EARLY RESOLUTION

The Rt Hon Lord Justice Leveson
The Leveson Inquiry,
Royal Courts of Justice,
Strand
London WC2A 2LL

3rd February 2012

Dear Brian,

Many thanks for your letter of 27th January and invitation to submit a written statement to your inquiry.

I have now drafted a statement with the help of my fellow directors and hope this is of some interest to you and your assessors.

I hope this is of some assistance but please do not hesitate to let me know if I can be of any further help.

Yours ever,

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Chairman Early Resolution

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WITNESS STATEMENT OF SIR CHARLES GRAY TO THE LEVESON INQUIRY INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS

1. Introduction

1.1 In recent days, according to newspaper reports, the Leveson Inquiry has been considering the possibility that a new body be set up to deal with defamation and privacy cases by means of arbitration and/or mediation.

1.2 It appeared to me that the Inquiry might be interested to know about a body already in existence called Early Resolution CIC (ER). ER was set up last year in order to enable those embarking on or already locked into defamation or privacy litigation to resolve their differences quickly, fairly and cost-effectively.

1.3 I have now been invited by the Chairman to make a statement in order to explain how ER operates and why it should enable both claimants and defendants in media cases, as well as other cases, to avoid having to incur the hideous expense of litigation in court.

1.4 I should start by providing the Inquiry with some biographical particulars: I was in full-time practice at the Bar from 1967 until 1997. My practice consisted largely of media work. I took silk in 1984. I was appointed to the High Court Bench in 1998 and dealt with many cases involving the media. I retired early in 2008 but continue to sit from time to time. I also do mediation and arbitration work. In 2009-2010 I advised the House of Commons Culture, Media and Sport Committee in relation to its Report on Press Standards, privacy and libel. I was a member of the Committee set up by the Ministry of Justice to advise on the Defamation Bill. I am currently acting as Specialist Adviser to the Joint Committee on Privacy and Injunctions which will be reporting in the near future.

1.5 In the sections of this statement which follow I will describe briefly how ER came to be established and the scope of the services which it offers. Next I will explain in some detail how the ER scheme operates. I will then describe what might be called the teething problems experienced by ER and how they can be overcome. This important topic will raise questions whether it is desirable to introduce a new statutory adjudication scheme or a regulatory scheme, possibly built on contracts entered into by publishers, which would require publishers to participate in a new regulatory scheme and to comply with its decisions.

2. How ER came to be established and the scope of its services

2.1 The moving spirit behind ER is Alastair Brett, a solicitor who was for many years the Legal Manager of Times Newspapers. In that capacity he had to deal with numerous heavy defamation cases. It was he who pioneered a Fast Track Arbitration system for dealing with

disputes between those who claimed to have been libelled in the columns of The Times or Sunday Times and the publishing company.

2.2 The arbitration scheme established at The Times undoubtedly saved the newspaper an enormous amount of money. Claimants also benefitted hugely: they did not have to face the possibility of bankruptcy in the event that a jury, after months of legal wrangling, found for the newspaper. Claimants who followed the conventional route of suing wealthy mid-market or tabloid newspapers in the courts often found that mounting costs meant that they had to discontinue their claims or settle on disadvantageous terms.

2.3 As a result many claimants not only failed to achieve their main objective of vindicating their reputations but might sometimes end up having to pay not only their own lawyers but also the costs of the newspaper.

3. The advantages of the ER scheme over litigating through the court system

3.1 Alastair left Times Newspapers in December 2010. It occurred to him that the arbitration system which he had devised was capable of a far wider application. He accordingly decided to set up a not-for-profit company to operate the arbitration scheme. The reason for this was to keep the costs of arbitrating under the scheme as low as possible. The name "Early Resolution" was his idea.

3.2 Alastair asked me to be the Chairman of ER. (The year before, I had chaired the Early Resolution Procedure Group on which Andrew Caldecott QC, Adrienne Page QC and other media experts had sat, including Alastair, which had reported to the Master of the Rolls and Lord Justice Jackson). Alastair is the Managing Director of ER as well as the energetic driving force behind it and has contributed not only his experience of 33 years at Times Newspapers, the last 10 of which were as Legal Manager, but also his indefatigable energy and experience in getting ER up and running. He is a trained mediator and is now a consultant with Collyer Bristow.

3.3 The other two directors are Robert Clinton, former senior partner of Farrers, who has extensive media experience, and Julian Peel Yates OBE, a former senior diplomat and now himself a mediator.

3.4 ER follows The Times module quite closely. The paramount selling point for both media organisations and complainants is that, if both parties agree, they can elect to have major issues determined straightaway by an expert arbitrator at a fraction of the cost of litigating through the court system.

3.5 In defamation cases – as in many other types of dispute – there is often a single issue which will be determinative of the entire dispute between the parties. In many defamation cases the question of meaning – that is, what meaning the publication complained of would

be understood to bear by ordinary reasonable readers – will determine what defences, if any, are available to the defendant. Sometimes there is even a dispute between the claimant and the publisher as to whether the publication bears any defamatory meaning.

3.6 Determining the meaning of a lengthy newspaper article can be tricky. As the law stands at present the determination of meaning in defamation cases is a matter for the jury. Nowadays juries rarely decide defamation actions. So meaning is more often than not determined by judge alone whether at the trial of the action or in some cases as a preliminary issue. The problem is that litigating through the courts has become prohibitively expensive. The cost of issuing a claim form for a sum within the top end of libel damages is just under £1,500. By the time Particulars of Claim have been drafted and served with accompanying evidential documents, the costs will often have risen to more than £10,000 plus VAT.

3.7 Until such time as the issue of meaning is finally determined, defendants are free to advance - and cannot be prevented from advancing - defences and raising other issues which cannot arise if the issue of meaning is determined at the outset.

3.8 Two everyday illustrations will suffice: in many defamation cases the meaning of the publication complained about is crucial. If the publication bears the meaning for which the claimant contends the defendant may recognise that he cannot defend the claim and should make an offer of amends under s.2 of the Defamation Act 1996. Conversely if the words bear a lesser meaning than the claimant contends, the defendant may be able to advance defences which have a real prospect of success. The ability to have such crucial issues decided before huge sums have been spent pursuing a claim or advancing a plea of justification, which might well not meet the sting of the libel as found by the jury, are critical to the cost of libel proceedings and the vitally important issue of access to justice.

3.9 Another issue which frequently arises is whether the publication complained of consists of comment or statements of fact. This is a question of fact for the jury (if there is one) or for the judge in cases where it has been agreed or directed that the trial should be by a judge sitting without a jury. As often as not this is problematic: lengthy articles will include statements which are plainly factual but their overall sting may constitute comment. The obvious advantage to both sides of an early determination of this issue is that the parties will know whether fair comment is an available defence or whether the defendant is saddled with the burden of proving the truth of what was published.

3.10 I have confined myself to questions which commonly arise in defamation cases which are self-evidently suitable for determination under the ER scheme. But there is no reason why the arbitration should not cover other less common media issues. There is no reason why the parties should not, for instance, invite the arbitrator to determine whether the words are defamatory, quantum of damages, whether there is a "public interest" defence and even if the claimant has been identified.

3.11 ER was originally set up to deal with media court cases, that is, defamation and privacy claims. But the arguments in favour of an early resolution of legal claims by a skilled arbitrator with specialist experience seem to me to be equally applicable in many other spheres. This is a topic to which I will return in para 6 below.

4. How the ER scheme operates

4.1 ER has a panel consisting of two retired Lord Justices of Appeal, one retired High Court Judge, 12 QCs, 2 barristers and 2 solicitors who are qualified mediators. All of them have extensive knowledge of media law and practice. We hope to add to the list over the coming months.

4.2 On payment of a relatively modest fee law firms and barristers chambers (with members who have passed the direct access exam) can advertise themselves as associate members of ER and experts in media law. This means that they believe libel actions should be resolved "quickly, fairly and cost-effectively" in accordance with Early Resolution's Principles as set out on its website. They are all specialists in media work with considerable knowledge and experience of defamation and privacy work. Their names can be found on the ER website at http://www.earlyresolution.co.uk .

4.3 The main features of the ER arbitration scheme are these: in most cases the cost of the arbitration, will normally be met by the defendant if it is a commercial publisher. Moreover commercial publishers will not normally seek to recover any costs from the claimant even if the claimant is unsuccessful. From a pecuniary point of view, claimants have everything to gain from arbitrating under the ER scheme because it should cost them nothing. Win or lose, defendant publishers will avoid the exorbitant cost of High Court litigation.

4.4 The way the ER scheme works is that an individual or company which feels that it has been defamed will consult a solicitor who will often be a specialist firm. The firm will (or should) know about the arbitration service offered by ER and will (or should) inform the client of the advantages of an ER arbitration as opposed to going down the more costly litigation route if meaning or another key determinative issue is in dispute. The defendant will then be contacted and asked to agree to arbitrate the key determinative issue.

4.5 If the parties agree to arbitrate the dispute, using the ER procedure, the prospective claimant (or more likely his solicitor) will then agree an arbitrator from the ER list with the defence solicitor. The selected arbitrator will be instructed jointly by or on behalf of the claimant and defendant, assisted if necessary by ER. The claimant or defendant is entitled under the ER scheme to ask that the professional arbitrator be assisted by two lay assessors. This has in my own experience worked well in an arbitration where the issue was what meaning the publication would have conveyed to the ordinary reasonable (lay) reader. The advantages of having two lay assessors, one male and one female, is self-evident: they are

well equipped to decide how ordinary reasonable readers would interpret a newspaper article or passages in a book.

4.6 The arbitrator will usually decide that an oral hearing is not necessary and decide the issue on paper. Alternatively the claimant may seek an oral hearing and the defendant will generally agree to that. Once the written submissions of both parties on fact or law have been received, the arbitrator will convene a meeting with his two lay assessors – if the parties have agreed to this – and they will consider the papers. At the meeting the papers will be read and the meaning or other key issue discussed. Following the meeting and a decision, the arbitrator will prepare his or her award. This is likely in the vast majority of cases to be available to the parties within a one month of the receipt by the arbitrator of the oral or written submissions of the parties. This is another important virtue of the ER scheme – the speed: the parties will have a decision many months and in some cases years before judgment would normally be given if they had chosen to litigate through the courts.

4.7 If the decision is that the article or other publication does bear the meaning for which the claimant contends, the defendant will invariably agree to publish a correction and apology and pay damages and costs. If decision is in favour of the defendant, the claimant will usually drop the claim. If agreement on damages or the wording of any correction and apology proves to be impossible, the case can be remitted to the arbitrator for a decision on what would be a fair and accurate summary of the arbitrator's decision and/or quantum of damages.

5. Teething problems with the ER scheme as presently constituted

5.1 Broadsheet editors, including the editors of the Financial Times, the Independent and Guardian, have already made clear their interest in a system of arbitration or adjudication of complaints against the media which they regard as preferable to expensive litigation in the High Court.

5.2 It has to be said, however, that the ER arbitration scheme has, so far at least, not proved to be as popular to those involved in media disputes as I (and more importantly, Hiscox, the sponsors of our launch party) had expected. The advantages, particularly in terms of costs savings and speed of decision-making, are irrefutable. The problem is that either party can refuse to enter into a voluntary arbitration and instead – particularly if they are the financially stronger of the parties – choose to go down the expensive High Court route. It is early days for ER and I expect the take-up may improve over time. But the question still needs to be answered: why do parties – or more realistically their legal advisers – continue to opt for the vastly more expensive High Court route? Could the voluntary nature of the ER scheme be its very weakness? What is the solution?

6. The case for mandatory system of regulation and/or adjudication

6.1 One possible solution to this conundrum would be to introduce a statutory or at least mandatory adjudication system. As I see it, the problem with a mandatory system is that it would necessarily be statute-based. This would, I recognise, be anathema to some sections of the press who regard any attempt by the legislature to control or to muzzle the press. I personally have some sympathy with this concern.

6.2 A mandatory adjudication system would enable those who claim to have been libelled or to have had their privacy invaded to take their case to adjudication and, if but only if successful, to obtain appropriate compensation promptly from the defendant publisher. What is objectionable about that? I cannot understand why it should be said that the introduction of such a system would pose any threat to the rightly treasured freedom of the press enjoyed in this country.

6.3 I can well understand the concern of the press at the prospect of any statute being enacted which requires – or even appears to require - the media to submit to any form of control over what may be published. "Publish and be damned" has always been and remains a principle of fundamental importance to most journalists. It is shorthand for a system of law which insists that any decision whether a publication is unlawful be made by a jury or a judge without any involvement or interference by the state.

6.4 I believe that a system of mandatory adjudication could be introduced which would be acceptable to all sections of the media. However, I also believe that it is the system which requires a statutory base. Provided that the system of adjudication operates entirely independently of the state and is not subject to any governmental control, there is no reason why the media should have concerns about their editorial or journalistic independence being threatened.

6.5 The first stage in the setting up of a statutory adjudication would be the establishment of the post of the adjudicator and the manner in which he or she (I see no reason why more than one adjudicator would be required in most cases) would be appointed and function. The statute would make provision for the adjudicator to be appointed by a body which would be and be seen to be independent both of government and of the media. That same body would be responsible under the statute for deciding, again independently of government and media influence, how the adjudicator should discharge his or her duties.

6.6 Stage 2 would be the compulsory enrolment into the mandatory scheme of media organisations including but not limited to national and regional newspapers, commercial publishers and perhaps others besides. As it appears to me, the scheme should require the media organisations to enter into contracts agreeing to refer any complaints of libel or invasion of privacy for decision by an adjudicator. I see no reason why this should be objectionable to any sections of the media; it involves no surrender of the traditional right

of the media to freedom of expression. I believe broadly similar schemes are already operated successfully by such bodies as the Jockey Club and The Premier League.

6.7 It is vital that the adjudicator should be knowledgable and experienced in media law and be seen to be wholly independent. I think this is best achieved by having a list of arbitrators similar to that currently used by ER (see paragraph 4.1 above) from which the parties would be free to select one (or in rare cases three) to preside over the adjudication.

6.8 In order that the adjudication scheme should be compliant with Article 6, the decision of the adjudicator would not be final. It would be wrong and contrary to Article 6 of the ECHR to seek to oust the jurisdiction of the courts. Either party would be entitled to appeal to the High Court. That said, I would not expect any such right to be exercised in any but exceptional cases. I understand that appeals to the High Court are rare under the statutory adjudication system which applies to construction contracts (the Housing Grants, Construction and Regeneration Act, 1996). That system requires parties to any dispute arising in connection with a construction contract to refer the dispute to an adjudicator who is usually able to decide the dispute in 42 days. In the meantime any legal proceedings which may have been commenced will be stayed. In the rare cases where the dispute cannot be resolved by adjudication are the parties be permitted to take their dispute to court.

6.9 I believe that all national and regional newspapers (including those newspapers who are not currently members of the Press Complaints Commission) would be prepared to sign up to the regulatory scheme which I am proposing. My belief is fortified by the acceptance of the recently appointed Chairman of the PCC, Lord Hunt of the Wirral, that the PCC should be replaced by a new body the constitution of which, as he explained to the Inquiry, will be different in material respects from its predecessor.

6.10 By the same token I would expect that claimants would have no reason to object to being required to take their claims to an adjudicator appointed pursuant to the statutory scheme which I have outlined. I say that for the following reasons: claimants will not share the concerns which have been expressed in some quarters of the media about governmental interference with freedom of expression. Their overriding concern will be to have their claims dealt with in a cost effective and speedy manner by a competent tribunal. I feel confident that the scheme which I have outlined would amply satisfy those conditions. Moreover claimants who were dissatisfied with the outcome of the adjudication would have the right to apply to the High Court (see paragraph 6.10 above).

6.11 At a late stage in the presentation of this statement I saw a copy of a Proposal made by the Reuters Institute for the Study of Journalism and its Media Regulation Roundtable Group written by Hugh Tomlinson QC. The Proposal deals with a number of topics which I have not addressed (e.g. incentives, mediation, arbitration, enhanced defences and a new Code). I express no view on those topics. But I am glad to see that there appears to be a

good deal of common ground between the Roundtable and ER as to the desirability of introducing a statutory system of media adjudication and how it should be constituted.

SIR CHARLES GRAY
CHAIRMAN, EARLY RESOLUTION

Date 6th February 2012