Neutral Citation Number: [2017] EWHC 173 (QB)

Claim No: HQ14D05164

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/02/2017

Before:

MR JUSTICE WARBY

- -

Between:

ISSAM SALAH HOURANI	**Claimant**
- and -	
(1) ALISTAIR THOMSON	
(2) BRYAN MCCARTHY	
(3) ALLISON BLAIR	
(4) PSYBERSOLUTIONS LLC	
(5) JOHN MICHAEL WALLER	**Defendants**

- -
- -

Heather Rogers QC and Jonathan Price (instructed by **Payne Hicks Beach**) for the **Claimant**
Anthony Hudson QC and Ben Silverstone (instructed by **Mishcon de Reya**) for the **Defendants**

Hearing dates: 1 - 3 February 2017

- -

Judgment Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

Mr Justice Warby :

Introduction

1. This judgment is given after the hearing of applications for inspection of documents and the provision of further information, as preliminary issues in the trial of this action for libel and harassment.

2. The claimant ("Mr Hourani") was born in Lebanon but is a British citizen who now lives in London. In this action he sues five defendants. All are resident or, in the case of the fourth defendant incorporated, in the United States. Mr Hourani sues the first four defendants for libel, and all five defendants for harassment, in respect of their roles or alleged roles in a campaign involving street demonstrations, online publications, and the distribution of stickers.

3. There is much that is unusual about the case. This will be clear from the summary set out in paragraph [1] of the most recent judgment in the case, that of Nicola Davies J at the Pre-Trial Review, [2017] EWHC 56 (QB) ("the PTR Judgment)":

> "On 19 June 2014 a demonstration took place outside the claimant's then London home (the "June Event"). The protesters, who were not genuine protesters, were paid to attend and instructed as to what to do and say. They held placards/banners provided to them, amongst which were one or more photographs of the claimant with the caption "Murderer". Some footage and reports of the June Event were published on various websites and social media sites that were established on or about this time (the "online publications"). The statements published at the June Event and in the online publications which are complained of are set out in the Amended Particulars of Claim. The pleaded defamatory meanings alleged by the claimant being that the claimant was guilty of or complicit in the murder of Anastasiya Novikova in June 2004 and other grave crimes against her. On 16 November 2014 another similar event was staged in Hyde Park (the "November Event") resulting in the publication of further and similar statements in the online publications."

4. The third and fourth defendants deny involvement in the campaign, but the first defendant ("Mr Thompson") admits involvement in the June Event; the second defendant ("Mr McCarthy") admits involvement in both the June and November Events; and the fifth defendant ("Dr Waller") admits to having organised and paid for both Events, most of the online publication complained of, and the sticker campaign.

5. Dr Waller was not acting of his own initiative. Nor was he using his own funds. It is undisputed that he was retained, and the campaign was paid for, by a client with very considerable resources. The initial budget proposed by Dr Waller was some US$827,000. Dr Waller does not dispute that he had a client. The claimant suggests that there was more than one: there was the person with whom Dr Waller dealt ("the Immediate Client") and behind that, another, or others ("the Ultimate Client(s)"). This is disputed. For convenience I shall refer to the Immediate Client and Ultimate

Client(s) as "the Client(s)" plural, except where it is necessary to distinguish between them.

6. Mr Hourani wishes to know the identities of the Client(s). He maintains that the campaign stems from a political falling out in 2007 between his brother-in-law, the late Rakhat Aliyev, and President Nazarbayev of Kazakhstan. On 12 December 2016, Mr Hourani issued an application ("the Claimant's December Application") seeking orders for the inspection of documents and the provision of information pursuant to a Request dated 24 November 2016. The inspection application sought access to (a) the entirety of certain documents that had been disclosed by Dr Waller in redacted form and (b) the production of any such document that was in electronic format in its "original native electronic format". That format would include the metadata. The Requests for Information sought the identity of those behind the campaign and details about Mr Waller's dealings with them. The most significant Requests are nos. 1 & 3:

> "1. Identify each and every person who conceived of, procured and/or organised the campaign, who determined its purposes, who determined its activities, and/or who determined upon the course of conduct complained of in this action (including the Online Publications, the Events and the Stickers)"
>
> ...
>
> 3. State the identity of your "client" in relation to your participation in the campaign, that is, the person
>
> (a) you referred to as the "client" in emails ... dated [on various dates in June and July 2014]; and
>
> (b) you met to discuss the campaign on 23 or 24 June 2014 ... and on 3 July 2014..."

7. The breadth of request 1 means that if the court were to grant the orders sought, and if they were complied with, the information supplied would identify the Immediate Client and, if there were any, the Ultimate Client(s). For the purposes of evaluating some of the issues on this application I have formed some views about the likelihood that any Ultimate Client(s) exist(s), as will appear. But there is no need, at least for present purposes, to reach a final conclusion. My use of the plural when referring to the Client(s) should not be taken as any indication that I have reached a final view.

8. At the PTR on 12-13 January 2017 there was prolonged argument on the Claimant's December Application. The defendants argued that the application was unreasonably late, and designed to derail the trial. Nicola Davies J rejected those contentions. Dr Waller further submitted that the order sought would represent an unjustified interference with the rights to source protection under s 10 of the Contempt of Court Act 1981 and under Article 10 of the Convention. I shall call these the "Source Protection Rights." Nicola Davies J concluded and ordered that the Claimant's December application should be "adjourned to the trial Judge, to be heard as a preliminary issue at the trial, which is listed to start on 30 January 2017". She gave directions varying the trial timetable so as to provide for a reading day, then a day of opening statements, followed by evidence from Mr Waller over 1 or 2 days, with all subsequent directions being reserved to the trial judge.

9. The Judge's reasons were set out at [55] of the PTR Judgment:

> "The protections afforded by section 10 of the 1981 Act and Article 10 ECHR are important. A balancing exercise is required to be carried out by the Court. This will require the Court to determine, *inter alia*, whether the fifth defendant was involved in what he genuinely believed was a legitimate campaign, whether he was acting as a journalist, what was the status of the documents upon which he relied, was it reasonable for him to pursue this course of conduct. Given the apparent issue of the credibility of the fifth defendant which is directly relevant to his alleged relationship with the client, and flowing from that the legitimacy of the campaign, I have come to the conclusion that the claimant's application for disclosure of the identity of the fifth defendant's client should be heard by the trial judge who will have the advantage, which I have not had, of seeing and hearing evidence from the fifth defendant. Determination of these issues requires the Court to be in as good a position as it reasonably can be to perform the balancing exercise. The oral evidence of the fifth defendant is necessary to assist the Court in this task. "

10. The Claimant's Disclosure Application therefore came before me for hearing on the first day of the trial. Counsel opened their clients' cases, and Dr Waller gave evidence and was cross-examined. Mr Anthony Hudson QC, for the defendants, then invited me to adjourn the application further. He submitted that I could not properly decide it against his client at this stage. That seems to me to amount in substance to an attempt to appeal against the order of Nicola Davies J, or to seek a variation when there has been no material change of circumstances. She directed a preliminary issue. Nor do I accept Mr Hudson's reasoning, which is that the claimant's argument depends on proof of facts that I could only find proved after a trial. I have therefore proceeded to determine the application, in line with the directions given at the PTR.

Issues on the application

11. Ms Rogers puts her argument on three distinct, though related bases. The first is that the identities of the Client(s) are relevant to, and necessary for the fair determination of, the existing issues between the claimant and the defendants. The second is that identification of the Client(s) would or might enable the claimant to obtain additional evidence relevant to those issues by way of an application against the Client(s) for third party disclosure. The third is that identification of the Client(s) is required to enable the claimant to assert and enforce his legal rights against the Client(s), or to enable him to consider whether to do so. It will be convenient to consider each of these bases of claim in turn.

12. In relation to each of these three bases of claim, the issues for decision at this stage can be conveniently summarised in this way: (1) Are the threshold conditions for access to the information sought met? If so (2) are the Source Protection Rights engaged? If so (3) would the orders sought would represent a justified interference with those rights? The claimant bears the burden on issue (1). If that is discharged, the defendant bears the burden on issue (2). If that is satisfied, the burden returns to the

claimant to show that the case falls within one of the exceptions prescribed by law, and is necessary.

Client identity as a fact relevant to the issues

13. The claims and the defences to them give rise to number of issues which will need to be addressed at the end of the trial. The present ground for the Claimant's December Application depends, however, on whether the information sought is relevant to and necessary for the resolution of a single aspect of the case. This is whether the harassment claim, if otherwise sound, is defensible on one or other of the bases advanced by the defendants in paragraph 130 of the Re-Amended Defence, which pleads that any campaign was pursued "for the purpose of preventing or detecting crime and/or was, in the particular circumstances, reasonable". This represents reliance on the defences provided for by s 1(3)(a) and (c) of the Protection from Harassment Act 1997. The basis on which these defences are put forward is set out in the particulars which follow paragraph 130:

> "131 Paragraphs 1-113 above are repeated.
>
> 132 The First, Second and Fifth Defendants were exercising their rights to protest and freedom of expression.
>
> 133 On the basis of what he knew about Rakhat Aliyev, the Claimant and the death of Anastasia Novikova, the Fifth Defendant believed that Ms Novikova had been imprisoned in the Claimant's Apartment in Beirut, tortured, drugged, beaten and sexually assaulted in the Claimant's apartment by Rakhat Aliyev and others and that Claimant was not only aware that these terrible crimes were being committed against Ms Novikova but facilitated them. The Fifth Defendant also believed that on the instructions of Rakhat Aliyev, Ms Novikova had either (a) been murdered in the Claimant's Apartment and then thrown off the balcony, (b) thrown off the balcony; or (c) caused such psychological and physical damage during her period of imprisonment that she had either committed suicide or had fallen to her death whilst trying to escape from the Claimant's Apartment. The Fifth Defendant believed that Rakhat Aliyev was responsible for Ms. Novikova's death and that the Claimant was an accomplice to Ms Novikova's death and/or would have been responsible for her murder under the US felony murder rule.134 The fifth defendant believed that it was very much in the public interest and reasonable for these matters to be brought to the attention of the public."

14. Paragraphs 1-113 assert facts relating to the death of Anastasia Novikova, and the claimant's alleged complicity in her death and in what is said to have been a cover-up after the event. Mr Hudson has made clear in argument that the defendants' case in answer to the claim in harassment is intended to be read as asserting not just that the defendants held a reasonable belief about those matters, and acted reasonably in

disseminating statements about them, but also that the assertions complained of were true. This raises some interesting issues. The four defendants who are sued for libel have not pleaded a defence of truth. This way of putting the case, as a defence to harassment, may require consideration later on. And it is not yet clear to me precisely what role the claimant is said to have played. But it is on the basis explained by Mr Hudson that I approach the preliminary issue trial.

Are the threshold conditions met?

15. Two sets of rules are relevant: the rules on disclosure of documents, contained in CPR 31, and the provisions of CPR 18 relating to further information.

16. Standard disclosure requires a party to identify documents on which he relies, those which undermine his case or that of another party, and those which support another party's case: CPR 31.6. If a document is disclosed the other party has a qualified right to inspect it. The qualification relevant to the present case is that there is no right of inspection where "the party disclosing the document has a right or a duty to withhold inspection of it": r 31.3(1)(b). The procedures to be followed where a party claims such a right or duty are set out in CPR 31.19:

> "(3) A person who wishes to claim that he has a right or a duty to withhold inspection of a document, or part of a document, must state in writing –
>
> (a) that he has such a right or duty; and
>
> (b) the grounds on which he claims that right or duty.
>
> (4) The statement referred to in paragraph (3) must be made–
>
> (a) in the list in which the document is disclosed; or
>
> (b) if there is no list, to the person wishing to inspect the document.
>
> (5) A party may apply to the court to decide whether a claim made under paragraph (3) should be upheld.
>
> (6) For the purpose of deciding an application under … paragraph (3) … (claim to withhold inspection) the court may –
>
> (a) require the person seeking to withhold … inspection of a document to produce that document to the court; and
>
> (b) invite any person, whether or not a party, to make representations.
>
> (7) An application under paragraph (1) or paragraph (5) must be supported by evidence."

17. The present application, insofar as it seeks inspection, is an application pursuant to CPR 31.19(5). The first question raised by Mr Hudson's argument on behalf of Dr Waller is whether the redacted parts of the documents at issue are relevant. Nobody has suggested I should inspect the documents for myself, nor do I consider that, in the absence of any application for the purpose, it would be appropriate.

18. The documents were all disclosed by Dr Waller in a Supplemental List dated 9 December 2016. They must be taken, as documents, to satisfy the test for standard disclosure. It does not necessarily follow, however, that the entirety of their contents is relevant, or that the claimant is entitled to inspect the entirety of the relevant content. Parts of documents may be and often are made on the basis of irrelevance, as well as on other grounds such as legal professional privilege or, as in this case, Source Protection Rights. That should be specified and explained in the list itself, but that was not done here. The lists did not state or explain the nature or the basis of the redactions. That does not assist Dr Waller's cause.

19. There were however explanations in correspondence, and it is fair to take these into account. That is so not least because the defendants' solicitors are in the best position to assess the relevance of material that the claimant and his representatives cannot review, and which I have not been shown. By letter of 10 November 2016 the claimant's solicitors demanded to know the identity of Dr Waller's client. They said that "The individual referred to by D5 as 'the client' (and indeed any others responsible for the campaign targeting our client) is a proper party to this action and should be joined as a defendant to enable the court to address all relevant aspects of our client's claim and to enable our client to obtain appropriate remedies." On 15 November 2016 the defendants' solicitors responded. They said that Dr Waller was "not prepared" to provide the information, and gave two reasons:

> "The fact that he had a client is irrelevant as far his defence is concerned, as he independently believed, from his own review and analysis of the documents, that the steps he took were reasonable. He is further more entitled to protect his sources of information pursuant to section 10 of the Contempt of Court Act 1981."

20. This letter was written before the disclosure of the documents at issue. But several points can be made about it: it does not address the claim to disclosure on the basis of a need to seek relief against the Client(s); to say that "the fact that" Dr Waller had a client is irrelevant is not the same as saying that the identity of his client is irrelevant; and to say that a fact is irrelevant "so far as his defence is concerned" rather begs the question of whether it might be relevant to defeating or undermining that defence. For all these reasons, the letter is less than satisfactory as a basis for Mr Hudson's submission. More pertinent, perhaps, is what the defendants' solicitors said when first giving the disputed disclosure. Their letter of 1 December 2016 enclosed a memory stick containing "documents which we are providing by way of supplemental disclosure on behalf of Dr Waller", and hard copies of three further documents. It went on to explain, as follows:

> "The documents were not originally included among the documents disclosed by Dr Waller on 6 October 2016, pending further consideration of whether their disclosure (either in whole or part) might lead to the identification of a source or sources and what, if any, redactions were necessary in order to protect the identity of any source(s). That review has now been completed. Unfortunately, the review took longer than we had hoped and we apologise for the delay in forwarding these to you.
>
> The vast majority of the redactions applied to these documents have been made so as not to identify a source, or sources, of information. A small number of other redactions, for example those in documents HOU0002543, HOU0002544, HOU0002545 and HOU0002546, relate to information which is irrelevant to these proceedings."

21. This wording, read in the light of all the surrounding circumstances, supports my conclusion that the redacted material is relevant to the issues, in the sense that it falls within the scope of standard disclosure. Dr Waller's solicitors evidently had the documents in question for some two months before they were disclosed. They had them for the purpose of assessing whether a claim to source protection could be made. After what appears to have been a thorough review, they concluded that a claim to source protection could and should be made. No such claim would be required in respect of irrelevant material. It might be said that material was irrelevant, or alternatively protected from inspection by virtue of the Source Protection Rights. But that is not what happened here. The solicitors did not, when giving disclosure, deny the relevance of the parts of the documents that were redacted on the basis of Source Protection Rights. On the contrary, they specifically identified parts of other documents which were being redacted on the grounds of irrelevance.

22. Other factors lend some support to my conclusion on this point. In particular, there are numerous passages in Dr Waller's own documents that acknowledge the broad point made on behalf of Mr Hourani, that "provenance matters". One example is a document of 12 June 2014 in which Dr Waller urged the Client(s) to adopt a strategy of indirect rather than direct attack on their main target Rikhat Aliyev, codenamed "Mars" or "T1". Dr Waller pointed out that targeting Mr Aliyev directly ran the risk of backfiring "since so many of the allegations against him come directly from his own government" and were "based on evidence provided by his political adversaries back home." A direct attack would allow Mr Aliyev to point this out and "brush it off" as politically inspired. In a later exchange of correspondence, the Client(s) and Dr Waller discussed the creation of ways of lending the campaign credibility, including the creation of an organisation that could be called on to "vouch for the validity of" the campaign or, alternatively, recruiting recognized figures who are "internationally credible" to endorse the campaign. Relevant text from these documents is set out at Appendix A to this judgment, together with extracts from four other documents which in my judgment also support this conclusion. I have highlighted text of particular relevance by italicising it.

23. As to the Part 18 Request for information as to the identity of the Client(s), the rules give the court power to "(a) clarify any matter which is in dispute in the proceedings;

or (b) give additional information in relation to any such matter": CPR 18.1(1). PD18 para 1.1 provides that parties should only seek information which is "reasonably necessary and proportionate" to enable them to prepare their own case or understand the case they have to meet. For the reasons given when dealing with the claimant's application for inspection, I am satisfied that the identities of the Client(s) are relevant to matters in dispute in these proceedings, namely the validity of the defences raised by paragraph 130 of the Re-Amended Defence, so that I have the power to grant the order sought, pursuant to CPR 18(1)1(b).

24. The significance of the identification of the Client(s) is another matter, as are the questions of whether disclosure is "reasonably necessary and proportionate" for the purposes specified in PD18. That test could not be met if the Source Protection Rights are engaged, unless it were shown that one of exceptions applies.

Are the Source Protection Rights engaged?

25. Rights of source protection have a long history in English law. Today they find expression in s 10 of the Contempt of Court Act 1981, which provides as follows:

> "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."

26. This imposes on the court a qualified statutory prohibition on an order for disclosure of information that falls within its scope; and it confers a corresponding qualified right or privilege on those who fall within its terms. The following points about the scope of s 10 are clear:

(1) A "publication" for these purposes is "any speech, writing, programme … or other communication in whatever form, which is addressed to the public at large or any section of the public": ss 2(1) and 19.

(2) A "person … responsible" for a "publication" does not have to be a journalist or editor, or a publishing company or other media professional; provided the information is addressed to the public at large or a section of it, every publication counts: *Secretary of State for Defence v Guardian Newspapers* [1985] AC 339, 348 (Lord Diplock).

(3) The protection is not confined to sources who provide information that finds its way into the public domain; it embraces those who provide information that is communicated and received *with a view to* publication: *X Ltd v Morgan-Grampian* [1991] 1 AC 1, 40 (Lord Bridge).

(4) The section confers a right not to disclose information which identifies a source, or may do so. Disclosure need not be probable. The protection exists if disclosure "may" follow, or there is a "reasonable chance" that it will follow: *Guardian Newspapers* 349 (Lord Diplock), *Morgan-Grampian* 372 (Lord Bridge).

27. The evidence before the court supports the assertion made in correspondence that the Client(s) were, as a matter of fact, sources of information contained in at least some and probably all or most of the publications complained of in this action. Dr Waller based what he did, and procured others to do, on information contained in documents that were provided to him by others. Those others were, principally (though not exclusively), the Client(s). None of this is in dispute as a matter of fact, or not materially so. Indeed, the fact that the Client(s) were sources is one of the main reasons why Mr Hourani wishes to know their identities. The submission for Mr Hourani is that nevertheless the Client(s) are not "sources" within the scope of s 10. Ms Rogers advances two submissions.

28. The first submission is that in reality the Client(s) were not "sources" at all; the relationship was a business relationship between principal and agent, in which the Clients engaged Dr Waller to act for them in staging events and running a social media campaign that included publication; publication was a joint enterprise in which the Client(s) were primary publishers alongside Dr Waller. The second submission is that even if the Client(s) were sources they were not sources "that fall within the important principle relating to the protection of sources". This is because the Client(s) were "not engaging in a journalistic exercise to report on matters of public interest in good faith"; their purpose was to "disable" its targets, including Mr Hourani. Integral to these submissions is the proposition that not every individual who is used by a journalist for information is a "source" for these purposes. Ms Rogers relies in particular on the admissibility decision of the European Court in *Stichting Ostade Blade v Netherlands* Application 8406/06, (2014) 59 EHRR SE9 at [60-65].

29. I do not accept either of these submissions. They seem to me to invite an unduly narrow reading of the statutory wording for reasons which, on analysis, are unsatisfactory.

30. The issue is one of statutory construction. The starting point must be that the words chosen by Parliament are to be given their ordinary and natural meaning. The task of statutory construction can be affected by the Human Rights Act 1998 (HRA), because s 2 requires the court to construe and apply the law in accordance with the Convention Rights. But although both parties have referred extensively to the Strasbourg jurisprudence on source protection (and Mr Hudson has cited the Committee of Minister's *Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information* adopted on 08 March 2000) neither has in terms submitted that s 2 has a bearing on the issue now before me. Ms Rogers has certainly not suggested that a literal or ordinary reading of s 10 would be incompatible with any Convention Right. Nor has any other principle of statutory interpretation been identified as a basis on which I ought to depart from the "golden rule". I do not consider there is any sound basis for such a departure.

31. I do not believe that *Stichting Ostade Blade v The Netherlands* can bear the weight that Mr Hourani seeks to place upon it. This is a single admissibility decision on extreme facts, which does not support the conclusion advocated by Ms Rogers. The applicant magazine published a report stating that it had been contacted by an organisation, the ELF, which had claimed in writing responsibility for three bomb attacks in Arnhem in 1995 and 1996. The Arnhem Regional Court authorised a search of the magazine's premises, looking for the letter. The applicant complained of a breach of Article 10, relying on its rights to source protection. The Strasbourg

jurisprudence approaches that question from a different starting point, and within a different framework. For the European Court the starting point must always be the Convention Right that is involved in the proceedings before it. Where Article 10 is invoked the Court will examine whether there is an interference and if so whether it is justified under Article 10(2). That is the approach adopted by the Court in *Stichting Ostade Blade*. Its conclusion, understandably, was although that there had been an interference it was prescribed by law and necessary in a democratic society in pursuit of the legitimate aim of "at the very least 'the prevention of … crime'".

32. En route to that conclusion the court 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, by 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.

Are disclosure orders justified?

35. The right afforded by s 10 has been described as a "strong presumptive right against disclosure": *Morgan-Grampian*, 41. Strictly, it would seem, it cannot be overridden. But it does not extend to a situation where it is "established to the satisfaction of the court that disclosure is necessary in the interests of justice". If that is established the statutory prohibition on an order for disclosure is removed. There remains a discretion.

36. The word "necessary" can bear different meanings in different contexts. In this context it has a meaning that lies "somewhere between 'indispensable' on the one hand, and 'useful' or 'expedient' on the other" with the "nearest paraphrase" being "really needed": *In Re An Inquiry Under The Company Securities (Insider Dealing) Act 1985* [1988] AC 660, 704 (Lord Griffiths). At this point in the analysis it is clear that I must be careful to act compatibly with the Convention, having regard to the Strasbourg jurisprudence. The authorities make clear that in determining whether source disclosure is "really needed" in the case before the court must recognise and give effect to certain core principles: freedom of expression is of vital importance, as "one of the essential foundations of a democratic society" (*Jersild v Denmark* (1994) 19 EHRR 1 [31]); the press and media have a "vital public-watchdog role" (*Goodwin* [39]); the protection of journalistic sources is one of the "basic conditions" for press freedom, and an order for disclosure as a "potentially chilling effect" on that freedom (*Goodwin*, ibid.).

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.

38. In the present case it seems to me convenient to take as my starting point the question of how helpful the information is likely to be, if disclosed, in resolving the pleaded issues between the claimant and the four defendants. My conclusion is that, although it is of some relevance, its importance is limited and slender. To some extent, the reasons for that conclusion will be apparent from the wording of the Re-Amended Defence and the letter of 15 November 2016 that I have quoted above. Dr Waller's case is that what he wrote or caused to be written and published was based on what he knew and believed about Rakhat Aliyev, Mr Hourani and the death of Anastasia Novikova; on his case, what he knew and believed about those matters was based on "his own review and analysis of the documents". Dr Waller's evidence, in the form of his witness statement and his oral evidence to me, expand and clarify the picture.

39. The witness statement is dated 5 December 2016, that is four days after the disclosure of the disputed documents, though four days before the supplemental list in which

they were formally disclosed. It is a long document, running to 100 pages, with a 5 page schedule of previous publications. At the heart of it is a section headed "My review and consideration of documents". This runs from paragraph 49 to 97. In it he maintains that the publications complained of were based on documents and searches. He identifies, describes, and analyses 19 documents and one further group of documents which are said to be "the key documents I considered." These include some documents from Beirut, some from Interpol, a number originating from Kazakhstan, and court documents from Malta, Austria, and the United States.

40. The next section of the statement is called "The conclusions I drew from my review of the documents". This covers paragraphs 98 – 144. In paragraph 144 Dr Waller states that "From my review and analysis of documents and various searches I had undertaken, and given the conclusions I had reached, I took the view that the campaign should centre on the death of Ms Novikova and the need to bring the perpetrators to justice." The campaign is then described.

41. The concluding section is headed "Why I believed the campaign was reasonable" and runs from paragraph 246 to 255. At paragraph 247 Dr Waller states that he has explained "the basis upon which, following a thorough and detailed review and analysis of the documents, I drew certain conclusions about Aliyev, and the Claimant." He refers at 249 to "the extensive reliable evidence" that he saw. He asserts at 251 that he "carefully built a campaign based on physical documentation from verifiable primary sources, and where primary sources were not available, multiple and reputable secondary sources…"

42. It is clear that the defences advanced by Dr Waller and, to the extent they rely on this evidence, the other defendants are critically dependent on the conclusions that should or can reasonably be drawn from a relatively small number of key documents. There is nothing in Dr Waller's witness statement that refers to or relies on any information that was provided to him by his Client(s), other than in documentary form. If the authenticity of any of the documents was in issue, the source(s) from which they came might be of great importance. But that is not the case. There is, for instance, no dispute that the Kazakh authorities created the key Kazakh documents that are relied on by Dr Waller, which include depositions in the names of Kurman Akimkulov and Leonid Fomaidi, dated 15 October and 7 November 2009. The central issues concern the evidential value of the documents, and the truthfulness of what they say, so far as the claimant Mr Hourani is concerned. The identity of the Client(s) is most unlikely to have any significant bearing on the resolution of those issues. The documents that were relied on must be considered in the overall context, including other information which was or should have been considered by Dr Waller. Again, however, it is hard to see how identification of the Client(s) would assist on this score. It would not add to the available information.

43. These are views I had provisionally formed before the cross-examination of Dr Waller began. That cross-examination has not changed my views. A principal focus of the questioning was, understandably, the reliability of the key documents on which Dr Waller rests his case, and the completeness or otherwise of the evidential picture that was available to him. The fact that some of the key documents came from Kazakhstan, and the consequences of that for their reliability, were explored. The process was not hampered, it seemed to me, by ignorance of their source.

44. The primary submission of Ms Rogers was, and remains, that knowledge of the Client(s) identities is "necessary for C to understand and meet Ds' case and for the court to determine the issues." It is submitted that "It is hard to see how the issues in this action could be determined by the court at trial, without identification of D5's Client." It seems to me, however, that the defendants' case is easy to understand without this information, and does not depend on the identity of the Client(s). Nor does that information seem likely to have any substantial relevance to the task of meeting the defence case. On the evidence I have seen and heard so far, it appears that the Immediate Client consisted of a group of individuals, some at least contractors, working under the umbrella of a corporate entity. Dr Waller contracted with a company. The group comprising the Immediate Client had a male boss, to whom Dr Waller and the Immediate Client sometimes referred as "the client". In that sense there seems to have been an Ultimate Client, though it may be that the boss was the CEO of the contracting company. All of this tends to suggest that Mr Hourani's suspicions as to the identities of the Client(s) may be wrong. But whether these provisional conclusions are right or wrong does not appear to matter much. The issues raised by the pleaded defence can fairly be resolved by reference to the selection of documents on which Dr Waller based his conclusions, without knowing who provided those documents.

45. The key questions would seem to be whether it was objectively reasonable to reach the conclusions about Mr Hourani which Dr Waller says he reached and, if so, whether it was objectively reasonable to act as he did in organising the campaign. Mr Hourani wishes "to challenge [Dr Waller] as to the claimed reasonableness of his actions in accepting instructions and large sums of money from that Client in return for setting out to cause C and his family significant pain, suffering and crippling financial detriment." The reasonableness of undertaking a well-paid advocacy campaign of this kind is capable of assessment without reference to the identity of the paymaster(s). It may be that knowledge of their identities would have some small impact on the assessment but I do not believe it would come close to being decisive. Indeed, I do not believe the identities of the Client(s) are likely to have any really material bearing on whether the campaign, based on the "key documents", was a reasonable one. It is not suggested that Dr Waller's bona fides would be undermined by disclosure. If and to the extent that his good faith comes into this exercise at all I do not consider it likely that my task would be significantly assisted by knowledge of the identities of the Client(s).

46. Having reached those conclusions, it will be no surprise that I have decided that the threshold of "necessity" is not satisfied. I accept that the case for source protection in this action is not as strong as some. Dr Waller's role is a long way from that of the public interest news journalist engaged by a mainstream media corporation, and acting in the course of his employment. He has described his activity as that of a "citizen journalist", not bound by the ethical or professional constraints applied to news journalists. But he is not an independent member of the public, devoting his own time and resources, disinterestedly and gratuitously. to a campaign inspired by his own investigations and passion for justice. He is someone paid handsomely by a client to apply his skills to the pursuit of a specified cause, of the client's choosing. The Client(s) are not whistleblowers, passing public interest information from within a corrupt public authority, or anything of that kind. They have not provided any first-hand information, only third party documents, some of these having origins that call

into question the reliability of their contents. That said, the Client(s) are sources, and both they and Dr Waller benefit from the presumption against disclosure. The claimant has yet to establish that the campaign amounted to harassment of him. If he does prove that, the cause which Dr Waller was paid to promote may prove to be legitimate. The broad question of whether Anastasia Novikova was murdered is one of legitimate public interest. The issue of whether there were reasonable grounds for accusing the claimant has yet to be determined. The defendants may prove that the campaign was pursued in a manner that was legitimate and reasonable in all the circumstances. The information sought is not "really needed" in order to resolve any of these issues.

Client identification as a springboard for third party disclosure

47. I can take this more shortly. It is true that Dr Waller destroyed a number of documents as the campaign progressed. The merits of that are of no concern at this stage, though I should note that it has not been suggested to him that he acted dishonestly in that regard. What has been said is that, this being so, the Client(s) may be in possession of documents that are not accessible from Dr Waller, or from the first or second defendants. This is not a basis for disclosure on which Mr Hourani's lawyers have focused their attention at any stage of the case. Rightly so, in my judgment. Dr Waller kept some documents, and he has disclosed them. Many of the documents that Dr Waller destroyed were kept by the first and second defendants and have been disclosed by them. The files before the court contain a considerable body of correspondence passing between these defendants. There is no real indication in any of this material that other, undisclosed documents, are likely to reveal anything of significance. It is likely that the Client(s) have documents that are not before the court. But judging by those that are, it is not likely in my view that further disclosure would add materially to the sum of the court's relevant knowledge. The likelihood that it would is not of sufficient weight to make disclosure "necessary".

Client identification for the purpose of vindicating rights

48. This is the basis on which identification of the Client(s) was first requested in correspondence: see the letter of 10 November 2016, above. The witness statement of Mr Crossley, filed in support of the Claimant's December Application, made a similar point asserting (at [42]) that Mr Hourani had been clear from the outset that it was "critical for him to identify the wrongdoers and hold them to account". Later in the statement Mr Crossley makes two points. The first is that identification is "fundamental for the determination of the issues in the action". I disagree, for the reasons given above. The second is that identification "is critical to securing the objectives of this litigation and to vindicate our client". That is easier to understand. The application is however for the inspection of disclosed documents and the provision of further information, and the powers conferred by the applicable Civil Procedure Rules are tied to the issues in the litigation. As Mr Hudson points out, there is no application nor is there any claim, for equitable disclosure under the *Norwich Pharmacal* principle on the basis that Dr Waller has become "mixed up" in or has facilitated the wrongdoing by another, whose identity he is duty bound to reveal to the claimant.

49. Ms Rogers has advanced this basis of claim on the footing that Dr Waller, as a party to the claim, is "amenable to the full scope of the court's wide power to order

discovery inter partes": *Morgan Grampian* 39B-D (Lord Bridge). But as it seems to me that submission does not advance her cause on this limb of the application. The point made by Lord Bridge was that the notes which were the subject of the application in that case were "unquestionably discoverable for the purposes of the quia timet application" against the respondent itself. That brings us back to the scope and exercise of the court's powers under the CPR, with which I have dealt above. Those powers do not of course prohibit or curtail the *Norwich Pharmacal* jurisdiction but the conditions for the exercise of that jurisdiction need to be examined and established before an order is made, whether or not the respondent is already a party to the litigation. The argument has not dealt with these points.

50. At the present stage, in any event, my clear view is that Source Protection Rights are engaged by this alternative basis of claim, and that the necessity test is not satisfied. I understand that Mr Hourani would have preferred to identify all potential defendants and to bring them all before the court at one and the same time in a single trial, in which his rights against all of them could be asserted, tested, and vindicated. It is obvious that in practice this could not be done now, even if I were to uphold this basis of claim. It is Ms Rogers' own case that if disclosure were ordered there would have to be a break in proceedings and a resumed trial at a later stage. That is highly undesirable. In my view it is not necessary, or appropriate. This trial can fairly proceed to its conclusion. If Mr Hourani succeeds, he will be vindicated to that extent. The question of whether source identification should be ordered on this basis can then be revisited. If Mr Hourani fails in his claims, it is not easy to see how he could claim source identification.

Conclusions

51. I find that the information sought by Mr Hourani has some relevance to the issues in dispute; but that the Source Protection Rights are engaged; and it has not been shown that it is necessary to interfere with those rights in order to have a fair trial of the issues between the parties. A fair trial can be conducted without knowing the identity of the Client(s), and without enabling the claimant to seek third party disclosure from the Client(s). In my assessment any value that those steps might add to the process would be minimal at best and would not justify the delay, disruption and costs that would result.

52. The question of whether disclosure of the identity of the Client(s) is necessary to enable Mr Hourani to vindicate his rights against the Client(s), or to enable him to consider such steps, can properly be left open for the time being. Disclosure for that purpose is not necessary at the present stage. The issue can be revisited in the light of the court's findings on the merits of the claims that are before it now.

APPENDIX A

(1) Document A (MDR0001973)

> **"Social Media Campaign questions & comments, 2014.06.12**
>
> …
>
> **Strategy is indirect attack via the victim,**
>
> **Not direct attack on the real target**
>
> …
>
> **Direct attack has higher risk of backfiring**
>
> So *emphasizing him as the primary target has a high risk of backfiring, since so many of the allegations against him come directly from his old government*, which is precisely why the European country has been so reluctant to go after him.
>
> We can't risk playing into Mars' hands by attacking him, because *he will raise his victim status and point - correctly – to the attacks being based on evidence provided by his political adversaries back home*.
>
> …
>
> Argument against separate Mars social media campaign – for now
>
> …
>
> Additionally, if we roll out a Mars social media campaign now, we run the risk of him making an issue of it – because we're in-your-face by using his name so prominently – and *he can brush it off as a political attack on him by his own government*.
>
> …"

(2) Document B (MDR0001984)

> "Questions about AN photos
>
> …
>
> I have a few questions.
>
> **Baby pictures**
>
> 1. Could the public display of any of these photos be used in any way by the opposition to discredit the site? *For example, would some of these photos be available only from certain authorities, or from people who are no longer free to provide them? This would damage the credibility of the campaign* if the allegation could be credibly made.
>
> …"

(3) Document C MDR0002018

> **"Progress update**
>
> This report is about promotion, search results and other initial progress concerning the online products we have developed to date.
>
> …
>
> Other results. This social media campaign has generated other results that cannot be quantified, but that should be of interest to the client. They are:
>
> …
>
> 5. Created information that others of significance are using. For example:
>
> …
>
> b. A Washington – based attorney involved in litigation against T1 informed a mutual friend about the protests in London and the #Justice website, and has sought us out for possible assistance and collaboration. Through a mutual friend, the attorney passed information that would be of use to our campaign. *The attorney does not know who is behind our campaign.*
>
> c. A group of senior congressional staff members, one of whom authored the Magnitsky Amendment to sanction former Soviet officials, heard about the London protests and saw the YouTube videos, and they want to use these as opportunities to pursue T1 and his accomplices. *These individuals are longtime friends and do not know the connections. We seek client guidance about how to proceed."*

(4) Document D (MDR0002023)

> "SEO report, 16 July 2014
>
> …
>
> **Negative SEO (NSEO) issues**
>
> In mapping out a Negative SEO (NSEO) strategy, we found that, contrary to our initial expectations, *NSEO will not be effective for the client for this particular project. Here is why*:
>
> …
>
> 2. Of the few positive items in the Top-20 returns, we have some hard targets that cannot be hit through NSEO:
>
> …

c. British government-funded pages. *Occasional news pages (BBC) call [Mars] a "dissident." These are hard targets and we would be unwise to attract the wrong sort of attention from Britain.*

…

As T1 has not pushed back legally.

…"

(5) Document E (MDR0002035)

"Hi Mike,

The client and [redacted] *would like for us to come up with a source to attribute the JusticeFor campaign – an organization that we somehow create so that if it is ever needed, they can be "called upon" to vouch for the validity of the organization*. [redacted] They want to attribute it to something or someone. They also asked that in the next protest, that we not attack the Austrian or other European governments in our interviews, etc. They are becoming a bit paranoid following the T1-T3 reactions.

Please let me know your ideas on how we can do this and next steps.

Best,

[redacted]"

(6) Document F (MDR0002036)

Hi,

…

Regarding the other organization: This is do-able to do as a matter of procedure, but challenging to do as a matter of credibility, because people are going to look into it and it has to have some real substance.

Below is one of my stream of consciousness things to map out the modalities, and pros and cons.

…

Here are the main points:

…

2. Those with organizational worldviews require an organization for their reassurance, so we may have to create one, as you note. This can be done but will create a public paper trail and will involve added expense.

3. *An alternative idea to insulate against concerns of criticism is to keep the social network campaign but to recruit recognized human rights, women's rights and other figures to endorse the campaign* (not an organization) *publicly*. However, those figures *will have to be internationally credible* and therefore will be critical of governments.

…

1. At present, the Justice Campaign is promoting itself as a grassroots effort with no organization, just a bunch of volunteers lending their time and modest resources. It is simply an informal network – nobody to be targeted, nobody to be sued, etc. Our narrative is that the volunteers are afraid of retaliation from T1 and his murderous friends, either through physical threats or through material damage/destruction via litigation. This works well in a Western society, because it is simply social networking. So, for now, there is no target for T1-T3 to strike at. However, *we will need a spokesperson for the reasons we discussed: credibility,* commenting to media, and as an official human point of contact.

…

In terms of recruitment, we will need three people to serve as members of the founding board. These individuals will be exposed for personal liability as board members, so we will have to have a donor provide a directors' insurance policy for them, as well as other compensation. *At least one of the members should have some track record in the Women's rights, human rights, or other related areas, so that there will be credibility to the founding of the group.*

…

3. An alternative idea is simply get people to endorse the current campaign, without creating an actual organization.

…

Most people tend to shy away from giving such endorsements if they don't know who is behind it, but the endorsements (if worded properly) do not expose them to any liability, and they carry some weight.

This can be particularly effective *if we can recruit human rights figures with a record of being against the central governments, which would help insulate the campaign from some of the concerns that the client has raised.*

> Which brings us back to the point we discussed very early on- *being mildly critical of the government or of certain government institutions, both for the credibility of the campaign itself, and to insulate the campaign against the allegations*. This is the best and easiest way to pre-empt or discredit such allegations, though the client might have a problem with it.
>
> *We can also insulate the campaign against allegations of regime support by ridiculing those making the allegations*, and showing fresh-faced young people from different countries as the spokespersons
>
> …"

(7) Document G (MDR0002049)

> "[Client representative] Shouldn't you be careful about promoting the Forbes piece [written by Dr Waller]? I am worried that it will expose you as the one behind the campaign. It seems too good to be true that a propaganda whiz would write this story and then post it on these very well crafted campaign platforms. I am concerned for the client as well, even if you were writing against the government, etc.
>
> [Dr Waller] I'm not worried about the Forbes piece. If we don't promote it, we'll be like "the dog that didn't bark" of Sherlock Holmes fame. All that the social media and website platforms are doing is to promote a good piece of news in a major news outlet during a time of very little news. So we have to have an echo chamber effect. If we're quiet, it could look to outsiders the way it looks to insiders. Check this little item to see what I mean:http:/tvtropes.org/pmwiki/pmwiki.php/Main/AbsenceOfEviolence"