

<p>1 2 (2.00 pm) 3 MR JAY: We are on to section 5 now of your submission, 4 please. Page 15, 00861, "Establishing the scope and 5 jurisdiction in a changing digital media environment", 6 where obviously there may be different providers growing 7 up over the course of time. 8 Can I ask you, please, to just summarise what your 9 advice is in this context. 10 MR RICHARDS: I think in essence we make a very obvious 11 point which a number of other people have made, which is 12 that this world is changing significantly, and we need 13 to think about, or the Inquiry needs to think about how 14 to ensure that that evolution of digital communications 15 is anticipated in any proposals that are made. 16 We note the environment as it is today, and in this 17 context I think that's particularly relevant in relation 18 to our co-regulator ATVOD, who were discussed earlier, 19 and that's a relatively new relationship that we have, 20 very young. But we have got a good understanding now of 21 how I think that works. 22 Clearly that is dealing with an on demand, video on 23 demand world, which has been populated thus far largely 24 by people with feet in the broadcasting environment, but 25 which in the future may well be populated by people who</p> <p style="text-align: center;">Page 1</p>	<p>1 fines and the significance of the fines is in the 2 context of the overall framework of sanctions. This is 3 very much how we think about it, and I would say I think 4 it's very much how our regulated companies think about 5 it, which is to say that there is a ladder of sanctions, 6 beginning with the simplest, which is that we may take 7 a case, we may decide that it is indeed a breach of the 8 Broadcasting Code, and we simply record in public that 9 it is a breach. 10 That has a reputational effect. It has a -- it 11 helps set precedent, it helps clarity, and it 12 establishes a basis, should there be any further similar 13 breaches. 14 We then step through a series of sanctions which 15 could be things such as requiring the programme in 16 question not to be broadcast again, requiring an apology 17 or a correction to be broadcast, importantly in a form 18 and at a time of our choosing. And then through to 19 fines, and then ultimately the sanction we have which is 20 of course licence revocation or suspension. So that is 21 a ladder of interventions and we always start at the -- 22 typically start at the most lenient, and then go through 23 those measures as appropriate. 24 LORD JUSTICE LEVESON: As a criminal judge, that's not 25 uncommon.</p> <p style="text-align: center;">Page 3</p>
<p>1 have historically been press organisations. 2 Q. The conclusions of your paper again summarise the points 3 you made before, but 6.5 is likely to be seen as the 4 critical point: 5 "... the importance of public confidence in the 6 press cannot be overstated. Confidence in a system can 7 be undermined very quickly by the actions of individual 8 commercial enterprises acting against the interests of 9 the industry as a whole. An effective regulatory 10 mechanism which builds public trust is in the interest 11 of the press as well as the public." 12 I'm sure that's a point you would wish to 13 underscore. 14 One point you haven't addressed in this paper, but 15 you did in the letter of 6 June, was the relevance and 16 significance of the sanctions. Could I ask you please 17 to talk to that. 18 Ofcom we know and understand doesn't have the 19 ability to order compensation to complainants, but it 20 does of course have the power to impose, I think, 21 unlimited fines. What is the significance of that power 22 within a regulatory system, whether it be 23 self-regulatory, co-regulatory or statutory regulatory? 24 MR RICHARDS: I don't think our fines are unlimited, but 25 they are significant. The way I would describe the</p> <p style="text-align: center;">Page 2</p>	<p>1 MR RICHARDS: Indeed. 2 MR JAY: As you say in the letter, obviously it's 3 a punishment, but perhaps more importantly, it's 4 a deterrent. 5 MR RICHARDS: Yes. I think we found the system works. It's 6 very, very rare that we revoke a licence. We have 7 revoked one in the last year or so. But it was -- it's 8 an egregious case, and we -- 9 LORD JUSTICE LEVESON: We talked about it on the last 10 occasion. 11 MR RICHARDS: We did. Thank you for reminding me. So it's 12 very rare, and largely we don't have to do that. The 13 sanctions are known, and they are, I think, broadly 14 speaking, effective. And they are -- needless to say, 15 I think they are an essential part of effective 16 regulation. 17 MR JAY: Two final areas of questioning. 18 Mr Suter's proposal, which I think on analysis is 19 a form of co-regulation. Whether with your agreement or 20 not, he places Ofcom at the centre of it as the 21 co-regulator. Could I have your considered reaction, 22 please, to what he's propounding. 23 MR RICHARDS: I think the ideas that Tim Suter has put to 24 you are very interesting, and there are some 25 similarities to one or two points that I think we've</p> <p style="text-align: center;">Page 4</p>

<p>1 made in the past. In a document we submitted to the 2 inquiry at an earlier stage we made the argument for the 3 case for common or similar codes. There is a similarity 4 between the existing PCC code and our own Broadcasting 5 Code. There's a close relationship between our code and 6 the BBC's editorial guidelines. In a converging digital 7 world, it does seem to us to make an awful lot of sense 8 that the closer the relationship between those codes, 9 the better.</p> <p>10 So I think that underlying point that Tim Suter is 11 making is a very, very good one, and one which we agree 12 with.</p> <p>13 He then goes on to expound a longer term vision, if 14 you like, about how this all might fit together, the 15 notion of authorisations and the notion that Ofcom might 16 be the spider at the heart of the web and not actually 17 doing any regulation any more itself, but approving 18 codes and being the backstop.</p> <p>19 I think I can probably say two things about that. 20 Firstly, we are obviously used to being a backstop. We 21 are a backstop in relation to ATVOD and various other 22 co-regulators. So the concept is familiar to us.</p> <p>23 The second though is where we would have concerns 24 about that kind of idea is that it would seem to move 25 broadcasting into a very different place potentially.</p> <p style="text-align: center;">Page 5</p>	<p>1 I don't think he was suggesting you should change 2 broadcasting, but given the rather different dynamics of 3 the press, a slightly different system might work better 4 for them. I'm not going to ask you to sign up to 5 anything. It would be quite unfair of me to do so, and 6 it's not in my gift. But I did want to make sure that 7 you had the opportunity to comment upon it, given that 8 we've just heard about it.</p> <p>9 DR BOWE: Well, I think the only thing I would add is if you 10 look at paragraph 5.6 of our advice to you, page 0861 of 11 your papers, you'll see that we're saying there the 12 importance of different regulatory bodies working 13 together, common and consistent principles. You'll 14 recall that Tim Suter ended his remarks by talking not 15 only about the importance of in effect being able to 16 deal with the convergent digital future, but also of the 17 importance for consumers and citizens of knowing where 18 to go in a clear way if they've got a problem.</p> <p>19 So I think what we're saying here is we think the 20 direction of travel sketched by Tim Suter is very 21 interesting. Right at this moment we have a system of 22 broadcasting regulation that appears to work well, and 23 which appears to command public trust.</p> <p>24 The two things, I think, are not inconsistent.</p> <p>25 LORD JUSTICE LEVESON: Yes. I understand the point you're</p> <p style="text-align: center;">Page 7</p>
<p>1 Actually, I think the level of trust among the 2 public or certainly what the public tells us about the 3 effectiveness of broadcasting regulation is it's pretty 4 high. It seems to work pretty well, it works with the 5 industry pretty well, and therefore I would be --</p> <p>6 I think our instinct would be to be cautious in relation 7 to radical change to a part of the system, a media 8 regulatory system, which broadly speaking works pretty 9 well.</p> <p>10 LORD JUSTICE LEVESON: Do I understand that it's this. If 11 that works for the press, why shouldn't it work for the 12 broadcasters, and why shouldn't there be a common 13 system, albeit with different regulators? Why should 14 Ofcom be directly involved? Is that the point?</p> <p>15 MR RICHARDS: Slightly different, I think. I think where 16 Mr Suter --it he was in a sense saying Ofcom should step 17 back from regulating in any respect, and merely be the 18 code approver. And I think what I'm saying is, well, 19 I can see the logic of that argument, particularly from 20 a longer term perspective, but I observe that in 21 broadcasting we have got something that works very well, 22 and therefore part of me is saying, well, why would we 23 want to change that?</p> <p>24 LORD JUSTICE LEVESON: Yes. I think that's what I was 25 trying to suggest.</p> <p style="text-align: center;">Page 6</p>	<p>1 making.</p> <p>2 DR BOWE: Thank you.</p> <p>3 MR JAY: There's one matter I have been asked to raise with 4 you from another core participant.</p> <p>5 One issue which has been raised before is what 6 happens when, at least in regulators, when there's the 7 possibility or the actuality of contemporaneous court 8 proceedings.</p> <p>9 The position with you, at least as regards fairness 10 complaints, section 114 of the Broadcasting Act -- I'm 11 sure this is well-known to you, but it won't be 12 well-known to everybody else -- is that if the matter 13 complained of is a matter in respect of which the 14 complainant or the person affected has a remedy by way 15 of proceedings in a court of law, and that in the 16 particular circumstances it is not appropriate for Ofcom 17 to consider a complaint about it, so you have to reach 18 a view as to whether or not it's appropriate to consider 19 the complaint.</p> <p>20 MR RICHARDS: Yes.</p> <p>21 Q. I haven't forewarned you of this question, but are you 22 able to help us in general terms as to how that works in 23 practice? What factors do you take into account in 24 deciding whether or not it's appropriate to consider 25 a complaint if there are extant legal proceedings?</p> <p style="text-align: center;">Page 8</p>

<p>1 MR RICHARDS: In light of legal proceedings taking place in 2 parallel, I think in light of -- I think the kind of 3 thing we would look at there is whether there is 4 a broader set of issues for broadcasting itself beyond 5 the individual specific case against the broadcaster, 6 and therefore whether there was something we could learn 7 or something that was important for a wider community. 8 That's the kind of consideration we take into account 9 there.</p> <p>10 LORD JUSTICE LEVESON: Other professions have been through 11 this battle. I vividly remember involvement in the 12 accounting industry where there were enormous corporate 13 collapses, and civil proceedings against auditors 14 parallel to disciplinary proceedings, and there were 15 a number of conflicting decisions ultimately resolved by 16 saying get on with it.</p> <p>17 So you look for something more than just get on with 18 it. You want to see that there is a wider public 19 interest engaged. But if there is, you do press on with 20 it, even though there are extant civil proceedings?</p> <p>21 MR RICHARDS: I think that's the approach we would seek to 22 take.</p> <p>23 Another example of that kind of thinking is own 24 initiative investigations where sometimes we don't 25 receive -- not very often, but occasionally we don't</p> <p style="text-align: center;">Page 9</p>	<p>1 A. Charles Anthony St John Gray.</p> <p>2 Q. You have provided us with two submissions. The main one 3 we're going to be working from today is dated 4 7 June 2012. You've signed and dated it. Is this your 5 formal evidence to the Inquiry?</p> <p>6 A. Yes, it is.</p> <p>7 Q. You wrote to Lord Justice Leveson on 3 February 2012, 8 and we have that letter as well. I'm not quite sure 9 whether it's on our Lextranet system but I'm not going 10 to be inhibited by that.</p> <p>11 LORD JUSTICE LEVESON: For the avoidance of all doubt, 12 Sir Charles and I have known each other for a very long 13 time. We appeared jointly together in the 14 House of Lords, and we were colleagues on the bench 15 together until he decided that he'd had enough.</p> <p>16 MR JAY: In terms of your career, Sir Charles, you were at 17 the bar for 30 years. Your practice was increasingly in 18 media law. You were involved in a number of extremely 19 high profile cases as a barrister, including the 20 Crossman diaries case, which I think was in the 21 mid-1970s.</p> <p>22 A. Yes, a very long time ago.</p> <p>23 Q. The Spycatcher case which went to the House of Lords, 24 Aldington v Tolstoy which was the Lords and then I think 25 Europe, and as a High Court judge, where you served for</p> <p style="text-align: center;">Page 11</p>
<p>1 receive a complaint, but we have the power to make an 2 own initiative investigation, if we judge that there is 3 an issue, and potentially a wider issue, even though the 4 individual in question hasn't actually complained. So 5 you can see it from both sides of that perspective.</p> <p>6 MR JAY: Thank you very much, both of you. Those were the 7 questions I had.</p> <p>8 LORD JUSTICE LEVESON: Dr Bowe, Mr Richards, before you go, 9 could I just repeat my thanks. You have many other 10 calls upon your time and have had many other calls upon 11 your time, and taking on this role for the Inquiry has 12 had little benefit for you, but it's had a great benefit 13 for the Inquiry. And I would like to thank both of you, 14 and indeed anybody else -- and I'm sure there are 15 others -- who exercised some grey matter in connection 16 with this paper. I would be grateful if you would pass 17 on to them my real thanks.</p> <p>18 DR BOWE: Thank you very much. Some of those people are 19 here with us in the room, and have heard what you have 20 very kindly said.</p> <p>21 LORD JUSTICE LEVESON: I'm very pleased about that.</p> <p>22 MR JAY: The next witness is Sir Charles Gray.</p> <p>23 SIR CHARLES GRAY (sworn)</p> <p>24 Questions by MR JAY</p> <p>25 MR JAY: Thank you, Sir Charles. Your full name, please.</p> <p style="text-align: center;">Page 10</p>	<p>1 ten years between 1998 and 2008, you tried a number of 2 high profile cases, including the well-known case of 3 Irving v Penguin Books?</p> <p>4 A. In this court, I think.</p> <p>5 Q. Now having retired as a High Court judge, you are 6 involved in a number of areas, but in particular 7 arbitration, mediation and adjudication.</p> <p>8 You're here to tell us about a company called Early 9 Resolution, how that works, what's its objectives are, 10 and how it can operate as an alternative to litigation.</p> <p>11 Can you tell us, please, in your own words how the 12 company was set up.</p> <p>13 A. Yes. There was a group formed, I think, by 14 Alastair Brett, who was then the legal manager of the 15 Times and the Sunday Times. There were several members 16 of what you might call the media bar who were all very 17 concerned about the way costs seemed to be going up 18 inexorably, and we got together and formed what was 19 called a procedure group, the Early Resolution procedure 20 group, and it had members such as Andrew Caldecott, 21 Robert Clinton, senior partner of a firm that did this 22 sort of work a lot, Adrian Page and many others. The 23 objective was, as I said in my witness statement or 24 submission, to really achieve a system of fair, rapid 25 and cost-effective resolution of media disputes.</p> <p style="text-align: center;">Page 12</p>

<p>1 The way in which we've done that -- it may be it's 2 fairly familiar territory, I don't know -- but what 3 happens is that there is a panel of experts. They're 4 either silks or some retired judges. They preside 5 over -- arbitrations is perhaps not quite the right 6 word, but hearings, at which a claimant who wants to go 7 down that route can hopefully achieve in 8 a cost-effective, rapid and relatively informal way 9 either the vindication he wants or, if appropriate, 10 compensation, and I think it works quite well. 11 Q. The scheme as it operates at the moment depends on the 12 agreement of both parties; is that right? 13 A. That's one of the problems. 14 Q. We'll come to how those problems might be circumvented. 15 But in terms of the benefit of the scheme, you make it 16 clear that there are certain media disputes, if I can so 17 describe the work you do, that lend themselves very 18 readily to the scheme because of the type of issue which 19 is at stake. Maybe there are other more limited classes 20 of disputes which don't lend themselves so well. Could 21 you help us please, for those of us who are not aware of 22 the bread and butter of media law, how this operates? 23 A. Certainly. This may be a bit surprising, perhaps, but 24 the meaning of what is complained of by the claimant is 25 often at the very heart of the dispute. The newspaper <p style="text-align: center;">Page 13</p> </p>	<p>1 It's not so obvious and so clear in practice. But 2 again -- 3 LORD JUSTICE LEVESON: Don't worry about that, Sir Charles. 4 Having spent many months in this Inquiry, debating the 5 difference between fact and opinion and comment is 6 clearly at the heart of many disputes. 7 A. It is, it is. Once you get that decided, you know which 8 defence is going to be the one the newspaper, 9 effectively, has to run. 10 So in all these various ways, you cut to the -- cut 11 to the chase in a way, and you rapidly find that cases 12 will resolve themselves. 13 MR JAY: What sort of case in your view is not so well 14 suited for this system? 15 A. It's not going to be terribly easy, although I think we 16 would be more than happy to try it if the parties felt 17 it appropriate for example to deal with a long factual 18 dispute which might arise if there was a plea of 19 justification. That would involve a lot of witnesses, 20 possibly a lengthy hearing, and it might not really be 21 the suitable kind of thing for one of our panels to deal 22 with. 23 LORD JUSTICE LEVESON: What about privacy issues? 24 A. Very suitable, I would think. I would suggest. Because 25 most of the people -- most of the experts on the panel <p style="text-align: center;">Page 15</p> </p>
<p>1 will say "We published something that was really 2 anodyne", the claimant will vigorously deny that and say 3 "No, this is highly defamatory of me". So you get two 4 rival contentions as to the meaning of the words, and 5 the basic advantage, as I see it, of the system Early 6 Resolution is now running is that it enables the silk 7 who is on the panel or the retired judge who is on the 8 panel to adjudicate on meaning, whether the claimant is 9 right or whether the defendant is right, or whether some 10 intermediate meaning may be the right one, at a very 11 early stage. 12 Once you have got that determined, so many other 13 things are unlocked. The newspaper knows exactly what 14 it has to prove, if it's pleading justification, for 15 example. The claimant knows the difficulties for him if 16 the lower meaning is found to be the right one, and he 17 may realise that he's he going to find it difficult to 18 prevent the newspaper proving that that meaning is true. 19 So everyone knows where they stand at an early 20 stage, and the fact is that it's not only meaning that 21 the ER panels can deal with; they can deal with other 22 questions, they sound a little arcane, but whether the 23 words are statements of fact or whether they are comment 24 or honest opinion. 25 That sounds a fairly clear and obvious distinction. <p style="text-align: center;">Page 14</p> </p>	<p>1 will have considerable experience of privacy litigation, 2 and they will be able to recognise very rapidly whether 3 there is an invasion or a misuse of private information. 4 It's a relatively straightforward question. I'm not 5 suggesting the answer is always straightforward, but 6 it's one that can be arrived at by a sensible person, 7 assisted if necessary -- and this applies in defamation 8 and privacy -- by lay assessors. I have done one, only 9 one. I sat with two assessors to decide a meaning issue 10 two or three years ago. It worked extremely well 11 because after all the judge, if it's in court, is 12 supposed to be determining the meaning, not according to 13 his own view of the meaning, but according to what 14 ordinary people, ordinary readers would make of the 15 newspaper article if it's a newspaper article. 16 So to have lay assessors giving their lay view of 17 what a particular article means is a very good idea, and 18 it worked well with me. 19 MR JAY: Thank you. So under the system as presently 20 constituted, as you explained in the letter you wrote 21 back in February, the costs of going to this voluntary 22 arbitration are borne by the publisher; is that right? 23 A. Yes. I think that wouldn't necessarily be so in every 24 case because sometimes one might get a foolish 25 application being made by somebody who had no merits at <p style="text-align: center;">Page 16</p> </p>

<p>1 all. Then I think we would reserve the right. But it 2 would be a very unusual case. Normally the media 3 defendant will be bearing the whole cost, which it has 4 to be said are not that great because it's a day for 5 most of these hearings. Half a day for some of them. 6 If it's a meaning dispute, it's very quick. 7 Q. To be clear, in this arbitration system there's nothing 8 to prevent the parties having lawyers to represent their 9 case, but there's nothing which requires it; is that 10 right? 11 A. That's right. 12 Q. Are you able to help us, how often, what percentage of 13 the time, are there lawyers approximately? 14 A. I think more often than not. In fact I would say in the 15 vast majority of cases. Of course it depends on the 16 issue, and it may be that the claimant will want to come 17 and argue his case because he feels he doesn't need 18 a lawyer, in which case all the better. 19 Q. Before we look at your proposal, which is an Article 6 20 compliant mandatory system, could you outline, please, 21 from your perspective -- it's paragraph 6.3 of your main 22 June submission -- the present state of litigation 23 involving the media? You have touched on the issue of 24 costs, but there are other problems I think you identify 25 in that system which you wish to outline for us.</p> <p style="text-align: center;">Page 17</p>	<p>1 would otherwise have wanted to fight because the risks 2 of losing, even in not particularly high risk, were just 3 too great. Is that something you would emphasise? 4 LORD JUSTICE LEVESON: And the costs are fabulously high. 5 A. They really are. I mean, if you multiply whatever the 6 going hourly rate is, and I wouldn't even presume to 7 know now, by 2, and have a three-week trial, you are 8 going to be in a stratosphere which no sensible 9 newspaper is really going to want to contemplate. 10 LORD JUSTICE LEVESON: Where costs utterly overwhelm the 11 amount that could ever legitimately be considered to be 12 at stake. 13 A. Of course. Because damages, as my Lord will know very 14 well, have been reduced by various decisions in the 15 courts. So costs are often a far greater factor than 16 the top bracket award of damages which might be 17 available. 18 MR JAY: Your statement also refers to the decline in 19 investigative journalism. 20 A. Yes. 21 Q. What do you analyse to be the fundamental causes of that 22 decline? 23 A. Well, I think it's the mainly the risk that newspapers 24 are at, that they will get it wrong in some way or be 25 found by the tribunal to get it wrong in some way, which</p> <p style="text-align: center;">Page 19</p>
<p>1 A. Well, I must underline costs. They are horrific, and of 2 course they're aggravated by conditional fee agreements, 3 which are still, I think, possible up to 100 per cent, 4 although there's legislation in the course of being 5 passed to reduce it to 25 per cent, I think. 6 Also the actual court costs are quite considerable. 7 I believe I'm right in saying it costs GBP1,500 to issue 8 a claim form now, which is a fairly astonishing figure. 9 The other problems that surround litigating, 10 I think, are these. 11 First of all, you tend to have -- and this is very 12 often a device adopted by defendants -- prolonged and 13 often rather unfruitful interlocutory jousting. That 14 just adds to the costs and although one doesn't really 15 have juries dealing with these cases any more, the power 16 of judges to get things moving is, as I think we all 17 know and understand, a bit limited. However hard you 18 try, somehow these things do last longer than they 19 really should. 20 Q. If defendants, if their strategy is, as you say, to have 21 prolonged interlocutory arguments, one consequence of 22 that is there is a war of attrition whereby claimants 23 lose. We have heard though from a number on the other 24 side that the effect of a 100 per cent CFA regime is 25 that newspapers often had to settle cases which they</p> <p style="text-align: center;">Page 18</p>	<p>1 might result in a major award of damages. 2 I think the other problem that the press are facing 3 at the moment is a very sharp downturn in advertising 4 revenue, so that funds are a bit scarce. 5 I think it's an enormous pity, the change that's 6 taken place, because one remembers maybe 30 years ago, 7 whatever it is, the number of really good investigative 8 stories that used to appear in the press. The 9 thalidomide story is one. Spycatcher. All these kind 10 of cases, where the press were running great risks of 11 the rather lesser costs than they would nowadays run, 12 but they were running those kind of stories, which is, 13 as I have always understood it, the essential role of 14 the press. 15 Nowadays one tends to get celebrity stories and 16 things like that instead, and that's a shame, obviously. 17 Q. Before we look at the features of your proposed scheme, 18 I think you want to explain for us why ER should be the 19 answer to the current problems. This is paragraph 7.2 20 of your submission. 21 A. Yes. 22 Q. Can I invite you, please, to outline that for us. 23 A. Yes. The first thing that I think I ought to stress is 24 that the role that ER plays, if it's going to play 25 a role in the future, is all after publication. The</p> <p style="text-align: center;">Page 20</p>

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<p>1 reason I stress that is that that means that there can't 2 be really any sensible objection on the grounds that 3 we're going to be interfering in any way with the 4 freedom of the press which we entirely support and 5 endorse. 6 If the regulatory system which ER is proposing were 7 to come into effect, it would only come into effect 8 after the publication has taken place. So there's no 9 risk of anyone saying, look, I wouldn't have published 10 that story, or rather I would have published that story 11 if I hadn't thought that there was going to be trouble 12 as a result of it. 13 So that's one example. 14 LORD JUSTICE LEVESON: It might be said that because the 15 regime is so oppressive, we can't publish stories that 16 we otherwise would publish. That's not particularly for 17 ER, but generally for regulatory regimes. 18 A. Yes, that could be said. But, I mean, better 19 a regulatory regime that operates post publication than 20 a regulatory machine that comes into play at some 21 earlier stage, pre-publication. 22 MR JAY: Apart from that factor, there are other positive 23 aspects of the scheme that fulfils the criteria of 24 effectiveness, fairness, objectivity, independence and 25 costs. Is that right?</p> <p style="text-align: center;">Page 21</p>	<p>1 suit, I think, both claimant and defendant. If the 2 claimant wins, he can publish it as he wishes, or the 3 result of it as he wishes. 4 Very often the whole exercise is done on paper 5 without any need for any oral hearing at all. 6 The decision is invariably arrived at within days or 7 certainly within weeks. If it's just a meaning issue 8 it's usually a matter of days. Whereas at present the 9 position is that very often you'll have to wait for the 10 full trail before you get a decision on meaning. That's 11 not always the case as it once was. 12 And it is worth noting, I think I'm right in saying, 13 that a number of editors, including the editors of the 14 Financial Times, the Guardian, the Independent and the 15 Daily Telegraph, have all expressed their support for 16 the sort of arbitral scheme that ER would be. 17 LORD JUSTICE LEVESON: You wanted to ask about the features. 18 MR JAY: The features of the scheme. Paragraph 6.4. 19 A. Yes. 20 Q. First of all, so we understand the derivation of its 21 power, we're talking about, say, a scheme which is 22 underpinned by statute? 23 A. Yes. 24 Q. Is that correctly understood? 25 A. Can I explain the reason for that, because that's</p> <p style="text-align: center;">Page 23</p>
<p>1 A. Yes. 2 Q. Can we please look at the features of the -- 3 LORD JUSTICE LEVESON: Just before you do, are there any 4 other advantages to a scheme -- and one could talk about 5 ER, but actually one can expand it a little bit to some 6 form of arbitral mechanism. 7 A. Absolutely. 8 LORD JUSTICE LEVESON: Which perhaps we'll come on to 9 discuss when you discuss ER. 10 A. Yes. 11 LORD JUSTICE LEVESON: What are the other advantages of some 12 sort of mechanism? 13 A. Well, mostly I suppose cost saving. Enormously cheaper 14 than going to court in the present circumstances. 15 You'll achieve in a day, I think this is fair to say, 16 with a competent silk who knows his way about, what 17 might take several days for a jury certainly, and even 18 for a judge who is less versed in that -- if I may dare 19 respectfully say so, in that field. 20 LORD JUSTICE LEVESON: They don't give me cases to try at 21 first instance any more, Sir Charles. You don't need to 22 be polite. 23 A. Of course I wasn't referring to your Lordship. 24 The other advantages are these, I think. The 25 hearings do take place in private. That will invariably</p> <p style="text-align: center;">Page 22</p>	<p>1 provoked a certain amount of resistance, I think, on the 2 part of some people. 3 LORD JUSTICE LEVESON: Sorry, now we are moving away from 4 what ER actually is? 5 A. Yes. 6 LORD JUSTICE LEVESON: Into a new idea? 7 MR JAY: Yes. 8 LORD JUSTICE LEVESON: We just have to be clear. Yes. 9 A. It's a mandatory scheme. It's got to be mandatory, it's 10 got to be compulsory, and I say that really for this 11 reason. It's only if you have a compulsion for every 12 person who wants to bring a defamation action or an 13 action for an invasion of privacy to go to ER, or to 14 whichever arbitration body it may be, that you can 15 ensure that the system of having a reasonably 16 inexpensive resolution of disputes can be achieved. 17 If either party can simply say, no, I don't want to 18 play ball with that, that really defeats the whole 19 object of the exercise. 20 LORD JUSTICE LEVESON: And that can work both ways, because 21 it may be a newspaper that feels "I can bash this 22 claimant into submission, make it go away". But 23 equally, it could be an extremely wealthy claimant that 24 feels "I can so overwhelm the defendant newspaper with 25 the risk of costs that they will have to go away".</p> <p style="text-align: center;">Page 24</p>

<p>1 A. Your Lordship is entirely right. It's as likely to be 2 the one as the other. I mean, wealthy claimants do 3 bully defendants into submission. Sometimes wealthy 4 defendants can bully claimants into submission as well. 5 So it is a real problem, that.</p> <p>6 The other advantage, I think, is perhaps equality of 7 arms, because once you are in front of the arbitral 8 panel, rich claimants and defendants are almost by 9 definition in the same position. There's no inequality 10 which can be exploited by the richer of the two.</p> <p>11 It's another way of expressing, I think, the point 12 that your Lordship just put to me.</p> <p>13 LORD JUSTICE LEVESON: It's a slightly different point, 14 because one of the things that I have been thinking 15 about, and raised with a number of people, is that 16 actually if your arbitral system is our normal mechanism 17 for resolution of disputes, then there could be 18 inequality because one side could bring along the most 19 fashionable silk in the area, and the other may not be 20 able to afford such representation; which is why I have 21 toyed with the idea of an inquisitorial type mechanism 22 that permits the arbitrator, or whatever you want to 23 call him, to control precisely what's going on, and 24 thereby demonstrate that it isn't necessary to bring the 25 most --</p> <p style="text-align: center;">Page 25</p>	<p>1 submission there, there are certain types of claim which 2 would exceptionally still need to be dealt with through 3 the court system.</p> <p>4 A. Yes, it wouldn't just be interlocutory injunctions. The 5 parties, I suppose, could agree to some form of order 6 being made by an arbitrator, but I think in practice if 7 a final injunction is sought. But that would follow as 8 a matter of course, wouldn't it, if the arbitration 9 resulted in a win for the claimant, he's almost entirely 10 assured of getting an injunction in his favour. 11 Conversely, no injunction could be applied for if the 12 finding was against him. It's an obvious point.</p> <p>13 Q. The exceptional type of case which is not suitable for 14 this system where there would still be ability to go to 15 the High Court -- this is setting aside the case of 16 where injunctive relief is being sought. In 17 paragraph 6.4 of your submission you refer to cases 18 which involve more recondite issues such as issuing 19 letters of request, service of subpoenas, et cetera?</p> <p>20 A. I didn't realise you were referring to those kind of 21 applications that sometimes have to be made, and have to 22 be made to the court. But they're all interlocutory. 23 They're not involving the final decision, which could 24 presumably go back to the tribunal.</p> <p>25 Q. What about a case which may involve such an important</p> <p style="text-align: center;">Page 27</p>
<p>1 A. Well, I quite understand the point, but I think that the 2 system that ER is advocating really meets that problem 3 by the form of the tribunal who is going to be making 4 the decision.</p> <p>5 It is an experienced silk who knows his way around 6 the media world. I just don't think, however 7 fashionable the silk who appears for one side or another 8 may be, he's going to be able to achieve very much in 9 the way that your Lordship is rightly suggesting.</p> <p>10 LORD JUSTICE LEVESON: It's not for me to sell the services 11 of one silk as opposed to another.</p> <p>12 A. Can I just say something that I ought to say, which is 13 that we don't anticipate there's any problem with 14 Article 6. I think it is Article 6 compliant, the 15 proposed scheme, because we're not ruling out the 16 possibility of an appeal on some point of law against 17 the decision that the tribunal or any other tribunal 18 might have arrived at.</p> <p>19 MR JAY: And the tribunal wouldn't be able to order 20 injunctive relief.</p> <p>21 A. No.</p> <p>22 Q. All pre-publication issues, therefore, are left for the 23 High Court?</p> <p>24 A. Absolutely.</p> <p>25 Q. And as you also explain in paragraph 6.4 of your</p> <p style="text-align: center;">Page 26</p>	<p>1 point of principle or engage the public interest in such 2 a way that almost as a matter of public interest you 3 would want it tried, like the case you tried of Irving 4 v Penguin Books. Would that be appropriately resolved 5 in this submission if one of the parties didn't want 6 that to happen?</p> <p>7 A. Well, I would be very reluctant -- I think that is the 8 exceptional case. I don't mean that particular case, 9 but there will be some kind of cases like that. You 10 could I suppose get over the problem of retaining an 11 arbitral panel to deal with those kind of cases if it 12 were to be public. But there are some where you do 13 need -- and they would be probably very lengthy. The 14 Irving case lasted about ten weeks, from recollection.</p> <p>15 I think you're right. They would have to go really 16 to a judge.</p> <p>17 LORD JUSTICE LEVESON: But that doesn't prevent you having 18 a compulsory system. It merely permits an application 19 within the compulsory system to say this doesn't work. 20 Please transfer us or authorise us to do it differently.</p> <p>21 A. Yes.</p> <p>22 MR JAY: And the ER system on its statutory base, save for 23 the inability to grant injunctive relief, would it 24 otherwise have exactly the same powers in relation to 25 awards and quantum of damages as the High Court has at</p> <p style="text-align: center;">Page 28</p>

7 (Pages 25 to 28)

<p>1 the moment?</p> <p>2 A. Yes, and costs.</p> <p>3 Q. Can I ask you, please, to compare and contrast this</p> <p>4 system, which I know you think operates successfully in</p> <p>5 another realm altogether, namely the adjudication system</p> <p>6 in the construction industry.</p> <p>7 A. Yes. There are obviously considerable differences</p> <p>8 between defamation or privacy cases on the one hand and</p> <p>9 construction cases. But I think there is a lot that can</p> <p>10 be learned from what happens. Your Lordship probably</p> <p>11 knows this already. There was a paper written -- this</p> <p>12 is the origin of it. It's the only reason I mention</p> <p>13 it -- by Sir Michael Latham, back in 1994, which was</p> <p>14 called "Constructing the team".</p> <p>15 That resulted, to cut things fairly short, in the</p> <p>16 enactment of an Act called the Housing Grants</p> <p>17 Construction and Regeneration Act 1976, which in effect</p> <p>18 has the result that every dispute involving the</p> <p>19 construction industry -- there are some exceptions, I'll</p> <p>20 mention them in a moment -- is dealt with not in the</p> <p>21 courts expensively and rather slowly, sometimes, but by</p> <p>22 an adjudication.</p> <p>23 We wondered -- it was actually suggested by</p> <p>24 Lord Justice Jackson that such a scheme might work in</p> <p>25 the defamation field, and I've had discussions with</p> <p style="text-align: center;">Page 29</p>	<p>1 gone to adjudication.</p> <p>2 It's widely regarded, so we are led to believe, as</p> <p>3 a huge success. Subcontractors get paid on time and so</p> <p>4 on and so forth.</p> <p>5 MR JAY: There may or may not be cultural differences</p> <p>6 between the construction industry and the press as</p> <p>7 currently constituted.</p> <p>8 LORD JUSTICE LEVESON: I don't think that's likely to be an</p> <p>9 issue.</p> <p>10 MR JAY: No, because it's mandatory.</p> <p>11 LORD JUSTICE LEVESON: But it's not irrelevant to note --</p> <p>12 and I'm grateful to you for pointing it out -- that the</p> <p>13 Joint Committee on Privacy and Injunctions in its report</p> <p>14 of March of this year advocated an increased role for</p> <p>15 regulating and arbitrating and mediating privacy</p> <p>16 disputes with the advantage that it would reduce the</p> <p>17 burden on the court system.</p> <p>18 A. Yes.</p> <p>19 MR JAY: We know that the press in general -- I don't think</p> <p>20 it's an exaggeration to put it this high -- are hostile</p> <p>21 to any form of statutory scheme. Do you feel that</p> <p>22 there's any justification for their fear?</p> <p>23 A. Well, I don't. And really for the reason I have already</p> <p>24 given, I can't see any problem, so far as the freedom of</p> <p>25 the press is concerned, by the setting up of whatever</p> <p style="text-align: center;">Page 31</p>
<p>1 Alastair Brett, firstly with the present head of the</p> <p>2 TCC, Mr Justice Akenhead, and also with Julian Holloway,</p> <p>3 who was a solicitor with great experience of</p> <p>4 construction law and practice, and we were rather</p> <p>5 encouraged by those discussions.</p> <p>6 What operates in the construction scheme at the</p> <p>7 moment is a statutory and mandatory scheme for all</p> <p>8 parties to construction contracts and the exceptions are</p> <p>9 contracts involving residential property and certain oil</p> <p>10 and gas contracts. Those are all dealt with by</p> <p>11 arbitration or adjudication.</p> <p>12 What happens is that if one party to the dispute</p> <p>13 says, well, I want to go to adjudication, he applies to</p> <p>14 the adjudicating nomination board. The adjudicator is</p> <p>15 then appointed. He can rule on any issue which arises.</p> <p>16 There's no judge or statutory body involved. The</p> <p>17 adjudicator can appoint his own experts.</p> <p>18 This scheme is also Article 6 compliant, so it's</p> <p>19 believed, because either party may apply to the TCC, the</p> <p>20 Technical Construction Court, and there's a section in</p> <p>21 the Act which makes that possible. And when an</p> <p>22 application is made to court, which it hardly ever is,</p> <p>23 we understand, it can be heard very quickly because the</p> <p>24 judges have been free from dealing with a lot of these</p> <p>25 construction contracts for the very reason that they've</p> <p style="text-align: center;">Page 30</p>	<p>1 body it may be, which is only going to come into play</p> <p>2 after the publication complained of has taken place.</p> <p>3 It seems to me to follow as night follows day that</p> <p>4 there can't be any question of anyone's -- any freedom</p> <p>5 of the press issue arising, if all we're concerned with</p> <p>6 is dealing with the problem that's already arisen in the</p> <p>7 publication, if it is a problem.</p> <p>8 Q. It's always possible to enshrine or entrench quasi</p> <p>9 constitutional rights such as freedom of the press</p> <p>10 within an enabling statute?</p> <p>11 A. Yes. I think my Lord has already suggested that there</p> <p>12 is the Constitutional Reform Act 2005, which expressly</p> <p>13 in terms safeguards the independence of the judiciary.</p> <p>14 Maybe that's necessary, and maybe it would be a good</p> <p>15 thing to do in the present case as well. I don't know.</p> <p>16 LORD JUSTICE LEVESON: That doesn't itself impact on free</p> <p>17 speech. One of the points that was made, I think, by</p> <p>18 Lord Hunt was well, yes, there is that statute, but then</p> <p>19 this minister abused it by saying what she wanted to</p> <p>20 say, and that minister abused it by saying what he</p> <p>21 wanted to say, and --</p> <p>22 A. What can be done about it?</p> <p>23 LORD JUSTICE LEVESON: But it's a question of identifying</p> <p>24 the independence. Then it's a matter for everybody else</p> <p>25 to say this is the independence that you've got to</p> <p style="text-align: center;">Page 32</p>

<p>1 recognise, and therefore, although you had free speech 2 rights, they have got to be exercised within the law. 3 Namely to uphold the independence in that case of the 4 judiciary, in this case of free speech.</p> <p>5 A. Yes. I think it's easier with free speech in a way than 6 it is with -- because it's such a clear cut thing. You 7 don't interfere pre-publication with what is going to be 8 published. You might occasionally if there's an 9 interlocutory injunction. But interlocutory injunctions 10 don't get granted when the defendant says he's going to 11 justify it.</p> <p>12 LORD JUSTICE LEVESON: I would like at some stage to ask you 13 about that because I have got a wrinkle on all that, but 14 I'll find an appropriate moment.</p> <p>15 MR JAY: If the system is free of charge for complainants 16 and going to be so effective, people will say you will 17 get a whole host of vexatious claims. How would we deal 18 with those?</p> <p>19 A. That is a potential one. I don't think it's likely to 20 happen. I just don't see that -- there is a sort of 21 floodgates point taken sometimes, but I don't see where 22 the flood is going to come from. There was a limited 23 number of -- even arguable claims, I would have thought, 24 on any day of newspapers getting published. 25 But supposing it were to develop into a problem,</p> <p style="text-align: center;">Page 33</p>	<p>1 regulator which carries out traditional regulatory 2 functions and then an arbitral arm which again would be 3 you, as it were.</p> <p>4 How do you see yourself working with or co-existing 5 with either the two hypothetical models I have put 6 forward?</p> <p>7 A. Well, I think we're clearly of the view that it's got to 8 be a mandatory system, it's going to be compulsory, and 9 the only way you can really compel is by a statute.</p> <p>10 We say no. We are unequivocal about that. I think 11 I'm right in saying -- I only read rather short passages 12 from not the evidence given I think earlier this week by 13 Lord Black, but the evidence of Lord Hunt, and I think 14 he conceded as I understand it that there was an urgent 15 need for a more effective system of redress for members 16 of the public who can't afford to take their case 17 through the courts.</p> <p>18 He endorsed, again, as I understood his evidence, 19 a much tougher and I think he even contemplated 20 a compulsory system, of bringing parties together in the 21 hope of reaching a full and final settlement of the 22 claims. That's pretty close to what we're advocating.</p> <p>23 Q. I think even in the self-regulatory model, which is 24 primarily contract based, its proponents recognise that 25 the arbitral arm would have to be statutorily</p> <p style="text-align: center;">Page 35</p>
<p>1 it's relatively easy to solve, I think, because you can 2 have either some sort of filter system, this would 3 involve an appropriate person, whether one of the panel 4 of experts that we already have or someone else, saying 5 that this is hopeless, and as it were striking out the 6 claim. Alternatively, and I think this is really 7 a better way of dealing with it, to have the reserve 8 power to make an order for costs against anyone who 9 brings a claim which is manifestly a hopeless and 10 speculative one.</p> <p>11 So I think it can be controlled in one or other or 12 both of those ways.</p> <p>13 Q. As we see, employment tribunals, I think, have such 14 a power exceptionally.</p> <p>15 A. I didn't know that. But that's encouraging.</p> <p>16 Q. Can we understand, Sir Charles, how this system would 17 work in the context of any reformed regulatory system as 18 a whole? We look first of all at Lord Black's proposal, 19 which, as you know, is a contractual proposal. He had 20 as a shaded box or possibility within his proposal what 21 he called an arbitral arm, which he understood would 22 require statutory underpinning. That arbitral arm looks 23 rather like the sort of system you are proposing.</p> <p>24 Or we could have some sort of statutory system or 25 system underpinned by statute where there's the main</p> <p style="text-align: center;">Page 34</p>	<p>1 underpinned because of Article 6?</p> <p>2 A. Again, I think Lord Hunt said that in terms.</p> <p>3 Q. Yes.</p> <p>4 A. It might turn out that it did need statutory backing.</p> <p>5 Q. Would your system, in your view, happily co-exist with 6 either a primarily self-regulatory model, or a model 7 with the new regulator, whatever you want to call it, 8 having a statutory underpinning?</p> <p>9 A. I think it wouldn't co-exist at all, would it, because 10 of the compulsory nature of what the statutory scheme 11 would be. I mean, that can't co-exist with a voluntary 12 scheme. If everybody has to go to ER, or whichever 13 other organisation it may be, how can that coexist with 14 a voluntary? I think that's the short answer, isn't it?</p> <p>15 Q. Well, it would be somewhat anomalous that if the main 16 regulatory structure were voluntary, that you were 17 nonetheless forcing people to bring their disputes to 18 a mandatory arbitral system, but --</p> <p>19 A. Well, you could put that the other way as well, couldn't 20 you, and say if you have got a mandatory system, you 21 can't have people setting up a voluntary scheme in 22 parallel. I mean, I think they are mutually exclusive, 23 unless I'm missing the point.</p> <p>24 Q. So it follows from that that you would be favouring, 25 when one is looking at the regulatory system more</p> <p style="text-align: center;">Page 36</p>

<p>1 generally, some sort of mandatory statutory underpinning 2 for such a system, of which ER, which may have a new 3 name under this system, is equally a mandatory 4 component? 5 A. Is your question addressing only post publication 6 regulation? 7 Q. Yes. 8 A. Yes, I think then I entirely agree. Pre-publication is 9 a different matter altogether, and it's no part of my 10 brief to be at all critical of the PCC. But I know that 11 the joint committee on privacy and injunctions was 12 highly critical in a number of respects of the way in 13 which the PCC unfortunately has been operating, as I'm 14 sure you already appreciate. 15 Q. Yes. I think it's your view that the PCC, even in 16 a reform state, is not an answer to the current problems 17 of the culture, practice and ethics of the press; is 18 that so? 19 A. Well, that was the view. There was another committee, 20 if you remember, on -- it was just a House of Commons 21 committee, as I recollect. And that also took the view, 22 having heard a lot of evidence about it, that that was 23 not something that the PCC was really the right body for 24 dealing with. 25 But that in a sense is rather outside the role that Page 37</p>	<p>1 them compulsorily transferred to adjudication. Does 2 that answer the question? 3 Q. It may feed into the wider question. If one were to 4 have an objection as a matter of principle to 5 a compulsory regime, in your view are there a form of 6 practical incentives, sticks and carrots, which could 7 bring people into a compulsory system and therefore 8 achieve the same outcome? I think it's implicit here 9 that you don't think there are? 10 A. I don't think there are. I don't conceive of a way in 11 which you can, as it were, coerce people in a voluntary 12 manner to join a scheme. I think it's really got to be 13 compulsory, and I don't myself see any sensible 14 objection to that because it's, as I say, not 15 interfering with the freedom of expression that we all 16 rightly cherish. 17 Q. I have been asked to ask you this. How effective has ER 18 been since it was set up? 19 A. It's not been as effective as we hoped, and can I try 20 and explain why that is? 21 We thought that, for example -- everybody talks 22 about the nationals. The regionals are just as 23 important, I think, to the whole of the dispute with 24 which his Lordship is concerned. 25 The regional newspapers were hugely enthusiastic Page 39</p>
<p>1 I feel able to play. I mean, I don't know what the 2 solution to that is. My Lord will have to wrestle with 3 that, I suppose. 4 Q. In section 9 of your statement, you do elaborate your 5 proposal for a media regulator which has statutory 6 underpinning? 7 A. Yes. 8 Q. You have already explained to me why really as a matter 9 of principle you would favour that. But you've also 10 taken time to comment on the proposal from the Media 11 Standards Authority, which we can see in paragraphs 9.5 12 and 9.7. There's no 9.6, but don't worry about that. 13 A. Sorry, I've just noticed. 14 Q. It's a form -- on our understanding of co-regulation, we 15 can see from those two paragraphs that you're not 16 immediately attracted by it. Could you elaborate why, 17 Sir Charles? 18 A. Well, we have got the same objectives. I suppose the 19 only reason that I am a little critical of the MSA is 20 that it's dependent on media organisations being 21 persuaded by a system of incentives to join it, whereas 22 the adjudication system proposed by ER and by the MSA is 23 statute based. Only the participants who join the MSA 24 and submit to its jurisdiction will be in a position to 25 stay libel actions started in the High Court, and have Page 38</p>	<p>1 when we launched the ER scheme. But they met with 2 opposition by claimants. What's the basis for that 3 opposition? I don't quite understand what the basis can 4 be, because it must be in the interests of most 5 claimants to go down the ER route, or whatever other 6 route. 7 LORD JUSTICE LEVESON: I wonder whether it might be 8 different if and when CFA is changed. 9 A. That may be one -- if I may say so, I entirely agree. 10 It may be that the role of some advisers -- I don't 11 want to be critical of everybody, but it may be that 12 advice along the lines that your Lordship has just 13 indicated is being given to claimants, that it's in both 14 the claimants' interest and in the legal advisers' 15 interests that they should operate on a CFA, and -- 16 LORD JUSTICE LEVESON: But you could articulate it slightly 17 differently, couldn't you, in a way that doesn't carry 18 any pejorative undertone? Because you could say, well, 19 you can use this system which would be free, but of 20 course I'm not free, and therefore you will have to pay 21 for me out of whatever ultimately you recover. 22 Alternatively, you can use what is actually the courts 23 of the country. It will take rather longer, but you 24 will be protected from any potential risk as to costs 25 because, with the benefit of a CFA and after the event Page 40</p>

1 insurance, there won't even be the chance of you having
 2 to pay me.
 3 **A. That's a more attractive way of putting what I was**
 4 **trying to suggest.**
 5 LORD JUSTICE LEVESON: I deliberately --
 6 **A. There was an element of cupidity in my expression of it,**
 7 **and not in your Lordship's. So can I adopt your**
 8 **Lordship's version.**
 9 LORD JUSTICE LEVESON: Is that what you were referring to
 10 when you said that's the problem in answer to the
 11 question Early Resolution requires the agreement of both
 12 parties?
 13 **A. Yes.**
 14 LORD JUSTICE LEVESON: So it's not been the press.
 15 **A. No. It hasn't. And I think the press stand to gain in**
 16 **some ways more than the claimants.**
 17 **But I really don't entirely understand why people**
 18 **haven't taken up. It may be that it's new, which it is.**
 19 **That may be part of the reason. But we're puzzled.**
 20 LORD JUSTICE LEVESON: Well, it may be that if one adds some
 21 arbitral arm to a system that covers the far more
 22 wide-ranging issues that I've got to address, then there
 23 will be rather more work to do. Do I gather that you
 24 and those with whom you have been associated in ER could
 25 see a place for themselves helping to adjudicate in

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1 issues along these lines?
 2 **A. Absolutely. If I haven't made it clear, which I fear**
 3 **I haven't, often it will be meaning which is the key**
 4 **thing.**
 5 LORD JUSTICE LEVESON: I understand that.
 6 **A. Suppose you take a case where there was an argument**
 7 **about meaning, and it's decided by the silk, assisted or**
 8 **not by lay assessors, that the claimant's right or the**
 9 **defendant's right, whichever it may be, that's the**
 10 **moment where both the claimant and the defendant might**
 11 **say this is a frightfully good way of actually disposing**
 12 **of every issue that's going to arise. We have got**
 13 **meaning out of the way. There's going to be a plea of**
 14 **justification or a plea of privilege, and every time**
 15 **it's open to the parties to say would you be prepared**
 16 **to --**
 17 LORD JUSTICE LEVESON: Do the next step.
 18 **A. Do the next step.**
 19 LORD JUSTICE LEVESON: I hadn't appreciated that.
 20 **A. I should have made it clear that that is on offer,**
 21 **because after all you can always by consent go to**
 22 **arbitration, can't you, and that's really what it would**
 23 **amount to.**
 24 **We would hope, eventually, if the thing were to take**
 25 **off, as it were, that more and more people would see the**

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1 **sense from the costs point of view and from every other**
 2 **point of view in getting every meaning out of the way --**
 3 **every issue out of the way and having damages awarded by**
 4 **the experienced silk or whoever it might be.**
 5 LORD JUSTICE LEVESON: I have one other thing to raise with
 6 you, and that's to just really ask for the benefit of
 7 your experience in relation to pre-publication issues.
 8 You'll be aware, or you may or may not be aware --
 9 depending on how much you have followed of what I've
 10 been concerned with -- that one of the issues that has
 11 addressed a number of people, particularly, of course,
 12 Mr Moseley, is the whole question of pre-publication
 13 notification.
 14 I understand very clearly why, as a matter of
 15 principle, requiring pre-publication notification could
 16 cause enormous damage to free expression, although
 17 editors have said that as a matter of routine they
 18 always will, but they want to preserve the right not to.
 19 I recognise the strength of both arguments.
 20 Mr Moseley makes the point, why on earth wouldn't you
 21 stop somebody cutting off a leg wrongly when you can't
 22 put the leg back with damages or anything else. It's
 23 there forever.
 24 His own evidence about his own experience is a very
 25 powerful enunciation --

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1 **A. Yes, I heard him.**
 2 LORD JUSTICE LEVESON: -- of the problem.
 3 On the other hand, the press say, entirely
 4 legitimately, well, if we've got to pre-notify, then,
 5 first of all, the wealthy will injunct us, and so
 6 suddenly we're bogged down. We will lose the element of
 7 our scoop that we've put money into, that we have
 8 researched, and alternatively, we won't be able to find
 9 a villain who will deliberately make himself scarce so
 10 that our story is emasculated in that way.
 11 What I would like your view on, based upon your
 12 experience in the field, is whether there isn't room for
 13 saying to a newspaper: you don't have to pre-notify if
 14 you think that it will be inimical to your interests to
 15 do so, but rather than -- if I borrow somebody else's
 16 phrase -- mark your own homework, if you think you have
 17 got a good case not to pre-notify, there is nothing to
 18 stop you going to somebody who wouldn't otherwise be
 19 involved -- one could take -- I'm not talking about
 20 Early Resolution, but somebody in your position.
 21 **A. I know what your Lordship means.**
 22 LORD JUSTICE LEVESON: To say, look, this is our story.
 23 This is why we don't want to pre-notify; what do you
 24 think? And that person could look at it, and assuming
 25 the facts were right, because that would be the premise

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<p>1 of the view, say, no, I think this is a very good case 2 for not pre-notifying that.</p> <p>3 A. Yes.</p> <p>4 LORD JUSTICE LEVESON: In which event, of course, there 5 wouldn't be pre-notification, and if there was 6 a challenge, that the newspaper would then be able to 7 use the fact that they had taken the responsible step of 8 getting a second opinion on the issue to mitigate 9 potentially exemplary or aggravated damages.</p> <p>10 I'm not trying to punish anybody for not doing it, 11 but I'm trying to underline the risk of publishing 12 without notification.</p> <p>13 Alternatively, if you choose not to ask, or to 14 ignore the advice, you're entitled to do that. You 15 might be right, and the judge at the end of the day may 16 say that was perfectly legitimate, and there's nothing 17 wrong with that. But if the judge took the view that, 18 no, actually the advice you received was right, or you 19 should have gone for advice, then I can take that into 20 account as a matter of aggravation.</p> <p>21 Now, using all your experience, recognising on my 22 part that the advice you're about to give me is worth 23 exactly what I'm paying for it, which I say before 24 anybody asks is nothing, I would be very interested for 25 your view.</p> <p style="text-align: center;">Page 45</p>	<p>1 heard him do so.</p> <p>2 LORD JUSTICE LEVESON: About that issue. I'm trying to find 3 a way. Maybe you should say in every single case, if 4 you don't pre-notify when you could, that's a reason 5 potentially for a court to consider aggravated damages.</p> <p>6 A. Publish and be damned.</p> <p>7 LORD JUSTICE LEVESON: Publish and be damned. But then I'm 8 trying to find a way for the newspaper to get some 9 protection.</p> <p>10 So far from seeking to limit the freedom of speech, 11 I'm actually trying in some way to support it.</p> <p>12 A. Yes. I do understand that.</p> <p>13 LORD JUSTICE LEVESON: Now it may not work and that's why 14 I'm keen on -- your evisceral reaction is itself 15 extremely important.</p> <p>16 A. But I just have a feeling that if you even have the 17 informal mechanism that your Lordship, I think, is 18 proposing -- mechanism is not even the right word, the 19 informal sort of understanding -- I think if you put 20 that to a newspaper editor, and said, well, what's wrong 21 with -- your Lordship may have done this, I don't 22 know -- he would immediately say, no, I don't think that 23 is really something I could possibly agree to, or want 24 to happen.</p> <p>25 I think I would agree with the newspaper editor who</p> <p style="text-align: center;">Page 47</p>
<p>1 A. Yes. I have no hesitation in saying I'm not 2 enthusiastic about what your Lordship has just put to 3 me. The reason I think is really a very simple one. 4 There cannot be any -- this is my sort of humble 5 experience. There can never be any justification for 6 compelling, even in the very skillful and indirect way 7 that I think your Lordship is putting to me -- there can 8 never be any justification for interfering before 9 publication in any way at all with the freedom of the 10 press and the right of the newspaper to run the risk of 11 having a massive award of damages against it.</p> <p>12 LORD JUSTICE LEVESON: But I wasn't trying to interfere with 13 it.</p> <p>14 A. Your Lordship -- I'm sorry.</p> <p>15 LORD JUSTICE LEVESON: Let me just articulate why.</p> <p>16 A. Yes.</p> <p>17 LORD JUSTICE LEVESON: It would be advisory only. It 18 doesn't in any sense prevent a newspaper from publishing 19 precisely what it wants to publish. But the concern 20 that I have is to cope with --</p> <p>21 A. Yes, I know. What happened in the Moseley case.</p> <p>22 LORD JUSTICE LEVESON: -- what happened in the Moseley case, 23 and one could take a different case. I'm not 24 personalising to Mr Moseley.</p> <p>25 A. No, he just gives evidence very articulately. I have</p> <p style="text-align: center;">Page 46</p>	<p>1 reacted in that way, although I understand where your 2 Lordship is coming from in making that suggestion. 3 I just think that one has got to give them utter freedom 4 to behave as badly as they like, knowing as one does 5 that damages aren't an adequate remedy very often at 6 all, however large.</p> <p>7 LORD JUSTICE LEVESON: But that's the point. So is there an 8 answer to Mr Moseley's point, or is there just no 9 answer?</p> <p>10 A. I fear there's no answer, even though I'm saying that in 11 the context of a privacy case, where I think the 12 arguments are even stronger than in a defamation case.</p> <p>13 LORD JUSTICE LEVESON: It's actually privacy that I'm 14 thinking of. Much more so, because in libel, where 15 damages -- it seems to me there's rather more scope in 16 libel than in privacy.</p> <p>17 A. Is your Lordship thinking of exemplary damages and 18 whether they're going to be available in privacy cases? 19 That's a potential problem.</p> <p>20 Leaving that aside, I just think it's a line 21 I wouldn't want to cross in any way. I suppose it's 22 partly because I was brought up I suppose so long ago 23 with that being the cardinal principle, that you had no 24 interference, and one went traipsing in to see the judge 25 in chambers, and if the defendant says I'm going to</p> <p style="text-align: center;">Page 48</p>

<p>1 justify, that was it.</p> <p>2 LORD JUSTICE LEVESON: Yes. Well, I've been in that</p> <p>3 position myself.</p> <p>4 A. I'm sure.</p> <p>5 LORD JUSTICE LEVESON: And I recognise it. I'm just</p> <p>6 struggling to deal with what, on the face of it, appears</p> <p>7 to be a potentially terrible injustice that is</p> <p>8 irremediable.</p> <p>9 A. Yes. And especially in privacy cases. Because --</p> <p>10 LORD JUSTICE LEVESON: Because by definition, this is not</p> <p>11 libellous.</p> <p>12 A. Yes, and the damages are relatively low, and I think</p> <p>13 it's an insoluble problem, myself, and I fear that --</p> <p>14 I wouldn't want to encourage your Lordship, if I may put</p> <p>15 it that way, to --</p> <p>16 LORD JUSTICE LEVESON: Not only you're not encouraging me,</p> <p>17 you are discouraging me, and you're not suggesting</p> <p>18 anything in its place.</p> <p>19 A. I didn't know your Lordship was going to ask me about</p> <p>20 this.</p> <p>21 LORD JUSTICE LEVESON: Sorry.</p> <p>22 A. If something occurs to me that might be a solution --</p> <p>23 LORD JUSTICE LEVESON: If something occurs to you, I would</p> <p>24 be very, very interested to hear it.</p> <p>25 A. How can I communicate?</p> <p style="text-align: center;">Page 49</p>	<p>1 LORD JUSTICE LEVESON: There are probably very many people</p> <p>2 named David Thomas, but again for the avoidance of all</p> <p>3 doubt, I have just realised that Mr Thomas and I have</p> <p>4 known each other for more years than I care to think</p> <p>5 about, although we have not seen each other for almost</p> <p>6 as many such years. I've got the correct Mr Thomas?</p> <p>7 A. You have indeed, my Lord. We used to appear in Wirral</p> <p>8 Magistrates Court some 30 years ago.</p> <p>9 MR JAY: There we go.</p> <p>10 First of all, please, your full name?</p> <p>11 A. David Thomas.</p> <p>12 Q. Thank you. Now, you provided us with a witness</p> <p>13 statement dated 5 July, which is quite short and tells</p> <p>14 us about yourself, but additionally there is</p> <p>15 a submission which was provided by the British and Irish</p> <p>16 Ombudsman Association dated 7 June 2012 to which you're</p> <p>17 going to speak; is that right?</p> <p>18 A. Indeed.</p> <p>19 Q. And insofar as the matters are facts set out in that</p> <p>20 submission, do you attest to the truth of those matters?</p> <p>21 A. I do indeed.</p> <p>22 Q. First of all about yourself, you qualified as</p> <p>23 a solicitor in 1969 in England and Wales, and then in</p> <p>24 Ireland in 1991. In 1997 you were appointed as the</p> <p>25 banking ombudsman, being a principal ombudsman with the</p> <p style="text-align: center;">Page 51</p>
<p>1 LORD JUSTICE LEVESON: By all means, if you would just write</p> <p>2 me a letter, I would be very grateful.</p> <p>3 A. I'll certainly do that. I'm sorry not to be able to</p> <p>4 express agreement with --</p> <p>5 LORD JUSTICE LEVESON: No.</p> <p>6 A. -- what is a new proposal to me.</p> <p>7 LORD JUSTICE LEVESON: I wanted your experienced view</p> <p>8 because I know that, as you explained, you spent</p> <p>9 30 years doing this sort of work, and I'm very</p> <p>10 conscious, and I'm constantly reminded, even if I'm not</p> <p>11 conscious of it, of the fact that this isn't my area and</p> <p>12 I am interfering with it --</p> <p>13 A. It's much better -- if I may say so, it's much better</p> <p>14 your Lordship comes from outside the area.</p> <p>15 LORD JUSTICE LEVESON: Well, thank you very much indeed.</p> <p>16 A. Thank you.</p> <p>17 LORD JUSTICE LEVESON: And thank you for the assistance you</p> <p>18 have provided. We will have a break.</p> <p>19 (3.19 pm)</p> <p>20 (A short break)</p> <p>21 (3.25 pm)</p> <p>22 MR JAY: The final witness for today is Mr David Thomas.</p> <p>23 His statements are at tabs 87 and 21.</p> <p>24 MR DAVID THOMAS (affirmed)</p> <p>25 Questions by MR JAY</p> <p style="text-align: center;">Page 50</p>	<p>1 statutory Financial Ombudsman Service from its creation</p> <p>2 until you retired in 2012. You also have and had</p> <p>3 various part-time roles in relation to ombudsmanry, if</p> <p>4 I pronounce it right, and related matters; is that so?</p> <p>5 A. Indeed.</p> <p>6 Q. You tell us there about the BIOA, the British and Irish</p> <p>7 Ombudsman Association. What is it, and what does it do?</p> <p>8 A. This was a body which was established back in 1993 as</p> <p>9 the United Kingdom Ombudsman Association, changing its</p> <p>10 name a year later when its scope was extended to the</p> <p>11 Irish Republic.</p> <p>12 It has two classes of members. They were originally</p> <p>13 called full or voting members and associate members, but</p> <p>14 they have been retitled as ombudsman members and</p> <p>15 complaint handling members. There are 24 or 25 -- my</p> <p>16 statement said 25, when I tried to count it this</p> <p>17 morning, I got 24 -- ombudsman members of the scheme,</p> <p>18 and some 35 complaint handling members.</p> <p>19 The Association was created in order to protect the</p> <p>20 sort of reputation of ombudsmanry, and foster good</p> <p>21 complaint handling, and it contains ombudsman schemes</p> <p>22 that handle complaints against, for example, national</p> <p>23 governments, devolved governments, local government,</p> <p>24 police, financial services, businesses, lawyers, estate</p> <p>25 agents and some utilities, both here and in Ireland.</p> <p style="text-align: center;">Page 52</p>

13 (Pages 49 to 52)

1 Q. Thank you. Now, the term "ombudsman" is one which is
 2 quite familiar to lawyers, but it has a precise meaning
 3 which some people in this Inquiry, with respect to them,
 4 have abused.
 5 Could you please --
 6 LORD JUSTICE LEVESON: Certainly used differently.
 7 MR JAY: I put it slightly high. But abused in the sense
 8 that they have used incorrectly.
 9 Could you tell us, please, in your own words the
 10 principal features of an ombudsman scheme in the
 11 United Kingdom?
 12 **A. Well, the principal features are that ombudsmen are**
 13 **there to resolve complaints. They are not in any sense**
 14 **regulators, and it's a mechanism which is typically used**
 15 **to resolve disputes between somebody small, ordinary**
 16 **people, as it were, and somebody big, either a large**
 17 **company or a large institution.**
 18 Their processes are designed to be informal, and to
 19 redress the balance of resources and experience
 20 available to the small citizen or consumer on the one
 21 hand and the large institution or the large business on
 22 the other.
 23 They deploy a range of tools in order to deal with
 24 resolution of those disputes. So typically they will
 25 deal with inquiries, and indeed many things can be

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1 disposed of quickly and simply as inquiries, without
 2 turning into full complaints. But if they do turn into
 3 complaints, then maybe they can be resolved by
 4 mediation. If that fails, maybe a recommendation. But
 5 if all else fails, maybe by a formal decision.
 6 The process is a process of active investigation.
 7 So there's no concern that one party may have better
 8 resources or better representation than another, because
 9 the ombudsman controls the process.
 10 And --
 11 LORD JUSTICE LEVESON: We call that inquisitorial rather
 12 than --
 13 **A. Indeed. So it is, as your Lordship says, an**
 14 **inquisitorial approach. Ombudsmen also tend to view**
 15 **their role as going beyond dealing with the particular**
 16 **cases that they deal with, but drawing lessons, general**
 17 **lessons, and then feeding them out generally to**
 18 **government and public regulators and consumer bodies.**
 19 Typically they are quicker and cheaper than an
 20 equivalent case would be in a court or tribunal.
 21 We tend in ombudsmanry to use the term unit cost,
 22 which is the total cost of the ombudsman scheme divided
 23 by the number of cases. Typically that would range
 24 between about GBP500 and about GBP2,000. That doesn't
 25 mean a case costs between GBP500 and GBP2,000. That's,

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1 **as I say, the total costs. So you are throwing all of**
 2 **the enquiries and all of the outreach activities in for**
 3 **free, as it were.**
 4 MR JAY: If an ombudsman is working in a context or in
 5 a regime where there is also a regulator, does the
 6 ombudsman really as a matter of definition have to be
 7 independent of the regulator and, if so, what does that
 8 mean?
 9 **A. Well, certainly in the view of the Association they**
 10 **ought to be. And indeed usually that is the pattern.**
 11 **So if you see the situation which obtains here in the UK**
 12 **at the moment in relation to law, to financial services,**
 13 **to utilities and to property professionals, the**
 14 **ombudsmen are entirely separate from the regulatory**
 15 **body, whether that's a statutory regulator or**
 16 **a self-regulator.**
 17 I think there are perhaps a number of reasons why
 18 one would go down this road. There's a concern that
 19 otherwise one might confuse sanction for breaking rules,
 20 which is a matter for the regulator, with redress for
 21 those adversely affected by the actions of the body,
 22 which is a matter for the ombudsman.
 23 It's very difficult to handle within the same body
 24 both sanction and redress with their differing standards
 25 of proof, the effect that it has on mediation in redress

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1 issues, if there is potentially a sanction, if somebody
 2 confesses that they have done or accepts for the purpose
 3 of resolution that they have done something wrong, and
 4 indeed entirely different skills are required for the
 5 different roles.
 6 So as far as the Association is concerned, they are
 7 not enthusiastic about the proposal that has been put
 8 forward by the -- on behalf of the industry, that
 9 complaints should be handled within the body that also
 10 handles the regulation.
 11 The fact that within that model the proposal is that
 12 it should be handled by two separate arms goes some way
 13 to recognising the points that I have made about the
 14 difference in function. But our view would be why not
 15 go the whole hog and separate them into an independent
 16 body for complaints? The arguments seem to us to be
 17 strong to have them separate, but we're not aware of any
 18 strong arguments why they need to be packaged together.
 19 Q. So if you have a complaints handling arm within a
 20 regulatory body, that entity should be called complaints
 21 handling arm or something similar, and shouldn't on your
 22 approach be called ombudsman?
 23 **A. Absolutely not. So there is a sort of a slight**
 24 **embarrassment about the situation in Ireland. I'm aware**
 25 **that you are receiving evidence about that tomorrow.**

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<p>1 There is an organisation in Ireland called the Press 2 Ombudsman, a very distinguished gentleman, but the 3 scheme itself is not recognised by the Association as an 4 ombudsman scheme, it is recognised merely as a complaint 5 handling scheme, because of the closeness of the 6 relationship between the ombudsman and the Press 7 Council. 8 Q. One attribute of the system in Ireland, which may well 9 have other virtues, which we'll address tomorrow, is 10 that there's a right of appeal from the ombudsman in 11 Ireland to the Press Council in Ireland? 12 A. Indeed. 13 Q. Which again is anathema really to the proposal -- to the 14 scheme that you are outlining to us? 15 A. Indeed. 16 Q. Thank you. Now, in terms of different types of 17 ombudsman, this is first of all page 2, 00310 of your 18 submission. Very often they are public sector schemes, 19 but we're concerned with a private sector scheme. In 20 a private sector scheme, the complaints are going to 21 come mainly from customers, but the press and media are 22 somewhat of a special case because they may or may not 23 be a customer who is going to be complaining of breach 24 of privacy or defamation, whether that may or may not be 25 the position.</p> <p style="text-align: center;">Page 57</p>	<p>1 governance, of which the most recent example is the 2 removals industry ombudsman, although the banking 3 ombudsman scheme to which you referred earlier was 4 originally a voluntary scheme. 5 Q. So the voluntary scheme will typically be contractual, 6 but the two other schemes will have some form of 7 statutory underpinning or the entity itself will be 8 created by statute? 9 A. Indeed. 10 Q. And the detail of it is set out at pages 3 and 4 of the 11 submission. It may not be necessary to look at the fine 12 detail. We can just understand the concept for present 13 purposes. 14 Can I deal with the issue of complaint handling, 15 which is page 5, 00313. Can you tell us typically how 16 that works, whether it be a statutory scheme or 17 a voluntary scheme or the intermediate underpinned by 18 a statutory scheme? 19 A. Well, the first essential is that there should be 20 a proper regime for the businesses themselves to handle 21 complaints. It's right that people should take their 22 concerns first to the business that is causing them that 23 concern, and they should deal with it appropriately and 24 promptly. And hopefully most difficulties will be 25 resolved in that way, leaving only unresolved issues to Page 59</p>
<p>1 As you explain, in a press context, you'll be 2 balancing the wider public interest against the private 3 interests of individuals. 4 But can you tell us, please, about the three 5 different ways of establishing ombudsman schemes which 6 is under the heading "Methods of establishment"? 7 A. Certainly. Just touching on your last point, I think 8 likely the complainant will almost certainly not be 9 a customer of the newspaper. Our public sector 10 colleagues, of course, do have a role in weighing the 11 public interest when they deal with complaints that they 12 deal with. 13 So far as private sector ombudsmen are concerned, 14 they can be established in one of three ways. Either 15 established by statute, the financial ombudsman, the 16 legal ombudsman, for example, were established in that 17 way. Or they can be underpinned by statute in the sense 18 that the law requires that there be an ombudsman which 19 satisfies various characteristics, but doesn't actually 20 establish the ombudsman, and the industry or some other 21 body is left to bring forward an ombudsman who meets 22 those characteristics. Examples there are the property 23 ombudsman and the energy ombudsman. 24 Or an entirely voluntary scheme established by an 25 industry or trade association, but with independent Page 58</p>	<p>1 be taken to the ombudsman. 2 It may be that that -- at that early stage, maybe 3 even before a complaint has been made, that an inquiry 4 will be made to the ombudsman. Typical sorts of 5 proportions. The ombudsman gets 75,000 enquiries, but 6 handles 8,000 cases. The financial ombudsman gets more 7 than 1 million inquiries, handles 250,000 cases. 8 So quite a lot of stuff is headed off at an early 9 stage, and obviously with minimal expense. 10 Assuming the citizen is not satisfied with the 11 response that they get, then it would come to the 12 ombudsman scheme which would see whether it was a matter 13 that was in their jurisdiction. They would also see 14 whether actually there was some ground to bring it to 15 a halt without taking it any further. 16 So if, for example, it was clear that even if the 17 ombudsman accepted every dot and comma of the complaint 18 that had been made, the redress that the business had 19 already offered would be bound to be sufficient, then 20 the ombudsman wouldn't take it any further. 21 Assuming that's not the position, then in many cases 22 it's possible to resolve the matter by mediation, with 23 the assistance of an independent third party view from 24 the ombudsman scheme. Although if the parties are more 25 entrenched or in the more complicated of cases, there Page 60</p>

<p>1 may need to be an inquisitorial investigation, leading 2 usually to a recommendation. 3 Within most ombudsman schemes, there's usually a two 4 stage approach. So you have a case handler with 5 a variety of different fancy names who would conduct the 6 investigation and would produce the recommendation, 7 which in the majority of cases is accepted by both 8 parties, but in a minority of cases, either party can 9 say, no, I want this case looked at by the ombudsman. 10 So the ombudsman actually acts as an internal appeal 11 stage, rather than the first instance. 12 Q. And in terms of the powers of the ombudsman, of course 13 that's going to depend on what the statute says, or the 14 rules say, but at the bottom of page 6 you explain that 15 their power may often be a power to award compensation 16 up to a ceiling; is that correct? 17 A. Indeed. So two powers qualified in a specific way. So 18 to award compensation, but subject to a maximum ceiling 19 for reasons which no doubt we'll get into in a moment. 20 Or to require the business to do something in relation 21 to the complainant, but it's something in relation to 22 that complainant. So not something that they must do 23 generally. Something to put it right for that 24 particular person. 25 LORD JUSTICE LEVESON: To what extent do you require Page 61</p>	<p>1 complaints handler, whether it's within the PCC or to an 2 ombudsman, is a much more subjective or could be a much 3 more subjective question of opinion and balance. Do you 4 understand -- 5 A. I understand absolutely the point your Lordship makes. 6 I think it's fair to say that the majority of cases that 7 come to ombudsmen are of sort of administrative 8 failings, using that in a very, very, very broad sense. 9 But equally, they can be failings of judgment. So if 10 one looks in the field of financial services, for 11 example, the ombudsman may be called upon to take a view 12 as to whether the judgment -- whether the advice that 13 somebody was given about the suitability of an 14 investment was appropriate advice. So there are those 15 elements of judgment. 16 What's lacking of course is the wider judgment of 17 balancing the interests of the individual against the 18 wider public interest, although, as I said before, our 19 public sector colleagues do have to take that into 20 account in the work that they do. 21 MR JAY: One feature though of an ombudsman system is that 22 the successful complainant, having been awarded a sum by 23 the ombudsman, can say, no, I'm not going to take the 24 compensation. I'm going to sue instead. Of course, if 25 he or she takes the compensation, that's the end of it, Page 63</p>
<p>1 a detailed knowledge and understanding of the operation 2 of the business that you are seeking to act as an 3 ombudsman in respect of? 4 A. It is helpful if the ombudsman goes out of his or her 5 way to develop an understanding of these things. If 6 I go back to the days when I was appointed as the 7 banking ombudsman, coincidentally, by Sir David Calcutt, 8 I was not a banking lawyer because it was considered it 9 didn't look good to appoint a banking lawyer as the 10 ombudsman, and I had to go out of my way to learn a lot 11 and visit bank branches and look at the insides of cash 12 machines to understand how they worked. 13 It seems to me that one of the points that's been 14 raised by the industry proposal is their suggestion it's 15 necessary to have active editors involved in the 16 process, because they know what's going on, which leaves 17 aside the fact that an ombudsman who is specialising in 18 this field can actually spend time to do that, and to 19 acquaint themselves with the latest going on and 20 developments. 21 LORD JUSTICE LEVESON: Yes. Is there a difference because 22 in most fields you're either dealing with something that 23 has gone wrong administratively, or in some way 24 structurally, in the operation, whereas for the press 25 the type of issue that's likely to come to any Page 62</p>	<p>1 presumably. But there's an option to start afresh in 2 court proceedings. So one doesn't, as it were, sign 3 away one's legal rights, if I have correctly understood? 4 A. That's right. 5 Q. Could you, as a matter of principle, have a system where 6 you did sign away your rights, in other words the 7 decision would be legally binding for all purposes, and 8 you couldn't say, as the complainant, I don't like this 9 decision, or I do like the decision but it's not enough 10 money, and be prevented from going off to court? 11 A. So if you're postulating a position where the decision 12 is automatically binding on the complainant, acres have 13 been written on the effect of that and its compatibility 14 with the Human Rights Act and various other things. 15 The pensions ombudsman, who deals with occupational 16 pensions, his decisions are binding on the complainant, 17 and the financial services ombudsman in Ireland works 18 obviously against the same background of European human 19 rights law. His decisions are binding on the 20 complainant. So this is theoretically possible. It's 21 not a view that the Association would advocate. 22 Q. Why not? 23 A. Because the model under which an ombudsman works is 24 broadly this, that the business is able to say to the 25 dissatisfied citizen, look, we've told you we don't Page 64</p>

16 (Pages 61 to 64)

<p>1 think your complaint is justified. But if you're not 2 happy, you don't need to go to the newspapers or to your 3 MP or whatever about it. You can go to the ombudsman 4 it's free the ombudsman will investigate it, and look at 5 it, and express his opinion, and if you don't accept the 6 ombudsman's opinion, then at the end of the day you are 7 still free to go to court. 8 Now, that's a strength and a weakness of the system. 9 The cards are stacked to a certain extent in favour of 10 the consumer, but this is a model that was invented by 11 the industry voluntarily originally. But because it is 12 in that way, then it's very easy for the industry to 13 bring complaints to a suitable close. 14 The reality is that once the consumer gets to the 15 end of the process, and has the ombudsman's decision, 16 and given the risk of an adverse costs order, it would 17 be a very brave consumer who then went off to court and 18 it's not something that one normally hears of. 19 Q. Thank you. Now, in terms of the ability to award 20 compensation, we've spoken of a monetary limit. 21 Obviously there's power to award financial compensation 22 for financial loss, but in the sort of realm with which 23 this Inquiry is concern, one would be awarding 24 compensation -- we can see it here at page 7 -- for 25 damage to reputation, possibly damages for distress and</p> <p style="text-align: center;">Page 65</p>	<p>1 brand which is it is comparatively easy to sell to the 2 public, I think. 3 Q. Accountability. Well, that's done by consultation and 4 publication of a yearly report, as one might expect? 5 A. Mm-hm. 6 Q. Can I ask you to elaborate on this section: 7 "Relationship with any regulator". That's likely to be 8 highly relevant to our consideration. How an ombudsman 9 scheme would work in conjunction with a regulator, 10 however that regulator is configured. 11 A. So I was postulating a situation where the ombudsman is 12 focusing on redress, whilst the regulator is focusing on 13 sanction. And there clearly needs to be a process by 14 which there is a flow of information from the ombudsman 15 to the regulator in order to inform the regulator's 16 general view as to the behaviour of the industry, and 17 indeed where sanctions need to be imposed. 18 It's also helpful for there to be a flow of sort of 19 non-business specific information about new and emerging 20 trends, so that the regulator can be developing policies 21 in order to deal with those as they go on. 22 As we have indicated in the evidence, there are 23 clearly some advantages to the ombudsman of being 24 a statutory body, or being underpinned by statute, but 25 there clearly would be risks, if the regulator were</p> <p style="text-align: center;">Page 67</p>
<p>1 inconvenience, if one included that within a general 2 damages award for damage to privacy. 3 Funding, please, which is the next section. As 4 funding of the system, it can either be a levy payable 5 by all businesses covered by the scheme, or it can be 6 case fees payable by the businesses or a combination of 7 the two; is that correct? 8 A. That's correct. 9 Q. In terms of the press, if one is going to conceive of 10 a system which might be appropriate for our Inquiry, 11 would you have a provisional view as to how it might be 12 funded in terms of whether we would be going for the 13 levy, for case fees or a mixture of the two? 14 A. I don't think the Association has a view on that at all. 15 It's largely a matter of convenience. The key thing 16 from the ombudsman's point of view is to ensure there 17 are adequate resources. The way in which the resources 18 are collected is less important. 19 Q. Thank you. Accessibility next. That's page 8, 00316. 20 That section is self-explanatory. It's obviously 21 vitally important that the consumer, who would be the 22 complainant, would know of the system and of the 23 processes which need to be undertaken to gain access to 24 it. 25 A. Indeed. And ombudsman seems to be quite a powerful</p> <p style="text-align: center;">Page 66</p>	<p>1 a self-regulatory body, to have an ombudsman who was 2 underpinned by statute, because there would be 3 inexorable pressure, I think, from the public if they 4 were to be satisfied with the self-regulatory body to 5 look to the ombudsman for that which the ombudsman could 6 not in fact deliver. 7 Q. Thank you. 8 LORD JUSTICE LEVESON: Does it mean that there is a risk of 9 duplication? Rather than talk about a regulator as 10 being concerned with sanction, I'd rather talk about the 11 regulator as being concerned with standards. 12 A. Mm-hm. 13 LORD JUSTICE LEVESON: And I'm just concerned with the 14 proposition that the ombudsman would require 15 an investigative arm to look at the issues, as you have 16 rather explained, and that the standards -- the 17 regulator would require an investigative arm to look at 18 possibly the same or equivalent issues, albeit through 19 different eyes. 20 Now, in financial services, which is an absolutely 21 vast area, that may not matter. In banking, that may 22 not matter. But in the rather smaller area of the 23 press, that might be quite a serious disadvantage to 24 requiring there to be a dual system. 25 A. Yes and no in the sense you are right there is a degree</p> <p style="text-align: center;">Page 68</p>

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<p>1 of duplication, because there may be certain issues 2 which are being looked at from a redress point of view 3 and from a potential sanction point of view. But they 4 are being looked at in different ways; and what the 5 ombudsman is looking at is not has somebody deliberately 6 set out to do somebody harm. It's: have they done 7 somebody harm in circumstances where the liability ought 8 to fall on them, rather than the person who has been 9 harmed?</p> <p>10 So it's a different quality of investigation. And 11 it's perfectly possible during the course of the 12 ombudsman investigation for the business on the 13 receiving end to say, well, these are matters of 14 judgment and now, with the wisdom of hindsight and 15 looking at it very carefully, we can accept that perhaps 16 we did get it wrong here and that we ought to provide 17 some redress to this sort of person, which is an 18 approach which is very difficult to take if at the same 19 time they are accepting to somebody who is acting on 20 behalf of the regulator that they have made a mistake.</p> <p>21 MR JAY: Thank you. I pass over the section "Industry 22 codes" because that's unlikely to be greatly material to 23 us, but deal with section C of your submission which is 24 page 10, 00318, issues that would be particular to 25 a press or media ombudsman, potential complaints issues.</p> <p style="text-align: center;">Page 69</p>	<p>1 advantages of being an ombudsman. So certainly on the 2 basis of the Association 's submission, this is not 3 a suggestion that the ombudsman would take up everything 4 which now would go to court. Rather, it would take up 5 many of the things which people might perhaps like to 6 take to court, but are unable to take to court, and some 7 of the things which do go to court.</p> <p>8 Q. So how would one determine which cases then go before 9 the ombudsman and which cases go to court?</p> <p>10 A. Well, the person who wished to bring the claim would 11 have that choice. They would know that if they went to 12 the ombudsman, the most that they could get was X, and 13 they could go to the ombudsman knowing that that was all 14 they could get, or they could go to court.</p> <p>15 Q. So it would be a voluntary system, but for most 16 complaints, the complainant would take it up, either 17 because of the nature of the complaint, or because they 18 wouldn't have the resources in any event to go to court?</p> <p>19 A. Yes.</p> <p>20 Q. I understand. Relationship with the regulator. I mean, 21 that may depend on whether the regulator is statutory or 22 statutorily underpinned or a voluntary regulator. But 23 could I ask you, please, to elaborate the points you are 24 making in that section.</p> <p>25 A. Well, in a sense I sort of foreshadowed some of what's</p> <p style="text-align: center;">Page 71</p>
<p>1 The complaints that fall for consideration appear to 2 cover broadly the following groups: various forms of 3 redress after publication, harassment, improper 4 acquisition, use of personal information 5 pre-publication, and intervention in relation to 6 harassment. We would also include, I suppose, breaches 7 of privacy, but they may be included within personal 8 information.</p> <p>9 The first issue which you discussed is relationship 10 with the court. Could I ask you to elaborate on that 11 issue, please?</p> <p>12 A. Well, I think the key point there is contained in the 13 earlier reference to setting some upper financial limit 14 on the award that the ombudsman can make.</p> <p>15 The ombudsman procedure, as I have described it, is 16 a more informal procedure, and one where the parties 17 don't need to be represented and are usually not 18 represented.</p> <p>19 If the ombudsman has power to award unlimited 20 amounts, the pressure for the ombudsman to become very 21 like a brother of the High Court becomes fairly 22 inexorable. So one has to make a judgment, and set 23 a compensation limit which is high enough to cover most 24 ordinary people, but low enough to ensure there's not 25 inexorable pressure that the ombudsman loses all of the</p> <p style="text-align: center;">Page 70</p>	<p>1 written down in that section in something that I said 2 before about problems if they are -- if the regulator 3 and the ombudsman are of a sort of a different nature in 4 terms that one is underpinned by statute and one is not. 5 I think they need to be broadly of equivalent underlying 6 structure.</p> <p>7 As far as the ombudsman was concerned, the 8 ombudsman's role would be to provide appropriate redress 9 for the person, if the case was upheld, for the person 10 who had been badly treated, but that would not extend to 11 anything punitive, and if it was felt that a sanction 12 was necessary, particularly if there had been regular 13 recurrence of a similar problem, then that would be 14 reported to the regulator and would be for the regulator 15 and not the ombudsman to deal with.</p> <p>16 Q. Thank you. Relationship with any rules, guidance or 17 code of practice. Well, in our context, the ombudsman 18 would presumably have to take into account the successor 19 to the Editors' Code of Practice in deciding what were 20 appropriate standards.</p> <p>21 The businesses covered, the issue here may be online 22 businesses but one would have to be clear as to which 23 were covered.</p> <p>24 Complainant eligibility. Are there any points there 25 which you would like to draw to our attention?</p> <p style="text-align: center;">Page 72</p>

<p>1 A. It is common in ombudsman schemes to set out -- unlike 2 with the courts, which are open to all, it's normal with 3 an ombudsman scheme to say that these are the sort of 4 people who can go to court, you normally cut out larger 5 businesses or maybe all businesses altogether. There is 6 clearly a question, it's not something the Association 7 has a view on, but it's clearly a question for the 8 Inquiry whether eligibility would be confined to those 9 who wished to complain about a hurt that they had 10 suffered themselves, or whether it would be open to 11 representative complainants who are concerned about the 12 way in which a group of people had been treated.</p> <p>13 Q. Basis of ombudsman decision. Very often the role of the 14 ombudsman, particularly in the public sector, is to 15 determine whether there's been maladministration, which 16 is quite a broad concept. It doesn't just involve that 17 which is contrary to the civil law. You make the point 18 here that we have got to be careful to define what the 19 media ombudsman might be doing. Presumably that entity 20 would not be deciding the broad question of whether or 21 not the newspapers acted fairly, but the more specific 22 question of whether the newspaper has acted unethically, 23 in breach of the code, or has invaded the private rights 24 of the complainant; is that right?</p> <p>25 A. Yes. I mean, they would be deciding whether the</p> <p style="text-align: center;">Page 73</p>	<p>1 A. As the written evidence indicates, this would be fairly 2 novel territory for ombudsmen, but in theory perfectly 3 possible. Clearly it's a matter of judgment for the 4 Inquiry as to whether it's desirable or not for there to 5 be some facility for newspapers to get this sort of 6 advice. But it seemed to the Association perfectly 7 possible for the ombudsman to be a source of such 8 advice. But of course it would be advice, and no more 9 than that, and it would be something to be taken into 10 account later, either by the ombudsman or by the court 11 or indeed by the regulator, in deciding some subsequent 12 complaint.</p> <p>13 Q. Yes. May I move forward to section D, which is your 14 views on the proposal advanced by the PCC.</p> <p>15 I think you are looking at there -- when we're 16 talking about what the PCC has proposed, it's a variant, 17 I think, of an earlier incarnation of Lord Black's 18 proposal. But it's basically a new voluntary regulator, 19 with contractual underpinning, with two arms. One of 20 the arms would be complaints and mediation. The other 21 arm would be more traditional regulation. But you don't 22 think that that's an appropriate model. Could you 23 explain why you don't think that?</p> <p>24 A. Okay. Well, the first issue is one that we've already 25 discussed, which is the problems that are inherent in</p> <p style="text-align: center;">Page 75</p>
<p>1 newspaper had acted rightly or wrongly in relation to 2 the individual who was making the complaint. But 3 clearly there is the problem that we referred to before, 4 about balancing the private rights of the dissatisfied 5 individual against the wider public interest, and 6 clearly if an ombudsman were to be established in this 7 area, it would be helpful to write something about that 8 specifically into the terms of reference and the basis 9 of decision.</p> <p>10 Q. Thank you. Issues of redress on the next page, this is 11 page 13, 00321, are broadly self-explanatory. But the 12 issue of intervention before publication may be 13 trickier, particularly in the light of the evidence we 14 heard from Sir Charles Gray.</p> <p>15 Can I ask you to consider this. Might there have 16 been a role for the ombudsman to act in an advisory way 17 in the context of intervention or pre-publication 18 issues? In other words, if a newspaper were concerned 19 as to whether or not to give notification to the target 20 of an article before it's published, or that is going to 21 be published, the newspaper can obtain advice from the 22 ombudsman as to whether or not notification may be 23 avoided for good public interest reasons. Do you see 24 that as being the sort of role that the Press Ombudsman 25 might be able to fulfil?</p> <p style="text-align: center;">Page 74</p>	<p>1 having redress and standards within the same body, 2 whether that's a regulatory body or a statutory body or 3 a self-regulatory body. So I refer back to the comments 4 that I made on that before.</p> <p>5 Secondly, then there is the way in which the 6 function is actually fulfilled. Lord Black's proposal 7 refers to the adjudicators on the complaint committee. 8 We passed over the constitution of an ombudsman scheme, 9 but normally there would be a board, which might have 10 a minority of industry representatives on it but 11 a majority of public representatives. But they do not 12 make any decisions in individual cases. It is their 13 role to appoint the decision-makers.</p> <p>14 So I think there's -- the Association is very 15 uncomfortable with the notion of this panel of people 16 making the decision, especially when some of them are 17 servicing editors, which, as I said before, is perhaps to 18 confuse the role of the expert witness and the judge, 19 and it's perfectly possible for the decision-makers to 20 be trained and familiarised with the latest developments 21 in the particular area.</p> <p>22 There seems to be an element of ambiguity, on my 23 reading of it at any rate, in the proposal about the 24 role of the independent assessor, because there's 25 a reference to the ability for a complainant to appeal</p> <p style="text-align: center;">Page 76</p>

<p>1 to the independent assessor, and in one place it says 2 the independent assessor can determine a different 3 conclusion and refer back with reasoning. But there's 4 another place, I think in the chart, where it sets out 5 the overall structure, which rather implies the 6 independent assessor is inviting these adjudicators to 7 think again. So it's not an appeal in the true sense. 8 So my own profession, the solicitors' profession, 9 had many decades of trying to wrestle with these 10 problems. The Law Society itself, first of all, dealt 11 with consumer complaints. Then it reconstituted that 12 bit as a thing called a solicitors' complaint bureau, 13 and then it reconstituted that as the Legal Complaints 14 Service. But it never worked out in the end, and we've 15 ended up with a legal ombudsman. 16 So far as the powers of the redress body are 17 concerned, the proposed body would have power to fine in 18 terms of breach -- or habitual breach of standards, but 19 the highest level of redress that is available to the 20 dissatisfied complainant is a critical adjudication. 21 Given that the well-off can go to court and secure 22 financial redress, it seems to be a shortcoming in the 23 proposal that the less well-off, who feel that they 24 cannot take the chance of going to court, can end up 25 with no redress.</p> <p style="text-align: center;">Page 77</p>	<p>1 which have been recognised also by the Cabinet Office. 2 Then there's a list which I won't repeat, unless you 3 wish me to, in bullet point term of how perhaps those 4 principles would play out if the Inquiry were to 5 recommend an ombudsman had some role as part of the 6 apparatus. 7 Q. These are the eight or nine bullet points halfway down 8 page 15, 00393? 9 A. And on page 16. 10 Q. And on the next page, there's a lot more of them there? 11 A. Yes. 12 Q. They merely reflect the general principles -- 13 A. Indeed. 14 Q. -- that you have earlier outlined. 15 So on this model, the ombudsman would be doing the 16 work which it is properly designed and designated to do, 17 but it would be independent from the regulatory body 18 which would be carrying out its standard regulatory 19 functions? 20 A. Indeed. 21 Q. And each body could, I suppose, have a statutory 22 underpinning or could be created by statute, depending 23 on policy preference? 24 A. Or could be created voluntarily. All those are 25 possibilities.</p> <p style="text-align: center;">Page 79</p>
<p>1 Q. Thank you. Then you have some tentative suggestions for 2 consideration. Can I ask you, please, to outline those, 3 particularly in the context of the possibility of an 4 ombudsman being within the new regulatory umbrella, if 5 I can use a loose term? 6 A. Yes. The Association has put forward its views at two 7 sorts of levels. So it can see the possibility of 8 a role for an ombudsman as part of whatever new 9 machinery emerges as a result of the Inquiry's work. 10 But it doesn't pretend to have a view on the whole 11 apparatus, and can quite see that the judgment as to 12 whether there ought to be an ombudsman, and how the 13 ombudsman would fit in, is something that has to be 14 decided as part of looking at the overall fabric in 15 which an ombudsman would operate. 16 So to that extent the Association's views are 17 tentative. The Association's views are far from 18 tentative, however, when it comes to the characteristics 19 that it would look for if an ombudsman were to be 20 created, which in a sense brings us back to your opening 21 question. The Association would be extremely unhappy to 22 see something created which was called an ombudsman, but 23 which was not in reality an ombudsman, and which did not 24 have all of the characteristics which are set out in the 25 Association's published criteria for ombudsman schemes</p> <p style="text-align: center;">Page 78</p>	<p>1 LORD JUSTICE LEVESON: But if voluntarily, everybody has got 2 to have signed up to it? 3 A. Indeed. It's perfectly possible, as with all of these 4 other mechanisms, if they volunteer to join, to bind 5 them. But getting them in is the difficulty. 6 MR JAY: The advantage of this model, provided one 7 understands how it's got to work, namely its 8 independence from the regulator, is the term "ombudsman" 9 has a particular cachet with the public. It will win it 10 immediately a degree of respectability -- it's more than 11 that. People like it. People understand that ombudsmen 12 do a good job in their areas of work. So that would be, 13 as it were, immediately appealing to public confidence. 14 LORD JUSTICE LEVESON: It's rather more than that, isn't it? 15 It's because the public have an understanding of what 16 ombudsmen do and the results they achieve, and if you 17 try and call somebody an ombudsman that doesn't seek to 18 do what you actually seek to do and does not therefore 19 achieve what you seek to achieve, you risk damaging the 20 concept which is very important in many different areas 21 of our public life. 22 A. Absolutely. 23 MR JAY: Thank you. Those are all the questions I have, 24 Mr Thomas. 25 LORD JUSTICE LEVESON: Is there anything you felt we've not</p> <p style="text-align: center;">Page 80</p>

20 (Pages 77 to 80)

1 covered, Mr Thomas?
2 **A. No.**
3 LORD JUSTICE LEVESON: Thank you very much.
4 **A. Thank you.**
5 **(4.13 pm)**
6 **(The hearing adjourned until Friday, 13 July 2012 at**
7 **10.00 am)**
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