Neutral Citation Number: [2005] EWHC 2252 (QB)

Case No: HQ04X03010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 October 2005

Before:

THE HON. MR JUSTICE GRAY

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Between:

(1) DAVID BECKHAM	**Claimants**
(2) VICTORIA BECKHAM	
- and -	
NEWS GROUP NEWSPAPERS LIMITED	**Defendant**

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- -

HUGH TOMLINSON QC and SARA MANSOORI
(instructed by **Harbottle & Lewis**) for the **Claimants**
RICHARD SPEARMAN QC and MATTHEW NICKLIN
(instructed by **Farrer & Co**) for the **Defendant**

Hearing dates: 17 October 2005

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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 HON. MR JUSTICE GRAY

Mr Justice Gray:

1. The Defendant in this action, News Group Newspapers Limited, publishers of the *News of the World*, seeks an order for disclosure of documents from the Claimants, David and Victoria Beckham ("C1" and "C2"). The allegedly libellous article complained of was contained in the issue of the News of the World for 12 September 2004 entitled "Posh and Becks on Rocks".

2. The broad ambit of the issues between the parties which will arise at the trial can be seen from the meanings attached to the article by the parties respectively. According to the Claimants, the article bears the following meanings:

   a) In order to protect their image and for financial reasons, the Claimants are cynically and hypocritically trying to convince the public that their failed marriage is perfect;

   b) The Claimants' irresponsible and aggressive rows and rages have brought C1 to the edge of a nervous breakdown, are threatening C2's health during her pregnancy and damaging their children; and

   c) While publicly presenting herself as a loyal wife, in private C2 is insulting about her husband and disloyal, telling everyone that he is a vain, arrogant and ranting Essex yob who has lost the plot.

3. The newspaper asserts its intention of justifying the following *Lucas-box* meaning:

> Because their substantial fortunes depend upon their public perceptions, the Claimants have been cynically and hypocritically trying – for financial reasons – to convince the public that they continue to enjoy a happy marriage, whereas the true position is that their marriage has been rocked and seriously damaged by C1's infidelity and betrayal of the C2 leading to inevitable tensions and rows between them.

4. Before coming to the parties' submissions as to the documents of which disclosure is sought, I should refer briefly to the submissions made, principally on behalf of the Claimants, as to the principles governing disclosure which are contained in the CPR. The documents which a party is required to disclose when making standard disclosure include the documents upon which he relies and the documents which (i) adversely affect his own case; (ii) adversely affect another party's case or (iii) support another party's case: see CPR Part 31.6. That duty extends not only to documents in the possession of the disclosing party but also to documents which are or have been in his "control", which is defined to encompass physical possession of the document as well as the right of possession or inspection of the document: see CPR Part 31.8. On an application for specific disclosure under CPR Part 31.12 the Practice Direction provides at para 5.4 that where the disclosing party "has failed adequately to comply with the obligations imposed by an order for disclosure…, the court will usually make such order as is necessary to ensure that those obligations are properly complied with". Para 5.5 of the Practice Direction further provides that an order for specific disclosure (such as is sought in the present case) "may in an appropriate case" direct a party to carry out a search for any documents which it is reasonable to suppose may

contain information which may (a) enable the party applying for disclosure either to advance his own case or to damage that of the party giving disclosure or (b) lead to a train of enquiry which has either of those consequences and to disclose any documents found as a result of that search. As appears from the wording of the latter Practice Direction, the power of the court to make an order for specific disclosure will only be exercised in "an appropriate case". It has to be established by the applying party that it is reasonable to suppose that the documents to be searched may contain information within (a) or (b). It is to be noted that the power to direct disclosure of documents leading to a train of enquiry which may enable the applying party to advance his own case or damage that of the party giving disclosure arises only where an order has been made for a search for documents. Mr Tomlinson QC for the Claimants argues, rightly, that disclosure will be ordered to the extent only that it is necessary for the fair disposal of the action. The approach under the CPR emphasises that the order for disclosure which is sought must be proportionate to the relevance and importance of the issue to which the documents are said to be relevant: see the Notes to the CPR at 31.0.6.

5. I turn now to the Defendant's application. Disclosure is sought of eight categories of documents with which I will deal individually.

Category 1: "Brand Beckham"

6. The documents sought under this heading are:

> "all documents from the Claimants relating to the co-ordination and execution of the public relations strategies of the Claimants including but not limited to the PR response to the exposé of C1's affairs".

The opening section of the Particulars of Justification under the sub-heading "the Claimants' cultivated public image" asserts that the Claimants have been astute to cultivate a particular image of a happily married celebrity couple in order, amongst other things, to profit commercially from this image which the Defendant calls "brand Beckham". Various quotations by the Beckhams proclaiming the happiness of their married life are relied on. It is alleged that C2 is particularly adept at manipulating the media. She is accused of hypocrisy and telling falsehoods. It is pleaded that the Claimants have amassed an enormous personal fortune. A considerable number of sponsorship deals are relied on.

7. There follows para 5.13 which is in these terms:

> "It is to be inferred that the companies who paid the Claimants for marketing their products would not have entered into such deals (or would have done so at significantly lower cost) if the true position had been known… It is further to be inferred that if C1 were to admit his adultery the companies would be likely to exercise clauses in the respective agreements giving them the right to terminate the arrangement".

8. In the Reply the Claimants assert that they are indeed a happily married couple with children and that they do not "deliberately promote" any "image" of themselves. The

charge of hypocrisy against C2 is denied. It is alleged that the quotations relied on by the Defendant, seen in their proper context, are appropriate. The Claimants admit to having amassed an enormous personal fortune, each of them individually attracting a large number of offers of sponsorship. The fact that they are married to one another heightens the media interest in them. As to the Defendant's allegation that the companies sponsoring the Claimants would not have entered into the deals relied on or would have done so at a lower cost if "the true position" had been known, the Claimants point out that "the true position" (i.e. the C1's alleged sexual relationship with Rebecca Loos – see below) began on 1 July 2003 and only two of the sponsorship agreements relied on by the Defendant precede that date. The inference that, if C1 were to admit his adultery, the sponsoring companies would terminate the arrangements is denied.

9. Mr Spearman QC for the Defendant argues that documents must exist dealing with the presentation of the "image" of the Claimants, which documents will support the Defendant's case. He submits that it is no answer for the Claimants to say that there are no documents evidencing the fact that they were seeking to promote a *false* image to the public and to sponsors. Mr Spearman contends that the Claimants should be ordered to carry out a further search and to provide full disclosure of documents relating to the promotion of "brand Beckham".

10. Mr Tomlinson submits that the nub of this part of the Defendant's case is that the Claimants manipulate the media in order to promote a false image of themselves as a happily married couple. The Claimants' case is that there are no documents within this first category. Such documents as exist in relation to the publicity given to C1's alleged sexual relationship with Ms Loos are privileged.

11. The first observation which I would make about this first category is that it is, potentially at least, of enormous width. It is accepted that the Claimants employ PR firms which have no doubt generated numerous documents over the years. It does not appear to me that the Defendant is entitled to have disclosed to them the totality of this documentation which would do little or nothing to advance their case, especially since the Claimants accept that they have on many occasions publicly described themselves as a happily married couple. There is no reason to suppose that the state of the Claimants' marriage would be regarded to have any relevance to the majority of the sponsorship agreements relied on by the Defendant since they spring from C1's prowess as a footballer. The Claimants say they do not have a "PR strategy" and I have seen no evidence to displace that assertion. I accept that the sting of this part of the Defendant's pleaded case is that the Claimants present a *false* image of themselves. The Claimants' case is that there exist no documents of that kind. The Defendant invites an inference to the contrary but I am far from persuaded that the Defendant is able to establish the necessary foundation for drawing such an inference. The application in relation to this first category is accordingly refused.

Category 2: C1's alleged affair with Ms Loos:

12. The Defendant seeks disclosure of:

> "All non-legally privileged documents from the Claimants and their PR advisers at the time relating to the Claimants' decision not to sue the Defendant and/or Rebecca Loos over the News of

> the World article of 4 April 2004 or any subsequent publication alleging that he had had an affair with her and all documents relating to the PR consequences of those articles".

I can deal with the application in relation to this category more shortly. It is common ground that the issue of the News of the World for 4 April 2004 accused C1 of having a sexual relationship with Ms Loos. In the pleadings in this action C1 denies having had such a relationship with her. He did not at the time of publication deny the relationship in terms, although he did describe the allegation as "absurd" and "ludicrous". Ms Louise Prince, a solicitor in the firm acting for the Claimants, says in paragraph 14 of her witness statement that "there are no non-privileged documents in this category". Mr Tomlinson for the Claimants, elaborating their case, accepts that discussions would have taken place at the material time and they would have involved both legal advisers and PR agents. But he tells me on instructions that all discussions and communications involved the legal advisers; there were no "separate" and therefore non-privileged documents involving the PR agents.

13. As it appears to me, where a party credibly asserts in relation to a category of documents that it is covered by legal professional privilege, that assertion will ordinarily be a complete answer to an application for disclosure. Mr Spearman suggests that Ms Prince "must" have misdirected herself as to the ambit of the privilege. I can see no basis for this suggestion. I can well believe that the legal advisers and the PR agents would have liaised in a co-ordinated effort to deal with and to limit the damage flowing from what C1 was telling them was a false allegation of infidelity against him. I refuse to order disclosure of this category of documents.

Category 3: Mobile telephone records:

14. This category is described as follows:

> "All relevant mobile telephone records for the telephones registered to the Claimants and SFX"

This part of the Defendant's application has two aspects to it: the first relates to Ms Loos and the second to another woman with whom C1 is alleged to have had a sexual relationship, namely Esther Canadas. The Defendant's case as to the former is that C1 and Ms Loos had sex on four occasions in the period September to December 2003. The Defendant relies further on three exchanges of text messages between C1 and Ms Loos in March 2004. As regards Ms Canadas the Defendant relies on three text messages said to have been found in one of C1's old mobile telephones which he gave to the Claimants' then nanny, Ms Gibson. All three messages were sent to a Spanish mobile telephone number 34 659 920299 which is alleged to have been the telephone number of Ms Canadas, a Spanish supermodel. C1 denies having exchanged the text messages with Ms Loos. As to the text messages allegedly exchanged with Ms Canadas, it is admitted that the text messages relied on were in a mobile telephone which Ms Gibson had in her possession whilst employed by the Claimants but no admissions are made as to how she came to be in possession of that phone. The Claimants do not admit that the telephone number to which the messages were sent was that of Ms Canadas.

15. I will deal first with the text messages said to have been exchanged with Ms Loos. Mr Spearman drew attention to the correspondence in which information was requested of the Claimants as to mobile telephones and SIM cards and the telephone numbers and mobile telephone networks used by C1 at the material time. The relevant part of the substantive response from the Claimants' solicitors' letter of 19 May 2005 reads:

> "As you are aware it is denied that Mr Beckham exchanged any text messages of a sexual nature with Ms Loos. As far as the mobile phones are concerned, you should note two points:
>
> (i) a number of telephones used by our clients and their employees were owned by SFX and these were returned to SFX when the Agency Agreement came to an end; and
>
> (ii) the itemised billing for the mobile phone records for the period relating to those times that your client claims the exchanges took place were shredded immediately upon receipt of the bills by Josephine Burston, our clients' PA. This was a decision she took when she was handed responsibility for the payment of the phone bills in or about the summer of 2002 in order to deal with the substantial volume of unnecessary paperwork that the bills generated. We are instructed that the shredding took place a substantial period of time prior to the commencement of the proceedings".

The Claimants' solicitors provided further information by a later letter dated 5 July 2005. The information provided in that letter can be summarised as follows: C1 has retained some of the mobile telephones and SIM cards used at the material time; others were returned to SFX (C1's agents) when the agency agreement came to an end and the remainder had either been lost or misplaced and their whereabouts were not now known; the numbers of telephones used by C1 at the material times were provided, all of them being Vodafone numbers, and finally it was said that the telephone number from and to which the Defendant alleged that the messages relied on had been sent (namely 34 64 797 0707 and recorded by Ms Loos as "Db3", was not registered to C1. The Claimants' solicitors said that they were therefore unable to provide the Defendant with copies of the telephone records for that number. Although in that letter the Claimants' solicitors referred to the number not being "registered" to C1, they later made clear that as far as the Claimants were aware, the number recorded as Db3 was not a number that had ever been used by the Claimants and they do not know who is the registered owner of that number.

16. As I understood him, Mr Spearman accepts on the basis of what has been said in correspondence that the phone which is relevant to the 'Ms Loos' allegation is that which is known as Db3, being the telephone number found in the message memory of Ms Loos' phone. Mr Spearman complains about what he says is the unsatisfactory manner in which information has been provided on behalf of the Claimants. He draws attention to what he submits is a discrepancy between the Claimants' pleaded case (that C1 had said that the messages may have come from a phone which he had lost) and the version given in the correspondence. Mr Spearman also points out that C1 has not given evidence that he never used the telephone Db3.

17. The case for the Claimants is that the category of documents originally requested (and set out above) was far too wide. Mr Tomlinson relies on paragraph 16 of Ms Prince's witness statement which says that the Claimants have informed the Defendant of all the telephone numbers used by C1 at the relevant period. She reiterates in paragraph 17 that Db3 is not registered to C1 and never has been. Consequently the Claimants are unable to provide the Defendant with copies of the telephone records for this number. Mr Tomlinson nevertheless offered that enquiries could be made on behalf of the Claimants of SFX whether telephone number 34 64 797 0707 is theirs.

18. I proceed on the basis that the only telephone number records of which the Defendant now seek is that known as Db3. It does not appear to me that the Defendant has any basis for controverting the evidence of Ms Prince that that number is not registered to C1 and never has been. Despite what is said in paragraph 16 of Ms Prince's witness statement, there remains the possibility (I put it no higher than that) that telephone Db3 may have been a Vodafone telephone belonging to SFX which might have been in the possession of C1 at one time or another. In those circumstances I think it right to take up the offer of Mr Tomlinson by directing that enquiries be made of SFX to ascertain whether that number is theirs. I should however make it clear that I am not to be taken as deciding that such records, if any, as SFX may have relating to that telephone number are within the "control" of the Claimants. That point can, if necessary, be argued hereafter.

19. I revert to the telephone number said to be that of Ms Canadas. There is no dispute that the messages relied on by the Defendant were sent to telephone number 34 659 920299, which number is said by the Defendant to be that of Ms Canadas. As I have recounted, that telephone number was obtained from the memory of a telephone which was in the possession of the nanny, Ms Gibson. The Defendant is of course concerned to find out the number of that telephone and the person who was using it in order to make good their contention that it was C1 who sent the messages. The Claimants agree that the telephone number recorded as having sent one of the messages to Ms Canadas does belong to a telephone which contains a later text message received by Ms Gibson from C1 using his telephone number 07799 000023. But the Claimants assert that they do not know in whose possession that telephone was at the material time.

20. Mr Spearman accuses the Claimants of being evasive on this point. He argues that it must be possible for the Claimants to obtain information which would at least cast some light on the question in whose possession that telephone was at the time when the messages relied on were sent to Ms Canadas (7 November 2003). Responding to that submission Mr Tomlinson for the Claimants offered an undertaking on the part of the Claimants to use their best endeavours to obtain from SFX or Vodafone itemised bills for that telephone number over the material period and to disclose the same to the Defendant (redacting entries which may be confidential and irrelevant). In my view it is appropriate that such an undertaking should have been offered. I accept it, although without making a finding as to whether or not the itemised bill can be said to be within the control of C1.

Category 4: C1's move to Madrid:

21. The Defendant seeks disclosure of

> "All documents from the Claimants, 19 and SFX relating to C2's travel arrangements, accommodation and expenditure relevant to her whereabouts from July 2003 until her permanent move to Spain and all documents relating to the Claimants' search for and selection of a property in which to live in Spain".

Mr Tomlinson described this request as "astonishingly wide" and so it is. In the course of argument Mr Spearman made clear that what is principally sought is the disclosure of documents relating to C2's travel arrangements. Such documents are said to be relevant to the Defendant's contention that C2 publicly refused to move to Madrid to be with C1 and the amount of time which she spent in Spain after C1 moved to Madrid. The Claimants' solicitors accept that if documents existed which evidenced C2's refusal to join her husband in Spain, they would be disclosable. According to them no such documents exist. The Claimants maintain that they should not be required to disclose any other documents falling within this category. I agree. The Claimants have already disclosed C2's electronic diary. That can be the subject of cross-examination at trial. I see no justification for imposing on the Claimants the onerous burden of providing what might well be a vast quantity of documents in circumstances where the evidential basis for an entitlement to disclosure has not been made out.

Category 5: the commercial arrangement with Jason Fraser

22. The Defendant seeks:

> "All documents from the Claimants, 19 and SFX relating to the commercial arrangement referred to at paragraph 8.1(c)(ii) of the Reply".

That sub-paragraph of the Reply refers to an agreement made between the Claimants and Mr Fraser, (one of the *paparazzi* who pursue the Claimants) to share the profits received from the syndication of photographs taken of the Claimants by Mr Fraser during their holiday in Tuscany in May 2000. The Defendant relies on a number of other occasions when Mr Fraser took photographs of the Claimants. The Defendant invites the inference that Mr Fraser and the Claimants have an arrangement whereby they alert him to where they will be in order for him to get photographs and that it is further to be inferred that there is an ongoing commercial arrangement for the Claimants to take a cut of monies received by Mr Fraser.

23. This appears to me to be pure speculation on the Defendant's part. The Claimants accept that there was a one-off agreement in relation to the Tuscany photographs but say that, apart from that occasion, there is no commercial arrangement with Mr Fraser. According to Mr Tomlinson, that single arrangement which the Claimants did enter into with Mr Fraser was not in writing. This is another instance in my judgment where the Defendant has failed to make out an evidential basis for the inference which they invite be drawn. I refuse to order disclosure of any documents within this category.

Category 6: Termination of agency agreement with SFX:

24. The Defendant applies for disclosure of

> "All non-legally privileged documents from the Claimants and from SFX and 19 (i) relating to their decision in October 2003 to dispense with the services of SFX and any consequential documentation (ii) relating to the termination of Rebecca Loos' role as the Claimants' PA in Spain".

The point here is a short one: the Defendant's case is that the SFX agreement was terminated because of the publication of the allegations of a sexual relationship with Ms Loos (who was employed by SFX to act as PA to the Claimants). The Claimants deny that the Loos allegations were the reason why the agency agreement was terminated. Their case is that negotiation with a view to renewal on revised terms had been ongoing since August 2003 and that in the event no agreement proved to be possible. The Defendant's case that the Loos affair was the reason for the termination of SFX's agency is entirely inferential, being based on allegedly unconvincing answers given by the Claimants in the course of a television interview when asked for the reason for their decision to part company with SFX.

25. The Claimants accept that if there were documents tending to show that the Loos allegations were the true reason for dispensing with the services of SFX, such documents would be disclosable. They assert that there are no such documents. I can see no circumstantial support for drawing the inference which the Defendant invites such as would entitle me to make the order for disclosure which is sought. This application is refused.

Category 7: The Courcheval holiday:

26. The Defendant seeks disclosure of

> "All documents from the Claimants and 19 relating to the Claimants' trip to Courcheval in April 2004 and documents relating to the dry ski-slope sessions attended by Brooklyn (the Claimants' son) throughout the previous six months".

The Defendant sensibly did not pursue the application for documents relating to the dry ski-slope sessions and in the end narrowed the scope of the balance of this category to documents evidencing the date when C1 made arrangements to travel to France. It is said on behalf of the Defendant that these documents would reveal whether it had always been intended that C1 should participate in a family skiing holiday or whether, as the Defendant alleges, his travel to Courcheval was to participate in a staged event as part of a damage limitation exercise following the publication of the Loos allegations.

27. The Defendant has already been provided as part of the disclosure with information relating to the time spent by C1 in Courcheval as well as his football commitments during the week of the family holiday. They will be able to cross-examine the Claimants as to the reasons why he went to France. I am not satisfied that the Defendant is entitled to any further disclosure. I note that Mr Tomlinson indicates

that there are no documents in the possession or control of the Claimants of the kind now sought by the Defendant: he tells me that C1 travelled to France by private jet which would not have involved the production of documents of the kind generated by ordinary commercial flights.

Category 8: "The Real Beckhams":

28. This final category consists of an application for disclosure of

> "All documents from the Claimants, 19 and Moody Productions Limited relating to *The Real Beckhams* including (i) all correspondences (sic) or exchanges passing between them as to the contents of the programmes shown as *The Real Beckhams* in December 2003 and (ii) all unedited versions of the programme including all rushes (each day's filming in full) and all correspondence concerning the same".

The programme "The Real Beckhams" was a "fly-on-the-wall" style documentary. It was produced by companies connected with the Claimants. The Defendant's case is that C2 insisted that part of the footage recorded of her arguing with and screaming at C1 and an admission of jealousy on her part be deleted. The Claimants' case is that it was C1, not C2 who requested that footage be removed and that it was footage of the children and not of rowing.

29. It appears to me that footage of argument and screaming would provide some support for the Defendant's case as to the tensions within the Beckham marriage. But Mr Tomlinson contends that it would be disproportionate to require those acting for the Claimants to go through what he tells me are 100 hours of film in order to find the passage which was removed at the behest of one or other of the Claimants. For reasons which I understand and accept the Claimants are reluctant to entrust the task to the newspaper since that would involve providing all the film, including untransmitted material, to the Defendant. Mr Tomlinson assures me that there are no documents evidencing any instructions to delete or omit passages from the transmitted version of the film.

30. I agree that it would be disproportionate to require the Claimants to go through 100 hours of film. I accept that marital rows between the Beckhams are relevant but the probative value of this piece of evidence (if it exists) appears to me to be very limited. That said, it appears to me that it should be possible to calculate at approximately what stage in the filming the argument (if any) occurred and for the Claimants' advisers to examine the film over that period. I direct that the Claimants through those advising them should use their best endeavours to find out from those involved in the filming and those who have subsequently viewed the film on what occasion and at what location the relevant incidents occurred. Any tape which might reasonably be considered to contain film of those incidents should then be viewed by the Claimants' advisers. The information obtained from taking these steps should be communicated to the Defendant's solicitors as soon as reasonably practicable. If necessary, this point can be considered further at a later stage.

The Claimants apply for an order for specific disclosure by the Defendants.

31. The order sought is that the Defendant carry out a search forthwith in each of the files of the journalists connected to the interviews with Abbie Gibson (the nanny) that took place on 21 and 25 April 2005 for any notes or tape recordings of the interviews and that specific disclosure by given of any such notes or tape recordings.

32. The background to this application is that articles were published in the News of the World on 24 April and 1 May 2005 based on information provided to the newspaper by Ms Gibson as to matters experienced by her during the course of her employment as the Claimants' nanny. The Defendant asserts that no notes were taken by the journalists who interviewed Ms Gibson; rather tape recordings were made of what she had to say. Proceedings were brought against Ms Gibson (but not against the newspaper) alleging breach of the terms of a confidentiality agreement. Those proceedings have not yet been resolved. The suggested relevance of the tape recordings, according to the Claimants' Particulars of Claim, is that damage suffered by the Claimants was aggravated by the fact that Ms Gibson was acting in flagrant breach of her contractual and common law duties of confidentiality in providing such information to the Defendant.

33. Mr Nicklin on behalf of the Defendant opposed the application on the ground that the Claimants can only claim to have been injured in their feelings by what was published in the newspaper. The Defendant is prepared to disclose those parts of the tape recordings which were the foundation for what was published but, submits Mr Nicklin, the remainder has no relevance. He points out that there is no allegation on the pleadings that Ms Gibson is not a credible source.

34. It appears to me that Mr Nicklin's argument is sound so far as it goes but it omits to take account of what is pleaded in para 8.2 of the Defence, namely that Ms Gibson was released from any obligation of confidence by the Claimants' treatment of her and/or in the public interest in order to expose the lies told by the Claimants. In my judgment in order to resolve those questions, the court would need to have regard to the totality of what Ms Gibson told the journalists. The issue whether it was in the public interest for the disclosures to be made requires full information as to the extent and nature of the disclosures. In addition it may well be that the tapes will be relevant to the question whether Ms Gibson should have appeared to the journalists as being a credible source of information about the Claimants.

35. Accordingly I direct disclosure of the tape recordings to the Claimants.