IN THE MATTER OF THE LEVESON INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS

WITNESS STATEMENT OF ALASTAIR JOHN BRETT

1. I make this statement in response to a Notice under section 21(2) of the Inquiries Act 2005 ("the Notice") from the Leveson Inquiry ("the Inquiry") dated 10 February 2012.

2. I set out the Inquiry's questions and my answers below.

Who you are and a brief summary of your career history.

3. I qualified as a solicitor in 1975 and after my training at Stephenson Harwood, I spent two years in the litigation department at Macfarlanes before moving to The Times in 1977. I am also a trained mediator. I have spent the vast majority of my working life as a lawyer in the area of media law.

4. For 33 years, until November 2010, I was an in-house lawyer at Times Newspapers Ltd (TNL), the publisher of The Times and The Sunday Times. I joined the company in 1977 when it was owned by the Thomson Organisation; I witnessed the take-over of TNL by News International (NI) in 1981 and became Legal Manager and Head of the Legal Department, in 1999. I campaigned for rights of audience for solicitors in the mid-1980s, set up the Fleet Street Lawyers' Society (now the Media Lawyers' Association), an association of in-house media lawyers in around 1987, helped develop the defence of *Reynolds* qualified privilege and lobbied the Government over the Defamation Act 1996, the Human Rights Act 1998, the Access to Justice Act 1999, and the Data Protection Act 1998. I finally left TNL at the end of 2010.

5. While at TNL, I worked under 11 editors:- Sir Harold Evans, Lord Rees-Mogg, Sir Peter Stothard, Sir Simon Jenkins, Frank Giles, Andrew Neil, Charles Douglas Home, Charles Wilson, Robert Thompson and the two current editors, John Witherow and James Harding.

6. I chaired the CLAF (Civil Legal Aid Fund) Working Group for Lord Justice Jackson in 2009 and set up the Early Resolution Procedure Group, Chaired by Sir Charles Gray in 2010. I designed and operated The Times Fast Track Arbitration Scheme for cases where the meaning of the words complained of was a critical issue in a libel action. The Scheme was also used to determine other key issues in libel actions like "comment or statement of fact" and "are the words defamatory?" This procedure now forms the basis for the Early Resolution arbitration scheme. It also forms the backdrop to Sir Charles Gray's submission to this inquiry about a mandatory adjudication system as a precursor to High Court litigation. I have also been an adviser to Lord Lester's Defamation Group, the Alternative Libel Project and the Reuters/Media Standards Trust Round Table Group on Press Regulation. Its report, just submitted to this Inquiry, was drafted by Hugh Tomlinson QC with whom I worked closely on its main recommendations.

7. I currently work as a sole practitioner and am the Managing Director of Early Resolution CIC, (ER) a not-for-profit company, which Sir Charles Gray and I set up in 2011 in order to help people resolve libel and privacy actions quickly, fairly and cost-effectively. The Principles behind ER can be seen at www.earlyresolution.co.uk along with the importance of one-way costs shifting in media disputes.

An outline of your recollection of when, by whom and how you, as the legal manager for the Times, first became involved in and came to learn about the NightJack story being written by Mr Foster.

8. I remember Patrick Foster coming to see me on or about 20 May 2009 about a story he was working on. He came into my office with Martin Barrow, the Home News Editor, who was his immediate line manager. Mr Barrow indicated that Mr Foster had a problem about a story he was working on. From my best recollection, Mr Barrow left shortly after that and Mr Foster and I were left alone. Mr Foster then asked if we could talk "off the record" i.e. confidentially, as he wanted to pick my brains on something and needed legal advice. I agreed. He then told me that he had found out that the award winning police blogger, known as NightJack, was in fact Richard Horton, a Detective Constable in the Lancashire Police and that he had been using confidential police information on his blog. As his activities were prima facie a breach of police regulations, Mr Foster felt there was a strong public interest in exposing the police officer and publishing his identity.

9. When I asked how he had identified DC Horton, Mr Foster told me that he had managed to gain access to NightJack's email account and as a result, he had learnt that the account was registered to an officer in the Lancashire police, a DC Richard Horton. This immediately raised serious alarm bells with me and I told him that what he had done was totally unacceptable.

From your recollection and in broad terms, on what aspects of the story or the obtaining of the story was advice being sought? Please explain if this changed throughout the course of the story and its eventual publication.

10. At that first meeting, on or about 20 May 2009, Mr Foster wanted to know if he had broken the law and if there was a public interest defence on which he could rely. I had already done some work with Antony White QC on the discrepancies between section 32 and section 55 of the Data Protection Act 1998 (DPA) and the Government's intention of bringing in prison sentences for breaches of s.55 of the DPA. I knew there was a public interest defence under section 55 of the DPA. I told Mr Foster that he might have a public interest defence under the section but I was unsure what other statutory provisions he might have breached by accessing someone's computer as I did not think it was a RIPA (Regulation of Investigatory Powers Act) situation.

11. I said I would have to ring counsel to check there was a public interest defence and what other statutory offences Mr Foster might have committed. I cannot now remember if I phoned One Brick Court, libel chambers, while Mr Foster was in my office or shortly thereafter but I do know I spoke to junior counsel around this time and he confirmed that s. 55 of the DPA had a public interest defence and it might be available. He did not mention anything about section 1 of the Computer Misuse Act 1990 during that conversation or point me in that direction.

12. I do remember being furious with Mr Foster. I told him he had put TNL and me into an incredibly difficult position. I said I would have to give careful consideration to whether or not I reported the matter to David Chappell, the Managing Editor of the Newspaper and the person on the newspaper who was responsible for issuing formal warnings to journalists and could ultimately hire or fire them. As Mr Barrow, the Home News Editor, had brought Mr Foster up to see me, I assumed that he was also fully aware of Mr Foster having accessed NightJack's email account and that he, as Mr Foster's immediate line manager, would take whatever disciplinary action he thought appropriate about a journalist in his newsroom.

13. I also remember making it clear that the story was unpublishable from a legal perspective, if it was based on unlawfully obtained information. It was therefore 'dead in the water' unless the same information – NightJack's identity – could be obtained through information in the public domain. I told him he had been incredibly stupid. He apologised, promised not to do it again but did stress how he believed the story was in the public interest and how important it was to stop DC Horton using police information on his blog. He said he thought he could identify NightJack using publicly available sources of information. I told him that even if he could identify NightJack through totally legitimate means, he would still have to put the allegation to DC Horton before publication. This process is called 'fronting up', and is an essential element of the *Reynolds* qualified privilege defence in libel actions.

14. At some stage after our meeting on 20 May 2009 and before 26 May 2009, I remember Mr Foster telephoning me to say he could identify NightJack from articles giving details about NightJack and how he was a Detective Constable and in his mid 40s. From this description and from information on the blog site and from other articles published around the time of the Orwell award, Mr Foster could demonstrate that NightJack had to be DC Richard Horton of the Lancashire Constabulary. I remember being told something about a Jiu Jitsu Club and references on the blog to Preston and Lancashire. I have a recollection of telling Mr Foster again in this call that he had to put it to DC Horton that he was NightJack.

15. Mr Foster proceeded to do this and approached DC Horton on 27 May 2009. He also contacted the Lancashire Constabulary on the same day and they commenced an investigation. I was not aware of this at the time, as I was out of the office. However, I was told the following day that this had provoked his lawyers, Olswang, into sending a letter to the Editor of The Times, exhibited at page 1 of JH3.[1] They threatened to seek an injunction unless The Times gave an undertaking not to publish the story on 28 May 2009. They also encapsulated the legal issues in the following passage in their letter: "We have advised our client that his identity as the author of the Blog is confidential and private and that any publication of this information would constitute a breach of confidence and a wrongful disclosure of private information. We have also advised our client that there is no justifiable public interest in any such publication" (page 2 of JH3).

[1] I have referred in this statement to documents contained in Exhibits JH3 and JH4. These are exhibits attached to James Harding's second witness statement to the Inquiry, dated 6 February 2012.

16. It then seems that the Editor delegated to Mr Barrow or Keith Blackmore, the Deputy Editor, the job of giving instructions to Stuart Patrick, the night lawyer on duty to give an undertaking that The Times would not publish the story on 28 May 2009 or subsequently without giving Olswang and their client 12 hours notice of The Times' intention to publish.

17. I returned to the office on 28 May having had a couple of days off at half term to an email from Mr Barrow asking me to go down to the Newsroom for "a chat about Patrick Foster's story regarding the identity of the police blogger." I went down and spoke to Mr Barrow and Mr Foster. There was no question in any of our minds that there was a public interest in publication. Most importantly, by this stage, Mr Foster again confirmed he could identify NightJack as DC Horton using publicly available information. Mr Barrow stated that he would like to publish the story and asked for my advice.

18. I told Mr Barrow that if DC Horton could be identified from "information in the public domain" it could not be private or confidential and this was yet another attempt to extend the law of confidence and privacy into an entirely new area. I also said that from what I had been told by Mr Foster there was a clear public interest defence in naming NightJack. I remember making two specific points. First, it was very likely that NightJack would be identified and be named by his own police force in days if not weeks as they had started an inquiry into whether he was NightJack and if he had breached police regulations. This immediately gave rise to a s.12 Human Rights Act issue and whether a prior restraint injunction could sensibly be granted when the information that DC Richard Horton was NightJack was about to become available to the public anyway. Not only could it become public knowledge in a matter of days but The Times would lose the story it had been working on and believed was in the public interest.

19. Second, I thought it most unlikely that DC Horton would want to go to court when there was strong evidence that NightJack had been breaching police regulations and using confidential police information on his blog site. The threat from Olswang had, therefore, the hallmarks of being a threat which was likely to evaporate into thin air. Over the 31 years I had been at TNL, I had had a number of such threats, particularly on The Sunday Times and I thought this one fitted into precisely the "empty threat" mould when I spoke to Mr Barrow that morning.

20. Mr Barrow told me he was still keen to get the story into The Times. I can now see he had emailed Mr Foster the day before saying that the 'Editor is keen; suggests a p4' (page 7 of JH4). Mr Foster also pointed out that, having identified DC Horton through totally legitimate means, he had approached him and put it to him that he was NightJack. DC Horton had neither

confirmed nor denied he was NightJack but had said something about losing his job. I told Mr Barrow we would have to give notice to Olswang that we were intending publishing the story so Olswang could move the court if they really wanted to.

21. It might be helpful, at this point, to explain how I, as Legal Manager, interacted with editorial staff at The Times, took instructions and gave advice. If a legal issue arose, in the vast majority of cases, I would deal with the department head, i.e. the Home News Editor, the Foreign Editor or whichever head of department that needed legal advice. In Mr Foster's case, this was Mr Barrow, who was Home News Editor. Mr Barrow had an office in the Newsroom. The newsroom was a large open-plan floor which was right outside the Editor's office. Mr Barrow and the Editor would see each other most days in morning and/or afternoon conference and it would be easy for Mr Barrow to see when the Editor might be approached as the Editor's office has glass walls. By contrast, my office was one floor up and I would only meet the Editor on very rare occasions. Unlike Tom Crone, NI Legal Manager and also Legal Manager to the Sun and News of the World, neither I nor anyone else in the legal department attended The Times editorial conferences. Tom Crone attended virtually all Sun and NoW editorial conferences. Instead I would wait to be summoned by the Editor if he had a query or wanted advice about a particular story or litigation. This rarely occurred in practice. I primarily gave advice to the head of department and relevant journalist, as occurred in this case.

22. After the substantive hearing on 4 June 2009, I sent an email memo explaining what had happened to David Chappell, the Managing Editor, and the man in charge of discipline. I also copied the memo to the Editor, Mr Harding. The fact that I was never summoned by the Editor following this email, which explained how Mr Foster had accessed DC Horton's email and had sought advice from me, demonstrates how rare it was that Mr Harding would want to see me or my assistants, even on a story of this kind. At all material times, I was taking instructions from Martin Barrow, Mr Foster's line manager and Home News Editor.

23. As an in-house lawyer my job is "re-active", not "pro-active": I would never "take action" or positively defend a position without consultation with, and instructions from, the relevant head of department and journalist concerned. There are a number of reasons for this. As a lawyer, I had no influence or role when it came to deciding whether or not a story had editorial merit or how important the story might be to The Times. This would be decided by the head of department and/or the Editor either at conference or at an editorial meeting. These were

editorial decisions. My role was to advise if asked. I certainly would not be involved in litigation without working in conjunction with the relevant head of department and journalist and taking appropriate instructions. For reasons I have already set out that would rarely be the Editor himself as he was a very busy man. In this case it was Martin Barrow.

At what point in your exchanges and contact with Mr Foster were you made aware of the hacking of an email account?

24. During the first conversation with him on or around 20 May 2009.

Is this the first time you had become aware of or dealt with an incidence of unauthorised access to emails by a journalist.

25. Yes. I had never been made aware of such activity by a journalist at TNL before, and this was the first time I was asked to advise on this issue.

26. I knew that such conduct would be totally unacceptable to TNL and its editors. This is borne out by the fact that he was subsequently disciplined. I also made it clear how angry I was at his behaviour.

As far as you can recall, when, how and in what circumstances did managers at The Times first learn of, or suspect that, a journalist had accessed another person's email account without authority? Please name the managers.

27. I believe that Mr Foster had told Mr Barrow, the Home News Editor, how he had gained access to NightJack's computer, on or about 19/20th May. This would have been sometime before coming to see me on 20th May. It was extremely rare for a head of department to come into my office with the journalist concerned. I am also aware from the emails exhibited to Mr Harding's statement to this Inquiry that Mr Foster had referred, in emails to Mr Barrow, about his "dirty deed".

28. I can also see from the above emails that Steve Bevan, a Special Investigations editor, knew of the story on or around 20 May 2009. However I simply do not know if he was told that Mr Foster had accessed DC Horton's email account.

29. From the emails contained in JH4, it also appears that Mr Barrow spoke to the Editor, Mr Harding, about the story on or about 27 May 2009. I do not know what Mr Barrow told him at that stage and whether the Editor knew that Mr Foster had accessed DC Horton's emails (page 7 of JH4). However, from what the Editor has said to this inquiry and from my memory of subsequent conversations with David Chappell, the Managing Editor, I do not believe the Editor knew about the accessing of the email account until they spoke on 5 June 2009.

30. I can also see from emails in JH4 that on 27 May 2009, The Times night lawyer emailed the Editor, about the intention of DC Horton's lawyers to apply for an injunction. Again, I do not know if the Editor and Deputy Editor were made aware that Mr Foster had accessed DC Horton's email account at this point, but I do not believe that they were. Mr Barrow was, I believe, fully aware of what Mr Foster had done.

31. When it became clear on Tuesday 2 June, that Mr Foster had been temporarily rusticated at Oxford for accessing a computer, I realised that whatever assurances Mr Foster might have given me about not accessing someone's computer again, I had to raise the matter with Mr Chappell, whatever Mr Barrow might or might not have done about one of his newsroom journalists. Through pressure of work on 2 June and an all-day mediation on 3 June, I only approached Mr Chappell sometime on 3 June i.e. 24 to 48 hours after I first heard about the Oxford problem and had become aware of s.1 of the Computer Misuse Act. On 3 June 2009, (the day before the substantive hearing) I told David Chappell, the Managing Editor of The Times and the person responsible for discipline, that I needed to speak to him. By this stage I realised that Mr Foster's accessing of NightJack's computer was far more serious than I initially thought as there was no public interest defence to s.1 of the Computer Misuse Act. Either at sometime on 3 June or early on 4 June, I told Mr Chappell "we have a problem with Patrick Foster, what he did at Oxford and how it might affect litigation I am involved in." Mr Chappell asked me to do him a memo when I got back from court.

32. On 4 June 2009, after the substantive hearing, I wrote a long email to Mr Chappell and copied it to the Editor setting out events up until then (page 23 of JH4).

33. I am aware that Mr Chappell then spoke to Mr Barrow and the Editor, about disciplining Mr Foster on Friday 5 June 2009. From what I now know, I presume that this was when Mr Harding

first became aware of Mr Foster's actions in gaining access to DC Horton's email account. I do remember Mr Chappell telling me that the Editor was "furious" when he learnt about Mr Foster's behaviour. It appears from the emails that the Editor wanted to see Mr Justice Eady's decision before making any final decision about how to discipline Mr Foster.

When, how and in what circumstances did Mr Harding first hear about the matter?

34. I have set out the extent of my knowledge, at paragraphs 29-33 , above.

Whether and if so what advice or instructions you gave to the journalist about the use he could make of the information which had already been obtained through the unauthorised email access?

35. As I have said, I told Mr Foster on or about 20 May that his story was effectively 'dead in the water' unless he could identify NightJack legitimately from publicly available sources of information.

36. At a later stage, sometime between 21 and 26 May 2009, Mr Foster telephoned me and told me he was able to identify NightJack legitimately using publicly available sources of information. Once the identity of the blogger could be discovered legitimately through publicly available sources of information, I felt that Mr Foster could proceed with the story so long as he fronted up DC Horton and the allegation was put to him.

37. I should further clarify that after the initial hearing on 28 May 2009 and because I knew the judge would need as much detail as possible, I told Mr Foster to double check the way in which he had identified Horton from publicly available sources and see if there were any additional ways in which this could be done. On 30 May 2009 Mr Foster emailed me to say that he had "cracked it" and he could "do the whole lot" from publicly available information. (This was a reference to the Facebook conversation DC Horton had had with his brother in Houston, Texas.)

What instructions were given to the hacker about the future conduct of his work on the NightJack story, when and by whom?

38. I certainly told Mr Foster that he must never access someone's private email ever again and that he had almost certainly committed a criminal offence. Following my conversation with counsel around 20 May 2009 and my own knowledge of s.55 of the DPA, I did though tell him he might have a public interest defence.

39. I undoubtedly told him we could not publish the story unless he could establish the blogger's identity using entirely legitimate means.

40. When Mr Foster phoned me and told me he could identify DC Horton entirely from publicly available sources of information, I told him again he would still have to 'front up' DC Horton to give him a reasonable opportunity to respond to the allegation that he was NightJack and he was breaching police regulations by using confidential police information on his website.

41. Before the hearing on 28 May there was no time for us to prepare proper witness statements or skeleton arguments in response to DC Horton's legal team. Following the hearing, I told Mr Foster he would have to set out in as much detail as possible how he could identify DC Horton from publicly available documents and/or information. He also had to double check everything and see if there were any additional ways of identifying DC Horton.

42. I do not know what Mr Barrow, Mr Chappell or the Editor said to Mr Foster about his future conduct and work on the NightJack story. Mr Barrow, as Home News Editor and Mr Foster's line manager, clearly did not remove Mr Foster from the story or stop him continuing to investigate it. On 28 May, Mr Barrow made it clear to me and Mr Foster he wanted the story in The Times. Most importantly, Mr Foster was disciplined by Mr Chappell on 22 June 2009 and given a final written warning about his "gross professional misconduct".

We would be grateful for your recollection of the decision to publish the story which identified the blogger Nightjack namely:

(a) If there was any managerial involvement in the decision to put the allegation to Mr Horton, what consideration, if any, was given to the fact that the journalist working on the story had, without authorisation, accessed email?

(b) In deciding to resist the application which Mr Horton subsequently made for an injunction, what consideration (if any) was given by the Times to the fact that the use of unauthorised email access in pursuit of the story.

(c) What factors and/or advice influenced the decision not to inform counsel instructed by The Times and the Court which considered the injunction proceedings about the unauthorised access to the email account notwithstanding the express allegation being made by Mr. Horton's lawyers to you and as part of their pleaded case?

(d) In deciding to publish the story what consideration, if any, was given to the fact of unauthorised email access? If the issue was considered what was the resultant thinking?

43. I have already described the events of 20 May 2009: how Mr Foster came to my office with Mr Barrow; the advice he was given; my phone call to One Brick Court and subsequent events leading up to the hearing on 28 May 2009. I will deal with the four sub-questions, compendiously, below.

<u>The managerial decision to put the allegation to Mr Horton and the consideration of unauthorised email access</u>

44. After the discussion on 20 May, the first decision was whether it would be lawful to publish the story. Whether an article should be published is a decision for the Editor or for those to whom he has delegated authority in this respect, in this case the Home News Editor, Mr Barrow. But it was my role to advise on the legal implications of publication. As I have explained, my original advice was quite straightforward, that the story was dead in the water unless Mr Foster could identify NightJack from publicly available sources of information.

45. As matters progressed and injunction proceedings were commenced, I had a number of competing considerations that I was required to balance:

(1) The Times could not and would not publish a story based on information obtained through unauthorised email access. It could ONLY be published when and if Mr Foster could identify DC Horton from publicly available information. Mr Foster's story did appear to have a significant public interest as a police officer was misusing police information in

relation to rape cases. There was therefore a legitimate reason for trying to get it into print.

(2) In the process of publishing a story in the public interest, I would always consider how genuine confidential or private information came into the newspaper's possession. If it was as a result of a criminal act, it was unpublishable. IF the self-same information could be obtained wholly legitimately from publicly available material, then it was neither private nor confidential and what might have happened in the past was irrelevant It must also be borne in mind that Mr Foster had come to seek my advice and talk to me in confidence about what he had done, potentially incriminating himself. I, therefore, had to ensure I did not breach that confidence other than in circumstances where it was absolutely necessary.

(3) I took the view that it was permissible for me to avoid answering questions about whether Mr Foster had accessed DC Horton's email because: a) Mr Foster had identified DC Horton through wholly legitimate means; b) Mr Foster and Mr Barrow felt publication was in the public interest (as also did I); and c) DC Horton was under investigation by the Lancashire police and his identity was almost certainly going to come out anyway – s.12 of the Human Rights Act was engaged. Therefore, the issue of any earlier unauthorised access to the NightJack email account was not relevant to the strict legal issues in the case.

46. With those factors in mind, I advised on 28 May that publication should be possible but we would have to give notice to Olswang in accordance with the undertaking given the night before. Having given this advice, Mr Barrow instructed me to give notice to Olswang that we intended to publish. This I did later that morning.

47. To my surprise, I received an email after lunch saying that Olswang had instructions to move the court for an injunction. I briefed Jonathan Barnes at very short notice on the afternoon of 28 May and together with Patrick Foster we met him at court that same day. We discussed the legal issues arising over whether or not the laws of confidence and privacy could be extended to protect bloggers and their desire to remain anonymous. Mr Foster explained how he had been able to identify DC Horton from a combination of information on the blog site (for example that the author had an interest in Jiu Jitsu), the interview in the Independent newspaper and other newspaper stories and Mr Foster's research on Jiu Jitsu clubs up in Lancashire. He was entirely

confident that he could identity NightJack from public information alone and what is more, DC Horton had neither confirmed nor denied it saying something about "losing his job".

48. During the hearing on 28 May (page 38 of JH3), it became clear that the Court needed to see a good deal more evidence and hear further argument on the legal issues before reaching a decision. As the hearing was at such short notice, The Times had not had time to file a skeleton argument or any witness statements before the hearing. The Court therefore needed to see how NightJack's name could be deduced from publicly available information. As can be seen from pages 26 and 28 of JH3 Mr Foster had told Mr Barnes only in outline how he had been able to ascertain DC Horton's identity. It was therefore important for Mr Foster to set out in a detailed witness statement how he had been able to identify DC Horton as NightJack from publicly available information. I therefore instructed Jonathan Barnes, counsel for the Respondent to offer up undertakings to the court as set out in the Confidential Annex to the Order on page 41 of JH3 and that we would be bound by those undertakings which could take the form of an injunction as long as we had a firm return date, one week later, on 4 June.

<u>Consideration of the fact that there had been unauthorised email access in pursuit of the story and whether this needed to be disclosed</u>

49. DC Horton's legal team included two lawyers, who are both very experienced in the field of media law and privacy: Dan Tench, a partner at Olswang and Hugh Tomlinson QC a specialist media and human rights silk.

50. On 1 June, I received a letter from Dan Tench asking TNL to confirm whether Mr Foster had obtained information relating to DC Horton by accessing his email account. Unsurprisingly, they had picked up on the fact that in Court, Mr Barnes had qualified his account of what Mr Foster had done by using the phrase "largely" when describing how Mr Foster had discovered DC Horton's identity through a process of deduction. Mr Barnes did this because he had only been briefed very shortly before the hearing, so was not entirely sure about the process of "jigsaw" identification that Mr Foster had been through. In short, he was choosing his words very carefully, not because he was trying to hide anything from the other side.

51. At this stage Olswang did not know how Mr Foster had been able to identify DC Horton as NightJack. It could have been through someone – a journalistic source – breaching a confidence

and telling Mr Foster that DC Horton was NightJack OR it could have been through Mr Foster illegally accessing NightJack's email account OR it could have been through some entirely legitimate process using information in the public domain. Olswang obviously wanted to try to persuade the Court that it was through one of the first two processes as if it was the third process i.e. through wholly legitimate means, then their case was in real difficulty. While bargaining about putting the entire blog back up on the internet so it was readily available for close scrutiny, they also claimed that Mr Foster had 'a history of making unauthorised access to email accounts' and sent me some cuttings. In the same letter they also "reserved their client's position" on the issue of whether or not Mr Foster might have gained unauthorised access to the NightJack account (see page 47 JH3).

52. It was obvious that Mr Horton's solicitors were trying to force TNL into a damaging admission when in fact Mr Foster had now been able to identify DC Horton through entirely legitimate means. When I raised these matters with Mr Foster at a heated meeting on 2 June, he told me that the suggestion by Olswang that "he had a history of making unauthorised access into email accounts" was "baseless". He accepted he had been temporarily rusticated at Oxford but what he had done there was entirely in the public interest and not in any way for personal benefit or gain. He did not, he said, "have a history of accessing email accounts".

53. I believed this was a distraction. There were two clear legal issues in the case. The first issue was whether someone who was blogging anonymously had a right to protect that anonymity by using the laws of confidence and privacy. It was a novel issue: what expectation of privacy did a blogger have? Second, if a blogger did have such a right, was there a public interest in that particular blogger being named, as in this particular case? Mr Foster's ability to demonstrate, as he could, that NightJack's identity was ascertainable entirely from publicly available information, was of paramount importance. The fact that prior to doing so he had also been able to gain unauthorised access to NightJack's account was, in my view, irrelevant to those key issues. Similarly, what Mr Foster had or had not done at Oxford was also irrelevant. He had now identified DC Horton through entirely legitimate means.

54. In my view his solicitors appeared to be engaged in the common litigation practice of trying to pull the focus into an irrelevant area which they believed was embarrassing and prejudicial for us. I make no criticism of them in that regard at all. But my task was to prevent them from doing so by keeping the focus purely on the real issues of law before the court.

55. For that reason I deliberately did not engage with Olswang on the issue of whether Mr Foster had accessed NightJack's email account. I could not deny that he had, but *until* they mounted a positive case that Mr Foster had done some illegal act and could ONLY identify NightJack through illegal means, I would avoid answering that question.

56. Accordingly, on 2 June 2009, I answered Olswang's letter by dealing only with the earlier allegations of Mr Foster having a 'history of making unauthorised access to email accounts'. I felt these allegations were simply prejudicial. Mr Foster told me that they were "baseless" so I used his expression in my letter back to Dan Tench. With hindsight I have to accept that the sentence is badly structured and I should not have used that word even if it was technically accurate according to Mr Foster.

57. Again, not surprisingly, given the experience of Mr Horton's legal team this did not escape them. They responded on the same day making it clear that they thought the answer I had given was inadequate, saying 'If this is the evidence of Mr Foster, we would expect the matter to be dealt with expressly in his witness statement'.

58. Mr Horton's solicitors continued to pursue this issue. Mr Tench made a second witness statement the following day, 3 June 2009. He made it clear at paragraphs 18 and 19 that his client was concerned that there had been illegal computer hacking and had not received an adequate answer from us. In effect he was asserting that we were not denying that email hacking had taken place, but we were avoiding engaging on that question. That is right. I thought the issue was irrelevant to the clear cut forensic legal issues in play. As part of their litigation strategy, DC Horton's lawyers may well have realised that if we had been required to answer it, we would have felt forced to withdraw our opposition to DC Horton's application for an injunction, even though on the merits of the privacy/confidence issues we had a strong case. I believed that was why they were continuing to pursue it.

59. Prior to the hearing on 4 June, I prepared for the possibility that if DC Horton's lawyers continued to pursue this line of inquiry and persuaded the Court that it was relevant, we might have either to answer it directly or withdraw. In light of the allegations about Mr Foster's behaviour at Oxford and after reading the newspaper cuttings sent by Olswang, I asked Jonathan Barnes on 3 June (page 27 of JH4) to advise what other offences Mr Foster might have

committed other than an offence under s.55 of the DPA. It was only after reading the Oxford cuttings and receiving Counsel's email advice of 3 June that I realised that Mr Foster had almost certainly breached section 1 of the Computer Misuse Act and there was no public interest defence if he was prosecuted.

60. By the second hearing on 4 June I was therefore aware that there was no public interest defence to what Mr Foster had done and he was, in effect, wide open to a criminal prosecution if what he had done became known. I cannot remember when I told Mr Foster about s.1 of the Computer Misuse Act but I believe it would have been sometime before the hearing before Mr Justice Eady and after my communications with Mr Barnes. That hearing was, however, a civil action involving an application under the law of privacy/confidence for an equitable remedy to protect a police officer who I and Mr Barrow felt had not behaved properly, had broken police regulations and should be named.

61. In the end the issue did not arise. At the hearing the focus was on the two issues that I believed were important. However, DC Horton's counsel did point out to the judge that while there had been "a great deal of detective work by The Times journalist", (page 133 of JH3) we had not directly denied gaining information by some improper means, but we had avoided ever answering whether Mr Foster had accessed DC Horton's email and implicitly that it might be a matter for another day:

> 'There is something of a dispute, which you do not need to be concerned with today. Perhaps it is just a matter of the way the witness statement is drafted, but Mr Foster describes in elaborate detail how he investigated and engaged in the detective work to find the identity of the claimant. What he never says, as I read his statement, is that was all he did. In other words, he does not say. "This was the only way I did it. I did not rely on any confidential sources."
>
> 'We are concerned, as you will see from the evidence, that someone has hacked into my client's email account. Be that as it may, the position we accept from today hearing this case now, you can assume that it is more likely than not, on the evidence that is before the court today, that the identity was discovered by detective work and not by, as it were, conventional breaches of confidence. We are content for you to proceed in that basis.'

62. My view at that time was this allowed us to proceed on the basis that we did not have to engage with DC Horton on the earlier unauthorised accessing of NightJack's email account as everyone accepted that DC Horton's identity could be ascertained from publicly available sources of information. Accordingly, the case could proceed on the basis that it was possible to

identify DC Horton legitimately i.e. process 3 as set out in paragraph 51 above. That being the case, I did not feel the court was in anyway misled.

63. I appreciate that my compartmentalising what had happened and not engaging with Olswang over the hacking issue leaves me open to criticism, particularly with hindsight and now we know what had been happening over the road at the News of the World. I fully understand why others may think I should not have allowed the matter to rest in the way that it did. I did though go to the Managing Editor when I knew I had to. It was the only case I ever had in 33 years of computer hacking which raised complex questions over legal professional privilege and confidential discussions with a young inexperienced journalist. If there was a real possibility that the Court could have been or was misled then it was my task to prevent that. I made a strategic litigation decision in good faith. If I made a mistake in the approach I took, I accept that criticism unreservedly.

64. I would though like to emphasise how difficult it can be to judge the right approach in a quite exceptionally difficult case like this. Mr Barrow felt this was an important story and the Editor was clearly "keen on it" (page 7 of JH4). All those I discussed it with from 20 May to 4 June believed it had a strong public interest element. This is borne out in Mr Justice Eady's judgment and by the fact that the story was subsequently published after Mr Chappell and Mr Harding were aware of the full facts. I for my part believed it raised extremely interesting and important legal principles over the ambit and range of the laws of confidence and privacy. My motivation was therefore to keep the focus of the case on what I believed to be the relevant issues. In over thirty years working for two very reputable newspapers, I felt strongly that the job of newspapers is to publish stories fearlessly, which are in the public interest and it was my job to fight this cause on behalf of the journalists I was advising.

65. With hindsight and the extraordinary revelations as to what had or was happening over the road at News Group Newspapers, I now concede that I may have concentrated too hard on the right of free speech, the discrete legal issues surrounding DC Horton's application to the Court, the public interest and not enough on Mr Foster's earlier behaviour. All I do know is that the law of privacy was burgeoning at the time and I genuinely believed that for a police officer, who was breaching police regulations to be able to use to the law of privacy/confidence to silence a newspaper which was acting as a "bloodhound and a watchdog" (Lord Nicholls in *Reynolds*) would be totally wrong. I also felt very strongly that the fact that someone may have done

something wrong or improperly on one occasion should not prevent them from doing the same thing totally correctly on another occasion. But again, with hindsight, I accept that I could have advised Mr Foster and Mr Barrow that even though the story was in the public interest, it was sufficiently tainted for it to be more appropriately dropped as carrying too high a risk that the Court might be misled over background facts. If that was the approach I should have taken, then I was in error and I offer up my unreserved apologies.

The decision not to inform counsel instructed by The Times about the unauthorised access to the email account 'notwithstanding that it was part of [Mr Horton's] pleaded case'

66. The reason I did not tell counsel was the same reason I did not think it necessary to inform DC Horton's lawyers or the Court: I did not think it was relevant to the issues in the case. Insofar as that issue was part of their case, I believed it was a distraction. It was not one of the relevant issues, but was an attempt to divert the Court's attention into another area. The important aspect of the case was whether Mr Horton had a right to block publication of his identity if it was, in fact, ascertainable from public information. His lawyers wanted to take the focus away from that point and have the court examine whether DC Horton's identity might have been discovered through other means as well. I considered it proper to keep the focus on the issue of discovery through public information and avoid answering their assertions on other points.

67. Furthermore, for reasons I have outlined above, given the circumstances in which Mr Foster approached me I considered it to be inappropriate for me to tell any person that he had committed a criminal offence (other than his manager) unless it was absolutely necessary for me to do so. As I have said, I thought that this was irrelevant to the issues before the Court. I therefore took the view that it was not necessary for me to discuss it with others, including counsel, and it was inappropriate for me to share that information.

68. At the time I felt that I could not possibly instruct Counsel to inform the Court that Mr Foster had initially gained illegal access to NightJack's email account. First, I do not believe it is counsel's job to incriminate the employees of their clients. Second, to have so instructed counsel would have been a serious breach of confidence imposed on me by a young journalist working on a public interest story. Third it would have made my position at Times Newspapers impossible, because journalists would not have come to me for legal advice in the future if they felt that I would then disclose their activities to a Court, especially when they had genuinely believed they were acting in the public interest. I also did not want to put Counsel into a

thoroughly invidious situation as Mr Foster had put me into. But the primary reason was that I believed the matter was irrelevant to the issues in the case.

69. I realise now that there were other options open to me. I could have shared the matter with counsel IF I had obtained Mr Foster's permission. Counsel would then have been able to determine in their own mind whether the approach I had decided to take was in danger of misleading the court. However, for reasons I have set out, I was very reluctant to share confidential information of that kind with counsel unless it was absolutely necessary to do so and I did not think it was. If a point had come in the proceedings when counsel was confronted with having to answer the issue directly I would have informed counsel at that point, or instructed him to abandon the case. I would not have allowed him to present a false account to the court. But we did not reach that point.

70. I also appreciate now that I could have sought advice from yet another barrister as to whether I should tell the barristers I was instructing.

Consideration given to the fact of unauthorised email access in the eventual publishing of the story

71. I provided my report as to what had happened on 4 June 2009 (page 25 of JH4). I was not asked to contribute further in the editorial decision making process.

72. Accordingly, I simply do not know as I was not a party to the editorial discussions and decision made by Mr Barrow, Mr Chappell, Mr Blackmore and Mr Harding when deciding whether or not to publish the story so I cannot say what consideration was given to the earlier unauthorised accessing of NightJack's email account. All I would say is that they may have felt under some pressure to publish given the fact that Mr Justice Eady had found in The Times' favour on the two important points of law in issue and this was one of the first occasions that the law of privacy had not been extended into new areas.

At paragraph 14 of Mr. Harding's statement dated 6 February 2012 he explains the decision to resist Mr. Horton's injunction was yours. Is that correct? Who else did you consult within The Times before taking this course? Why was Mr. Harding not involved as he suggests? From whom did you have authority to proceed with the legal proceedings?

73. It was not my decision to resist Mr Horton's application for an injunction. As I have explained, on the morning of 28 May I was summoned by Mr Barrow, the Home News Editor, to discuss the NightJack case. Mr Barrow had been delegated the night before to deal with the injunction

threat from Olswang and was in charge of the story from an editorial point of view. Mr Barrow knew the whole background to the story and had discussed it with the Editor on 27 May and the possibility of it being a page 4 story. In those circumstances Mr Barrow was clearly in a position to instruct me to give notice to Olswang that The Times was proposing to publish the story and if they did move the court for an injunction, to resist any application on The Times' behalf.

74. After the hearing on 28 May I returned to the office with Mr Foster and we told Mr Barrow that the hearing had been adjourned for a week and that Mr Foster would have to devote a considerable amount of time to setting out in a witness statement how he had identified NightJack using publicly available information. I also told Mr Barrow that we could not publish the story as I had offered up undertakings not to publish until after a full hearing on 4 June. I advised him that in the meantime the story could not possibly go into the newspaper without it being a very serious contempt. If Mr Barrow chose not to tell the Editor, who he reported to, that was his decision not mine.

75. I always felt that Mr Barrow as Home News Editor was sufficiently senior for me to take instructions from him and notify him of the outcome of what happened on 28 May and thereafter what the advice was from Leading and Junior Counsel about resisting the application for an injunction. As the advice from counsel on the pure legal issues relating to the law of confidence and privacy was similar to that I had already given and that we should continue to resist an application for an injunction, I did not think I needed to tell anyone more senior than Mr Barrow about Counsel's advice. When things became more complicated on Tuesday 2 June and Olswang sent me the cuttings on Mr Foster's behaviour at Oxford, I then decided that Mr Chappell as Managing Editor had to be brought into the equation to deal with it from a disciplinary point of view, whatever Mr Barrow might or might not have done about it.

What were the circumstances in which you left The Times?

76. From passages in Mr Harding's second witness statement it might be inferred that I was dismissed by Times Newspapers Ltd following NightJack or subsequently. I was not. I was asked to leave the company by Rebekah Brooks who was then CEO of NI some four days after we received a judgment from the Court of Appeal in a libel action where The Times was being sued by a Metropolitan Police officer, Detective Sergeant Gary Flood about allegations that he had received backhanders as an officer working in the extradition squad from a security company acting for certain Russian oligarchs. It was a case I conducted in house on behalf of TNL. The previous year, we had won an important preliminary issue on *Reynolds* qualified

privilege before Mr Justice Tugendhat after three days of cross-examination of The Times journalists but lost a discrete issue on later website publications following an IPCC investigation into DS Flood. Unfortunately, the Court of Appeal decided to reverse the main Tugendhat J decision. The case has since gone to the Supreme Court. In any event, I signed a confidential Compromise Agreement with News International in November 2010, which is common practice when there may be disputes following an employee leaving a company. All I can say is that I was never disciplined either in relation to the NightJack affair or anything else I had done at Times Newspapers over 33 years. Indeed, the company agreed to make the Press Announcement exhibited at AJB1 when I eventually left the Company on 31 December 2010 and it also agreed to furnish me with a reference from my other Editor, John Witherow, Editor of The Sunday Times, which is also attached to AJB1 should I need to furnish a reference to a future employer.

I believe that the contents of this statement are true.

Signed.....

Alastair John Brett

Dated this 5th day of March 2012