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Case No: HQ09X02293

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 June 2009

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

THE AUTHOR OF A BLOG **Claimant**

- and -

TIMES NEWSPAPERS LIMITED **Defendant**

- -
- -

Hugh Tomlinson QC (instructed by **Olswang**) for the **Claimant**
Antony White QC and **Jonathan Barnes** (instructed by **Times Newspapers Ltd**) for the **Defendant**

Hearing date: 4 June 2009

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE EADY

Mr Justice Eady :

1. On 4 June 2009 I heard an application in private whereby the Claimant, who is the author of a blog known as "Night Jack", sought an interim injunction to restrain Times Newspapers Ltd from publishing any information that would or might lead to his identification as the person responsible for that blog. An undertaking had been given on 28 May 2009 that such information would not be published pending the outcome. I indicated at the conclusion that I would refuse the injunction but, in the meantime, I granted temporary cover to restrain publication until the handing down of the judgment, when the matter could be considered afresh if need be.

2. The Claimant's case, advanced on his behalf by Mr Tomlinson QC, is based both on the traditional law of confidence and upon the more recently developed doctrine acknowledging an independent cause of action arising from the improper disclosure of private information: see e.g. *Campbell v MGN Ltd* [2004] 2 AC 457 and *McKennitt v Ash* [2008] QB 73. It is suggested that *The Times* is subject to an enforceable duty of confidence not to reveal the Claimant's identity as the author of the blog; alternatively, that he has a reasonable expectation of privacy in respect of that information, in respect of which there is no countervailing public interest justification for its publication.

3. It was asserted in the Claimant's skeleton for the hearing of 28 May that his identity had been disclosed to *The Times* in breach of confidence. By the time the matter came before me, on the other hand, Mr Tomlinson was prepared to proceed on the basis that the evidence relied upon from Mr Patrick Foster, the relevant journalist, was correct; that is to say, that he had been able to arrive at the identification by a process of deduction and detective work, mainly using information available on the Internet.

4. Mr Tomlinson submitted that the thousands of regular bloggers who communicate nowadays via the Internet, under a cloak of anonymity, would be horrified to think that the law would do nothing to protect their anonymity if someone carried out the necessary detective work and sought to unmask them. That may be true. I suspect that some would be very concerned and others less so. Be that as it may, Mr Tomlinson needs to demonstrate that there would be a legally enforceable right to maintain anonymity, in the absence of a genuine breach of confidence, by suppressing the fruits of detective work such as that carried out by Mr Foster.

5. Mr Tomlinson's primary argument was simply that the Claimant wished to remain anonymous and has taken steps to preserve his anonymity accordingly. He says that the Defendant is fully aware of the Claimant's wish and that, in the circumstances, there is no justification for "unmasking" him, as he is entitled to keep his identity as the author of the blog private and confidential. Indeed, it is submitted as a general proposition that "there is a public interest in preserving the anonymity of bloggers".

6. It is necessary to examine the matter more closely, however, since the mere fact that the Claimant wishes to remain anonymous does not mean either that he has a reasonable expectation of doing so or that *The Times* is under an enforceable obligation to him in that respect.

7. It is well known that the court nowadays adopts a two stage approach, when addressing claims based upon the publication of allegedly private information in

contravention of Article 8 of the European Convention on Human Rights and Fundamental Freedoms. One must ask, first, whether the claimant had a reasonable expectation of privacy in relation to the particular information in question and, if so, then move to the second stage of enquiring whether there is some countervailing public interest such as to justify overriding that *prima facie* right. Whereas Mr Tomlinson focused most of his attention upon the second stage, and rather took it for granted that the stage one test had been passed, Mr White QC made it clear on behalf of *The Times* that it was most certainly not accepted that this Claimant had a reasonable expectation of maintaining his anonymity.

8. The test is an objective one (both for privacy and breach of confidence) and the importance of that has recently been underlined by the Court of Appeal in *Napier v Pressdram Ltd* [2009] EWCA Civ 443 at [42], where Toulson LJ commented:

> " … For a duty of confidentiality to be owed (other than under a contract or statute), the information in question must be of a nature and obtained in circumstances such that any reasonable person in the position of the recipient ought to recognise that it should be treated as confidential. As Cross J observed in *Printers and Finishers Limited v Holloway* [1965] RPC 239, 256, the law would defeat its own object if it seeks to enforce in this field standards which would be rejected by the ordinary person. Freedom to report the truth is a precious thing both for the liberty of the individual (the libertarian principle) and for the sake of wider society (the democratic principle), and it would be unduly eroded if the law of confidentiality were to prevent a person from reporting facts which a reasonable person in his position would not perceive to be confidential."

9. Hitherto, in those cases which have come before the courts where the claimant relied successfully upon the recently developed cause of action, in the absence of any pre-existing relationship of confidence, the information in question has been of a strictly personal nature concerning, for example, sexual relationships, mental or physical health, financial affairs, or the claimant's family or domestic arrangements. I am not aware of a case in which, as here, there is a significant public element in the information sought to be restricted. I have in mind, of course, that what the Claimant seeks to withhold from scrutiny is the identity of the person communicating to the public through his blog. Those who wish to hold forth to the public by this means often take steps to disguise their authorship, but it is in my judgment a significantly further step to argue, if others are able to deduce their identity, that they should be restrained by law from revealing it.

10. Mr White drew my attention to the case of *Mahmood v Galloway* [2006] EMLR 26. Mr Tomlinson challenged him to identify any useful *ratio decidendi* from this case, to which Mr White responded by advancing the proposition that a journalist who writes under a pseudonym for the purpose of functioning more effectively in his undercover work has no reasonable expectation of privacy in respect of his identity and, in particular, in relation to photographs which would, when published widely, reveal his identity. It seems to me that Mr White's interpretation is correct and, although the decision is not strictly binding upon me, the reasoning of Mitting J is nonetheless, if I may respectfully say so, entirely persuasive. Although the Claimant here is not a

journalist, the function he performs via his blog is closely analogous. I see no greater justification for a reasonable expectation of anonymity in this case than in that concerning Mr Mahmood.

11. I consider that the Claimant fails at stage one, because blogging is essentially a public rather than a private activity.

12. When I move, therefore, to the second stage, the exercise becomes somewhat artificial. That is because I have to proceed on the hypothesis that one or more public interest considerations have to be identified which would be capable of outweighing the Claimant's right to privacy – when I have already held that no such right exists. Nevertheless, I should address the arguments raised. It is not always easy to come to a conclusion on matters of public interest on an application for an interim injunction, as Mitting J observed in *Mahmood* at [24], but it cannot be ignored since s.12 of the Human Rights Act 1998 requires that an overall view should be formed as to the likelihood of the Claimant succeeding at trial. Such a judgment has to be made almost always on an incomplete picture of the available evidence. But that is what Parliament intended.

13. At this stage it is necessary to address the background circumstances in more detail. The Claimant is a serving detective constable and his blog mostly deals with his police work and his opinions on a number of social and political issues relating to the police and the administration of justice. He expresses strong opinions about these matters including on subjects of political controversy. In particular, he has criticised a number of ministers. In so far as he has written about cases of which he has obtained direct knowledge through his police duties, it is said that he has taken particular care to disguise the information. Moreover, he has tried to make it a practice not to comment on cases which were pending or "active" within the meaning of the Contempt of Court Act 1981. Nor has he flouted any court reporting restrictions. Whether he has always succeeded in achieving these aims may be a matter of debate. Such an exercise will often involve fine questions of judgment.

14. Nevertheless, on the basis of the evidence before me, it has always been apparent that if his employing police authority became aware (as it now has) that one of its officers was communicating information and opinions to the public at large about the conduct of police operations, there would be a significant risk of disciplinary action. This is recognised by the Claimant and is reflected in the evidence of his solicitor. Indeed, this would appear to be one of the main reasons why he was keen from the outset to maintain his anonymity.

15. My attention was drawn to the relevant Police (Conduct) Regulations. Those governing his conduct prior to 1 December 2008 were to be found in SI 2004 No 645 and those applicable subsequently in SI 2008 No 2864. The wording of the provisions differs somewhat, but perhaps not to any material extent. The relevant passages prior to 1 December 2008 were contained in Schedule 1 to the 2004 Regulations under the heading "Code of Conduct":

> "Confidentiality
>
> 7. Information which comes into the possession of the police should be treated as confidential. It should not

> be used for personal benefit and nor should it be divulged to other parties except in the proper course of police duty. Similarly, officers should respect, as confidential, information about force policy and operations unless authorised to disclose it in the course of their duties.
>
> …
>
> General Conduct
>
> 12. Whether on or off duty, police officers should not behave in a way which is likely to bring discredit upon the police service."

16. Under the more recent 2008 Regulations, the corresponding wording is to be found under the heading "Standards of Professional Behaviour":

> "Confidentiality
>
> Police officers treat information with respect and access or disclose it only in the proper course of police duties.
>
> …
>
> Discreditable Conduct
>
> Police officers behave in a manner which does not discredit the police service or undermine public confidence in it, whether on or off duty."

17. It may be said that the wording is in some respects woolly and imprecise. After all, it clearly cannot be intended that police officers have to treat *all* information "with respect" or be restrained so as not to disclose it except "in the proper course of police duties". There must be some limit. Presumably what is intended is that they should show such restraint in relation to information acquired in the course of, and connected with, their police duties. What would appear to be tolerably clear, however, is that the regulation would certainly apply to information obtained by a police officer about cases on which he is working or has in the past been engaged. It is obvious that the regulations should not be read subject to a proviso such that information of this kind may be "disclosed" or "divulged" *if the officer does it anonymously or in his spare time*.

18. Mr Tomlinson argues that if *The Times* were to reveal the Claimant's identity this would not only infringe his rights under Article 8 but also those under Article 10, since it would inhibit his right to impart information and ideas to the general public. It has not been argued, however, that the statutory restrictions on police officers disclosing information are not "necessary", not "proportionate", or not "prescribed by law" (i.e. that they are not compatible with the exceptions recognised in Article 10(2) of the Convention).

19. Against this background, Mr White submits that the obligations contained in the two relevant sets of regulations are imposed in the public interest to maintain appropriate standards of conduct in the police service. It is said that there is a corresponding public interest in the disclosure of any significant non-compliance by a police officer with his obligations under the statutory code.

20. Moreover, it is argued that there is a general public law duty on police officers not to reveal information obtained in the course of a police investigation otherwise than for the purpose of performing public duties: see e.g. *R v Chief Constable of the North Wales Police, ex parte Thorpe* [1999] QB 396, 409-410, 415, 429. Failure to comply with that duty would also, it is said, justify public exposure. There is much force in the argument that any wrongdoing by a public servant (save perhaps in trivial circumstances) is a matter which can legitimately be drawn to the attention of the public by journalists. There is a growing trend towards openness and transparency in such matters.

21. Although Mr Tomlinson rather dismissed it, a further argument was advanced by Mr White to the effect that the Claimant's writings, being "overtly political and highly critical of central and local policing strategies", are such that the public is entitled to receive information about the author, so as to enable it to make an assessment of the weight and authority to be attached to them. Mr Tomlinson submitted that all the Claimant's readers need to know is that the author is a serving police officer. I disagree. It is very often useful, in assessing the value of an opinion or argument, to know its source. As was pointed out, for example, by Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 205A-B, one may wish to apply greater caution or scepticism in the case of a person with "an axe to grind". For so long as there is anonymity, it would obviously be difficult to make any such assessment. More generally, when making a judgment as to the value of comments made about police affairs by "insiders", it may sometimes help to know how experienced or senior the commentator is.

22. Mr Tomlinson also submits that there is no public interest in the disclosure of the Claimant's identity and (echoing the language used by the European Court of Human Rights in *Von Hannover v Germany* (2005) 40 EHRR 1) that the publication of such information would make no "contribution to a debate of general interest".

23. If it were the case that the Defendant's Article 10 right of freedom of expression here is indeed conditional upon establishing a public interest (which I do not believe it is), it would seem to me quite legitimate for the public to be told who it was who was choosing to make, in some instances, quite serious criticisms of police activities and, if it be the case, that frequent infringements of police discipline regulations were taking place. Correspondingly, if the allegations and observations made by the Claimant through his blog were themselves contributing to a debate of general interest, as he undoubtedly thinks they are, I cannot see why the proposed publication in *The Times* would not be worthy of the same classification.

24. Much of what the Claimant publishes could be characterised as "political speech", since he criticises and ridicules a number of senior politicians. It is well recognised both here and in Strasbourg that considerable value must be attached to a citizen's right to express his opinions on matters of this kind. Nevertheless, constraints are placed upon the rights of civil servants and police officers to become involved in

party political debate. Some such restraint may be regarded as legitimate and proportionate for reasons which are fairly obvious; namely, that for some people the discharge of public duties requires them to stand aside from the cut and thrust of such debate. Such constraints are recognised as appropriate, for example, for judges, teachers and civil servants. I sought assistance from counsel as to the precise nature of the restraints placed on police officers in this respect, but they were unable to provide much information save to the extent that it was accepted that police officers are not permitted to stand for elected office.

25. Even though the Claimant believes that he was doing nothing wrong, he suspected that as and when his employing authority discovered his activities, he might be subjected to disciplinary action or, at least, some kind of "pressure" to limit the use of his freedom of expression.

26. I have drawn attention to the wording of the regulations relating to an officer's obligation of confidentiality in relation to "information", but there is also the more general prohibition against "discreditable conduct". This is a notoriously flexible concept, of course, but it might well be thought that some of the Claimant's publications would "discredit the police service or undermine public confidence in it". It would not be appropriate for me to come to any conclusion about that, but I recognise that his superiors might, at least, take that view.

27. It is clear from his own evidence that one of the reasons why the Claimant originally sought the court's assistance to maintain his anonymity was to protect him against disciplinary measures being brought to bear. His solicitor said in his witness statement that:

> "26. Publication of the identification of the identity [*sic*] of the Claimant as the author of the Blog would be likely to cause him significant damage.
>
> 27. Firstly, while it appears to be true that the Force has been notified of his identity by the Defendants (in breach of confidence), the Claimant believes that if the matter is subject to publicity in the media this could lead to more serious disciplinary charges being brought – on the basis that the publicity itself might be regarded as damaging to the force and having brought it into disrepute.
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> 28. Secondly, the Claimant has no reason to believe that his identity as the author of the Blog is known beyond his immediate supervisor and the Professional Standards Department of the Force. If this became now [*sic*] beyond this was group [*sic*], the Claimant considers that there would be inevitable disruption to his work as a detective. In particular, the Claimant is concerned that his identification as the author of the Blog might have an adverse effect on his working relationships and could make it very difficult for him to carry on his job. Some of his colleagues may be

> hostile to the Blog and may have objections to working with him as a result. Moreover, if his picture is published, it will also make it far harder for him to undertake the surveillance and informant handling work for which he is trained."

28. As he points out, his identity has been revealed to the police service by the Defendant. Even if this had not happened, however, I would agree with Mr White's observation that any such justification for seeking an injunction would be "unattractive", to say the least. I do not accept that it is part of the court's function to protect police officers who are, or think they may be, acting in breach of police discipline regulations from coming to the attention of their superiors (whose task it is to make judgments about such matters, at least in the first instance).

29. An alternative argument advanced by Mr Tomlinson is founded on the fact that now, for better or worse, the police authority does know about the Claimant's identity. In those circumstances, he suggests, there is no need for the information to be released more widely (i.e. to the readership of *The Times*). I do not accept that this necessarily follows. It seems to me that the public is entitled to know how police officers behave and the newspaper's readers would be entitled to come to their own conclusions about whether it is desirable for officers to communicate such matters publicly (whether there is an infringement of the disciplinary regulations or not). Of course, generally speaking, there would be no reason to publicise genuinely private matters about police officers, such as their domestic arrangements or personal relationships, but blogging is not a wholly private activity (as I have already noted in the context of addressing the arguments at stage one).

30. Mr Tomlinson sought to draw a distinction between the Claimant's police duties and what he does in his own spare time "off duty". That is nevertheless, in the context of a police officer, a somewhat hazy distinction. It is clear, for example, that police officers should not behave in a manner which brings discredit on the police force "whether on or off duty". Furthermore, the restraints upon disclosing confidential information are not qualified by any wording to the effect that the information can be disclosed otherwise than "in the proper course of police duties" provided that the disclosure takes place when the officer is "off duty". That would make a nonsense of the regulatory requirements.

31. I return briefly to the subject of photographs, to which the Claimant's solicitor referred in his witness statement. I was asked to bear in mind that rather blurred pictures of the Claimant have apparently from time to time appeared in the local press. I am not sure that this assists Mr White's argument, since the photographs are not relevant to the Claimant's identity as the author of the blog in question. On the other hand, his solicitor seems concerned about possible prejudice to undercover work. I would require more convincing evidence before considering the restraint of photographs, especially having regard to the *Mahmood* decision. There is no suggestion here of physical risk to the Claimant, as there was in that case.

32. As I have already noted, it is necessary for me to have in mind the provisions of s.12 of the Human Rights Act 1998, since the injunction sought would restrain *The Times* from exercising its right of freedom of expression. I have properly been reminded by both counsel of these provisions and, in all the circumstances, I have come to the

conclusion that it is not likely that the Claimant would succeed at trial in restraining *The Times* from publishing his identity as the author of the blog, whether on grounds of traditional breach of confidence or by way of reliance upon the more recently developed remedies in respect of "private information".

33. I conclude that he fails at stage one, in the sense that the information does not have about it the necessary "quality of confidence", as contemplated by Megarry V.-C. in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41; nor does it qualify as information in respect of which the Claimant has a reasonable expectation of privacy – essentially because blogging is a public activity. Furthermore, even if I were wrong about this, I consider that any such right of privacy on the Claimant's part would be likely to be outweighed at trial by a countervailing public interest in revealing that a particular police officer has been making these communications.