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Case No: HC-2000-000004

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 04/06/2020

Before :

MR JUSTICE MANN

- -

Between :

Various Claimants	**Claimants**
- and -	
News Group Newspapers Ltd	**Defendant**

- -
- -

David Sherborne, Sara Mansoori and **Julian Santos** (instructed by **Hamlins LLP**) for the **Claimants**
Clare Montgomery QC, Anthony Hudson QC and **Ben Silverstone** (instructed by **Clifford Chance LLP**) for the **Defendant**

Hearing dates: 20th, 21st and 22nd May 2020

- -

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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MR JUSTICE MANN

Disclosure of documents relating to "Nigel"

Mr Justice Mann : JUDGMENT ON THE "NIGEL" CONFIDENTIAL SOURCE

Introduction

1. This is technically an application for inspection of disclosed documents, but the real issue in the application is whether a given individual, to whom the inspection relates, is correctly treated as a confidential source of the defendant and whether the documents should nonetheless be made available for inspection. The situation is a slightly unusual one because in this instance the identity of the individual is known. What the defendant seeks to protect is not his identity, but the fact that he was the source of various tips and/or newspaper stories. His first name is Nigel. I can safely call him that throughout this judgment, though as will appear on reflection I question whether his continued anonymity can be justified.

The background to the disclosure and what has been disclosed

2. In their pursuit of generic evidence, and in particular (for these purposes) in relation to the claim against the Sun where they are faced with a non-admission which requires the claimants to prove their case (without denying it), the claimants have identified Nigel as an apparent contributor of stories. His name was at one point redacted from email traffic with Mr John Sturgis, an associate news editor at the Sun. The emails (from June 2008) claim payment for various tips or stories. He also claimed for "kill fees", ie a payment for a tip or story that the Sun did not use in exchange for not taking the story to a competitor newspaper. Originally his surname was redacted as a confidential source, but the claimants were able to identify him and it is now accepted that they have correctly identified Mr Sturgis's correspondent. It appears he was a journalist on another newspaper who was moonlighting by supplying tips to the news desk at the Sun.

3. The claimants have also identified him as a user of Mr Steve Whittamore, a private investigator whose activities were the subject of an investigation and report by the Information Commissioner. Those activities included unlawful information gathering. A study of Mr Whittamore's notebooks apparently reveals that Nigel was a significant user of Mr Whittamore's services. I was shown a number of entries which showed Nigel commissioning a vehicle check (finding out the owner of a vehicle from its registration number, which cannot be done lawfully), an alleged hospital "blag" ("Royal Free Hosp blag", presumably trying to get medical information by pretence); a phone number "conversion" (trying to find out the owner of a telephone number); and finding an ex-directory number. I was shown only sample entries. There is evidence showing Nigel to be the user of those who supplied

unlawful information gathering services. That has not been challenged by the defendant in this application or otherwise in connection with Nigel.

4. The claimants also maintain that Nigel is the source called "Nigel" who supplied information to Mr Nick Parker, who held a senior position at the Sun at the time (and who still does). It is apparent from disclosed emails that he had a source called Nigel, and it is a reasonable inference that that Nigel carried out medical information blagging, because it is suggested that he had taken over to some extent from another known medical blagger. Mr Parker was ordered to disclose the entirety of a contact list that he had maintained (and which was originally disclosed very heavily redacted). The only redactions permitted were Mr Parker's personal details and details of confidential sources who were not involved in unlawful information gathering. When the redactions were removed the Nigel who is the subject of this application was revealed (forename and surname) on that unredacted list and the claimants seek to infer that that Nigel was not a confidential source or that if he was then he must have been a user of unlawful information gathering techniques. Otherwise he would have remained redacted. The claimants seek to forge a link between the Nigel who is the subject of this application and Mr Parker, to demonstrate knowledge of unlawful information gathering techniques at a high level in the Sun newspaper. An order was made requiring the defendant to reveal the identity of the Nigel who provided information to Mr Parker. I was told by Mr Sherborne, that the defendant has said that it cannot identify that person even after asking Mr Parker.

5. By an order dated 1st November 2019 the defendants were ordered to:

> "… search for and disclose to the Claimants (subject to the Defendant's right to protect its confidential sources):
>
> ….
>
> b. any SAP payment records relating to Nigel [and his associated entities] and any emails on Relativity sent to or from [Nigel's email addresses]."

The "SAP payment records" are records in which, inter alia, payments to contributors are recorded. They have (according to the claimants) provided a fruitful source of information said to demonstrate payment for unlawful activities.

6. The order did not allow for a relevance test to be applied. The only exception was the right to withhold information to protect a confidential source. In response to that order the defendant disclosed 79 emails and (as its solicitors explained in correspondence) withheld 1474 emails and 49 SAP payment records. No further

details or date ranges were provided of emails or payments. It was explained that those documents were withheld under the "confidential source" proviso, and it was also explained that the documents had been reviewed for relevance and none of them were in fact relevant.

7. The claimants now apply for the provision of all the withheld SAP records and emails. They dispute that Nigel qualifies as a confidential source who is entitled to be protected, on the basis that he is a journalist, and is effectively conducting a commercial enterprise in supplying tips. They express deep scepticism that he can have been a confidential source in respect of every tip he provided (which would seem to be a large number judging by the number of emails withheld).

8. The defendant has served evidence in support of its stance. Mr Sturgis has provided a witness statement saying that the withheld documents should not be disclosed because "to do so would identify [the defendant's] source of information". His witness statement goes on to say:

> "4. [Nigel] was a freelance journalist who also previously worked at [another newspaper]. He was a source who provided me with information on a variety of stories and tips for publication over a number of years. This was on the understanding that he would not be identified as the source of any resulting material published. [Nigel] wanted his identity protected for the purpose of such publications. I have been shown copies of certain documents which I understand were withheld from disclosure. I confirm they identify [Nigel] as my source of information for stories or potential stories.
>
> 5. To the best of my knowledge, [Nigel] obtained all the information he provided to me legitimately."

Miss Montgomery confirmed, on instructions, that "certain documents" was not all the documents that are in dispute; Mr Sturgis was shown only some (we do not know how many) of those disputed documents.[1]

[1] When I suggested to Ms Montgomery in argument that Mr Sturgis's "certain documents" were less than the whole cohort of the disputed documents she said that that reading would be unfair and that it should be read in the sense that he had reviewed all of them. It turned out when she subsequently took instructions that the "unfair" reading was in fact the correct one.

The arguments

9. Mr Sherborne questioned most aspects of the claim that Nigel was a confidential source. Taking the points logically, he first queried the adequacy of the evidence of confidentiality. He said it was too thin to amount to confidence which covered the entirety of Nigel's activities, which are likely to have involved many tips. The short assertion of confidentiality did not indicate when it was, whether it was an ad hoc agreement covering some stories only, or how long it might have been expected to last for. He suggested that Mr Sturgis was not particularly to be relied on in this respect, bearing in mind that several documents that he showed me indicated that Mr Sturgis was himself a user or procurer of unlawfully garnered material – he showed me emails in which Mr Sturgis suggested blagging to get information, "turning" a phone number, and of his being provided with the email address and password of a pop star (procured from an employee of the email provider) apparently so that that email account could be perused for useful information. Mr Sherborne also drew attention to previous occasions on which confidentiality for what was said to be a source was claimed, only for the claim to be withdrawn when the claimants pressed on the point, and the source turned out to be a freelance journalist. So averments of confidentiality, he said, should be treated with the greatest caution. He did, however, accept that if there was an actual agreement covering all stories provided by the journalist, then Nigel would be a confidential source for the purposes of the law on such things.

10. If there was a degree of confidentiality which would normally attract protection for the source, then Mr Sherborne submitted that the interests of justice in this case required disclosure. There was no great public interest in the sort of stories that Nigel was likely to be peddling – see the stories which we do know about from the email which started the debate. The defendant has never put forward public interest as justifying any of its activities. He stressed the commercial activities of Nigel, and his profession as a journalist, and said that the protection given to the law was not intended to cover that sort of situation.

11. In terms of significance to the litigation, he said that being able to demonstrate that Nigel is likely to have used unlawful information gathering techniques is another brick in the edifice of the generic case that the claimants seek to make, particularly in relation to the Sun. He will be said to be another manifestation of the generic case and an important link to senior management if the link to Mr Parker is established. There is no reason to protect the procurer of private information unlawfully acquired. Furthermore, a decision against protecting him as a source will (it was said) be significant in enabling the claimants to meet averments by the defendant that there was a confidential source for a number of the stories on which claims have been brought. Mr Sherborne expressed concern that such confidential source claims were untestable at present, and there was a risk that the protection would be unfairly claimed where a journalist (and perhaps this journalist) was in fact the source. The

defendant's claim that the withheld emails were irrelevant was not significant and had to be treated with care anyway.

12. Miss Montgomery said the starting point for the debate was section 10 of the Contempt of Court Act 1981, which made it clear that any source was covered by the protection. It did not matter if the source was a journalist, or if the source was paid. All the issues which Mr Sherborne raised fell to be dealt with under the balancing exercise which has to be carried out in deciding whether the interests of justice required disclosure. Confidentiality is not specified as an essential aspect of the protection – it comes in at that later stage in the analysis. She submitted that there was no principled attack on the Sturgis evidence and no successful attack on its weight, and she sought to deal with some (but not all) of the evidence which was said to demonstrate that Mr Sturgis knew of the newspaper's misuse of confidential information. The clear evidence of a solicitor, in a witness statement, that the emails had been reviewed for relevance and had been found to be irrelevant was a very material matter to put in the balance in considering whether the interests of justice required disclosure. What was protected via the protection of sources is the wider public interest in the principle, and the worthiness or unworthiness of the material which is withheld, or its use, is of no relevance to the application of that principle. A promise of confidence is relevant, but is in fact not necessary. There is a strong presumption in favour of non-disclosure and it has not been rebutted on the facts of this case.

13. The defendant offered to let me see the email traffic so that I could form my own view on relevance. The claimants did not invite me to take that course. In the circumstances that matter was not taken further.

The legal principles involved

14. The starting point for this debate is section 10 of the 1981 Act. It provides:

> "10 Sources of information
>
> 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."

This principle applies to unpublished material – *X v Morgan-Grampian Ltd* [1991] AC 1 at 40G. So in the present case it does not matter (of itself) that the documents may relate to tips that did not result in a story.

15. I was referred to authorities which demonstrate the high public importance of source protection – for example the *Morgan-Grampian* case. The protection exists even if there is some doubt as to whether the source will be disclosed – the fact that it "may" follow is sufficient – see eg *Hourani v Thompson* [2017] 1 WLR 933 at para 26(4). Nor is the protection inapplicable merely because of the lack of public interest (in the strict) sense in its content - *Ashworth v MGN Ltd* [2001] 1 WLR 515 at para 101; *Secretary of State for Defence v Guardian Newspapers* [1985] 1 AC 339 at 348.

16. The nature of the source is irrelevant to the question of whether it is capable of being a source falling with the exception; but it is a factor which can be taken into account in the "interests of justice" consideration. Warby J considered this point in *Hourani*:

> "32. En route to that conclusion the court [in *Stichting Ostade Blade v Netherlands* Application 8406/06, (2014) 59 EHRR SE9] referred to its extensive previous jurisprudence on the protection of journalistic sources, such as *Goodwin v United Kingdom* (1996) 22 EHRR 122, and stated (at [62]) that not every individual "used by a journalist for information is a 'source' *in the sense of the case-law mentioned"* (emphasis added). It concluded that the informant ("T"), who had "donned the veil of anonymity with a view to evading his own criminal accountability" was "not, in principle, entitled to *the same protection as the 'sources'* in cases like *Goodwin* …" (emphasis added). It is in this context that the court stated that it had "established that 'source protection' is not in issue". But it acknowledged an interference with Article 10(1) and went on to consider whether it was justified. The European Court's decision does not seem to me to involve a "bright line" determination of whether T was a source of information but rather an evaluation of the degree of protection to which he was entitled, and a comparison with "classic" journalistic sources. The motives of T were relevant for that purpose, and to the determination of whether he could in any sense be equated with the journalistic sources which were the subject of earlier jurisprudence. The decision certainly provides a vivid illustration of the point that not all sources are equal. It has little if anything of value to offer by way of guidance on the right approach to the interpretation of the word "source" in s 10 of the 1981 Act.

> 33. In my judgment it would be unsatisfactory for the court to adopt an approach to the meaning of the word "source" in s 10 which distinguishes between different categories or classes of person who, as a matter of fact, provide information to others with a view to that information being published to the public or a section of the public. Such an approach would tend to undermine legal certainty. It is hard to see a principled basis on which this approach could be adopted. Distinctions based on objective criteria about a person's role would be rational. But a person who provides information to someone else with a view to publication will often be jointly responsible in law with the person who writes the article or places the material online. That cannot be enough to deprive the person of the status of a source. The further or alternative suggestion appears to be that the court should take account of subjective factors such as motive or purpose, and whether the source was acting in good faith. But there is no reason to suppose that this was Parliament's intention. And such considerations surely do not bear on whether someone is or is not a source of information contained in a publication; logically, they belong to a different stage of the analysis.
>
> 34. The structure of s 10 enables the court to take such considerations into account, if appropriate, at the later stage when it assesses whether source disclosure is necessary for one or more of the purposes specified in s 10. That, in my opinion, is the approach that gives effect to Parliament's intention, and the better approach in practice. It is at this stage that an evaluative assessment can safely be conducted."

17. Thus in any given case, much work is potentially given to the "interests of justice" qualification to section 10. The word "necessary" has been described as lying "somewhere between 'indispensable' on the one hand, and 'useful' or 'expedient' on the other", with the "nearest paraphrase" being "really needed" – per Lord Griffiths in *In re an Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660 at 704. In *Hourani* (in which Warby J cited Lord Griffiths) Warby J went on to acknowledge the need to give effect to European jurisprudence and then had helpful observations on the operation of the "interests of justice" qualification:

> "37. At the same time, it must be recognised that the evaluation of whether information identifying a source is "really needed" in an individual case will always be fact-sensitive. *Stichting Ostade Blade* makes clear that the importance of source protection is not fixed and unalterable; there is a sliding scale. The status and role of the particular source require some evaluation. The closer the particular source

> appears to lie to the paradigm of the "classic" confidential journalistic source, the stronger the presumption is likely to be in favour of source protection. The nature of the information conveyed by the source must also be a relevant consideration. The higher its apparent public interest value, the greater the weight to be attributed to protection of the source. At the far end of the scale from these instances would be the written confession of serious criminality with which the court was concerned in *Stichting Ostade Blade.* A multitude of other considerations may come into play in some cases."

18. In considering such matters I need to have in mind at all times the high principle which lies behind the protection, as appears from such cases as *Goodwin v UK* (1996) 22 EHRR 123 and *Interbrew SA v Financial Ties Ltd* [2002] EMLR 24. I do indeed have them in mind even though I do not set them out verbatim in this judgment.

19. It should be noted that the concept of a confidential source does not feature expressly in the statutory provision. Nonetheless confidentiality, or perhaps the absence of it, would be a very relevant factor to consider in considering where the interests of justice lie. In this case the defendant relies on some sort of express agreement about confidentiality (see Mr Sturgis's evidence). There was a dispute as to the quality of the evidence or averment necessary to raise the point. Ms Montgomery submitted in her skeleton argument that where there is a claim to an agreement of confidentiality it was not necessary to adduce further evidence of such an agreement in order to engage the principles applicable to confidential sources, and she relied on *Sanoma Uitgevers BV v Netherlands* [2011] EMLR 4 at para 64. Mr Sherborne disputed that a mere unsubstantiated averment or alleged agreement was not necessarily enough, and that *Sanoma* did not provide otherwise.

20. This is about the only difference in principle which exists between the parties in this dispute. Paragraph 64 of *Sanoma* says:

> "64. Turning to the present case, the court is of the view that although the question has been the subject of much debate between the parties, it is not necessary to determine whether there actually existed an agreement binding the applicant company to confidentiality. The court agrees with the applicant company that there is no need to require evidence of the existence of a confidentiality agreement beyond their claim that such an agreement existed. Like the Chamber, the court sees no reason to disbelieve the applicant company's claim that a promise had been made to protect the cars and their owners from being identified."

21. I agree with Mr Sherborne that this paragraph is dealing with the question of what level of proof was necessary on the facts of that case. The last sentence shows that the court was satisfied on the evidence that had been produced that there was in fact a promise of confidentiality. What the court is doing in the previous sentences is to remove the idea either that there has to be a written agreement, or that there has to be some form of binding contractual agreement. It is not clear which, but it does not matter.

22. The paragraph has to be put in the context of the dispute which is articulated earlier in the judgment of the Court. Paragraph 53 records the Dutch government's invitation not to accept a submission that a promise had been made to obscure the identities of participants (not a confidentiality arrangement in terms, but in substance the same sort of thing.) The government challenged whether any arrangement that was made was made with each participant. Paragraph 56 records the news media's response:

> "56. The applicant company replied that they could not realistically have been required to produce a written agreement. Their journalists had stated that in order to be allowed to take pictures, they had had to promise the organisers of the street race—who were acting on behalf of all participants—in advance that the identity of participants would not be revealed in any way."

This makes it look as though the debate was about whether there had to be a written agreement. The case of the media was that a promise had been made – presumably oral.

23. In the light of that context, I consider that what paragraph 64 is doing is no more than rejecting the idea that there had to be a written agreement, or that the journalists had not done enough to prove a confidentiality arrangement on the facts of the case. That is the last sentence. I do not consider that the court can conceivably have meant that a mere assertion of a confidentiality arrangement, no matter how implausible or weak, could not (in a relevant case) be challenged as a fact if there was an evidential basis for doing so. An averment of an agreement is no more protected from challenge than practically every averment in litigation; there is no basis in principle for saying that all a journalist has to do is claim a confidentiality agreement and the point is unchallengeable. Like everything else factual in litigation, it is a question of the adequacy of the proof in all the circumstances.

The application of the principles to the facts

24. In my view this matter turns on the application of the "interests of justice" exception to the facts of this case. The defendant surmounts the first hurdle of demonstrating that section 10 is engaged. On the evidence the material which it wishes to protect was (or relates to, in the case of the SAP entries) material provided to a publisher with a view to possible publication. The material therefore qualifies. As I have observed, this is not a case in which the source himself is at risk of identification – he has already been identified. However, his being the source of particular material has not been established, and that falls within the protection of the section. If the material would link him to such material then it is prima facie protected.

25. Mr Sherborne's first case was (in essence) that Nigel did not qualify as a source within the section, because he was himself a journalist and he was providing material on a commercial basis and in a large amount. He was nothing like the confidential tipster who is the person traditionally protected, and he want so far as to describe the arrangement as a sham.

26. As a matter of fact, Nigel certainly was a journalist. That much is not disputed. It is not disputed that he was paid. He is likely to have been paid, or paid more, for published tips, or for some kill fees. It is likely that he provided some tips for which he was not paid. The number of undisclosed emails demonstrates the likely significant scale of his activities. (The disclosed emails are such things as social contacts, with no "tip" content.)

27. I do not consider that Nigel's status as a journalist by itself means that section 10 does not apply. There is no justification in the text of section 10 for distinguishing him based on that status and paragraph 33 of *Hourani,* with which I respectfully agree, makes that clear. Nor does the fact that he was being paid exclude him; it is well know that the familiar type of protected source will sometimes be paid for the information. The scale of the payments does not seem to me to require a different approach either. So the fact that he was paid, or that he was likely to have been providing tips on a large scale (which seems likely, judging by number of withheld emails and the number of SAP payments) are not features which prevent the engagement of section 10. Nor does the combination of all those factors (journalist, payment and scale) have that effect.

28. Accordingly, Nigel is a source for the purposes of the first part of section 10, and his information is capable of being information for those purposes. It does not matter at this stage of the reasoning whether there is an agreement for confidentiality. The withheld material is or is said to be (at least in the main) material which is capable of identifying Nigel as the source of it, and Mr Sturgis speaks to some unspecified part of it as doing that. In a confidential annex Ms Mossman of Clifford Chance (solicitors for the defendant) implicitly (though not explicitly) claims that all the material is material which identifies Nigel as the source. Although the descriptions of

the withheld material as source-identifying material are not as clearly stated as one would have expected, I do not consider that in the circumstances of this case it would be appropriate to assume that only the material selected for Mr Sturgis's review is capable of being source-identifying and the rest is not.

29. That means that Mr Sherborne has to fall back on the "interests of justice" provision if he is to obtain the inspection of material that he seeks.

30. A great many factors are capable of affecting this assessment. I have considered the following.

31. At the heart of this matter is Nigel's position as a journalist who was paid for his tips (or work). For these purposes he was in the position of a freelance journalist. It seems to me that in the majority of cases a person in that position would not be a source who would expect, or be afforded, protection under section 10. They are likely to be in an equivalent position to an employed journalist, for these purposes, and the latter cannot claim protection. It would be unusual for a freelance journalist not to want to receive a credit or some recognition for the work done. Like a news agency, such a person is likely to be right at the other end of the spectrum of types of informant from the informants at whom the section is more typically aimed (see *Hourani* at paragraph 37). They are more likely to deserve, for these purposes, to be treated in the same way as the employed journalist to whom they provide their information. That is not to say that the freelance journalist can in practice never invoke section 10, or can never have his/her material and identity protected under the section; but in my view it is right that their status means there is much less weight on the scales in the non-disclosure direction.

32. That position is, however, changed if there is, either generally or in any particular instance, an understanding or agreement of confidentiality. That would be capable of putting the journalist back up the spectrum. That is why the alleged arrangements for confidentiality are of real significance in this case. They are capable of weighing much more heavily in the balancing exercise that I have to conduct. Mr Sherborne in effect urged me to give the allegations of confidentiality little weight, and to say that it is not plausible to say that the confidentiality arrangements covered every material communication capable of identifying Nigel as a source of a story, or as a source at all. I do not think I can reach that conclusion. Mr Sturgis, tainted though he may turn out to be by his knowledge of, participation in or encouragement of unlawful information gathering techniques (see above) has stated clearly enough that Nigel's information was provided on the basis of confidentiality. The evidence is a little short on particularity, but if there was a short verbal understanding (no document has been produced) then there may not be much to be given by the way of particularisation. It is clear enough as it stands, in its two sentences. No reason for the confidentiality is given. One could surmise that it is because Nigel did not wish his employer to know

he was moonlighting. That is not a reason that can be disregarded for these purposes, both evidentially and in the context of the weight to be given to the confidentiality which apparently arose. Short though the evidence is, it is evidence and is unchallenged (and, probably, unchallengeable on an application such as this). It apparently governs the entire relationship. I reach this conclusion not on the basis that any briefly stated claim will do, but on the basis that there is real evidence on which this court is entitled to rely (see the above remarks about *Sanoma*).

33. We do not know clearly the nature of the material which was provided by Nigel, but one gets a flavour from the apparent nature of the tips referred to in the email from which his identity first appeared, and bearing in mind the whole background to this case it is highly unlikely that his tips or information related to stories of genuine public interest. They are likely to be, as Mr Sherborne submitted, "low value".

34. Mr Sturgis has stated that to the best of his knowledge the information provided by Nigel was acquired lawfully. I give little or no weight to this statement. He gives no details as to the basis on which this was made. There are no details of any discussions he had about tips generally, or particular tips, or anything like that. For all we know it is merely an assumption untested by any questioning.

35. I give some weight to the assertion by the defendant's solicitor that the documents have been reviewed for relevance, applying a generous test (according to Ms Montgomery), and have been determined to be irrelevant. Since the order I made was for disclosure of the documents, and there was no reference to relevance, this is by itself is not a reason for withholding disclosure (or technically inspection), as Ms Montgomery readily and correctly accepted, but it is something which should be taken into account in considering whether the interests of justice require that the material be revealed.

36. This view, however, is tempered by the fact that the defendant's view of relevance may not be entirely correct. I do not question the bona fides of the assessment carried out by the unidentified solicitor or solicitors who carried it out, but the fact is that the claimants' team from time to time find relevance in documents and material which may not be so readily apparent to the defendant's team (though they should be learning by now). The exercises that the claimants' team carry out involve the construction of a jigsaw out of pieces whose significance may not be so apparent to the eyes of the defendant's team. Some of the information in the document may have some not readily perceivable relevance to that exercise in the present case, and I do not rule out that possibility at all. What I do assume, however, is that there is nothing like an overt or euphemistic reference to anything which might be an unlawful information gathering activity of the kind with which we are now familiar in this litigation, and no overt or implicit reference to those who are said by the claimants to be suppliers of unlawfully gathered information. Again, the defendant will be

familiar with those persons and bodies by now. It is appropriate that the defendant should understand what I have taken from its statements as to relevance and irrelevance. If my assumption is wrong then the statement of irrelevance is likely to be wrong and it would have to be reconsidered.

37. It is also relevant to consider the relevance, or the significance, of the potential disclosure to the claimants' case. The significance is identified above. The claimants wish to make a case that Nigel is another brick in the wall of the alleged misuse of unlawfully gathered information, done to the knowledge of senior personnel. They also wish to establish that he was an informant of Mr Parker, and that he used unlawfully garnered information for that purpose. Mr Parker has not claimed or admitted that he is a confidential informant of him, and we know that he features in Mr Parker's contact list. This potential relevance has not been challenged, though the defendant does say that Mr Sherborne has spent a lot of time and money gathering a lot more bricks for his edifice. For my part I accept that the documents might be capable in principle of assisting the claimants in their jigsaw puzzle (unless the defendant is absolutely right about relevance, which I do not fully assume for the reasons given above).

38. In his skeleton argument, and in oral submissions, Mr Sherborne made a further case of relevance in terms of the impact on claims in the litigation that a story has a confidential source. Mr Sherborne asserts that if the payments and emails are not disclosed, it will be possible for NGN to rely on Nigel as a confidential source in an individual case and argue that the information was obtained by the journalist legitimately, with the result that the claimants would not be able to test the assertion. It would be impossible for the Court to resolve any dispute relating to articles contributed by the journalist if blanket confidentiality is pleaded in relation to him.

39. I do not accept this analysis, particularly in the light of the way matters were developed at the hearing. First, it is unlikely that the defendant would say that a particular article was contributed by this journalist. Since his identity is known that would amount to penetrating the very confidentiality which the defendant is trying to preserve. Second, the averment of irrelevance in the evidence of Ms Mossman would be wrong if there was evidence that Nigel was the source of a currently pleaded article. Third, and related to the second point, Ms Montgomery made it clear in her submissions that the withheld material did not relate to any currently pleaded article. She said:

> "But, critically, just so I can just finish off with the confidential evidence, the evidence from the confidential annex to Ms Mossman's statement couldn't be clearer. It is that, so far as these documents are concerned, they are simply not relevant to the issues in the case, and in our submission, since they are not relevant firstly one can dismiss as hyperbole on the part of Mr

> Sherborne the suggestion that Nigel is going to be used as CS cover for any of the stories in the case. He isn't. If the stories in which he was involved were either the subject of claimant-specific claims or generic claims, they would not be irrelevant, they would clearly be relevant, but you have a clear statement that they are irrelevant."

That makes it plain that the defendant cannot assert that Nigel is the confidential (or non-confidential) source for any of the articles. The claimants will, of course, be free to probe claims of a confidential source in the usual way, provided they can do that without seeking answers which will tend to identify the source. They will now be able to do so in the knowledge that none of the sources can be Nigel.

40. Balancing all these matters out, I consider that the defendant has made a case for treating the material as source material which is entitled to protection under section 10, and the claimants have not quite made out a case for saying that the interests of justice require the removal of the blanket protection. I consider that the claims to source protection for the fruits of a journalist who is (for these purposes) a freelance journalist, being paid for tips and effectively carrying on his/her profession, is a weak one, and it is only the confidentiality agreement which gives it any force. If Mr Sherborne had a stronger case on relevance he would probably have succeeded, but part of his case on relevance fails (his point on separate claims of a confidential source) and while he is entitled to invoke support for his generic case (his "additional brick" point), it is, after all, just an additional brick and while one can never tell at this stage it is unlikely to be a cornerstone or keystone.

41. In the circumstances the interests of justice in this case are not sufficient to overcome the ostensible right of source protection.

42. That deals with Mr Sherborne's challenge to the whole of non-disclosure. It does not follow that he should not have any of it. I come back to the nature of the source protection which is claimed. Nigel's identity is known. He is identified as a confidential source. So there is nothing about his identity which requires protection. What requires protection is his identity as a source of a particular story, and the particular information he provided whether it resulted in a story or not. That does not require the blanket withholding of the entirety of documents which the defendant claims. It requires the redaction of material which identifies Nigel as the source of particular information.

43. The defendant is obliged to comply with the order that I made, withholding only such information as the order entitles it to do. It should therefore serve redacted copies of

the documents which have been withheld, redacting only such material as indicates or might indicate the actual source material. That would not include the other parties to emails, or the dates of the emails. So far as the SAP records are concerned, it would seem to me that it would justify only the removal of information which points to the story or tip that was provided. It would not include the dates or amounts of payments. Any redaction should carry a clear indication of the basis of the redaction, which I would expect will usually be something like "identification of story", or "information about tip", or something like that. Although I have heard no argument on it, it would seem to me to be unlikely that the provision of dates will enable any particularly significant link between Nigel and a story which appeared. It may be that this exercise will yield nothing for the claimants, but they are entitled to it under my order, and I would not assume that the exercise will be of no value to their generic case.

44. To that extent, therefore, the claimants are entitled to succeed in their application to see the withheld documents.

45. I finish with remarks about the open identification of Nigel. He was referred to by his first name throughout the hearing and his surname was withheld. The evidence of Mr Sturgis was provided in a confidential exhibit. It was assumed that his surname should be withheld even though the claimants knew it and even though it appears plainly in the order for disclosure, which is an order of this court which is available for public inspection. My recollection is that no steps were taken to preserve confidentiality at the date the order was made. The claimants did not acquire knowledge of his name through any illegitimate means. Although I have assiduously followed the working convention and not named him fully in this judgment, it seems to me on reflection that that protection is no longer appropriate. His cover as a confidential source has in effect been blown. While he and the defendant are still entitled to cover for the information that he provided I now struggle to see the justification for the protection of his name. Section 10 is invoked against the disclosure of the information he provided not against the disclosure of his name. Unless a good reason to the contrary is advanced after the hand-down of this judgment, or its provision in draft to the parties, I am minded to rule that he can be named in these proceedings whenever it is appropriate to refer to him.