Neutral Citation Number: [2025] EWHC 550 (KB)

Claim Number: QB-2022-001397

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Friday, 7th March 2025

Before:

MRS. JUSTICE STEYN

- -

Between:

NOEL ANTHONY CLARKE	**Claimant**
- and -	
GUARDIAN NEWS & MEDIA LTD	**Defendant**

- -
- -

PHILIP WILLIAMS, ARTHUR LO and **DANIEL JEREMY** (instructed by **The Khan Partnership LLP**) appeared for the **Claimant.**

GAVIN MILLAR KC, ALEXANDRA MARZEC and **BEN GALLOP** (instructed by **Wiggin LLP**) appeared for the **Defendant.**

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Approved Judgment

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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MRS. JUSTICE STEYN :

1. The Claimant filed an application notice on 27th February 2025 by which he makes two applications. The first is for an order that the Defendant disclose the professional and certified transcripts of the audio files contained in its disclosure ('the transcripts application'). The second is for an order requiring the Defendant to remove redactions which fall outside the protections afforded by the Sexual Offences (Amendment) Act 1992, and which either fall outside section 10 of the Contempt of Court Act 1981 ('the 1981 Act') or to which the interests of justice exception in that provision applies ('the redactions application').

2. The Claimant's application is supported by the eighth witness statement of the Claimant's solicitor, Mr. Khan. The Defendant has served evidence in response in the form of the sixth witness statement of the Defendant's solicitor, Ms. Fuhrmann.

The transcripts application

3. The Defendant's standard disclosure on 3rd October 2024 included 142 audio files (such as recordings of telephone calls). 60 of those audio files were provided to the Claimant for inspection and 82 of the recordings were withheld pursuant to section 10 of the 1981 Act. In respect of 77 of the audio files, during the course of the journalists' investigation, the Defendant had produced its own contemporaneous notes or transcripts ('the contemporaneous transcripts'). The contemporaneous transcripts were prepared for journalistic purposes, not for the purpose of litigation. The 77 contemporaneous transcripts have been disclosed and were provided for inspection, subject to redactions.

4. The contemporaneous transcripts are produced by otter.AI, an artificial intelligence software service. They are of variable quality. Mr. Khan's evidence includes examples of ten passages some of which are unintelligible, and others are at least difficult to decipher. It is evident, for example, that the software often interpreted the first name of the Claimant, Noel, as the word "no". Mr. Khan's criticisms of the Defendant for not proofreading or correcting errors in the contemporaneous transcripts before they were disclosed (Khan 8, paragraph 6) is misplaced. These were contemporaneous documents that fell to be disclosed as they were, without amendment or correction. The Defendant's solicitors explained that in a letter dated 23rd October 2024.

5. For 27 of the 60 audio files that have been disclosed, at least one contemporaneous transcript has been provided. In relation to those transcripts, the Claimant has the audio file to check the accuracy of the transcript. For 47 of the 82 audio files in respect of which inspection was withheld, contemporaneous transcripts have been provided. The Claimant obviously does not have the audio files to check in respect of those transcripts.

6. Subsequent to the exchange of standard disclosure, the Defendant decided to commission professional certified transcripts of the audio files in its disclosure ('the certified transcripts'). On 23rd October 2024, the Defendant's solicitors informed the Claimant's solicitors that they were commissioning certified transcripts and indicated that they would be prepared to share those if the Claimant agreed to share the cost of

their preparation. In that letter, the Defendant's solicitor stated that such transcripts "will be required for trial in any event".

7. The Claimant did not agree to share the cost. In a letter dated 1st November 2024, the Claimant's solicitors asserted that it was necessary for the Defendant to provide accurate transcripts of the audio files and that any suggestion that the Claimant should bear any proportion of the costs of obtaining certificated transcripts was "unfounded and unreasonable". They wrote that if the Defendant "intends to *rely*" (emphasis added) on the certified transcripts "these should be properly disclosed to the Claimant to enable him to do the same".

8. In a letter dated 11th November 2024, the Defendant responded that the Defendant is not required to produce transcripts, drawing attention to the White Book paragraph 31.15.7, and stating that the Defendant would commission certified transcripts "for its own purposes" and "produce the transcripts in due course as may be appropriate". The Defendant stated that if the Claimant "wishes to obtain copies before then please inform us by return and we shall be happy to discuss sharing costs in this regard".

9. At a hearing on 27th November 2024, the Claimant raised the non-disclosure of the certified transcripts in the context of an application for an extension of time for exchange of witness statements. Master Thornett made clear that if the Claimant considered that certified transcripts should have been provided, he should have made a specific disclosure application.

10. On 20th January 2025, following the pre-trial review that day, the Claimant's solicitor wrote to the Defendant's solicitor reiterating that the Claimant was unwilling to pay for the transcription of the audio files and considered the suggestion he should do so unreasonable and illogical. They wrote "Please confirm whether the Defendant intends to provide copies of professional transcripts for inclusion into trial bundles and if so please do so by 12 p.m. tomorrow, 21st January 2025". The Claimant's solicitors responded on 22nd January 2025 that the Defendant did not intend to provide the certified transcripts, leading counsel having advised that it is not necessary to have transcripts of audio recordings at the liability trial.

11. On 31st January 2025, the Claimant's solicitor asked again for the certified transcripts to be provided by 4th February 2025 stating "in lieu of receiving the professional transcripts, the Claimant will issue an application for the disclosure of the transcripts". The Defendant's solicitor responded on 4th February 2025 that the Defendant had complied with its disclosure obligations by providing the audio recordings and contemporaneous transcripts. They asserted that as it would not be necessary to make use of professional transcripts at trial, "We no longer consider it proportionate to seek to produce agreed transcripts". They also asserted that the certified transcripts were subject to litigation privilege.

12. It was against this background that the Claimant filed the transcripts application on 27th February 2025, and it has been heard on the second day of the trial which began on 5th March 2025.

13. The order that the Claimant now seeks is for disclosure of *all* of the certified transcripts in respect of the 142 audio files.

14. Mr. Khan asserts that the Defendant should have provided certified transcripts as part of its standard disclosure. In my judgment, that contention lacks merit. The Defendant had no certified transcripts when standard disclosure was exchanged and I am not persuaded that it was under any obligation to obtain professional transcriptions of the audio recordings: see White Book at 31.15.7.

15. The question is whether the position is different now that the Defendant has in fact obtained certified transcripts. The Defendant points out that the Claimant has not identified the power he invites the court to exercise in making that order. The Claimant did not remedy this omission in his skeleton argument in response, or oral submissions, although Mr. Williams referred to court's general case management powers. Nevertheless, I consider that the court has power to order specific disclosure of the documents sought, pursuant to CPR 31.12.1.

16. The next issue is whether the certified transcripts are properly the subject of a claim to litigation privilege, as the Defendant contends, as they are documents brought into existence for the dominant purpose of conducting the litigation. The Claimant refutes this relying on *Property Alliance Group Limited v RBS Plc (No 3)* [2015] EWHC 3341 Ch; [2016] 4 WLR 3, in which Birss J observed at paragraph 24:

> "RBS relies on a number of authorities from English and other common law countries' courts concerning the recording of a conversations. The first two English cases are *Grant v South Western County Properties Limited* [1975] Ch 185 and *Parry v News Group Newspapers Limited* [1990] 140 NLJ 1719 CA. These cases establish that a record of a non-privileged conversation, whether it is in the form of a recording, a verbatim note or a transcript, cannot itself be privileged if the underlying conversation was not privileged, see in particular Bingham LJ in Parry's case."

17. In *Parry*, Bingham LJ observed,

> "In the course of the argument, the question was raised as to what the position would be if the oral exchange on the telephone had been taped and the plaintiffs' solicitor had had the tape of this *inter partes* conversation transcribed. Would the transcript be privileged? As I understood him, Mr. Brown, for the defendant, answered that it would not, but he drew a distinction between this hypothetical transcript, assumed to be a full and faithful record of what was said, and a memorandum such as that which Mr. Barton-Taylor made, which inevitably amounts to a precis of what was said and therefore involves a process of distillation or selection. So far as it goes, that distinction is no doubt correct, but it seems to me irrelevant to any issue arising on this appeal. I cannot accept that the intervention of a machine has any bearing on whether a documentary record or an oral exchange between hostile parties in litigation is or is not protected by legal professional privilege. A bare record of what passed is in my view entitled

> to no legal professional privilege whether it is a solicitor's memorandum, a transcript or an exchange of letters."

18. Mr. Millar sought to distinguish both *Property Alliance Group* and *Parry* on the basis that in both cases, the claim to privilege was based on a proposition that the underlying meeting was privileged, and in both cases that contention failed. In *Property Alliance Group*, the claim for privilege in respect of the record of the meeting was parasitic on the contention that the meeting itself was privileged and so the parasitic claim inevitably fell when it was determined the meeting was not privileged. He contends that the principle to be derived is that where the claim to litigation privilege depends on the argument that the dominant purpose of the discussion was privileged, if that claim fails then the parasitic claim that the transcript or other recording of the discussion will also fail. Mr. Millar submits that the claim to privilege in respect of the certified transcripts is not a parasitic one. There is no contention that the conversations that were recorded were privileged.

19. I reject the Defendant's claim that the certified transcripts are privileged. The authorities to which I have referred clearly establish that a transcript of a non-privileged conversation cannot itself be privileged if the underlying conversation was not privileged. In *Parry*, it was not contended that the *inter partes* meeting was privileged. Privilege was only sought to be invoked, as in this case, in respect of the record of the meeting. In my judgment, it is clear that although the Defendant has obtained the certified transcripts from a third party for the purpose of this litigation, the nature of those documents as transcripts of non-privileged conversations is such that privilege cannot attach to them.

20. In deciding whether to make an order for specific disclosure, the court will take into account all the circumstances of the case and in particular the overriding objection. I must consider the proportionality of making the order sought and determine whether disclosure of the certified transcripts is necessary for the fair disposal of the liability trial. The lateness of an application may undermine the claim that the documents are in fact necessary for the fair disposal of the forthcoming proceedings: see the White Book 31.12.1.1, citing *Harris & Ors v The Society of Lloyd's* [2008] EWHC 1433 (Comm), in which an application for disclosure made on the eve of an interlocutory hearing was refused.

21. The basis for the Claimant's application is contained in Mr. Khan's eighth statement. However, he does not address the question why disclosure of the certified transcripts is necessary for the fair disposal of the liability trial, or indeed why they are relevant. I accept in broad terms that they are a category of documents of relevance to the defences of truth and public interest that the Defendant has raised, given that the audio recordings were made during the course of the Defendant's journalistic investigation.

22. Mr. Williams has drawn attention to a message from one of the two main journalists in which, after publication, she expressed concern that she had asked a leading question. He submits that is the kind of material that the Claimant anticipates it will find in the certified transcripts. He contends that it is a simple and confined request for the certified transcripts which the Defendant already holds, and that there will be no adverse consequences for the trial if the order is made. The work of getting to grips with the new material would fall on the Claimant's team as the Defendant

already has them. Mr. Williams strongly refutes the suggestion that there is any risk that granting the order sought would lead to an application to adjourn the trial.

23. Ms. Fuhrmann's evidence is that, as a result of the Claimant's decision not to share the costs of the transcription and the Defendant's subsequent decision that it does not intend to adduce the certified transcripts at trial:

> "15. ...the Certified Transcripts in the hands of the Defendant are not in final form. Had agreement been reached between the parties or had the Defendant decided unilaterally to produce and rely on the Certified Transcripts, further work would have been required in order to finalise the documents, complete any necessary redactions and obtain instructions to produce them.
>
> ...
>
> 22. The trial is about to begin. The Defendant is, save for having to respond to this disclosure application, fully occupied with trial preparation.
>
> 23. The production of Certified Transcripts to the Claimant would require a large amount of work. There are over 100 audio recordings, in respect of which audio files and/or Contemporaneous Transcripts have been produced to the Claimant. The Claimant is apparently seeking Certified Transcripts for all of them without discrimination, despite the fact that he has chosen to put only 12 in the trial bundle. These would need to (i) be re-reviewed in the light of any order by the court, (ii) be checked for consistency across documents relating to the same audio recording as appropriate, (iii) have any amendments to redactions applied, (iv) be reviewed by the Defendant to allow them to provide instructions to produce and, (v) be produced by the Defendant's document review provider. This would be in parallel to participating in the trial. The distraction from trial would be significant."

24. I have some sympathy for the position that the Claimant is in, given, first, I rejected the contention that the Certified Transcripts are privileged; and, secondly, in the initial correspondence it did appear that the Defendant considered it would be necessary to produce professional transcripts at trial, albeit that position was quickly watered down to a possibility.

25. Nevertheless, I am not satisfied that it is necessary for the fair disposal of the trial to make the broad order sought. First, as I have said, there has been virtually no attempt to explain the materiality to the issues of the documents sought. There is no explanation at all in Mr. Khan's statement, the application notice or the Claimant's skeleton argument in response to the Defendant's skeleton on this issue of why the certified transcripts are important. The mere fact that parts of the contemporaneous transcripts are unintelligible is not sufficient. It has not been suggested that any of those passages appear to be of particular importance to the issues, as it would be possible to do by reference to the contemporaneous transcripts if that were the case.

26. The evidence indicates that only about 15% of the contemporaneous transcripts are considered to be sufficiently material to even be included in the very extensive trial bundles. The Claimant has, for many months, had nearly half the files in audio form and there is no evidence that the audio is difficult to understand. In respect of nearly half of those 60 audio files the Claimant also has the contemporaneous transcripts. To the extent that the latter contain unintelligible material, that can be checked against the audio files.

27. I appreciate that in respect of a substantial proportion of the audio files the Claimant has neither the audio nor a contemporaneous transcript, as the audio has been withheld on source protection grounds and either no contemporaneous transcript exists or that too has been withheld on source protection grounds. In the latter case, a certified transcript would also in all likelihood be withheld on source protection grounds.

28. The submission that further material would be likely to show the journalists asking leading questions is not enough. I have been given no reason to think that the extensive material already disclosed would be insufficient to show the approach taken by the journalists. If that shows, for example, that they routinely, or in key cases, or on key points, asked leading questions of sources, the Claimant can ask me to infer they would have taken the same approach in the rest of their investigation.

29. Secondly, the Claimant is seeking a mass of material. The audio recordings in respect of which inspection was given amount to about 27 hours of recordings, and that is less than half the number of such recordings. Transcriptions of 142 audio files is therefore likely to be a large number of pages of documents. I accept Ms. Fuhrmann's evidence that the certified transcripts are not in final form. They would have to be redacted and that work has not been done. An order requiring the Defendant to disclose all 142 certified transcripts would impose an onerous task on the Defendant at a time when it is heavily engaged in the work required for the trial which has begun.

30. The parties have prepared for the liability trial on the basis of the material that has been disclosed and is in the trial bundles. Requiring such a large amount of material to be disclosed now, when the court is imminently going to hear opening submissions and evidence, would be disruptive.

31. Thirdly, the Claimant has known since October 2024 the contemporaneous transcripts were, to some extent, unintelligible and that the Defendant was obtaining certified transcripts.

32. At a hearing on 27th November 2024 the Claimant raised the non-disclosure of the certified transcripts in the context of an application for an extension of time for exchange of witness statements. Master Thornett made abundantly clear that he considered that if the Claimant considered that certified transcripts should have been provided, he should already by then (that is more than three months ago) have made a specific disclosure application. The Claimant did not make an application promptly after Master Thornett gave that indication.

33. Nearly two months after that hearing, on 20th January 2025, the Claimant's solicitors asked the Defendant to confirm whether they intended to provide copies of the certified transcripts for inclusion in the trial bundles. The Defendant's solicitors

replied two days later that they did not intend to do so. The Claimant repeated its request on 31st January and the Defendant again rejected the request on 4th February 2025. Yet this application was filed over three weeks later, only four working days before the trial. Mr. Khan's statement provides no explanation for the lateness of the application.

34. In my judgment, the fact that this application was only made on the eve of the trial, in circumstances where it could have been made months or at the very least weeks earlier, the lateness of the application does undermine the Claimant's contention that the certified transcripts are necessary for the liability trial.

35. The Claimant seeks all the certified transcripts, even though he has chosen to put only 12 of the 77 contemporaneous transcripts in the trial bundle. This is not a focused application. The Claimant seeks a mass of material at this very late stage and yet, as I have said, notably absent from Mr. Khan's statement is any explanation of why the Claimant asserts that this material is important for the trial.

36. If a narrower more focused application had been made, backed up by a compelling explanation as to why this material is necessary for the fair disposal of the liability trial, the lateness of the application would not have been decisive. But no such application, even in the alternative, has been made.

37. In my judgment the Transcripts Application must be refused, given the delay in bringing this application, the consequent disruption to the trial that granting the order sought would cause and the lack of explanation, let alone any compelling one, as to why the mass of material now sought is important to the liability trial.

38. Accordingly I refuse the Transcripts Application.

The Redactions Application

39. In the same application notice dated 27th February 2025, the Claimant applied for an order requiring the Defendant to remove redactions which fall outside the protections afforded by the Sexual Offences (Amendment) Act 1992 and which either fall outside section 10 of the 1981 Act or to which the interests of justice exception in that provision applies.

40. On the face of the application and the draft order, it appears that the Claimant is seeking a review of and removal of redactions across the whole of the Defendant's disclosure. Mr. Khan's evidence limits the application to the removal of any redactions made in respect of 19 named individuals, but the application still continues to apply to any such redactions made in any of the Defendant's disclosure.

41. The Defendant's evidence makes clear, first, that no redactions have been made pursuant to the Sexual Offences (Amendment) Act 1992 and, secondly, that “Where a source’s contribution to the articles had been published by reference to their true name, they were not treated as a confidential source in relation to that information”. Although section 10 applies irrespective of whether a source is confidential (see *Vardy v Rooney* [2022] EWHC 1209 (QB), [26]), the only redactions the Defendant has made in reliance on section 10 are to protect *confidential* journalistic sources.

42. Ms. Fuhrmann's evidence is that some of the redactions referred to by Mr. Khan relate to material that is the subject of legal professional privilege. Some other redactions he has referred to are of material which is irrelevant (such as an e-mail footer and internal business communications). I reject the contention that there is any inconsistency in Ms. Fuhrmann's evidence as to whether redactions have been made on any grounds other than source protection. She makes clear that some redactions were made to remove irrelevant material and some to protect legally privileged material, in addition to the redactions made pursuant to section 10.

43. As regards the application of section 10, Ms. Fuhrmann states:

> "27. ...the Court will understand that I am limited in what I can say about the details of reasons for particular redactions to protect confidential journalistic sources because of the risk that, by so doing, I reveal information which could lead to the identification of a source...
>
> 28. The disclosure process in this claim, including preparation of documents for inspection, was carried out by my firm. Redactions were applied by qualified solicitors who understood (including as a result of specific briefings) the criteria to be satisfied before redactions could be applied for source protection reasons. These redactions were applied only on the basis of Section 10 and were applied to protect the identity of confidential journalistic sources - notwithstanding that Section 10 applies more broadly. For these purposes, I confirm that where a source's contribution to the articles had been published by reference to their true name, they were not treated as a confidential source in relation to that information."

44. This application too has been made on the eve of trial. I accept Ms. Fuhrmann's evidence that:

> "By the time disclosure was given on 3 October 2024, the names of at least 200 individuals had been assessed for this purpose and their source-identifying information redacted as appropriate. The exercise of accurately preventing identification of a large number of confidential sources across several thousand documents was complex and time-consuming. Reviewing or redoing this exercise would be similarly hugely difficult and lengthy."

45. I also accept her evidence that the task was undertaken by qualified solicitors assessing each piece of information on a "text-level and cell-level basis", not applying a blanket approach.

46. In so far as redactions have been made on legal professional privilege or irrelevance grounds there is no basis for questioning the accuracy of the Defendant's solicitor's assessment that the material redacted was privileged or irrelevant, as the case may be. Nor is there, in any event, any application before me for such redactions to be removed.

The relevant legal principles

47. Section 10 of the 1981 Act provides that:

> "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 the 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."

48. Any order of a court as a public authority which requires or causes disclosure of a confidential journalistic source is an interference with the journalist's right to freedom of expression within the meaning of Article 10 of the European Convention on Human Rights. Section 6 of the Human Rights Act 1998 therefore precludes such an order where incompatible with the Article 10 right. That is, where it cannot be justified under Article 10(2) applying the principles adopted by the Strasbourg Court.

49. Section 10 of the 1981 Act therefore becomes the domestic vehicle for the application of the Strasbourg principles: see *Ashworth Hospital Authority v MGN Ltd* [2002] 1WLR, 2033 Lord Woolf CJ at [38].

50. The foundation of the Strasbourg principles is the seminal judgment of the European Court of Human Rights in *Goodwin v United Kingdom* [1996] 23 EHRR 123, which established the strong right to protection of journalistic sources. The European Court of Human Rights stated:

> "39. Protection of journalistic sources is one of the basic conditions for press freedom ... 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 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 the European Convention on Human Rights, unless it is justified by an overriding requirement in the public interest ...
>
> 40. As a matter of general principle the 'necessity' for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is 'a pressing social need' for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In the present context, however, the national margin of appreciation is circumscribed by the interests of democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under

> Article 10(2), whether the restriction was proportionate to the legitimate aim pursued. In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court."

51. The Article 10 right will be engaged not only to protect identification of a *source* but also if the order sought might reveal *information* provided by a source: see *Richard v BBC* [2017] EMLR 22, Mann J, [47]-[48], citing the judgment of Dyson LJ in *Malik v Manchester Crown Court* [2008] EMLR 19.

52. In Vardy v Rooney [2022] EWHC 1209 (QB), I observed at paragraph 17 that, "The initial obligation to establish that section 10 of the 1981 Act is *engaged* is on the journalist or publisher". But that does not detract from the point that once the journalist or publisher has raised the application of section 10, informing the court that material has been withheld on the grounds that there is a reasonable chance or serious risk that disclosure would comprise the identity of a source or might reveal information provided by a source, the onus is squarely on the applicant to show that disclosure should be ordered.

53. Pursuant to section 10 of the 1981 Act the right may only be overridden on grounds of necessity in the "interests of justice or national security or for the prevention of disorder or crime".

54. In *Various Claimants v MGN Ltd* [2019] EWCA (Civ) 350, Floyd LJ, at [18]-[23], summarised the relevant principles in relation to the balancing exercise as follows:

> "18. The protection of journalistic sources has long been recognised to be a principle of high importance. Encroachments on this protection are capable of having a chilling effect on the free flow of information to journalists and therefore amount to an inhibition on the freedom of the press protected by Article 10. Without such protection sources may be deterred from assisting the press and informing the public on matters of public interest.
>
> 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 v United Kingdom* 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:
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> > '...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.'

20. Both parties drew our attention to the helpful summary of principles by Warby J in *Arcadia Group Limited v Telegraph Media Group* [2019] EWHC 96 (QB) at [15], which I accept as correct:

> '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 section 10. It is not enough for this purpose to show that the information is relevant to the claim or defence: *Maxwell v Pressdram* [1987] 1 WLR 293 at 310 G-H (Parker LJ). It is not even enough to show that the claim or defence cannot be maintained without disclosure: *Goodwin v United Kingdom* [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 Co Securities (Insider Dealing) Act 1985* [1988] AC 60, 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 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': *X Limited v Morgan Grampian Publishers Limited* [1991] 1 AC 1 at 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 interest 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 individual sources. 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.'

21. In his speech in *X Limited 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). 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);
>
> (b) 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).
>
> (c) 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 44C-D).

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 44E-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 of 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."

55. The Defendant has made clear in its evidence and submissions that no redactions have been applied to documents to protect sources who have "waived their right to confidentiality" in relation to the relevant material (Fuhrmann 6, paragraphs 27-31). No proper basis for questioning the evidence that redactions made pursuant to section 10 cover material which falls within that section has been put forward.

56. The Claimant contends that I should rule that the interests of justice exception in section 10 applies, but there has been no attempt to focus on particular documents or redactions. Mr. Williams took me to a few instances where the Claimant contends material has been wrongly redacted, for example, where a short redaction follows the name "James", and he contends the redaction is covering the surname of James Krishna Floyd. It seems to me unlikely that is in fact what the redaction is covering as, if the Defendant considers the identity of a source needs to be redacted, it would not disclose the source's first name. Inevitably, the Defendant cannot confirm or deny whether that is the case, but in any event, as Mr. Millar contended, it is of course open to the Claimant to contend at trial, and for the court to find, that an inference can be drawn as to the material that has been redacted. Moreover, it is evident, looking at the material, that the identity of sources who were named in the articles and in these proceedings has, at least to a considerable extent, been disclosed in the documents provided.

57. The Claimant also appears to have overlooked the point that the Article 10 right may be engaged to protect information provided by a source even if the source has been identified. The necessity for interference with journalistic freedom of expression must be convincingly established. I agree with the Defendant that the evidence adduced by the Claimant in support of this very broad brush application does not come close to meeting that test and the court would be acting unlawfully if it were to grant the order sought.

58. The application has also been made remarkably late. The Claimant has had the redacted material for many months. It is too late now to seek an order which would require the Defendant to undertake a review of the entirety of its disclosure consisting, of thousands of documents, while it is heavily engaged in this trial. Such an order would clearly prejudice the Defendant and I have no reason to believe it would be of

any benefit as, on the evidence before me, the exercise has been conscientiously undertaken.

59. The Claimant has plainly failed to convincingly establish that it is necessary to override the important public interest in protection of journalistic sources in the interests of justice. Accordingly, I refuse the redactions application.

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