IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
[2022] EWHC 1209 (QB)

No. QB-2020-002028

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 29 April 2022

Before:

MRS JUSTICE STEYN DBE

B E T W E E N :

REBEKAH VARDY — Claimant

- and -

COLEEN ROONEY — Defendant

- and -

NEWS GROUP NEWSPAPERS LIMITED — Respondent

- and -

(1) SIMON BOYLE
(2) AMY BROOKBANKS
(3) ANDREW HALLS — Applicants

J U D G M E N T

A P P E A R A N C E S

MR H. TOMLINSON QC and MS S. MANSOORI QC (instructed by Kingsley Napley LLP) appeared on behalf of the Claimant.

MR D. SHERBORNE and MR B. HAMER (instructed by Brabners LLP) appeared on behalf of the Defendant.

MR A. WOLANSKI QC and MS C. HAMER (instructed by Simons Muirhead Burton LLP) appeared on behalf of the Respondent.

MR D. PRICE QC (Solicitor-Advocate, David Price Solicitors & Advocates) appeared on behalf of the Applicants.

MRS JUSTICE STEYN:

Introduction

1 This is a libel claim brought by Rebekah Vardy against Coleen Rooney. The trial is listed to begin on 10 May with a seven day time estimate. The claimant, the defendant and three journalists who have been issued with witness summonses have each filed application notices containing several pre-trial applications (some of which I have already addressed, leaving three applications to address in this *ex tempore* judgment).

2 First, the claimant issued witness summonses against eight journalists on 7 April 2022. In light of responses from two of the journalists that they had no relevant evidence to give, and my decision to refuse to give the claimant relief from sanctions and permission to serve witness summonses in respect of another two of them (§3 of the order sealed on 27 April 2022), four witness summonses have been set aside and four remain live.

3 In connection with the live summonses there are two related applications ("the Witness Summons applications"), namely:

(a) An application by three journalists, Andrew Halls, Simon Boyle and Amy Brookbanks ("the Applicants"), to set aside the witness summonses issued on 7 April 2022 in relation to each of them pursuant to CPR rule 34.3(4) on the grounds that (i) questioning will or is likely to disclose the identity of the source or sources of information contained in the publication for which they are responsible contrary to section 10 of the Contempt of Court Act 1981 ("the 1981 Act") or, alternatively (ii) the claimant does not have (and ought not to be granted) permission to rely on the witness summaries served on 26 April 2022. No application to set aside is made by the fourth journalist, Michael Hamilton.

(b) The claimant's application for permission to rely at trial on the amended witness summaries served on Mr Halls, Ms Brookbanks, Mr Boyle and Mr Hamilton on 26 April 2022.

4 Secondly, on the defendant's application, I made an order for non-party disclosure against NGN at the pre-trial review on 13 April ("the NGN Order"). In essence, paragraph 1.1 of the NGN Order required the disclosure of communications on various identified platforms between the claimant and Mr Halls, and paragraph 1.2 required the same in respect of communications between the claimant's agent, Ms Caroline Watt, and Mr Halls.

5 On 27 April, in response to that order, NGN provided a document entitled, "Respondent's list of documents" which states:

> "Pursuant to s.10 of the Contempt of Court Act 1981 and/or the protection of journalistic sources under Article 10(1) of the European Convention on Human Rights, and pursuant to paragraph 4 of the Order, the Respondent can neither confirm nor deny whether it has documents within its control which fall within the scope of paragraphs 1.1 and 1.2 of the Order."

6 NGN also filed a witness statement made by Mr Jeffrey Smele, a partner at the firm of solicitors which acts for NGN in this claim. Mr Smele's statement states:

> "Pursuant to s.10 of the Contempt of Court Act 1981 and/or the protection of journalistic sources under Art.10(1) of the European Convention on Human Rights, and pursuant to paragraphs 3 and 4 of the Order:
>
> 2.1 the Respondent can neither confirm nor deny whether it has documents within its control which fall within the scope of paragraphs 1.1 and 1.2 of the Order; and
>
> 2.2 it is not possible for the respondent to give reasons for withholding any documents or information which it may be withholding."

7 The defendant challenges the withholding of material by NGN, pursuant to paragraph 5 of the NGN Order, and applies for an order to compel NGN to provide a list of the documents withheld by NGN pursuant to paragraphs 3 and 4 of the NGN Order, together with a copy of each of the documents contained in the list.

8 The applications were served on short notice, and I have given the requisite permission pursuant to CPR 23.7(4) for short service of each of the applications heard today.

Protection of sources: the law

9 I shall first address the law regarding source protection which is at the heart of the applicants' application to set aside the summonses and NGN's response to the defendant's application to compel disclosure and inspection.

10 In *Arcadia Group Limited & Ors. v Telegraph Media Group Limited* [2019] EWHC 96 (QB) Warby J observed at [13]:

> "Rights of source protection have a long history in English law, and are also implicit in the right to freedom of expression protected by Article 10 of the Convention. Today, these rights - which I shall call 'the Source Protection Rights' - find domestic expression in s.10 of the Contempt of Court Act 1981."

11 In *Various Claimants v MGN Limited* [2019] EWCA Civ.350, Floyd LJ observed to similar effect at [18]:

> "The protection of journalistic sources has long been recognised to be a principle of high importance."

12 Section 10 of the 1981 Act provides:

> "No court may require a person to disclose, nor is any person guilty of contempt of court for refusing to disclose, the source of information contained in a publication for which he is responsible, unless it be established to the satisfaction of the court that disclosure is necessary in the interests of justice or national security or for the prevention of disorder or crime."

13 In *Arcadia Group*, Warby J observed at [14]:

> "The scope of the protection is somewhat wider than it might appear on its face. The protection is not confined to sources who provide information that finds its way into the public domain; it embraces those who provide information that is communicated and received with a view to publication: *X Ltd. v Morgan-Grampian (Publishers) Ltd.* [1991] 1 AC 1, 40 (Lord Bridge). And the section not only confers a right not to disclose information which identifies a source, it extends to information which may do so. Source identification need not be probable. The protection exists if identification 'may' follow, or there is a 'reasonable chance' that it will follow: *Secretary of State for Defence v Guardian Newspapers Ltd*. [1985] 1 AC 339, 349 (Lord Diplock), *Morgan Grampian*, 372 (Lord Bridge)."

14 Section 10 must of course be interpreted and applied in conformity with article 10. Article 10 provides, so far as material:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to... receive and impart information and ideas without interference by public authority...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

15 In *Arcadia Group*, Warby J set out at [15] a helpful summary of principles which was approved by the Court of Appeal in *Various Claimants v MGN Limited*, [20]:

> "The following principles are now clearly established, and not controversial:-
>
> (1) The onus lies on the applicant to show that disclosure should be ordered.
>
> (2) It must be shown that disclosure is necessary for one of the four legitimate purposes identified in s 10. It is not enough, for this purpose, to show that the information is relevant to the claim or defence: *Maxwell v. Pressdram* 310G-H (Parker LJ). It is not even enough to show that the claim or defence cannot be maintained without disclosure: *Goodwin v UK* [1996] 22 EHRR 123 [39], [45]. The need for the information in order to bring or defend a particular claim is not to be equated with necessity 'in the interests of justice'.
>
> (3) In *In re An Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660, 704, Lord Griffiths gave this guidance as to the meaning of the term 'necessary' in this context:

> 'I doubt if it is possible to go further than to say that "necessary" has a meaning that lies somewhere between "indispensable" on the one hand, and "useful" or "expedient" on the other, and to leave it to the judge to decide towards which end of the scale of meaning he will place it on the facts of any particular case. The nearest paraphrase I can suggest is "really needed".'

(4) This requires proof that the interests of justice in the context of the particular case are 'so pressing as to require the absolute ban on disclosure to be overridden': *Morgan-Grampian* 53C (Lord Oliver). In the language of Strasbourg, the disclosure order must correspond to a pressing social need, and must be proportionate. It must be 'justified by an overriding requirement in the public interest': *Goodwin* [39].

(5) Hence, it is necessary for the applicant to satisfy the Court, on the basis of cogent evidence, that the claim or defence to which the disclosure is relevant is sufficiently important to outweigh the private and public interests of source protection, and that disclosure is proportionate.

(6) When making this assessment, the Court must bear in mind that incursions into journalistic confidentiality may have detrimental impacts on persons other than the individual source(s). Disclosure may have a 'detrimental impact... on the newspaper against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves': *Goodwin* [69].

(7) The court must be satisfied that there is, 'no reasonable, less invasive, alternative means' of achieving whatever aim is pursued by a source disclosure application: *Goodwin* ibid."

16 It is common ground that in cases in which the disclosure sought goes to the identity of the source the threshold to invoke the protection of section10 is that there is a "reasonable chance" or "serious risk" of compromising the source's identity. In *Secretary of State for Defence v Guardian Newspapers Limited* [1985] AC 339 Lord Diplock held at 349G that the newspaper had to establish that answering the question would lead to a reasonable chance that the identity of the source would be revealed. In *Richard v BBC* [2017] EWHC 1291 (Ch) at [40]-[41] Mann J considered whether the threshold articulated by Lord Diplock had survived the enactment of the Humans Rights Act 1998 having regard to the Grand Chamber's decision in *Samona Uitgevers BV v The Netherlands* [2011] EMLR 4 (formulating the question at issue in article 10 in terms of whether there was a "serious risk of compromising the identity of the journalist's sources"). Mann J observed that: "It is not clear that that is materially different from the test in the *Guardian* case, but if it is, it is not a lower, or significantly lower, threshold": [40]-[42].

17 The initial obligation to establish that section 10 of the 1981 Act is engaged is on the journalist or publisher i.e. it is for them to show that there is a reasonable chance or serious risk of compromising the identity of a source.

18 In *Ashworth Hospital Authority v MGN Limited* [2002] 1 WLR 2033, Lord Woolf CJ observed at [77] that "section 10 sets out to give effect to the general requirements of article 10 in the narrow context of protection of the sources of information of the press". At [88] he stated:

> "The judgment... in *Goodwin v UK* [2022] EHRR 123 included this important state or principle at p.143, para.39:
>
> > 'Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.'"

19 The focus of s.10 of the 1981 Act is on disclosure of the identity of the source. Article 10 is broader: it will also be engaged if the order sought may reveal material provided by a source: see *Richard v BBC* [2017] EWHC 1291 (Ch), Mann at [42]-[48]. Although Mann J accepted on the facts of the case that answering the Claimant's question:

> "would lead to discomfort on the part of the source, and therefore some degree of chilling effect in some, if not many, cases." ([51]),

this factor did not

> "have anything like the great weight given to the non-disclosure of identity (a true "*Goodwin"* case)." ([52]).

Confidentiality of the source

20 The claimant contends s.10 of the 1981 Act is confined to the protection of confidential sources. In support of this contention, the claimant seeks to rely on two passages from the Parliamentary debate in which it was emphasised that the provision was being produced to protect the public interest. The claimant cites the Editors' Code of Practice, clause 14 of which provides:

> "Journalists have a moral obligation to protect confidential sources of information."

21 The claimant also submits that the case law demonstrates that the purpose of the protection provided by s.10 is to prevent the chilling effect associated with <u>confidential</u> sources being deterred.

22 The defendant supports the claimant's submission on this issue, suggesting that it is difficult to see why s.10 would be engaged if the reason for the power no longer applies, as is the case, in Mr Sherborne's submission, where the source is not confidential or has waived their right to source protection.

23 NGN contends that the protection afforded by section10 and article 10 applies to any source, whether or not they are a 'confidential' source. NGN draws attention to the judgment of the Fifth Section of the European Court of Human Rights given in *Becker v Norway* (app 21272/12) in which the court found a violation of article 10 in circumstances where a journalist who was ordered to testify, in criminal proceedings about her contact with the source who had himself come forward and declared himself the source. The court held at [74] that:

> "...a journalist's protection under Article 10 cannot automatically be removed by virtue of a source's own conduct. In the Court's view, these considerations are also relevant in a situation where a source comes forward, as in the present case."

24 The court added that it has previously held that source protection under article 10 applies where a source's identity was known to the investigating authorities before a search: *Becker* at [70], [74] citing *Nagla v Latvia* (no. 73469/10 at [95]. At [76], the Court observed that the degree of protection under article 10 was lessened by the fact that the source had come forward, albeit the circumstances were not sufficient to compel the journalist to testify.

25 Mr Price on behalf of the applicants also relies upon the judgment of Mann J in *Various Claimants v MGN Limited* [2020] EWHC 1435 (Ch), [2020] EMLR 29 as supporting the submission that s.10 should not be interpreted as being confined to disclosure of confidential sources. In particular, Mann J observed at [19]:

> "It should be noted that the concept of a <u>confidential</u> source does not feature expressly in the statutory provisions. Nonetheless confidentiality, or perhaps the absence of it, would be a very relevant factor to consider in considering where the interests of justice lie."

And at [28] he held "Nigel is a source for the purposes of the first part of s.10, and his information is capable of being information for those purposes".

26 In my judgment, the opening words of s.10 of the 1981 Act apply irrespective of whether the source is confidential. First, there is nothing in the words of section 10 to indicate that the term "source" should be construed narrowly to mean only a source which is confidential at the time of any order for disclosure. Secondly, it is well-established that s.10 should be interpreted consistently with article 10 and the jurisprudence of the European Court of Human Rights to which I have referred makes clear that source of protection rights under article 10 extend to sources who are not confidential or unknown. While I acknowledge that the court in *Becker* was concerned with source protection rights going beyond disclosure of the source's identity, nonetheless the judgment supports the natural and broader interpretation of s.10 as covering sources without limitation by reference to the word "confidential" which does not appear in that section. Thirdly, I do not consider that the Parliamentary materials provide any support for the contention that s.10 only applies to confidential sources. The passages do not address the question of interpretation of s.10, the statement has not been made by a government minister, and in any event, as I have said, I do not consider the section to be ambiguous.

27 In most cases, no doubt, where s.10 is engaged the source will be at least unknown if not confidential. That reflects the fact that if the sources come forward as such the need to ask the journalist to disclose their source would be unlikely to arise. If the source has come forward, that would be a factor to take into account in considering the necessity of requiring disclosure by a journalist, on the one hand because it may lessen the need for such disclosure, and on the other hand lessen the need for source protection. It does not, in my judgment, have the effect that s.10 is not engaged.

Necessity in the interests of justice

28 As the terms of s.10 make clear, although the protection of journalistic sources is of high importance, the protection may be overridden where the test of necessity in the interests of justice or national security or for the prevention of disorder or crime is met. In this case, only the interests of justice are relied on.

29 In *Various Claimants v MGN Limited*, Floyd LJ held:

> "19. The protection afforded against disclosure of journalistic sources is not, however, absolute. Measures requiring the disclosure of such sources can be justified by 'an overriding requirement in the public interest': see paragraph 39 of the judgment of the ECtHR in *Goodwin v United Kingdom* [1996] 22 EHRR 123 at page 143. This reflects the test of 'necessary in a democratic society' in Article 10(2) ECHR, which requires the court to weigh whether the restriction is proportionate to the legitimate aim pursued (*Goodwin* at [40]). The ECtHR went on to explain in the same case that 'necessity' must, in any case be 'convincingly established'. At paragraph 45 the court said:
>
> > '...it will not be sufficient, per se, for a party seeking disclosure of a source to show merely that he or she will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he or she bases his or her claim in order to establish the necessity of disclosure.'
>
> ...
>
> 21. In his speech in *X Ltd v Morgan-Grampian* Lord Bridge emphasised the following:
>
> (a) '...where a judge asks himself the question: "Can I be satisfied that disclosure of the source of this information is necessary to serve this interest?" he has to engage in a balancing exercise', (see 41E);
>
> (b) The starting assumptions in that exercise are (i) the protection of sources is itself a matter of high public importance; (ii) nothing less than necessity will serve to override it, and (iii) that necessity can only arise out of another matter of high public importance, being one of the four matters listed in the section, (see 41E-F);
>
> (c) Whether necessity of disclosure is established is a question of fact, not of discretion, but, like such questions as whether someone has acted reasonably, it is one which requires 'the exercise of a discriminating and sometimes difficult value judgment' (see 44C);

(d) The balance is between the weight to be attached to the importance of disclosure in the interests of justice on the one hand and that of protection from disclosure in pursuance of the policy which underlies section 10 on the other hand, (see 44 C-D)."

The impact of the nature of the information

30 The defendant submits that the degree of protection for sources must vary based on the nature and content of the disclosure both because this affects the public interest in protecting sources and it has an impact on the level of protection afforded by article 10.

31 In support of this submission, the defendant relies on *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115 in which Lord Steyn said at 127A:

> "The value of free speech in a particular case must be measured in specifics. Not all types of speech have an equal value."

32 In *PJS v News Group Newspapers Limited* [2016] AC 1081, the Supreme Court considered that "kiss and tell stories" were clearly at the bottom end of the spectrum of importance (compared, for example, with freedom of political speech).

33 In the context of source protection, NGN relies on *Various Claimants v MGN Limited* in which the Court of Appeal held:

> "22. There was some debate before us as to the extent to which the court might vary the weight to be given to the protection of the source dependent on the nature of the information which is sought to be protected. Lord Bridge in *Morgan-Grampian* said at 44 E-F:
>
> > 'One important factor will be the nature of the information obtained from the source. The greater the legitimate public interest in the information which the source has given to the publisher... the greater will be the importance of protecting the source.'
>
> 23. One must be careful how far one takes that proposition. It is certainly not the case that one ceases to afford protection to the source because the source is providing information which is low down on the public interest spectrum. Read as a whole, I understand Lord Bridge's speech to be saying that one starts with the assumption that the protection of the source is always a matter of high importance, and it becomes yet more difficult to override that public interest in cases where there is a real public interest in the information provided by the source."

34 This point is echoed in *Ashworth Hospital Authority v MGN Limited* [2000] EWCA Civ. 334 where Laws LJ said at 537E-G:

> "It is in my judgment of the first importance to recognise that the potential vice - the 'chilling effect' - of court orders requiring the disclosure of press sources is in no way lessened, and certainly not abrogated, simply because the case is one in which the information actually published is of no legitimate, objective public interest. Nor is it to the least degree lessened or abrogated by the fact (where it is so) that the source is a disloyal and

> greedy individual, prepared for money to betray his employer's confidences. The public interest in the non-disclosure of press sources is constant, whatever the merits of the particular publication, and the particular source."

35 Against that background, I turn first to consider the application regarding the witness summonses.

The Witness Summons applications

The claimant's application for permission

36 On 21 April 2022, I granted the claimant permission to rely on the witness summaries of Mr Halls, Mr Boyle and Ms Brookbanks (as well as that of Mr Hamilton): [2022] EWHC 946 (QB), at [78]-[85], [88]). The grant of permission expressly contemplated that the witness summaries which were served on 1 April 2022 would be amended to remove any reference to Ms Watt in the light of the withdrawal of her waiver of her right to source protection.

37 On 26 April 2022, the claimant served amended witness summaries. The amendments made to Mr Hamilton's statement were in the form that Mr Tomlinson had indicated and I had anticipated in my judgment. The references to Ms Watt were removed and the witness summary otherwise remained the same as originally served.

38 The amendments made to the witness summaries of Mr Halls, Mr Boyle and Ms Brookbanks were more substantial than I had anticipated. The references to Ms Watt were removed as Mr Tomlinson had indicated. But in addition the form of the summaries was amended from that contemplated by CPR 32.9(2)(a) ("*the evidence, if known, which would otherwise be included in a witness statement*") to the form contemplated by CPR 32.9(2)(b) ("*if the evidence is not known, the matters about which the party serving the witness summary proposes to question the witness*").

39 The claimant has explained that the change of form was made in the light of the submissions made by Mr Price QC and the information provided on behalf of the applicants. In light of that information, the claimant considered that the evidence of the witnesses was not known and so their witness summaries could only properly be provided in the form of topics to be addressed rather than what they will say (if called).

40 The claimant seeks permission, if needed, to rely on the amended witness summaries. Mr Tomlinson submits that the only change not anticipated in my earlier judgment is one of form rather than substance. I had raised a concern with respect to the summary for Ms Brookbanks (as well as the summary for two other witnesses) that it was in the CPR 32.9(2)(a) form in circumstances where it appeared that it ought to have been in CPR 32.9(2)(b) form, but I nevertheless accepted that the summary made sufficiently clear the topics on which the claimant wished to adduce evidence from Ms Brookbanks (para.87). I did not raise the same concern in respect of the summaries of Mr Halls or Mr Boyle as it has appeared that those summaries reflected what the claimant believed they would say.

41 The amended versions of the witness summaries are very short. In Mr Halls case, the topics are reduced by more than just the removal of any reference to Ms Watt. The original summary referred to two of the articles in dispute in these proceedings of which Mr Halls is the author, namely the Car Crash Article and the Soho House Article. Any express reference to those articles has been removed. The claimant's summary indicates the claimant only proposes to question him about the Gender Selection Article save, perhaps, to the extent that she also

proposes to question him about the witness statement that he made in 2019 which itself refers to the fact that he also wrote the Car Crash and Soho House Articles.

42 In Mr Boyle's case, the original witness summary referred to two articles of which he is the author, the Flooded Basement Articles and the Marriage Article. The amended summary only refers to the Flooded Basement Articles. In Ms Brookbanks' case both versions of the summary refer to a single article, the Pyjamas Article.

43 The defendant contends that the witness summaries ought never to have been in the form that they were originally in and that it was an abuse of process to put them in that form. It does not appear to me on the basis of the evidence currently before me that it would be possible to make any such a finding.

44 On balance, in my judgment it is appropriate to grant the claimant permission, subject to the application to set aside the summonses relating to Mr Halls, Mr Boyle and Ms Brookbanks, to rely on their witness summaries. The extent to which the witness summaries have been narrowed is, however, potentially relevant in considering the application to set aside those three summonses. As I say, there is no application to set aside the summons served on Mr Hamilton and, accordingly, I grant permission to rely on the witness summary of Mr Hamilton.

Applicants' application to set aside the summonses

45 The more substantial application in respect of the witness summonses is the applicants' application to set them aside which is made pursuant to CPR 34.3(4). That provision confers a general power to set aside a witness summons.

46 The witness summaries for each of the applicants provides that they will be questioned about the following matters:

(1) Their professional role.
(2) Their relationship with the claimant.
(3) Any communications which they have with the claimant concerning (a) in Mr Halls' case the Gender Selection Article, (b) in Mr Boyle's case the Flooded Basement Articles, and (c) in Ms Brookbanks' case the Pyjamas Article.

47 In addition, the summary of Mr Halls states that he will be questioned about the witness statement that he provided to the claimant's solicitors on 20 December 2019. In that statement, he briefly addressed his role, stating that the claimant was not the source of the Gender Selection Article and has never provided any story or information to him, and addressed his relationship with the claimant, stating he does not have a personal friendship with her.

48 The evidence provided in the applicants' application states in summary:

(1) Mr Halls was responsible for the Car Crash Article, the Soho House Article and the Gender Selection Article referred to in the witness summary dated 25 March 2022. Questioning in relation to his witness summaries will or is likely to disclose the identity of the source or sources of each article. In addition, he is responsible for the Flooded Basement Articles referred to in the witness summary for Mr Boyle and equivalent questioning will or is likely to disclose the identity of the source or sources.

(2) Mr Boyle is responsible for the Flooded Basement Articles and he provided information for the Marriage Article. Questioning in relation to his witness summaries will or is likely to disclose the identity of the source or sources.

(3) Ms Brookbanks is responsible for the Pyjamas Article. Questioning in relation to her witness summaries will or is likely to disclose the identity of the source or sources.

49 In relation to this evidence, each of the applicants has signed a statement of truth and stated: "An explanation as to why this is so will disclose the identity of the source or sources".

50 The claimant does not seek to override the right to source protection if and insofar as it is engaged. The claimant accepts that if s.10 is engaged that is a high hurdle, and the claimant does not attempt to overcome it. But the claimant submits that it is not engaged, first, on the hypothesis that the claimant is a source of the articles - and I emphasise it is only a hypothesis for the purpose of the argument - the claimant submits s.10 confers no protection on her. This submission is based on the argument that (a) s.10 is only engaged where the source is confidential, and (b) the effect of the claimant's waiver is to place her in the same position as a non-confidential, on-the-record source.

51 Second, on the alternative hypothesis that someone else is the source, the claimant submits that having advanced no reason at all, the applicants have not established a reasonable chance or serious risk of compromising the source's identity.

52 Thirdly, the claimant submits that in any event neither s.10 nor article 10 operates as a bar to questioning the applicants as to whether they have an "exceptionally close relationship" with the claimant. The claimant accepts that the applicants should not be questioned about whether any other person than her is the source of the articles, including in particular Ms Watt, and to do so would be contrary to the protection provided by s.10.

53 Mr Sherborne, Counsel for the defendant, submits that if the applicants are to give evidence, he should be able to cross-examine them about whether the claimant or Ms Watt are sources, the manner in which any disclosures occurred, and the claimant's knowledge in this regard. If this is not permitted, he submits the witnesses should be excluded. He contends that it would be wholly unfair to allow only questions regarding the relationship between the claimant and the journalists and regarding direct communications by her given that the defendant's truth defence is so tied up with the alleged involvement of Ms Watt in leaking the defendant's information to the press, and the allegations that the claimant was responsible for such leaks, having used Ms Watt as a conduit.

54 In relation to the evidence provided by the applicants, Mr Tomlinson submits that the effect of this is undermined by the statement of Mr Halls given in 2019 to which I have referred. He submits that it is clear that Mr Halls was able to answer the questions in 2019 without needing to raise s.10 and no explanation has been provided in the evidence submitted with the application for why s.10 is now engaged when it was not engaged in 2019.

55 Mr Price states that the statement made by Mr Halls in 2019 was made on the basis of what was known to him at the time. On instruction, he states that Mr Halls has acquired relevant information since he made that statement, and he submits that that statement does not provide a proper basis for doubting what is stated by Mr Halls now in the application to set aside the summons, or by any of the other applicants.

56 For the reasons that I have given, I reject the claimant's argument that s.10 should be construed as confined to confidential sources. As I have said, "confidential" is not a word used in s.10, and I do not consider that the section should be so narrowly construed. Even if s.10 were only engaged in circumstances where the source is confidential, in this case no source has come forward to identify themselves as being a source. On the hypothesis that the

claimant is the source, she has not come forward and said so. On the contrary, that is precisely the allegation she denies. On the hypothesis that she is the source, the fact that she is one currently remains unknown, albeit the allegation to that effect is the subject of these proceedings.

57 In my judgment, the existence of a highly publicised allegation does not detract from the point that whether or not she is the source remains unknown. It does not seem to me that the claimant's formal waiver of any right to source protection, while maintaining she is not a source, puts her in the same position as someone who was on-the-record in the first instance or who has subsequently come forward and publicly divulged that they are the source.

58 At first sight, the lack of any explanation for the assertion that questioning in relation to the witness summaries will or is likely to disclose the identity of the source or sources is a little surprising. But the reality is that the very purpose for which the claimant seeks to adduce each journalist's evidence is to assist in defeating the allegation that she was the source for the articles, and the purpose of cross-examination by the defendant would be to assist in establishing that she was.

59 Although questioning about the claimant's relationship with each journalist does not directly entail questioning regarding their sources, in circumstances where the defendant's very purpose in seeking to establish that the claimant had close relationships with these journalists just to prove that she was the source, on the evidence I accept that there is at least a serious risk or reasonable chance that questioning the applicants on the witness summaries will or is likely to disclose the identity of the source or sources.

60 As I have said, the claimant has not sought to contend that if s.10 is engaged then it is overridden by necessity in the interests of justice. As I have found that s.10 is engaged, accordingly the applicants' application for the summonses to be set aside succeeds.

The defendant's application to compel disclosure by NGN

61 As I indicated at the outset, the defendant seeks the disclosure by NGN and production of copies of all the material held by NGN in reliance on s.10 of the 1981 Act and article 10(1) of the ECHR.

62 The defendant makes submissions on the assumption that s.10 is indeed engaged, and NGN asserts, albeit the defendant raises queries as to how it is that all of the documents including the number and general nature of the documents can be said to engage s.10. The defendant also questions whether s.10 is engaged in circumstances where both the claimant and Ms Watt have provided waivers allowing them to be identified as sources. Mr Sherborne questions whether Ms Watt's waiver should be treated as withdrawn in circumstances where the evidence that it has been withdrawn appears to have come third hand from Ms Watt to her husband, and then from her husband to the claimant's solicitors.

63 The claimant supports the defendant's application for disclosure from NGN fully insofar as her source protection rights may be engaged, but insofar as any other individual's source protection rights are concerned the claimant takes a more nuanced approach. In effect, she leaves it to the court to determine whether the necessity test is met. The claimant does not seek to contend that so far as other individuals' source protection rights are concerned that the necessity test is met and their source protection rights ought to be overridden.

64 For the reasons I have already given, I have rejected the contention that s.10 is not engaged by reason of the claimant's waiver of source protection. Ms Watt's waiver has been

withdrawn so I do not accept that it would be fair to address these applications on the basis that NGN or any journalists could now place any reliance on it. In any event, if her waiver were to be treated as extant that would not, for the reasons I have given, prevent s.10 being engaged in her case.

65 It is fair to say that the absolute 'neither confirm nor deny' response, and the statement that no explanation can be given for that, is not one which was anticipated at the pre-trial review. However, I accept that there is no basis for going behind the statement filed by NGN. I have considered whether it might be appropriate to question that statement by engaging in a procedure akin to that adopted where there is a question whether a claim to privilege has been improperly made. However in this case, as I have said in relation to the evidence sought from the journalists, given that the very issue for which the disclosure is sought is to establish or refute the allegations that the claimant, and/or the claimant through the auspices of Ms Watt, is the source, I accept NGN's evidence that it is not possible for it to give reasons for withholding any documents or information which it may be withholding without undermining the source protection.

66 The critical question in respect of this application is therefore whether the source protection rights that are engaged should be overridden. Are the interests of justice in this case so pressing, or to put it another way, of such preponderating importance as to require the statutory source of protection rights to be overridden (see *X Ltd. and Anor. v Morgan-Grampian (Publishers) Ltd. and Ors*. [1991] 1 AC 1 at 44B and 53C).

67 The defendant submits that the balance should come down firmly in favour of ordering disclosure and inspection. Mr Sherborne relies on five key points, all of which he submits militate towards making the order sought. First, the messages sought should have been disclosed and would have already been disclosed to the defendant but for their loss or destruction by the claimant who would not herself benefit from any protection under s.10 when making disclosure from her own documents. The claimant should not benefit from the loss or destruction of evidence.

68 Secondly, the evidence contained in the disclosure could, he submits, be decisive and its exclusion could result in a seriously unfair trial which would be adverse to the interests of justice. Thirdly, both the claimant and Ms Watt produced waivers of source protection under which they said that the journalists would confirm that they were not the source of stories. Mr Sherborne submits that those waivers are an important factor to be taken into account in balancing the respective interests.

69 Fourthly, the defendant believes that Ms Watt and the claimant are the source and in this regard she relies on *Chief Constable of Greater Manchester Police v McNally* [2002] 2 Cr. App. R 37 at [27] ("*McNally*") in which the Court of Appeal said:

> "...although the Judge drew back from treating the case as one in which X had consented to the disclosure of information that he was a police informer, the scope for protecting him was limited by the fact that both sides knew who he was and that the claimant believed, rightly or wrongly, that he was an informer."

Mr Sherborne submits that the same point applies here because the defendant believes the claimant to be the source thus limiting the scope for protecting her as a source.

70 Fifthly, he submits that the leaking of gossip for venal purposes attracts a low level of source protection which means that any countervailing public policy in favour of protection is far weaker here.

71 I accept NGN's submission that the first point does not add significant weight to the public interest in disclosure in the interests of justice. The documents are relevant, and I ordered disclosure against NGN because I consider that it was necessary to do so in circumstances where they could not be obtained from any other source. But the test to be applied now is a different one and the fact that the threshold for making a disclosure order against a non-party was met is merely the starting point. If that were not the case, it would be unnecessary to address source protection rights.

72 In relation to the defendant's second point, while I accept that the disclosure sought from NGN could be highly significant, this is not a case in which the defendant contends that she cannot defend the claim without such disclosure. On the contrary, Mr Sherborne submits that she has a very strong case on the material already available. Nor is this a case in which the claimant contends that she cannot maintain her claim in the absence of such disclosure. Moreover, the citation of *Goodwin* at paragraph 19 of *Various Claimants v MGN Limited* makes clear that even if it were the case that the defendant would be unable to maintain her defence without disclosure from NGN, that would not in and of itself be sufficient to override the source protection rights, albeit it would be a significant factor. I consider that the disclosure already available does provide sufficient elucidation.

73 As regards the waivers, as I have said, I do not consider that any weight can be placed on the waiver given by Ms Watt in circumstances where the evidence provided by the claimant's solicitor at the pre-trial review was that that waiver had been withdrawn. NGN and the journalists will necessarily act on the basis it has been withdrawn, given the claimant's solicitor's evidence, and it seems to me the court should do so also.

74 I take into account as a factor that the claimant herself has given a waiver. It is not one that fully covers the material that was the subject of the Disclosure Order. Nevertheless, the fact that she has waived her right to source protection is a factor of some significance to be weighed in the balance.

75 I do not consider that the fact that the defendant herself believes that the claimant and Ms Watt are sources significantly lessens the public interest in source protection in this case. I have to bear in mind of course that the evidence of NGN as to the need for source protection is not necessarily limited to them in any event; it may mean that it covers other individuals.

76 It also seems to me that *McNally* is a judgment on its particular facts. In *McNally* the trial judge, following the collapse of a murder trial, clearly considered that there was a compelling public interest in enabling the claimant to bring a malicious prosecution claim and the disclosure was vital for that important public purpose. The position in that case is to be distinguished, in my view, from the position here where I am dealing with a private claim between two private parties. No important public interest in disclosure comparable to that which was present in *McNally*, where misconduct on the part of the police was alleged, is present here.

77 As regard to the defendant's final point, while the disputed articles in this case fall at the lowest end of the hierarchy of value given to free speech, as they are in the nature of mere gossip, I accept Mr Wolanski's submission, relying on the passages from *Various Claimants v MGN Limited* and *Ashworth Security Hospital* that I have cited, that the high importance of source protection rights remains even if the nature of the publications is of the type that is in

issue here. The nature of the disputed articles is such that the public interest in source protection is not "elevated" further – as Mr Sherborne put it - than the ordinary starting point. But nor is it lowered by reason of the nature of any publications. Clearly if the free speech in issue was higher in the hierarchy of value then the public interest in source protection might well be elevated above that which arises in this case. Nonetheless, the starting point of the high importance of protection of sources applies in this case.

78 It also seems to me that I am not in a position at this hearing to determine the sources' motives for providing any information that may be shown by the disclosure sought to have been disclosed. And in light of *Financial Times Limited & Ors. v UK* (821/03) at [66], I do not consider that I should place any significant weight on the alleged maleficent, venal or monetary motives of the sources.

79 For the reasons that I have given, balancing the importance of the protection of sources against the public interest in the interests of justice, the defendant's application for an order compelling the disclosure sought from NGN fails. This is not a case in which, in my judgment, the balance falls in favour of overriding the s.10 rights that are engaged.

Conclusion

80 For the reasons I have given, I conclude:

(1) The claimant's application for permission to rely on the amended witness summary of Mr Hamilton is granted;

(2) The witness summonses in respect of Mr Halls, Mr Boyle and Ms Brookbanks are set aside; and

(3) The defendant's application for an order for disclosure and inspection against NGN is refused.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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