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Case No: HC-2016-002849

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 26/05/2017

Before :

MR JUSTICE MANN

- -

Between :

Sir Cliff Richard OBE	**Claimant**
- and -	
(1) The British Broadcasting Corporation	
(2) Chief Constable of South Yorkshire Police	**Defendants**

- -
- -

Mr Justin Rushbrooke QC and **Mr Godwin Busuttil** (instructed by **Simkins LLP**) for the **Claimant**
Mr Gavin Millar QC and **Mr Aidan Eardley** (instructed by **BBC Litigation Department**) for the **First Defendant**
Mr Adam Wolanski (instructed by **DWF LLP**) for the **Second Defendant**

Hearing dates: 4th & 5th May 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE MANN

Mr Justice Mann :

Introduction and the parties

1. Sir Cliff Richard is a well-known entertainer whose career dates back over 50 years. On 14th August 2014 his flat in Sunningdale was raided by the South Yorkshire Police (the second defendant - "SYP") seeking material in connection with an investigation of child abuse. Mr Dan Johnson, a journalist working for the first defendant, had been told of the raid in advance, and as a result the BBC was able to be in place to cover it as it happened, which it did with journalists, photographers and a helicopter. It was thus able to broadcast its occurrence more or less concurrently and did so, giving apparently extensive coverage both at the time and subsequently. In due course the police announced that there would be no further investigation into Sir Cliff.

2. That has led to the present action. It is an action based on infringement of what are said to be Sir Cliff's privacy rights and his rights under the Data Protection Act 1998. In it Sir Cliff pleads that Mr Johnson had found out about the existence of an investigation into him from a person involved in, or from a person associated with, Operation Yewtree, which is a Metropolitan Police umbrella operation into historic child abuse. The Metropolitan Police asked SYP to conduct the investigation into Sir Cliff. It is said by both Sir Cliff and the SYP that Mr Johnson was able to use information about his being the subject of the Yewtree investigation to get more information out of SYP, and in particular to provide him with advance information of the raid. It is the claimant's case that SYP was "strong-armed" (a word used by his leading counsel on a previous occasion - the same word is used by the claimant in his pleading) into giving Mr Johnson advance information about the raid because, as he explained to SYP, he had already been told about the investigation by a Yewtree source and SYP felt that if it did not give Mr Johnson some information, Mr Johnson would reveal the investigation into Sir Cliff before SYP was ready to launch its raid. SYP makes a similar case, saying it was "manipulated". Whether Mr Johnson said anything about Yewtree to SYP is contested by the BBC, which says he did not. Sir Cliff has made a Part 18 request about Mr Johnson's knowledge of his source which the BBC wishes to be able to decline to answer on the basis that it risks exposing a journalistic source, or otherwise requires the disclosure of information about a source which it ought not to have to provide. That is (in outline) the question which I have to answer.

3. Mr Justin Rushbrooke QC led for the claimant; Mr Gavin Millar QC led for the BBC; and Mr Jason Beer QC led for the SYP on the case management conference of which this application formed part but did not take a stance on, or make submissions on, the application with which this judgment is concerned.

The request and its alleged relevance

4. This point at issue starts with the pleaded cases. Paragraph 6 of the Particulars of Claim marks the start of a section of pleaded facts which makes it clear that it is part of the claimant's factual case that Mr Johnson approached SYP on 14th July 2014 on the basis that he had been told about the investigation into the claimant by a source within Operation Yewtree and told SYP that. This was repeated the next day. The claimant claims, inter alia, that he had a reasonable expectation of privacy in relation to the existence of, and the facts underpinning, the investigation and that they would remain private and not disclosed by SYP. The detail of this pleading does not matter for present purposes, but the matters in respect of which privacy is claimed include the obtaining of the search warrant and the date, time and location of the intended raid. Paragraph 42 pleads:

> "'42.1. Mr Johnson knew full well that the information he had acquired from a source within Operation Yewtree had been disclosed to him covertly and improperly: self-evidently it was not provided to him formally or on the record by a police force or other investigating authority; and it would have been obvious to him that the person disclosing it to him was not authorised to do so and was likely to be breaching confidentiality in respect of highly sensitive police investigations and committing a criminal or disciplinary offence by doing so;
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> 42.2. Further, and in any event, Mr Johnson knew that the SYP had not wanted him to run a story naming the Claimant as the subject of an investigation into an alleged historic sexual offence, and that the only reason they had agreed to cooperate with him was because of his threat to broadcast a story in which the Claimant was named before the SYP had had the opportunity to carry out a search, which would have risked undermining the investigation. In other words, because he had effectively strong-armed the SYP into providing the Confirmation and making the Agreement with him;
>
> 42.3. Mr Johnson and his supervising editor or editors knew or ought to have known that, for strong public policy reasons, the police were not permitted to name criminal suspects prior to their being charged save in exceptional circumstances; and that (for obvious reasons) those same public policy reasons applied to disclosure by the media ...

> 42.4. in the premises, and in any event, neither Mr Johnson nor any relevant BBC editor had any reasonable grounds to believe, and cannot have reasonably believed, that in all the circumstances it was in the public interest to name the Claimant as a suspect in an investigation into a historic sexual offence against a minor, let alone to broadcast a story about the investigation and the search in the way that he did;"

5. The prayer contains claims for expenses, damages, a declaration as to unlawful conduct, the rectification or blocking of personal data and a further enquiry as to special damages.

6. Probably anticipating the sort of debate that took place in front of me, the BBC pleaded in its Defence:

> "5. The BBC asserts its right and the rights of its reporter Mr Johnson, to withhold information which may lead to the identification of the Confidential Source referred to at paragraph 9 below, and any information tending to identify the Confidential Source, including whether the Confidential Source was from within Operation Yewtree (which is neither confirmed nor denied)."

7. Paragraph 9 reads:

> "9. Dan Johnson is a reporter for BBC News and was based at the material time in Newcastle upon Tyne. On or about 9 June 2014 he was in contact with a person with whom he had dealt on a number of previous occasions and whom he regarded as credible ('the Confidential Source'). As a result Mr Johnson believed that SYP was investigating the Claimant for an historic sex offence involving a minor."

8. Paragraph 33.5 disputes the contention of a reasonable expectation of privacy in relation to the fact that a person is the subject of a police investigation. Paragraph 39 raises a defence of public interest.

9. Paragraph 40 responds to paragraph 42.1 of the Particulars of Claim. So far as relevant it reads:

> "40. As to the matters identified in paragraph 42 as allegedly providing further support to the Claimant's case:
>
> 40.1 Paragraph 42.1 is denied. The only information provided by the Confidential Source to Mr Johnson was that set out in paragraph 9 above. No admissions are made as to whether that information was provided to him covertly, improperly or amounted to any breach of confidentiality, criminal offence or disciplinary offence by the Confidential Source;".

10. Paragraph 40.4 repeats the public interest defence and says that:

> "Insofar as it may be relevant, Mr Johnson and the relevant editorial staff believed that to be the case [i.e. that publication was in the public interest] and, for the same reasons, had reasonable grounds for their belief;".

11. The claimant pursued the question of the source in a Request for Further Information dated 18th January 2017. The respondent provided the following information under paragraphs 5 and 9 of its Defence:

> "1. The source was not an open source. The source provided information to Mr Johnson in confidence and on condition that Mr Johnson would protect the source's identity. These are familiar attributes of a confidential journalistic source."

12. Request 2 and its answer is the one which is in issue in the application before me:

> "2. Please state whether or not Mr Johnson's source was (to Mr Johnson's knowledge or belief) from within Operation Yewtree or a person who had obtained that information from Operation Yewtree. (For the avoidance of doubt, the Claimant contends that for the First Defendant to answer this Request will not require the First Defendant or Mr Johnson to disclose the identity of their individual source or any information that will create a reasonable chance of this occurring. As such, no issue arises under s10, Contempt of Court Act 1981.)
>
> **Response**

> 2. The information sought by this request, if disclosed in these proceedings, may lead to the identification of Mr Johnson's source. The First Defendant respects the ethical obligation of Mr Johnson as a journalist to protect his source. Accordingly the First Defendant does not respond to this request. Its case is, in any event, sufficiently particularised at paragraph 9 of the Defence. The First Defendant does not advance any case in relation to the source or Mr Johnson's contact with the source beyond that pleaded at Defence paragraphs 5 and 9, and as explained in Response 2 above."

13. The claimant has clarified his position by saying that he would be content with a Yes or No covering both limbs of its question – that is to say, the claimant does not require a separate answer in relation to each part of the question (one relating to a source within the Operation and one relating to a person who obtained the information from a person within the Operation). The BBC maintains its pleaded stance.

14. In the course of the run-up to the hearing before me the BBC sought to avoid the debate by proffering an agreed assumption on which the case could take place. In a letter dated 28th April 2017 its legal adviser said:

> "We have heeded those indications [by which was meant suggestions made by me on a previous hearing] and in lieu of answering the Request, the BBC is prepared for the case to be determined on the assumed basis that the Confidential Source was under an obligation to treat information about the investigation into the Claimant as confidential."

That was not acceptable to the claimant who responded with his own proposal which was:

> "… the BBC accepts that the same rights of privacy and confidentiality can be treated as attaching to the information provided by Mr Johnson's source as if it had come from within Operation Yewtree".

That was not acceptable to the BBC. Thus the technical issue arrived before me.

The issues to which the point may go

15. It is necessary to consider this point because, while the BBC does not go quite so far as to say that the question and answer do not go to anything relevant in the action, it is part of Mr Millar's case that the point is not of great significance, and its real significance is something that has to be put into any balancing act that the court has to perform between the BBC's right to respect the confidentiality of its source and such rights as the claimant would otherwise have, in the course of the litigation, to have an answer to the question.

16. The point about the source is said by the claimant to be capable of going to two separate issues in the case. The lesser point (as I find it to be) is a dispute of fact between SYP and the claimant on the one hand (relying on evidence from SYP) and the BBC on the other as to what was said by Mr Johnson to SYP when he first approached them. The former parties say that he told SYP that his source for his knowledge about the investigation into the claimant was someone within Operation Yewtree. The BBC's case is that he did not say anything about the identity or qualifications of his source. Whether Mr Johnson said anything about Yewtree is capable of being relevant to that debate. At one level this is purely a dispute of fact, and insofar as it is necessary to assess the weight of the need for information from Mr Johnson for the purposes of the litigation (as part of a balancing exercise that has to be carried out - see below) then I would give it little weight. In fact the point probably has a greater significance than that. It would, in my view, be capable of going to the relative levels of culpability (if any) between SYP and the BBC because it would be capable of going to the level of "pressure" (if any) that Mr Johnson exerted on SYP in a situation which ended up with SYP informing him about the intended raid. However, this particular point would be one which SYP would have been expected to take on the application before me, and SYP did not make that case. Furthermore, it was not the major plank in Mr Rushbrooke's case either. He referred to the dispute of fact and its potential relevance as to what happened later in the dealings between Mr Johnson and SYP, but did not really press it as being of great significance in this context. I shall therefore acknowledge that an answer to the claimant's question is capable of being significant in this context but not of great weight in a balancing exercise.

17. The more significant point is said to be Mr Johnson's state of mind and awareness. Mr Rushbrooke will argue that his case, and particularly his rebuttal of the public interest defence, will be very materially strengthened if it is the case that Mr Johnson knew his source was within, or got the information from, Operation Yewtree. It is the knowledge that is important to him. That point is made by the counter-proposal for assumptions that he made (see above). He will wish to argue that if the source was known to be Yewtree-related then that goes into the balance in assessing public interest. Knowledge that his information came covertly from a police source, against the background of a public interest in maintaining the confidentiality of police sources, will make it harder for Mr Johnson to rely on public interest.

18. Mr Millar submitted that the point was not that important. The case is really all about the publicity that was given to the raid on 14th August. The original contact between Mr Johnson and SYP did not cause anything to be broadcast. It merely triggered further dealings, which eventually led to the broadcast. The right to privacy, and any public interest point, relates to the disclosure which arose from the reporting of the raid. He also suggested that at the trial Mr Rushbrooke would be likely to get some way to what he wanted by virtue of the fact that Mr Johnson would not be able to make a positive case as to his source and the court could be invited to draw an inference in favour of the claimant which might get a finding of the nature that Mr Rushbrooke apparently hopes to get (a positive answer to the question). The BBC would be, to some degree, hamstrung by the position it wishes to be able to adopt. Mr Millar did not go so far as to say that the point was of no relevance to the proceedings, but the thrust of what he said was that it was not going to be a really important, central factor.

19. I will deal first with the procedural aspects raised by Mr Millar as to the position he will be in at trial. I do not think that this is a strong point. Mr Millar obviously does not think that it is inevitable that the BBC would be unable to resist an inference as to the source, first because he did not say so, and second because if the BBC thought that then they could accept the assumption which has been proffered by the claimant. The BBC obviously thinks that there is something worthwhile fighting for in this area. I will not assume that the claimant is likely to be in the same position by the end of the trial as he would be in if he had got a positive answer to the question.

20. I turn therefore to the possible significance of a positive answer to the question (which is what the claimant's pleaded case anticipates and doubtless hopes for). At this stage it is not necessary, or appropriate, to make a detailed and full finding as to the effect of one answer or the other. That is a matter for trial, in the light of the facts as they eventually emerge. For the present it is sufficient to form a view as to the possible significance of the finding that Mr Rushbrooke will seek and to assess the weight of that point which will ultimately have to be put in the balance against the interests of the BBC in not revealing the identity of its source or not revealing source information.

21. I think that Mr Millar is right to say that the greater focus of the case will be on the broadcast. That is the culmination of the events which went before it, whatever they were, and its status as an infringement of Sir Cliff's rights will have to be considered and determined. A large part of the success of the claim will stand or fall by that. However, what went before is far from irrelevant. Mr Rushbrooke says that the public interest defence, or the justification for publication, may well be affected by Mr Johnson's state of knowledge or belief as to the confidentiality attaching to his source. It is the BBC's case that SYP volunteered information (without pressure) to Mr Johnson, and that that goes to whether the claimant had a reasonable expectation

of privacy in relation to the information. In paragraph 37.2 of its Defence the BBC pleads:

> "37.2 The fact that SYP had voluntarily confirmed to Mr Johnson that the Claimant was the subject of its investigation, and had volunteered the information identified in paragraphs 26.1-26.5 is highly material to the question whether the Claimant had a reasonable expectation of privacy in respect of any of the information published. Paragraph 33.8 above is repeated;".

Paragraph 33.8.3 reads:

> "33.8.3 SYP had decided to (a) confirm to the BBC that it was the Claimant who was being investigated; (b) provide the BBC with the other information identified at paragraphs 26.1-26.5; and (c) provide its own Press Statements (which it additionally published on its own website), all with the knowledge and intention that such information would be broadcast and/or used to enable the BBC to film and report on the search."

22. All that presents a picture of voluntary disclosure which is said to be relevant to the reasonable expectation of privacy. If it is in fact the case that the disclosure was pursuant to the sort of "duress" (my word) that Mr Johnson is said to have applied, and if he was able to apply that because he had got prior information from elsewhere, and if he acquired that prior information knowing that it came from a source who should not have disclosed it to him, then that is all material which challenges the way in which the BBC puts its case factually and legally. The issue is pleaded as arising in relation to whether there was a legitimate expectation of privacy, but it may also feed similarly into the public interest defence. I therefore agree with Mr Rushbrooke that the point of which he now seeks clarification is one which goes to an important part of the case and is one of real weight and significance. As I have indicated, its precise significance cannot be determined until trial, but at the very least it cannot be said that it can be dismissed as being the sort of fringe point that Mr Millar says it is, and in fact in my view it will be right to go much further and say it is a point of weighty significance in the case even if it is not central (in that it might be the case that Mr Rushbrooke could win without it.)

23. I reach this conclusion without, at this stage, placing much reliance on *Axel Springer AG v Germany* [2012] EMLR 15. In that case the ECHR accepted that the balancing of a journalist's right of freedom of expression against the right of an individual to privacy involved considering, inter alia, the "Method of obtaining the information and its veracity" (see paragraph 93). It may be said that the "method" criterion speaks

more to the accuracy of the information than anything else, but I do not need to dwell on that because I am able to reach my conclusion without considering how far that case goes.

The likelihood of the disclosure of the source

24. Mr Millar's case did not turn wholly on the likelihood or probability that a Yes answer to the question (if accurately given) would imperil the confidentiality in the identity of the source, but part of his case turns on the level of risk, and I therefore have to consider it notwithstanding the fact that the claimant has expressly disclaimed an intention to ask for that source.

25. Although the question asked by the claimant does not go directly to the identity of the source it is not disputed, as a matter of principle, that the answer to an apparently general question, coupled with the surrounding circumstances, may be such as to enable a source to be identified, or seriously raise the risk that that will be the case. Thus if it were the case that only, say, 5 officers were involved in Operation Yewtree then a Yes answer would narrow the field of possible sources to such an extent as (potentially) to make it very much more possible to identify the source when further inquiries were made.

26. Accordingly the BBC wished to have the opportunity to put in evidence going to that risk. The evidence comprised 3 witness statements from BBC witnesses (including Mr Johnson) going to the importance, as a matter of principle, of preserving the confidences of a source, and one from Commander Cundy of the Metropolitan Police giving details of the numerical scope of Operation Yewtree and those who might get information from it. The relevant evidence can be summarised as follows:

(a) A journalist's credibility with sources or potential sources can be seriously if not fatally damaged if the journalist identifies a source or if confidences are breached.

(b) 119 people (officers and civilians, including secretaries) had access to the computerised records of the inquiry which contained details of the fact that the claimant was under investigation.

(c) An unspecified number of senior officers above Detective Chief Inspector would have been involved in discussions and meetings about the investigation. Bearing in mind the ranks, these numbers would seem to be small,

(d) Staff in the Directorate of Media Communications and the Directorate of Legal Services would have known something about the investigation. Numbers are not given.

(e) Other unknown associates of the individuals in (b), (c) and (d) could have found

out about the investigation via unauthorised disclosures by those within the operation.

(f) The Metropolitan Police carried out an inquiry in the form of a scoping exercise to assess whether there was evidence of a leak from within Operation Yewtree. The conclusion was there was no evidence of such a leak.

27. It follows from that that a very significant number of people had access to the information. If the matter stopped there it would be right to conclude that a Yes answer to the question would not create a very serious, or indeed very plausible, risk that the source would be identified. 119 people plus others legitimately told, plus unknown others who might have been told illegitimately, is too wide a field to admit of any obvious narrowing.

28. However, that is not necessarily the end of the narrowing process. Mr Millar pointed out that the candidates could be narrowed by time frame - the disclosure had taken place by 14th July 2014, and the BBC's case is that Mr Johnson was first approached by his informant on 9th June. That could assist investigators in narrowing the field, because the informant must have had access to the database prior to that date, and logs should show who accessed it and when. Furthermore, the police could investigate phone records to see if there was telephonic contact with Mr Johnson via a traceable number. Mr Johnson described the source as "credible", which might be a further narrowing feature.

29. Mr Millar relied on all that as presenting a picture in which the identification of the source became a much more likely event than might at first sight appear. Coupled with that was the suggestion that a Yes answer would inevitably lead the police to investigate (again), so an investigation which would go into these matters (and deploy other techniques available to the police) would be likely to take place. The first investigation was a scoping exercise which would not be treated as sufficient reason for not carrying out a further one. He even suggested that the claimant would demand that the police should investigate (an intention disavowed by Mr Rushbrooke, backed up with an undertaking not to do it).

30. Whatever the precise scope of the previous inquiry, it would appear to have been a serious one. The suggestion that the leak came from Operation Yewtree had been live ever since the raid. A letter from Assistant Commander Hewitt of the Metropolitan Police dated 29th August 2014, addressed to Mr Keith Vaz MP (Chair of the House of Commons Home Affairs Select Committee) referred to concerns about a leak from Operation Yewtree as early as the day after the raid, and the great concern which the Metropolitan Police had about that suggestion. The Chief Constable of SYP had also expressed his concern to the Metropolitan Police. As a result, as the letter explains, an investigation was being carried out - presumably the investigation referred to by Commander Cundy. A letter of 10th February 2015 to Mr Vaz, this time from the

Chief Constable of SYP, said that the Metropolitan Police had confirmed to SYP that the Metropolitan Police had not been able to trace the original source of the leak and had concluded its investigation. This is not surprising in the light of evidence from senior police officers to the Leveson inquiry to the effect that leak inquiries were difficult to conduct and were rarely able to identify the person responsible (see the inquiry report at paragraph 2.119).

31. I conclude from this that one police inquiry into whether the leak was from Yewtree has already taken place and failed and on the evidence there is no obvious reason to conduct a further inquiry. Mr Millar's submissions proceed on the assumption that a Yes answer by Mr Johnson would be a significant enough act to trigger such an inquiry. I do not think that that is likely to be the case.

32. As will appear, part of the process of weighing the effect of the BBC's rights to withhold information involves weighing the risks of revealing the identity of a source. On the basis of the evidence summarised above I regard the risks as very low although they cannot quite be regarded as non-existent. The number of potential disclosers revealed by Commander Cundy is too large to allow inferences to be drawn without some further narrowing. The scope for narrowing suggested by Mr Millar involves a decision to conduct a further inquiry and some possible investigatory techniques which amount to speculation. All that does not demonstrate a particularly significant risk of a new inquiry, or a significant risk that such an inquiry would reveal the source. The accumulation of these improbabilities means that the chances of a Yes answer leading to an identification of the source are low.

33. For the sake of completeness I should say that it was not suggested that a No answer would pose any risk at all of revealing a source.

The principles to be applied in this application

34. When the present journalistic issues were first raised the strong suggestion was that the BBC would be seeking to say that an answer to the disputed question would be likely to lead to (or perhaps would seriously risk) the disclosure of the journalist's source. To that end the BBC sought to put in evidence on the point, including the evidence which emanated from the Metropolitan Police and which is referred to above. The BBC still maintains that case, but also now advances an alternative, and lower, case which invokes protection for any significant disclosure of material about, or emanating from, a source even if it would not risk disclosure of the identity of the source.

35. My conclusion expressed above as to the level of risk or likelihood of disclosure means that the first way in which Mr Millar puts his case does not arise, but the status of the point, and the authorities on it, are part of the background to his alternative way of putting the case and it is necessary to deal with them.

36. Although the importance of protecting a source is recognised by section 10 of the 1981 Act, it is also a right protected by Article 10 of the European Convention on Human Rights. It is regarded as a negative right for the purposes of Article 10. The point arose in *Goodwin v United Kingdom* (1996) 22 EHRR 123. In that case a UK claimant sought an order requiring a journalist to divulge the identity of a source, and also sought the delivery up of copies of confidential documents. The UK courts granted that relief. The Commission acknowledged a "negative right" implicit in Article 10 not to be compelled to provide information or to state an opinion (paragraph 48):

> "Compulsion to provide information as to a journalist's sources must in particular constitute a restriction on the capacity of a journalist freely to receive and impart information without interference by a public authority."

37. Thus the prima facie right of a journalist not to divulge his or her sources was brought within Article 10. The European Court of Human Rights explained the need to protect sources and the care required before that protection could be over-ridden as follows:

> "39. The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance.
>
> Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement *in the public interest.*

> 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 Article 10(2).
>
> 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 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 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."

38. The chilling effect should be noted. It is a point to which I return below. The italicised words are expressions relied on by Mr Millar as containing tests to be applied in two different circumstances, and again I deal with this below.

39. Section 10 of the 1981 Act seeks to achieve the same result, and now has to be read in the light of Article 10. In that respect Mr Millar relied first on *Interbrew SA v Financial Times Ltd* [2002] EMLR 24 (another case where the identity of a source was sought) where Sedley LJ acknowledged the need to read section 10 compatibly with the Convention.

> "30. The purpose of s.10 of the Contempt of Court Act 1981 is to limit to the necessary minimum any requirement upon journalists to reveal their sources. It has now to be read and applied by our courts, so far as possible, compatibly with the Convention rights: Human Rights Act 1998, s.3(1). For reasons touched on earlier in this judgment, there should be no difficulty about this; but that is not to say that the Convention can simply be treated as background, for it and its jurisprudence may both amplify and modify the hitherto accepted meaning and effect of s.10. For present purposes the Convention right which is in play is the qualified right spelt out in art. 10."

40. In a case in which the disclosure sought goes to the identity of a source the question of standard of proof arises in order to invoke the protection. This question arose in

the context of section 10 before the coming into force of the Human Rights Act 1998 in *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] AC 339. The point was addressed by Lord Diplock, and with the agreement of three others of their Lordships he expressed the view that in order to come within section 10 the newspaper had to establish that answering the question would lead to a "reasonable chance" that the identity of the source would be revealed - see page 349G. In *Sanoma v Uitgevers BV v The Netherlands* [2011] EMLR 4 a slightly different formulation was proposed in the context of Article 10:

> "It should be open to the judge or other authority to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not they are specifically named in the withheld material, on the grounds that the communication of such material creates a *serious risk of compromising the identity of the journalist's sources*…" (para 92 - my emphasis)

41. It is not clear that that is materially different from the test in the *Guardian* case, but if it is, it is not a lower, or significantly lower, threshold. For the reasons given above I do not think that the BBC's case passes whichever of those tests is the right one. The likelihood of a source being identified as a result of either a Yes or a No answer to the question is very low.

42. That being the case, the exceptions set out in section 10, or the qualifications to the right provided for in Article 10(2), do not arise in that context. However, as indicated, that is not an end to Mr Millar's argument. He points out that if the case is not what he called a "Goodwin" case (which I have held it is not) the question still amounts to an attempt to obtain information about the journalist's source, and that still engages Article 10, and submits that the protection thus given to the information should only be overridden if there was a "pressing social need" to do so. He contrasted this with what he said was a higher test applicable to "Goodwin" cases, namely that disclosure be in the "public interest".

43. Mr Rushbrooke in his reply accepted that Article 10 was engaged by his application that his question 2 be answered, and he accepted that that led to a balancing act between the Article 10 rights of the journalist and the Article 6 and Article 8 rights of his client. I agree that that is where the debate ends up, but because Mr Millar's submissions propose a prima facie high-flown test – "pressing social need" - (though he accepted a qualification which meant it was not as high-flown as it sounds) I should deal briefly with his submissions about it.

44. Mr Millar seems to have derived his twofold test (public interest, and pressing social need) from the terminology used in *Goodwin*. The expressions appear italicised in the passage from *Goodwin* set out above. I do not think that passage requires two separate tests. The reference to "pressing social need" appears to be a summary of the sort of things that will be required before any restriction on free speech can be justified under Article 10(2). It is not so much a test as a description or paraphrase. The reference to the "overriding requirement in the public interest" is an expression intended to give emphasis to the particularly great weight that attaches to the confidentiality of journalists' sources, and the correspondingly great weight that has to be demanded of the factors said to justify an order or other measure which requires disclosure. I shall therefore not apply the test proposed by Mr Millar.

45. I do, however, agree that Article 10 is engaged by the suggestion that the BBC should answer the claimant's question. Since the claimant seems to accept this proposition I do not need to elaborate it at any length, but the justification seems to me to lie in the fact that respect for a journalist's source may extend to information other than the identity of that source, and the fact that the chilling effect may arise if a source feels that anything material is disclosed about him/her which was not intended for disclosure. A source would be understandably sensitive to such matters because he or she would be unlikely to be able to carry out a risk assessment as to the consequences of disclosure of non-identity matters, and would be highly unlikely to be willing to run risks in that respect. They may well regard most disclosures beyond the trivial as being risky, and sufficiently risky to discourage the source from being a source. That is not to say that a source would actually rationalise matters in that way in any given case. Life is not like that. It is, in my view, how they would view the matter if asked. That gives rise to a potential for chilling, and that leads one into Article 10.

46. That Article 10 can indeed be engaged by matters other than those going directly to the disclosure of the identity of sources, and can extend to other material or information provided by a source, is apparent from *Malik v Manchester Crown Court* [2008] EMLR 19. In that case a production order was made against a journalist who had been collaborating with an individual who had had an admitted involvement with a terrorist organisation, so that he could write a book about the organisation. The journalist had been given information by that individual for that purpose. The police wished to have some of that information for the purposes of their investigations into terrorism - hence the production order. The order was granted, and upheld on judicial review proceedings.

47. This was not an instance of the identity of a source being placed at risk. The identity of the source was known. It was all about the material provided by that source. The court accepted that Article 10 was engaged in those circumstances, and indeed seems to have considered that the point was plain. Dyson LJ, giving the judgment of the court, said:

> "48. The correct approach to the article 10 issues as articulated in both the Strasbourg jurisprudence and our domestic law emphasises that (i) the court should attach considerable weight to the nature of the right interfered with when an application is made against a journalist; (ii) the proportionality of any proposed order should be measured and justified against that weight and (iii) a person who applies for an order should provide a clear and compelling case in justification of it."

48. He went on to set out the principles and their justification:

> "50. The importance of the right and the weight of the justification required for an interference that compels a journalist to reveal confidential material about or provided by a source has been frequently stated both in Strasbourg and in our courts. It is sufficient to refer to *Goodwin v United Kingdom* (1996) 22 EHRR 123 at [39] and [40] "protection of journalistic sources is one of the basic conditions for press freedom" and "limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the court"; *Tillack v Belgium* (Application no 20477/05, 27 November 2007) at [53]; *John v Express Newspapers* [2000] 1 WLR 1931 at [27] where the court of appeal said: "Before the courts require journalists to break what a journalist regards as a most important professional obligation to protect a source, the minimum requirement is that other avenues should be explored"; and *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033 at [61] where Lord Woolf CJ said that disclosure of a journalist's sources has a chilling effect on the freedom of the press and that the court will "normally protect journalists' sources"."

The emphasis by underlining is mine. It shows that Article 10 is engaged not only in relation to measures seeking to identify a source, but can extend to material going beyond that. The cases cited were all cases which seem to have involved attempts to identify a source, as opposed to other information provided by the source, but the Divisional Court obviously regarded the same overall principle as applying to both types of case. At paragraph 56 the court went on to consider the nature of the balancing act required in those circumstances:

> "56. In our view, it is relevant to the balancing exercise to have in mind the gravity of the activities that are the subject of the investigation, the benefit likely to accrue to the investigation and the weight to be accorded to the need to protect the sources."

49. That is the sort of balancing exercise to which it is now necessary to turn.

The striking of the balance

50. As Mr Millar accepted, this has to be conducted on the assumption that the answer is Yes. If the answer were No it is hard to see (on the facts) what particular weight would be given on the side of non-disclosure.

51. As against disclosure, and despite the fact that I have held that there is no real risk of the answer leading to the identification of the source, there is still the factor that the information is likely to be something that the source would be uncomfortable about having disclosed. That source would not necessarily know that the result of the journalist's use of the information would be such as to point to Operation Yewtree as a potential source. It is within the category of any non-trivial information whose disclosure would lead to discomfort on the part of the source, and therefore some degree of chilling effect in some, if not many, cases.

52. That is really the principal factor on the non-disclosure side of the case. It does not have anything like the great weight given to the non-disclosure of identity (a true "Goodwin" case). In the present circumstances its weight is diminished further by the fact that the spotlight has already been turned on to Operation Yewtree as a result of previous clear suggestions that the Operation was the source, as identified above. The allegations have even resulted in an inquiry. While a Yes answer would add something new to the case in the form of a more positive confirmation, it would not be introducing anything entirely new. What survives on this side of the line is more the question of principle (which is still important) rather than a practical effect.

53. On the other side of the line, or balance, Mr Johnson's knowledge of the source is of real significance, as identified above. Its full significance will not be revealed until trial, where the point will be argued out, but in my view it is clear that that significance is real. It is something that Sir Cliff may well need in order to be able to make his case, or rebut one of the BBC's defences, or at least that he needs materially to improve his chances of success. One cannot go so far as to say that he cannot make his case without it but he has at this stage a strong case for saying that it relates to a very material point. He has a procedural right to the information under normal CPR principles. If his privacy rights have been invaded he has a good case for saying that he needs the information in order to vindicate those rights. Mr Millar submitted that one could not possibly say that Sir Cliff could not have a fair trial without an answer to the question, but that suggests that the dichotomy is between a fair trial and an unfair trial. That is not the right dichotomy, in my view. A fair trial, with the benefit of being able to argue that which can legitimately be argued, requires that the question be answered.

54. I have to strike a balance between those interests, and to do so bearing in mind the serious effect which the courts should normally give to the rights of journalists (and the interests of their sources). What is sought is an answer to a question about Mr Johnson's knowledge of a particular attribute of his source. Assuming a positive answer to the question, the risks of disclosure are still very low. The quality of the information, especially in the light of the fact that the idea of a Yewtree source has been in play more or less since the raid, and of the fact that an investigation has not revealed it, is, in my view, not of great significance in terms of journalistic confidence. The fact that a source might not be happy to have the information revealed does not, of itself, give the information great weight. All it does is ultimately give rise to the question which I have to decide. The ultimate weight of the interests of Mr Johnson and his source, arising from that consideration and Mr Johnson's position as a journalist, is what I have to assess, and compare with the rights and interests of Sir Cliff. The rights and interests of Sir Cliff are in my view much more weighty. I find that the balance comes down clearly in favour of the question being answered.

55. Last, I should deal with the question of whether Mr Millar's proposal as to the basis on which the proceedings could be conducted means that the question need not be answered. I find that it does not have that effect. Its terms are not a proper substitute for an answer to the question because it does not match the question. The question is not just about confidentiality; it is about an understanding as to source as well. The BBC's proposal does not address that and does not go far enough.

Conclusion

56. It follows that the claimant's application succeeds and the BBC must provide a proper answer to the question posed.

APPENDIX - RELEVANT LEGISLATION

European Convention on Human Rights

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Contempt of Court Act 1981

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.