Case No: HQ 0000657

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Royal Courts of Justice Strand,
London,
WC2A 2LL

Date: 3 March 2000

B e f o r e :
THE HON MR JUSTICE MORLAND

(1) SIR ELTON HERCULES JOHN **(2) HAPPENSTANCE LIMITED** **(3) WILLIAM A BONG LIMITED** **(4) J BONDI LIMITED** **(5) EVERSHEDS (A FIRM)**	**CLAIMANTS** **(5)**
- v -	
(1) EXPRESS NEWSPAPERS **(a private unlimited company)** **(2) ROSIE BOYCOTT** **(3) RACHEL BAIRD**	**DEFENDANTS** **(3)**

Mr A. Scrivener Q.C. Leading Mr Calver (instructed by Eversheds for the Claimants)
Mr Beloff Q.C. Leading Mr P. Moloney Q.C. (instructed by Richards Butler for the Defendants)

Judgment Approved by the Court for Handing Down (subject to Editorial Corrections).
I direct pursuant to RSC ORD 68.r.1 that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

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The Hon. Mr Justice Morland.

Mr Justice Morland:

JUDGMENT

1 The Claimants seek an order that the Defendants do disclose to the Claimants the identity of their source of the confidential information contained in a draft advice the property of the Claimants and of the precise circumstances in which it came to the attention of the Defendants or any of them.

The Factual Background

2 The First to Fourth Claimants are the Claimants in a High Court action ("the main action") brought against Pricewaterhouse Coopers and Andrew Haydon claiming damages amounting to many millions of pounds.

3 On the 14th January 2000 Mr Valner, a partner in Eversheds, the fifth Claimants, who act for the First to Fourth Claimants in the main action, instructed their counsel, Mr Jonathan Hirst Q.C. and Mr Neil Calver to advise on an aspect of the main action of a confidential nature. They gave a joint advice in writing which contained information confidential to the Claimants

4 The advice contains subject matter which in my judgment is of topical concern and serious public interest deserving discussion and comment in the media but for the fact that it is confidential to the Claimants. I emphasise that there is no suggestion of "iniquity", using that word in its very widest sense.

5 On the 26th January 2000 Mr Calver produced a draft advice using his computer in Chambers. It is reasonable to assume that the advice was headed "draft advice" and had typed upon it the names of Mr Jonathan Hirst Q.C. and Mr Neil Calver bearing the date of the 26th January 2000. It was then delivered in a sealed envelope by hand by Mr Calver's clerk to the offices of the Bar Council. Mr Hirst read the draft advice in his office at the Bar Council and made annotations upon it in manuscript. He then returned to Brick Court Chambers carrying the draft advice. He then discussed the draft advice and his annotations with Mr Calver who made notes on separate sheets of paper.

6 It is reasonable to assume that the draft advice with Mr Hirst's annotations and Mr Calver's notes remained in Mr Calver's room overnight. Brick Court Chambers has electronic Keypads which bar access to every floor of the building. All members of Chambers, pupils and no doubt mini pupils have access to rooms to obtain textbooks and law reports. Employees and cleaning staff have to be given access to rooms.

7 On the 27th January Mr Calver produced the final advice using the draft, Mr Hirst's annotations, and his own notes. The definitive advice was signed and sent to Mr Valner in a sealed envelope. Mr Calver if he followed his normal practice tore the draft advice in half and put it in his waste paper basket.

8 On the 2nd February Ms Baird, the Third Defendant, a journalist working for Express Newspapers who usually writes for the city pages, telephoned Eversheds on three occasions in order to speak to Mr Valner. It was not until 12.15 p.m. on the 3rd February that she managed to speak to Mr Valner. A quarter of an hour earlier she had spoken to a Mr Presland.

9 Suffice it to say that these telephone calls concerned the contents of the draft advice dated the 26th January 2000. I cannot reach a conclusion as to whether or not it was the draft advice with or without Mr Hirst's manuscript annotations or as to whether Ms Baird was referring to the document probably torn in two halves by Mr Calver or a photostat of it with or without Mr Hirst's annotations.

10 The telephone calls were honourably made by Ms Baird in accordance with good journalistic practice. Before making these calls indeed at about 2.45 p.m. on the 2nd February again as I find entirely honourable to protect her source Ms Baird had torn the draft advice into tiny pieces of paper. The elaborate method of the disposal of them in a bin in Dean Street Soho is detailed in the statement of Ms Stanistreet (pages 161-163 of the Court Bundle).

11 On the 3rd February the Claimants obtained from Hallett J. without notice the injunction restraining publication of the advice etc (page 8). There seems to have been some confusion in the mind of Mr Valner as to whether Ms Baird had seen the draft advice dated the 26th January or the definitive advice of the 27th January. It was while Mr Valner with Mr Hirst and Mr Calver were waiting to appear before Hallett J. that Ms Baird sent by fax two letters to Mr Valner and Mr Presland.

12 Before destroying the advice on the 2nd February Ms Baird had made some written notes of its contents and had put three lines of text for a draft article on her computer. With regard to this material the parties have or will have reached agreement as to its disposal.

13 On the 4th February 2000 the Express published an article under the bye-line of Michael Gillard headlined "Sir Elton's hair-raising battle with the taxman". In his article reference is made to litigation against accountants and John Reid (page 160).

14 I entirely accept Ms Boycott's, the Second Defendant's statement (page 51) that the publication of Mr Gillard's article was a complete coincidence. However I think it probable that whoever it was that passed the draft advice to Ms Baird was aware of the Express's interest in the litigation between the First Claimant and his accountants.

15 Brick Court Chambers did not carry out an investigation in an attempt to discover the person responsible for obtaining the draft advice or a Photostat of it which eventually reached Ms Baird. As this fact featured in the submissions of both Mr Beloff Q.C. for the Defendants and Mr Scrivener Q.C. for the Claimants, I shall outline the set-up at Brick Court Chambers.

16 First in the main action not only are Mr Hirst Q.C. and Mr Calver Counsel for the Claimants but also both Leading and Junior Counsel for the Defendants are members of Brick Court Chambers.

17 There are about 55 members of Chambers, 4 pupils, and at any time 3 or 4 mini pupils. There is an employed staff of 25, clerks etc. A firm is employed to carry out cleaning; its personnel would inevitably change due to sickness and holidays but would probably be confined to between 5 and 10 identifiable people. A firm is employed to carry out security services; its personnel would probably be confined to about 3 identifiable people. Additionally daily numerous Solicitors, clients, expert witnesses and others would attend Chambers for consultations etc.

18 It is a matter of speculation who it was that obtained the draft advice or a photostat of it. In the absence of any evidence that there has been a leak of confidential information before or since this incident, it is unlikely that the culprit is in-house. It is more likely to have been an employee of the cleaning firm, the outside waste disposal company or possibly a scavenger on a waste dump. Whoever it was, I consider that it is unlikely that the person would have passed the draft advice direct to Ms Baird. The probabilities are that the culprit passed on the draft advice for financial reward to a professional hawker to the media of confidential information about celebrities.

The Law

19 Mr Scrivener made it clear that he did not suggest that Ms Baird had been in anyway dishonest. In my judgment she acted entirely properly in taking every step to protect her source.

20 I entirely endorse everything said by Ms Boycott in Paragraph 3 of her statement (page 50) and I set it out :-

> "General public Interest in Confidentiality of Journalists' Sources. I wish to make the following points::- (a) It is a long standing journalistic principle not to reveal the source of confidential information provided for possible publication. (b) This principle is recognised by the Code of Practice of the Press Complaints Commission which is annexed to this written statement. Paragraph 15 of that Code provides (page 5 of "RMB1") that; "Journalists have a moral obligation to protect confidential sources of information" (c) Similarly, the Code of Conduct of the National Union of Journalists, which I also annex to my statement, states (at principle 7) (page 7 of "RMB1") that "A

journalist shall protect confidential sources of information" (d) The reason for the rule is that it is vitally important, if the press is to perform its public function in our democracy, that a person possessed of information on matters of public interest should not be deterred from coming forward by fear of exposure. To encourage such disclosures, it is necessary to offer a thorough protection to confidential sources generally. (e) If a newspaper or journalist were known to have disclosed a confidential source, the flow of information to them would be likely to dry up. As is obvious, if flow of information to newspapers dries up, there are serious consequences for investigative journalism and for the publication of material in the public interest, as well as for the newspaper and journalist concerned."

21 A free, independent, and vigorous press is, to echo Lord Steyn's phrase, the lifeblood of democracy in Reg .v. Home Secretary Ex p. Simms [1999] 3.W.L.R. 328 at page 337B he said:-

> "The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them. It acts as a brake on the abuse of power by public officials. It facilitates the exposure of errors in the governance and administration of justice of the country"

22 So that journalists can effectively discharge their right indeed their duty to expose wrongdoing, abuse, corruption and incompetence in all aspects of central and local government and of business, industry, the professions and all aspects of society, they have to receive information including confidential information from a variety of sources including seedy sources and disloyal sources.

23 The codes referred to by Ms Boycott are buttressed by statute in section 10 of the Contempt of Court Act 1981:- "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."

24 It cannot be over emphasised that the principle of non-disclosure of sources remains supreme unless overridden by the establishment of the necessity of disclosure for a specified interest.

25 (See per Lord Bridge in X Ltd ,v. Morgan Grampian Ltd [1991] A.C. 1 at page 40D - 41F and Lord Oliver at page 53C where he says:-

> "The true question, in my opinion, is not "is the information needed in order to serve the interests of justice?" but "are the interests of justice in this case so pressing as to require the absolute ban on disclosure to be overridden?""

26 In Goodwin .v. The United Kingdom [1996] 22 EHR R123 the European Court of Human Rights reviewing the decision of the House of Lords reached a different conclusion on the same facts by eleven votes to seven holding that there had been a violation of Article 10 of the Convention.

27 The European Court stressed:-

> "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 (see, amongst others, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and Resolution on the Confidentiality of Journalists' Sources by the European Parliament 18 January 1994, Official Journal of the European Communities No C.44/34). 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 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest. These considerations are to be taken into account in applying to the facts of the present case the test of necessity in a democratic society under paragraph 2 of Article 10 (art. 10-2). As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established (see the Sunday Times .v. the United Kingdom (no. 2) judgment of 26th November 1991, Series A no. 217, pp. 28-29, para 50, for a statement of the major principles governing the "necessity" test). 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 interest 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 paragraph 2 of Article 10 (art. 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."

28 Necessity is not to be equated with expedience. The need for disclosure has to be compelling or pressing or as Lord Griffiths put it in re an Inquiry under the Company Securities (Insider Dealing) Act 1985 [1988] A.C. 660 at p.704 "really needed".

29 What is meant by the interests of Justice?

30 Lord Bridge said in X LTD at p.43F:-

" It is, in my opinion, "in the interests of justice," in the sense in which this phrase is used in section 10, that persons should be enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives. Thus, to take a very obvious example, if an employer of a large staff is suffering grave damage from the activities of an unidentified disloyal servant, it is undoubtedly in the interests of justice that he should be able to identify him in order to terminate his contract of employment, notwithstanding that no legal proceedings may be necessary to achieve that end. Construing the phrase "in the interests of justice" in this sense immediately emphasises the importance of the balancing exercise. It will not be sufficient, per se for a party seeking disclosure of a source protected by section 10 to show merely that he will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he bases his claim in order to establish the necessity of disclosure. The judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached. Whether the necessity of disclosure in this sense is established is certainly a question of fact rather than an issue calling for the exercise of the judge's discretion, but, like many other questions of fact, such as the question whether somebody has acted reasonably in given circumstances, it will call for the exercise of a discriminating and sometimes difficult value judgment. In estimating 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, many factors will be relevant on both sides of the scale."

31 Lord Oliver said in X Ltd at p.54B:-

"But the public equally has an interest in the maintenance of the rights of private citizens under the law which cannot reasonably be confined simply to the area of actual or contemplated proceedings. The interest of the public in the administration of justice must, in my opinion, embrace its interest in the maintenance of a system of law, within the framework of which every citizen has the ability and the freedom to exercise his legal right to remedy a wrong done to him or to prevent it being done, whether or not through the medium of legal proceedings. To deny to an employer engaged in proceedings to restrain a breach of confidence the opportunity to discover and proceed against a treacherous employee who is causing him loss and damage is no less a denial of justice because the employer is able, and may prefer in the event, to protect himself by the exercise of his legal right to terminate the contract of service rather than by civil proceedings in court or by prosecution. Whether the denial of that right is of such importance as to necessitate overriding the privilege of non-disclosure will depend on the facts of each case, including the magnitude of the damage or potential damage, the opportunities for repetition and so on. In the instant case, however, the potential damage to the plaintiffs' business is very substantial and I see no reason for differing from the conclusion of Hoffman J. and the Court of Appeal that the importance to the plaintiffs of ensuring that further dissemination of the highly confidential material contained in the stolen document should be prevented rendered the discovery that he ordered "necessary in the interests of justice"."

32 I agree with the view of Neuberger J. in O'Mara Books Ltd .v. Express Newspapers Plc [1999] Fleet Street Reports 49 at p.68 who said:-

"Mr Parkes points out that Donnellys are not parties to the present proceedings. That does not appear to me to be a factor of any significant weight. The concept of "the interests of justice" is a wide one and, does not appear to be linked to, ete alone limited to, the interest of persons who happen to be parties to the instant proceedings. That "the interests of justice" is to be given such a wide interpretation is also supported by the immediately following reference to "national security" and " the prevention of disorder or crime""

33 If the Court comes to the conclusion as a matter of fact and judgment that a compelling necessity has been established in the interests of justice, the Court then has to carryout a balancing exercise and decide as a matter of discretion whether to order disclosure of the identity of the source. The Court has to weigh up two competing interests. On the one hand vigorous journalism, a bulwark of democracy, dependent on being fed by sources and on the other the interests of justice, another bulwark of democracy.

34 Lord Bridge put it in this way in X Ltd at p.44D:-

"It would be foolish to attempt to give comprehensive guidance as to how the balancing exercise should be carried out. But it may not be out of place to indicate the kind of factors which will require consideration. In estimating the importance to be given to the case in favour of disclosure there will be a wide spectrum within which the particular case must be located. If the party seeking disclosure shows, for example that his very livelihood depends upon it, this will put the case near one end of the spectrum. If he shows no more that that what he seeks to protect is a minor interest in property, this will put the case at or near the other end. On the other side the importance of protecting a source from disclosure in pursuance of the policy underlying the statute will also vary within a wide spectrum. 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 or intended publisher, the greater will be the importance of protecting the source. But another and perhaps more significant factor which will very much affect the importance of protecting the source will be the manner in which the information was itself obtained by the source. If it appears to the court that the information was obtained legitimately this will enhance the importance of protecting the source unless, of course, this factor is counterbalanced by a clear public interest in publication of the

information, as in the classic case where the source has acted for the purpose of exposing iniquity. I draw attention to these considerations by way of illustration only and I emphasise once again that they are in no way intended to be read as a code."

The Application of the Law to the Facts and Circumstances of the Present Case.

35 Mr Scrivener Q.C. for the Claimants accepted that the injunction already granted, if made final, would prevent any harm occurring to the Claimants from the supply to the Defendants by the source or his intermediary of the draft advice containing confidential information.

36 Mr Scrivener's submissions were directed to the future.

37 In my judgment necessity in the interests of justice has been clearly established in this case.

38 Although I accept Mr Beloff's submission that equity does not accord greater sanctity to confidential information which is the subject of legal professional privilege than say to communications between doctor and patient or lover and mistress, Section 10 makes a specific exception of the interests of justice. Legal professional privilege is a cornerstone whereby justice is achieved (See per Lord Taylor C.J. in Reg .v. Derby Magistrates [1996] A.C. 487 at p.507). Although as Lindsay J. pointed out in Saunders .v. Punch Ltd [1998] 1W.L.R. 986 that case was not dealing with section 10, he described "the preservation and protection of legal professional confidence as a towering public interest".

39 Clearly if there is a person or there are persons around who search for and select confidential information subject to legal professional privilege and hawk it around for passage to the media, the achievement of justice will be endangered.

40 Clients will lose faith in their lawyers. Solicitors will lose faith in Barristers. Members of Chambers and their staff will lose faith in each other. Suspicion and mistrust will abound (see per Schiemann L.J. in Camelot Group Plc .v. Centaur [1999] Q.B. 124 at p.137G).

41 In my judgment whoever came across the draft advice and filched it did it for financial gain. I do not accept he did it because he considered its subject matter deserved publication in the public interest. The draft advice would have attracted his attention as of value because it was newsworthy concerning Sir Elton John, a great celebrity, and a forthcoming big Court case.

42 In my judgment although I cannot rule it out it is less likely that the draft advice was filched or photocopied by a member of Chambers, an employee of Chambers or by Solicitors, clients, witnesses or others visiting Chambers. In the absence of any evidence of leakage before or since this incident of confidential information from Brick Court Chambers assuming that it was filched from Chambers, the most likely culprit is an employee of the Chambers' cleaning contractors. Such a person would have the time to search waste paper baskets when Chambers was deserted. Such a person is in my judgment a much more likely culprit than a scavenger in an outside bin or on a rubbish tip. Whoever was the culprit would probably need a go-between so that the confidential document could reach the journalist.

43 During the argument much time was spent on the relevance of the absence of any internal inquiry to find the source at Brick Court Chambers. Having considered the matter I have reached the conclusion that a worthwhile enquiry conducted from within Brick Court Chambers would have been utterly impracticable. The chance of anyone admitting leaking the draft advice to a journalist or go-between would be minimal. Such an enquiry would fan resentment and suspicion. I accept that the omission of an inquiry by Brick Court Chambers is a factor for me to take in account. The omission of an enquiry may suggest that there is not a compelling necessity in the interests of justice for the disclosure of the source. It is also a factor to weigh in the scales at the final discretionary stage.

44 On very different facts from the present case Sir Peter Pain so approached the question in Special Hospitals Service Authority .v. Hyde [1994] 20 BMLR 75:-

> "What weighs in my mind in considering whether it is necessary to make an order are (1) the failure of Mr Franey or members of the management to make any attempt to discover the source other than making application to this court. (2) the absence of any evidence to show that inquiries, if made, would not have been fruitful; and (3) the facts that the actual disclosure of the matter to be confidential to the press was not of great importance. In view of these considerations I cannot hold that it is necessary in the interests of justice that Mr Hyde's source should be disclosed" "If I had held that I did have jurisdiction to make an order for disclosure then I would, in my discretion, have refused to make one."

45 In Camelot at page 130D an internal inquiry failed to find the culprit.

46 Echoing but strengthening the test set out by Beldam L.J. in the Chief Constable of Leicestershire .v. Garavelli [1997] EMLR 543 at page 551 it has been convincingly established to my satisfaction as a question of fact and judgment that the identification of the Third Defendant's source from which she obtained the draft judgment is compellingly necessary in the interests of justice so as to override the prime need to protect journalistic sources in the interest of ensuring a free press in a democratic society.

47 It is likely that the source or at least the original source is a cleaner employed by contractors operating within the London legal community. Although it may have been an isolated instance so far as Brick Court Chambers is concerned, repetition is very probable by the source in relation to confidential information protected by legal professional privilege emanating from Barristers' Chambers and Solicitors offices generally. The source is likely to be on the look-out for other confidential matter

protected by the legal professional privilege in the hope of the receipt of financial reward. I do not reach my decision because some may regard the source's conduct disreputable. I hearken to the words of Lord Scarman in the House of Lords (Hansard February 10 1981).

> "One knows that if information is going to reach the public through the media of the press of misdoings or inefficiency in high places, it is more than likely (let us face it) that the channel, the agent or the messenger of that information will be some "weasel", some pretty despicable person, and his confidence is essential if the journalist is to get the information. One does not wish to protect the "weasel"; there is no need to protect the journalist; but there is every need to ensure that the right of the public to get the information is supported"

48 Such a source presents a very real and continuing danger to the interests of justice threatening the confidentiality of legal professional privilege, a cornerstone in the achievement of justice. Balancing the competing interests of justice and of investigative journalism, in the exercise of my discretion in my judgment I do not consider it disproportionate to order and do so order the Defendants to disclose the identity of the source. In order to give the Defendants reasonable time to consider my judgment I order disclosure by not later than noon on Wednesday.

49 By agreement confidential sections of this judgment have not been printed out on this copy