed and substantial than is often the case on a renewed application for permission to apply for judicial review, I emphasise that my task is simply to decide whether the case is "arguable" – to which might be added the words "with some real or reasonable prospects of success" – or, perhaps, whether it should be allowed to proceed simply because it raises important issues. It follows that if I do grant permission it is entirely open to the judge who hears the substantive case in due course to dismiss the case if, after full argument and consideration of the issues, the case is not made out.

10. Third, and following from the last matter, where a judge grants permission to apply for judicial review (as I am proposing to do in this case), it is customary only to give relatively brief reasons for doing so. I am proposing to give somewhat more detailed reasons than I might otherwise have done for two reasons: (a) given the high profile that is being attached to issues arising from the "phone hacking affair", it is important that those who interest themselves in it should understand why certain decisions are being taken at a judicial level; (b) since I am taking a different position from that taken by Mitting J, it is right that I should state clearly why I am doing so. In that latter connection, it will already be plain that the factual complexion of the application with which I have been presented is markedly different from the picture that would have been conveyed to Mitting J on the papers that he saw.

The background to the application considered by Mitting J

11. As will be well known, it emerged in 2005/2006 that there were suspicions that someone had intercepted voicemail messages left for members of the Royal household. Attention became focused on Mr Mulcaire and Mr Goodman and the police investigation that forms the subject-matter of this application ensued. As I have already indicated, following that investigation they faced certain charges, pleaded guilty and were sentenced - each to short terms of imprisonment.

12. In the course of that investigation the MPS came into possession of a substantial quantity of documents taken from Mr Mulcaire's offices. That documentation, together with documentation obtained from Mr Goodman, included names, addresses, telephone numbers, unique PIN codes (that is, PIN codes changed from the manufacturer's default code), passwords and other personal information as well as call data, audio recordings and other material held by phone companies. Although not revealed publicly until 2010, some 4 or 5 years later, following requests under the Freedom of Information Act, it seems that Mr Mulcaire was in possession of 91 unique PIN codes and related mobile telephone numbers, as well as other information about individuals and that the overall material found in Mr Mulcaire's and Mr Goodman's possession contained 4,332 names or partial names and 2,978 numbers or partial numbers for mobile phones, along with 30 audio tapes containing recordings of voicemail messages.

13. It is not in issue that during the investigation some mobile telephone companies were contacted by the police which confirmed that attempts had been made to "hack" into certain message boxes. The method adopted involved at least in part 'blagging' (pretending to be someone else) so as to persuade telephone companies to alter PIN codes to default numbers thus enabling access to the voicemails of the owner of the mobile telephone. Even without 'blagging', it appears that Mr Goodman and Mr Mulcaire were aware of a process which, having acquired the additional unique number that is assigned by a mobile phone provider to a person's telephone in order to access a mailbox remotely or the PIN number for an individual telephone, enabled them to access the voicemails of their targeted individual. Using the targeted individual's unique voicemail number, PIN number, or sometimes the default PIN number, they were able to access remotely the stored messages. Listening to the voicemails in this way enabled the obtaining of private information concerning the owner of the telephone or, one supposes, concerning the person who left the message or anyone referred to in the message who could be identified from its content.

14. Mobile phone companies keep data that permits identification of a number used to access or attempt to access the voicemail box of a mobile number for only 12 months. Once that period has passed it is not possible to discover who accessed, or had tried to access, the voicemail messages on a particular mobile telephone number.

15. At all events, it became apparent in that investigation that access to voicemails of members of the Royal household represented the means by which Mr Goodman

became aware of certain matters concerning members of the Royal family that he then revealed in the *News of the World*. In the same investigation it became clear that access had been obtained to the voicemail messages of the other individuals identified in paragraph 8 above.

16. With the convictions and sentences imposed on Mr Mulcaire and Mr Goodman, matters essentially rested there for a year or so. Mr Bryant, Mr Paddick and Lord Prescott had not been alerted by the police to the fact that, as has emerged subsequently, details relating to their mobile telephone numbers, or those of people close to them, were within the papers retrieved during that investigation. Each says that he had been, or in Lord Prescott's case was, the subject of intense press interest in that period and that each assumed that he would have been told by the police that his details were in the papers recovered. Mr Montague's interest was somewhat different, but his complaint is based upon what is now alleged to be the same unlawful acts of hacking and the same alleged breach of duty by the police.

17. The trigger for the events that have led to the present proceedings, and indeed the proceedings continuing in the Chancery Division, was an article written in the *Guardian* by Mr Nick Davies on 9 July 2009 which was said to show "how the *News of the World* was involved in illegal activity, from intercepting phone messages to buying confidential personal data." It contained the following two paragraphs:

> "The full picture on News Group's involvement in the hacking of mobile phones is still not clear, largely because the Metropolitan Police took the controversial decision not to inform the public figures whose phones had been targeted and the Crown Prosecution Service decided not to take News Group executives to court ….
>
> Scotland Yard disclosed only a limited amount of its evidence to [Mr Gordon Taylor who had sued the *News of the World*]. The Guardian understands that the full police file shows that several thousand public figures were targeted by investigators, including, during one month in 2006: John Prescott, then deputy prime minister …."

18. The article prompted each of the Claimants to question whether they had been the subject of phone hacking in the period before the arrests of Mr Mulcaire and Mr Goodman. Mr Bryant and Mr Prescott (as he then was) wrote to the Commissioner that day each asking whether they had been the object of any form of unlawful phone "tapping" which was the expression each used. Mr Paddick consulted Messrs Bindmans LLP who wrote to the Metropolitan Police on his behalf on 26 November 2009 raising similar issues. Mr Montague, who had apparently spoken to the author of the *Guardian* articles, Mr Davies, also instructed Messrs Bindmans LLP who wrote to the Commissioner on his behalf, as well as on behalf of Mr Bryant and Mr Paddick, on 20 May 2010 by way of a full letter of claim. His case is that he left two telephone messages with the Legal Directorate of the Metropolitan Police "in or around

February 2010" seeking information although apparently no record of those messages has been found and he never received a reply.

19. For present purposes, I need not set out in any detail the sequence of events between the first article in the *Guardian* in July 2009 and the service of the judicial review proceedings on or around 14 September 2010. They are clearly set out in the documentation supplied to the court and many of the events are well documented in the public domain, including the interventions of the DPP, the House of Commons Culture, Media and Sport Select Committee and Assistant Commissioner John Yates. Assistant Commissioner John Yates had been asked by the Commissioner, apparently on 9 July 2009, "to establish the facts around [the] inquiry into the alleged unlawful tapping of mobile phones" by Mr Goodman and Mr Mulcaire. He had not been involved in the inquiry itself.

20. I will, however, mention the following matters as potentially relevant to the issue of what was placed before Mitting J when he considered this application on the papers.

(i) In a statement made on 9 July 2009 Mr Yates said that the police investigation at the time was complex and that the technical challenges posed to the service providers to establish that there had been interception were "very, very significant" and that the enquiries showed "that in the vast majority of cases there was insufficient evidence to show that tapping had actually been achieved." He said that where "there was clear evidence that people had been the subject of tapping, they were all contacted by the police" and thus "were made aware of the potential compromise to their phones and offered preventative advice."

(ii) In relation to Mr Prescott, as he then was, he said that the "investigation has not uncovered any evidence to suggest that [his] phone had been tapped."

(iii) He said that he recognised "the very real concerns" expressed by a number of people who believed that their privacy may have been invaded and said that he needed to ensure "that we have been diligent, reasonable and sensible, and taken all proper steps to ensure that where we have evidence that people have been the subject of any form of phone tapping, or that there is any suspicion that they might have been, that they have been informed."

(iv) His statement said that he considered "that no further investigation is required."

(v) The following day a statement was issued indicating that "[the] process of contacting people is currently underway and we expect this to take some time to complete."

(vi) When he gave evidence to the House of Commons Culture, Media and Sport Select Committee on 2 September 2009 Mr Yates said that the approach taken during the investigation had been that an offence under the Regulation of Investigatory Powers Act 2000 was committed only where the messages intercepted had not previously been listened to by the intended recipient. He acknowledged that, where the intended recipient had listened to the message previously and it had been accessed by some third party subsequently, whilst no offence was committed, there would be "a breach of privacy".

(vii) When he gave evidence to the Home Affairs Committee just over a year later on 7 September 2010 Mr Yates said that Lord Prescott was not on the list of the 91 PIN numbers (see paragraph 12 above) and that "he has never been hacked to my knowledge and there is no evidence that he has."

(viii) At the same hearing, in answer to the question of whether the police had written to those whose PIN numbers were on the list, he said that they had taken "all reasonable steps in conjunction with the major service providers … to ensure where we had even the minutest possibility that they may have been the subject of an attempt to hack" that they had been informed.

21. At the stage of the service of the judicial review proceedings Lord Prescott was separately represented, but he was added to the proceedings in November 2010. That necessitated an Amended Acknowledgement of Service and Grounds for Contesting Claim which was filed and served on 3 December 2010.

22. I should, perhaps, simply record that it is common knowledge for anyone who has interested themselves in the developing story that further questions had been raised about what had been going on at the time of the original investigation in an article published in the *New York Times* on 1 September 2010.

The claims as advanced initially and the initial response

23. I will summarise as briefly as I can the nature of the case advanced in the Amended Grounds (which were amended principally to bring Lord Prescott into the proceedings).

24. On behalf of all Claimants the following proposition is advanced:

> "There is a strong inference that those whose names and/or telephone numbers were discovered in the Mulcaire/Goodman material were or might have been victims of invasions of privacy."

25. Although in the Amended Acknowledgement of Service and Grounds for Contesting Claim it is contended that "[the] names of persons found on documents would not be unusual for a journalist or journalistic researcher to have, particularly if they are persons in the "public eye" [because they] will often seek to record contact names and telephone numbers of persons they consider newsworthy or contactable for journalistic purposes", I cannot see how in the circumstances of this case it is not at least arguable that the inference contended for on behalf of the Claimants is valid.

26. Leaving to one side for the moment the way in which the case in law is advanced (see paragraphs 51-61 below), the broad nature of the case put forward in support of the proposition that the police had failed to protect the Claimants' rights under Article 8 of the ECHR was put as follows:

> "39. Since about 2005, the Defendant has been in possession of information that the Claimants and numerous others were or might have been targeted by private investigators employed by newspapers, and that those investigators used unlawful means to hack into targets' private messages or personal records or to conduct other unlawful monitoring or surveillance activities. Had the Claimants known that they were targets or potential targets, they would have been able to take simple measures to protect their privacy, such as changing their telephone numbers or the pin codes for accessing their telephone message boxes.
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> 40. The Defendant's failure to provide this information to the Claimants meant that it was possible for serious invasions of privacy to continue using the methods which had been deployed by Mr Mulcaire and others. Even if the specific unlawful activities had ceased on Mr Mulcaire's arrest, the Claimants were entitled to know what had happened to their information, so as
>
> (a) to understand how their privacy had been invaded
>
> (b) to take practical steps to protect themselves from future breaches of their privacy and
>
> (c) to seek legal remedies in relation to past breaches.
>
> The failure to inform the Claimants also deprived them of the opportunity to contact their mobile telephone companies to request that relevant evidence be preserved. The knowledge that their privacy had been compromised was an essential precondition to ensuring that the Claimants' privacy rights could be made practical and effective, as required by Article 8."

27. Each of the Claimants who claimed to have been the subject of press interest at the material time (see paragraph 16 above) made certain assertions in the Claim Form

about what they understood then to have been the factual position relating to their respective cases and the response that each had received so far on behalf of the Commissioner. I will endeavour to summarise the position they have advanced below:

Mr Bryant

In response to the letter referred to in paragraph 18 above, he suggested that after five months he was informed that his name and telephone number appeared in the material retrieved during the investigation, but he suggested that the information provided was "vague and incomplete". He requested further details in a letter dated 25 February 2010. By then he had received a response from his mobile telephone network provider to the effect that there had been three unlawful attempts to intercept his communications in about December 2003. He was told by the police, he suggested, "informally in a telephone conversation that he would not be given any further information without a court order." He was then, he says, provided with a written response "without any supporting documentary evidence" and, he asserts, a refusal to tell him "whether or not individuals close to him, including his father, were targeted." This refusal was said to be based on a duty of confidentiality owed to those individuals.

Mr Paddick

The initial response to his solicitors' letter (see paragraph 18 above) was, he asserts, in February 2010 when he was told "that [there was] no information to suggest that [he] was subject to unlawful monitoring or interception of his telephone". A further enquiry by his solicitors yielded the response that, in fact, his name and occupation did appear in the documents obtained during the investigation.

Lord Prescott

The essential response to his letter of 9 July 2009 (see paragraph 18 above) was as indicated in the statement of Mr Yates (see paragraph 20 above), a position confirmed personally to him by Mr Yates. Lord Prescott was not satisfied with this response or with the failure to provide a written response to his letter of 9 July and on 21 August 2009 he wrote again to Mr Yates, enclosing a copy of his previous letter and asking for a response. Mr Yates replied on 11 September 2009 saying that the investigation "did not uncover any evidence to suggest that your telephone had been tapped." After a further letter from Lord Prescott he was told in a letter dated 15 December 2009 by Ms Saleh of the Directorate of Legal Services that he was a "person of interest" to Mr Mulcaire. He said that this information consisted of a piece of paper containing the words "John Prescott" and "Hull", and two self-billing tax invoices dated 7 and 21 May 2006, addressed to News International Supply Company Limited and containing the words "Story – Other Prescott Assist – TXT" and "Story – Other Prescott Assist – TXT:Urgent".

28. I will deal with Mr Montague's case below (see paragraph 32).

29. It is important to see how these essential claims were responded to in the Amended Acknowledgement of Service and Grounds for Contesting Claim which was filed and served on 3 December 2010. I will endeavour to summarise what was said on behalf of the Commissioner in relation to each of these three Claimants:

Mr Bryant

On 9 December 2009 the Defendant wrote to him confirming that there was some documentation in police possession to suggest that he may have been a person of interest to Mr Mulcaire. During the investigation a single piece of paper was found which contained the name "Chris Bryant" and a mobile telephone number written underneath the name. Following the further letter from Mr Bryant of 25 February it is said that the Defendant "replied in detail on 25 March 2010, seeking to answer as fully as possible the questions raised about the nature of the piece of paper in police possession." Given that Mr Bryant had made a request for the names of anyone else written on the sheet of paper who may have had their mobile telephone intercepted, or written on any accompanying papers, it was made clear in the letter that the Commissioner was unable to provide any information relating to the other persons listed because he did not have their authority to release that information to him and, in any event, he owed a duty of confidentiality to any such individual.

Mr Paddick

On 12 February 2010 it is asserted that the Defendant wrote to him confirming that the police had no documentation to suggest that he had been subjected to unlawful monitoring or interception of his mobile telephone. During further exchanges, it was "made clear in … correspondence that the police had no documentation to suggest that [he] was subject to unlawful monitoring or interception of his mobile telephone by Goodman and Mulcaire". It was also said that the Commissioner "was unable to conduct any form of review of the documentation created by the Information Commissioner known as 'Operation Motorman' or a previous operation known as 'Operation Glade' which was unrelated to the intercept activity of Goodman and Mulcaire."

Lord Prescott

It was said that on 15 December 2009 the Defendant "disclosed that, while there was no documentation in the possession of the police to suggest that Mr Mulcaire had attempted to intercept any voicemail messages of Lord Prescott, there were some references which could be attributed to him in the seized material", namely, one piece of paper with the name "John Prescott" on it with the word "Hull" and two self-billing invoices for £250 on the 7 May 2006 and 21 May 2006 with no reference to what story or services were provided.

30. When refusing permission to apply for judicial review Mitting J said as follows in relation to each of the three individuals who had claimed that their privacy was or may have been breached:

Mr Bryant

"[As] the Defendant explains …, he was told everything relating to him which the investigation had revealed. The Defendant was entitled to refuse to disclose to [him] the names of others written on documents in their possession on the ground that [the Commissioner] did not have their authority to release that information to him. Further, the fact that his mobile telephone provider had information that there had been unlawful attempts to intercept his communications in December 2003 does not mean that the Defendant's belief, communicated to [him], that the information in his possession did not reveal that Mulcaire had unlawfully intercepted his voicemail message was wrong."

Mr Paddick

"[There] is no reason to doubt the [Commissioner's] statement, made to the Claimant, that he had no documentation to suggest that his mobile telephone had been unlawfully intercepted. There is no reason to doubt the Defendant's contention that he confirmed the only fact revealed by the investigation – that the third Claimant's name and an address attributed to him appeared on a piece of paper recovered from Mulcaire."

Lord Prescott

"[There] is no reason to doubt the statements made in … the amended summary grounds … that the Defendant had not uncovered any evidence that [Lord Prescott's] telephone had been tapped (or voicemail intercepted), but had retrieved documentary material from Mulcaire which referred to him."

31. I do not think that there can be any doubt that Mitting J placed considerable reliance on the reliability of what was asserted on behalf of the Defendant in the Amended Acknowledgement of Service and Grounds for Contesting Claim when rejecting the application for permission on the papers in relation to Mr Bryant, Mr Paddick and Lord Prescott. Given the well-established duty of candour on the part of a public authority in the context of proceedings of this kind, that was not surprising.

32. So far as Mr Montague was concerned, there was, as I understand it, no evidence available at the time the proceedings were instituted that his name had appeared in the documentary material recovered during the investigation. His concerns that he may have been the target of hacking were somewhat generalised, rather than being based upon any specific incident or report, save that he had been informed by his mobile

phone company that someone had obtained details of his telephone records sometime after he had spoken to Mr Goodman about a story he had offered to the *News of the World*. In the response to the claim there was no concession that his name appeared in any of the documentation or that there was any other identifiable link with him.

33. Mitting J said, in relation to his claim, that "the fact that [his] mobile telephone provider [had] alerted him to the fact that someone had sought copies of his telephone records does not establish, or even suggest, that the Defendant had information relevant to him in his possession."

The changes to the factual scenario thereafter

34. I take a fair amount of what follows from the witness statement of Tamsin Allen, the partner at Bindmans LLP with conduct of this case on behalf of the Claimants, dated 5 May.

35. I will have to start about 6-7 weeks before the decision made by Mitting J simply to be able to describe the sequence of events accurately.

36. I have already mentioned the article in the *New York Times* on 1 September 2010, but it appears that a new momentum in the unfolding events started in December when on 15 December 2010 the *Guardian* reported on the Particulars of Claim in a case brought by the actress, Sienna Miller, against News Group Newspapers and Mr Mulcaire. The article suggested that the Particulars of Claim alleged that the hacking of phones of the royal household "was part of a scheme commissioned by the [*News of the World*] and not simply the unauthorised work of its former royal correspondent, Clive Goodman, acting as a 'rogue reporter' as it [had] previously claimed."

37. The Particulars of Claim set out in detail Ms Miller's allegations many of which, as I understand it, were based upon documents disclosed to her legal advisers by the MPS following a *Norwich Pharmacal* application. The allegations were detailed and listed a number of articles written about her in 2005 and 2006 which she alleged had arisen as a result of the illegal phone hacking. (That action has, I understand, now been settled.)

38. On 5 January 2011 Mr Ian Edmondson, the assistant news editor of the *News of the World*, who had been suspended in December, was dismissed. Various other resignations occurred over the succeeding weeks. On 14 January the DPP announced a "comprehensive assessment of all material in the possession of the Metropolitan Police Service relating to phone hacking, following developments in the civil courts" and on 26 January a new police investigation was announced after "significant new information" was provided by News International to the police "relating to allegations of phone hacking at the *News of the World* in 2005/06." This new investigation was called 'Operation Weeting' and it continues.

39. This announcement was just over a week before Mitting J considered the papers. It is, perhaps, unfortunate that the Administrative Court (and thus whichever judge was assigned the papers for consideration) was not invited to delay the initial decision (which had been pending for a month or so by then) in case, as might have been anticipated, there were developments of importance. In fairness, Ms Royan (see paragraph 42 below) wrote to Bindmans LLP on 2 February about the new criminal investigation inviting them to agree to a stay of the proceedings – however, it was to be a stay, she suggested, "pending the conclusion of the criminal investigation". She also said that the Defendant would be examining the material provided by News International in the context of the new investigation. Bindmans LLP rejected the idea of a stay of proceedings, maintaining that the Claimants' claims concerned, in reality, the adequacy and effectiveness of the original investigation and not any subsequent investigation. That position was, in my view, a justified position to take. The net effect was that no steps were taken to invite a delay to the making of a decision on the papers.

40. Within a week of Mitting J's decision, on 9 February 2011 Deputy Assistant Commissioner Sue Akers, the officer in charge of 'Operation Weeting', issued a Press statement acknowledging that some individuals had been identified who had previously been advised that little or no information was held on them and announced that those individuals would now be contacted. Her Press statement included the following paragraphs:

> "We will build on the previous commitment to all those victims whose phones we already have reasonable evidence to believe may have been hacked by establishing or renewing contact with them. With this new investigation we will be as open as we can be and will show them all the information we hold about them, while giving them the opportunity to tell us anything that may be of concern to them.
>
> In time, we will go beyond this group of individuals and make contact with everyone who had some of their personal contact details found in the documents seized in 2005. This will ensure all of those who have been affected in some way are made aware of the information we have found relating to them."

41. It emerged that three of the Claimants in these proceedings figured in this new material.

Lord Prescott

42. Indeed on that day, according to the witness statement of Ms Sara Royan, a solicitor with the MPS Directorate of Legal Services, dated 18 April 2011, she was told that "some new material concerning … Lord Prescott" had emerged. She wrote to Bindmans LLP on 9 February about this explaining that "it was believed that the new material would not affect the decision of [Mitting J] in refusing permission". (That

appears to have been based on a consultation with Leading Counsel on 4 February.) She also copied this letter to the court, writing separately and stating that the Defendant did not believe that it had any bearing on his decision to refuse permission. The letter revealed that in "recent material supplied … by News International" there was an e-mail dated 28 April 2006 which appeared to contain details of the mobile telephone number and PIN number of Lord Prescott's adviser and there was reference to 45 messages. The letter suggested that the e-mail had been sent from an e-mail address associated with Mr Mulcaire. The concluding paragraph of the letter asserted that "[the] situation remains the same in that at present … the MPS have (sic) no other material indicating that [Lord Prescott's] voicemail messages were intercepted but obviously there is now material that [his] adviser may have had her messages intercepted."

43. Officers from 'Operation Weeting' had met with Lord Prescott on 9 February and showed him the material they had. They met him again on 11 February.

44. On any view, this was a significant development and certainly presented a very different picture from that which had been presented previously. The messages of someone who had regular contact with Lord Prescott had been intercepted. There were further developments in relation to Mr Bryant and Mr Paddick.

Mr Bryant

45. On 10 March Mr Bryant was shown by the police copies of six documents taken from the home address of Mr Mulcaire. He was told that, to the best of the officers' knowledge, only two of the documents related to him and that the remaining four may not. After studying the documents, he did indeed confirm that only the first two pages related to him. Ms Royan accepts that of the two pages shown to him, he had initially been told on 9 December 2009 that only one page related to him.

46. The pages shown to him were facing pages in Mr Mulcaire's notebook which, according to Ms Allen's witness statement were "covered in notes which relate to him, including numerous telephone numbers which would have dialled his phone and very probably left voicemail messages, various addresses where he has lived, the names of his partners, his constituency and home telephone numbers and other personal information." She asserts on his behalf that there is information to suggest that his voicemail messages had been intercepted by Mr Mulcaire because, on the second page shown to him, his telephone number is linked by a line to 23 other telephone numbers, including some which would not normally be associated with him. For instance, his telephone number is linked by a line to a particular number and another line linking that number to the expression 'Land Rover' and the words "duration 4 min". Apparently, he had a Land Rover on a hire purchase agreement between 2000 and 2004 and, it is suggested, that this note suggests that a 4-minute message or telephone call between him and someone connected with the hire of the Land Rover had been intercepted.

Mr Paddick

47. So far as Mr Paddick was concerned, at a meeting on 15 March three documents obtained by the police in 2006 were shown to him, two of which were handwritten and one printed. He confirmed that these pages related to him. Ms Allen says on his behalf that these sheets of paper included his police mobile telephone number, the mobile telephone number of his then partner and his former partner, the addresses and telephone numbers of numerous other associates, his own landline number and landline numbers of others. I am not able to form any conclusion, but she says that it is "difficult to see how some of these numbers could have been associated with him except by hacking voicemails or intercepting calls". There is, she says, also a print out from Mr Mulcaire's computer system which contains Mr Paddick's name and describes him as a "project" on a database.

Mr Montague

48. As I understand the position, it is not disputed that no evidence has emerged that his name or details figured in any of the 2005/2006 material reviewed so far by the police in the new investigation. That does not mean, of course, that his name or details associated with him may not emerge during the course of the new investigation, but it does mean that, at least for present purposes, he stands in a somewhat different position from the other Claimants.

49. There can be little doubt that the factual scenarios in relation to Mr Bryant, Mr Paddick and Lord Prescott are different from those presented to Mitting J in the Amended Acknowledgement of Service and Grounds for Contesting Claim. Mr Lewis has argued, and there may be force in what he says, that the links in the documentation to each of them have been made only by reason of the fact that various telephone numbers and contact details were supplied to the police on behalf of each of them on 11 February. However, that seems to me to be a matter that would require investigation, if it is relevant, at any substantive hearing and not at this stage in the process.

50. For my part, unless the basis of the claims advanced under Article 8 is wholly untenable, the factual situation in relation to the cases of Mr Bryant, Mr Paddick and Lord Prescott each raises a claim worthy of consideration at a substantive hearing.

Is the Article 8 claim arguable?

51. Article 8 provides as follows:

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

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

52. The Claimants contend that Article 8 can impose "positive obligations" on public authorities, requiring them to take action to ensure that individuals' Article 8 rights are "practical and effective": *Airey v Ireland* (1979) 2 EHRR 305, paragraph 32. As a result, it is argued that the State may be required to provide certain personal information to individuals, or warn them of potential harm caused to them by the activities of others. In *Guerra v Italy* (1998) 26 EHRR 357, which followed the approach in *López Ostra v Spain* (1995) 20 EHHR 277, it was recorded, relying upon *Airey*, that "although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life." The European Court of Human Rights held that a breach of Article 8 had occurred when local residents were not provided with information about health risks and safety measures taken to mitigate them in respect of a local chemical plant. Had the information been provided, it would have allowed the residents to take steps to protect themselves from health risks. The Court considered that what "had to be ascertained was whether the national authorities had taken the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life" (paragraph 58). Where it did not warn the public of the risks to their private life, it had breached the positive obligations in Article 8.

53. Mitting J said that the circumstances in this case were "far removed" from those considered in *Guerra* and *López Ostra* and concluded that it is "not reasonably arguable that Article 8 imposed upon the Defendant a duty to notify any of the four Claimants in December 2005 or 2006 that they might have been the victim of an attempt to intercept their communications."

54. I respectfully agree that the two specific cases mentioned are very different on the facts from the present case. Mr Tomlinson accepts that there is no case that actually deals with the situation that arises in this case. The question is, however, whether the principle that those cases establish or reflect can be extended to a situation such as that which obtains of this case. There can be no doubt that the police (a "public authority") must come into possession of a great deal of information from a variety of sources (including intelligence sources) that could, for example, indicate that someone's right to respect for his or her private life is potentially threatened. There are circumstances in which the police are under a positive obligation to take steps to safeguard a person's physical integrity, an obligation that appears to be regarded as capable of being embraced within Article 8: *Osman v UK* (2000) 29 EHRR 245, paragraphs 124-130.

55. This is a difficult, controversial and sensitive area. I am far from saying that the ultimate conclusion of the court in this case may not be that, even if Article 8 was engaged, it was not breached by the failure of the police to alert each of the Claimants to the fact that their names, or names of those associated with them, had been identified within the material retrieved in the investigation. The essential question, however, at this stage is whether the contrary argument is wholly untenable such that permission should not be given to enable it to be put before the court for full argument.

56. For my part, I would prefer to try to answer that question by reference to a scenario that does not involve the potential Article 8 rights of "public figures" – as certainly Mr Bryant, Mr Paddick and Lord Prescott are. A scenario that does involve individuals of that nature (particularly individuals who, intentionally or otherwise, court controversy) tends to obscure the underlying principle, perhaps the more so when that which underlies the illegal activity is an attempt to find out intimate details about their private lives.

57. An example of a less high profile situation in which the issue might arise would be one in which a local police force comes into possession of information that suggested that elderly residents in a particular community were likely to be the target of a team of confidence tricksters and that the confidence tricksters were hacking into the mobile phones of the relatives of these elderly residents to find out when the residents would be alone in their homes. Would that raise an arguable case under Article 8 that the police owed a positive obligation to take steps to alert those who might be targeted if they can be identified? I am inclined to think that in principle the answer to the question posed would be "yes". There might be reasons why, in the particular circumstances, the police decide to do nothing or that limited action is proportionate, but, as it seems to me, the case that they should do something to alert the potential targets would be arguable. That is one situation that comes to mind: there may be others.

58. Whilst the hypothetical circumstances I have identified are different from the present case, is the principle so different? Arguably, in my view, it is not. It is, of course, the case that the hypothetical situation I have postulated involves illegal activity (phone hacking) which may lead to the commission, or attempted commission, of a crime. The same illegal activity in the circumstances of the present case does not necessarily lead to the commission of a criminal offence. An issue may arise as to whether that is a material distinction between the two situations. Nonetheless, it is an issue that is worthy of sustained argument on each side.

59. The other factor in the particular circumstances of this case is this: from the moment that the *Guardian* article raised the profile of the phone hacking issue again in July 2009, the position taken on behalf of the Commissioner is that the police had sought to notify anyone potentially affected (see paragraph 20 above).

60. Whether that was simply thought to be "the right thing to say" in the circumstances that prevailed on that day, or whether it reflected an established view of the police about their obligations in such a case, is something that is worthy of full consideration. In that context Mr Tomlinson and Miss Macdonald press the "legitimate expectation" argument that representations of the kind made by the police created an expectation on the part of the Claimants that they would have been notified if referred to in the Mulcaire/Goodman material. I have seen no evidence that representations of this kind were made in 2005/2006 and, on that basis, a conventional "legitimate expectation" argument seems to me to be a very difficult one to sustain. Nonetheless, the argument exists and it needs to be considered.

61. It follows from this analysis that, having had the benefit of more extensive argument on the overall issue of the potential engagement of Article 8 than was available to Mitting J, I am not, as presently advised, prepared to characterise the issue as unarguable.

Other matters raised on behalf of the Commissioner

62. Various other arguments were advanced in support of the proposition that permission to apply for judicial review should not be granted. Some probably overlap with each other, but I will endeavour to address each of them briefly.

Claims are academic?

63. Mr Lewis has submitted that the claims are academic in the sense that the Claimants have now been supplied with the information that they have been seeking and that a full investigation is now under way. I do not accept that it can be said at this stage of the proceedings that the claims are academic. The focus is on what, on the Claimants' case, should have been done in 2005/2006, not on whether what has been conveyed to the Claimants recently is a sufficient discharge of any continuing obligation that exists towards them under Article 8. If a breach of their Article 8 rights is established, they seek a declaration to that effect and "just satisfaction".

64. As to the need for a declaration, I think it can be said at this stage (though the position may be clarified with the passage of time) that there is some ambivalence about the Commissioner's position. The argument is advanced that the Article 8 argument is unsustainable, yet everything said on his behalf from July 2009 onwards (see paragraph 20 above) seems to be a recognition that, at least in a practical sense, the victims or potential victims of the phone hacking that occurred were entitled to be informed. Mr Lewis made it clear at the hearing of the application that it was accepted that "in a clear case of interception [the police] are obliged to inform the victims identified." An issue of some importance is whether that obligation derives from Article 8 or simply from what might be termed "good policing policy".

65. If I may say so, it seems to me to be as important to the Commissioner as it is to the Claimants for there to be some clarity about this.

New criminal investigation must not be impeded?

66. As to the existence of the present investigation, I do not see that as precluding in principle questions being raised about what should have happened in the context of the original investigation which is what underlies the present case. Obviously, I am alive (as Vos J has been in the Chancery proceedings) to the need to ensure that the present proceedings should not impede in any way the current ongoing investigations. I shall certainly wish to incorporate in the order giving effect to my decision a provision that enables the Commissioner (without notice initially, if appropriate) to apply to a Judge of the Administrative Court for directions concerning his disclosure obligations or in respect of any other matter that affects the conduct of the investigation if it is thought that it will be impeded or otherwise adversely affected by anything done in these proceedings. However, I can see no basis for otherwise delaying the proceedings, or declining to grant permission, simply because of the present inquiries. That mirrors the approach being taken in the Chancery proceedings.

Prolonged factual investigation?

67. Mr Lewis has also submitted in effect that I should be careful not to be seduced into thinking that this is a simple case. He says that it will require "an intense factual investigation into the adequacy of the investigation". I am not really persuaded that that is so: the issues seem to me to be capable of being argued without delving too deeply into the intricacies of the original investigation. But whether that is so or not, I cannot turn a claimant away from the court simply because the defendant asserts that there are factual issues to consider: many judicial review claims involve consideration of a complex factual scenario. However, that will be an issue for the judge dealing with the substantive application to consider.

The new revelations have arisen through advances in the IT available?

68. Ms Royan's witness statement indicates that in 2006, when the documentary material was obtained from Mr Mulcaire, it was assessed by the original enquiry team "without the benefit of any computerised system". Thereafter, she says, "in 2009 software, not available at the time of the original investigation, was utilised to scan and index onto a system, known as HOLMES, all of the documents seized … to assist the MPS in relation to requests for information, disclosure and for ongoing private civil law claims brought by individuals." The documentary material, she indicates, "amounted to about 10,000 pages and the documents were initially scanned onto the system and manually indexed which was an enormously time and resource intensive task." She continues thus:

> "It now transpires that, inadvertently, not all of the documents seized were scanned during this process. The original indexing

> was carried out against the scanned documents, which, given their poor quality, led to further inaccuracies."

69. This essential theme may, of course, be something that will need to be considered at the substantive hearing, but I do not see that it obliges me to say that the claims should not be put forward for consideration.

No duty on the Commissioner to investigate?

70. Mitting J said this:

> "It is not reasonably arguable that the [Commissioner] was under a duty to conduct an investigation into the possibility that [the Claimant's] mobile communications had been unlawfully intercepted. The decision, if made, not to do so was well within the discretion available to [him]: *R v Commissioner of Police for the Metropolis ex p Blackburn*. The notion that it was unlawful for [him] to decline to devote substantial human and financial resources to investigate a possible offence under s.1 Regulation of Investigatory Powers Act 2000 on the basis of the material seized from Mulcaire is far fetched".

71. Not surprisingly, Mr Lewis placed some strong reliance upon this analysis.

72. It is, of course, entirely possible that this is the rock upon which these claims will founder. However, until the full extent of the way in which the "decision, if made" was arrived at is deployed evidentially, the court will not be in a position to determine whether the discretion was exercised lawfully and on proper grounds. The case of *Blackburn* was, of course, about the discretion of the police to prosecute or not to prosecute in a particular case. Even in that context it is not impossible for a successful application for permission to apply for judicial review to be made even though it is well-established that the court would be very slow to interfere in such a decision. In *R. v DPP Ex p. Manning* [2001] QB 330, Lord Bingham of Cornhill, then Lord Chief Justice, said this about judicial review in the context of a decision to prosecute (in obviously very different circumstances from those in this case):

> "…as the decided cases also make clear, the power of review is one to be sparingly exercised. The reasons for this are clear. The primary decision to prosecute or not to prosecute is entrusted by Parliament to the Director as head of an independent, professional prosecuting service, answerable to the Attorney General in his role as guardian of the public interest, and to no-one else. It makes no difference that in practice the decision will ordinarily be taken by a senior member of the Crown Prosecution Service, as it was here, and not by the Director personally. In any borderline case the decision may be one of acute difficulty, since while a defendant

> whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial … The director and his officials (and senior Treasury counsel when consulted) will bring to their task of deciding whether to prosecute an experience and expertise which most courts called upon to review their decisions could not match. In most cases the decision will not turn on an analysis of the relevant legal principles but on the exercise of an informed judgment of how a case against a particular defendant, if brought, would be likely to fare in the context of a criminal trial before … a jury. This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere. At the same time, the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied."

73. If the "standard of review should not be set to too high" in that context, it is at least arguable that it should not be set too high in the context of a decision about the extent to which potential criminality should be investigated and the victims informed. I make it absolutely plain that I say this merely to test whether the Claimants' claims can be said to be arguable, not by way of any definitive analysis as to whether they will succeed. Mr Lewis acknowledged what he described as "some operational shortcomings" in the original investigation, albeit set against the background of a period when there were major terrorist alerts and when police resources were stretched. Doubtless that will be something that will be addressed in the further evidence that will be submitted before the substantive hearing takes place.

Conclusion

74. For the reasons I have given (at somewhat greater length than I had originally intended), I am prepared to grant permission to Mr Bryant, Mr Paddick and Lord Prescott to apply for judicial review. So far as Mr Montague is concerned, for reasons I have identified in paragraph 32 above there does not, at this stage, appear to be any evidence that his name did appear in the Mulcaire/Goodman papers. That being so, and for the reason given by Mitting J (see paragraph 33), I had not been minded to grant permission in his case. However, he has raised at least a *prima facie* case from which it might be inferred that his mobile telephone communications were intercepted by someone acting for or on behalf of the *News of the World* (see paragraph 32 above) and it is possible that some support for that may emerge in the course of the continuing police investigation. On that purely pragmatic basis, and with a view not to

increasing costs, I have drawn back from refusing permission. However, I will be giving a general warning below in this case that its merits will need to be kept under review by the Claimants' advisers after the evidence has been served on behalf of the Defendant. That will relate to the general merits of the case and, of course, the merits of each individual Claimant's case. It will, I am sure, be apparent to Mr Montague and to his advisers that his individual claim looks somewhat threadbare at this stage.

75. As I have said, notwithstanding the general grant of permission, I do issue a clear warning that the merits of this case need to be kept under review. The following statement appears at the foot of the standard form used when a Judge grants permission to apply for judicial review:

> "You are reminded of your obligation to reconsider the merits of your claim on receipt of the defendant's evidence."

76. This has received judicial endorsement: see, e.g., *R (Bateman and Bateman) v Legal Services Commission* [2001] EWHC Admin 797.

77. Whilst placing such a provision at the foot of the order giving effect to my decision is unnecessary in the circumstances, the obligation on the part of the Claimants' advisers to keep the merits of the case (both generally and in relation to each individual Claimant) under review, particularly after the Defendant's evidence has been served, is one they will, I am sure, well understand.

78. I will ask Counsel to endeavour to agree a form of order that gives effect to my decision including the matter I identified in paragraph 66 above.

79. I hope that they will also be able to agree a timetable for the filing of evidence and other consequential directions. If they cannot do so, the papers will have to be submitted to a judge of the Administrative Court for further consideration.