

# 12

## PROTECTION OF THE IDENTITY OF INFORMANTS

---

A. Victimization	12.02	(1) Protection for informants through section 10 of the Contempt of Court Act	12.16
B. Anonymity of informants and the fairness of disciplinary and dismissal procedures	12.03	(2) The public interest defence to a <i>Norwich Pharmacal</i> application	12.22
C. Forcing disclosure of the identity of informants	12.10		

---

A prospective whistleblower (in this context the expression ‘informant’ is more apposite) may be deterred from making a disclosure if his/her identity will become apparent to the perpetrator of the wrongdoing or someone associated with the perpetrator. There is a recognized public interest that there should be disclosures of wrongdoing and also in extending protection to informants. However, a balance has to be struck between the protection afforded to the informant and the rights of those who are the subject of the information disclosed. **12.01**

### A. Victimization

A whistleblower whose employer fails to take reasonable protective steps to prevent detrimental treatment by fellow employees or others by maintaining the confidentiality of the disclosure or otherwise may have a claim under ERA, section 47B. There might also be a claim of unfair dismissal under section 103A if an employee leaves in circumstances amounting to constructive dismissal. We consider the ingredients which would need to be satisfied for such claims in Chapters 7 and 8. We also consider the ways in which these issues are approached through the use of whistleblowing procedures in Chapter 16. **12.02**

### B. Anonymity of informants and the fairness of disciplinary and dismissal procedures

The difficulties which arise in relation to protecting the identity of an informant may be particularly acute in the context of an employee making allegations against a colleague. Clearly, if the information known to the employer is truly anonymous, then it is not possible for the employer to disclose the identity of the informant. If, however, the informant gives evidence to the employer confidentially and wishes to remain anonymous to the alleged perpetrator an employer risks a complaint by either the whistleblower or the perpetrator. Especially within the context of disciplinary proceedings, the alleged perpetrator will need to have sufficient details of the allegations and this might of itself reveal the identity of the whistleblower. Further, it may be argued that the employee who is being disciplined cannot properly defend himself without knowing the identity of the accuser, perhaps in order to show a malign motive. **12.03**

**12.04** Guidance has developed as to how a reasonable employer would be expected to proceed.<sup>1</sup> The starting point is *Linfood Cash and Carry Limited v Thomson* [1989] IRLR 235. In that case the EAT (Wood J) set out guidance for employers in dealing with informant evidence against employees who are accused of misconduct (theft of credit notes) where the informants wish to remain anonymous:

1. The information given by the informant should be reduced into writing in one or more statements. Initially these statements should be taken without regard to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others—in order to prevent identification.
2. In taking statements the following seem important:
  - (a) date, time and place of each or any observation or incident;
  - (b) the opportunity and ability to observe clearly and with accuracy;
  - (c) the circumstantial evidence such as knowledge of a system or arrangement, or the reason for the presence of the informer and why certain small details are memorable;
  - (d) whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.
3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.
4. Tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add or detract from the value of the information.
5. If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is satisfied that the fear is genuine then a decision will need to be made whether or not to continue with the disciplinary process.
6. If it is to continue, then it seems to us desirable that at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself what weight is to be given to the information.
7. The written statement of the informant—if necessary with omissions to avoid identification—should be made available to the employee and his representatives.
8. If the employee or his representative raises any particular and relevant issue which should be put to the informant, then it may be desirable to adjourn for the chairman to make further inquiries of that informant.
9. Although it is always desirable for notes to be taken during disciplinary procedures, it seems to us to be particularly important that full and careful notes should be taken in these cases.
10. Although not peculiar to cases where informants have been the cause for the initiation of an investigation, it seems to us important that if evidence from an investigating officer is to be taken at a hearing it should, where possible, be prepared in a written form.

**12.05** The *Linfood* guidance therefore envisaged that the information provided by the informant, suitably edited to prevent his/her identity, should be supplied to the employee who is the subject of the allegations, and that management conducting a disciplinary hearing against the person subject to the allegations should themselves interview the informant. In some cases, however, even this might be problematic. This was the situation considered by the EAT in *Ramsay v Walkers Snack Foods Limited; Hamblet v Walkers Snack Foods Limited* [2004] IRLR 754.

---

<sup>1</sup> Each case must be considered on its own particular facts however, and in *Sainsbury's Supermarkets Limited v Hitt* [2002] EWCA Civ 1588, [2003] IRLR 23 the Court of Appeal confirmed that the range of reasonable responses test (the need to apply the objective standards of the reasonable employer) apply to the investigation and procedure adopted as much as to the reasonableness of a decision to dismiss.

The context was ‘the necessity of obtaining information about dishonesty<sup>[2]</sup> in a factory in a close-knit community where the slightest whiff of cooperation with the management could have the most serious consequences’. The particular issues were:

- (a) the unwillingness of informants to sign a statement unless it had been sufficiently edited so as to remove any risk of identifying the maker of the statement from its content; and
- (b) the informants’ unwillingness to be exposed to further questioning on their statements by managers within the investigatory and/or disciplinary process (other than the human resources officer who took the original statements) for risk of their identities being revealed with the resulting reprisals that they feared.

The EAT said that the employment tribunal had made ‘the clearest of findings’ that the offer of anonymity given by the employer to the informants was not unreasonable in the circumstances of the case. The informants who had come forward had done so expressly on the basis that their identity would remain confidential. In those circumstances the tribunal found that the respondent genuinely and reasonably believed that no further information would be provided unless it was on an entirely confidential basis; and that was the offer made to the workforce. The tribunal found that the respondent genuinely and reasonably believed in the informant employees’ expressions of fear. It was reasonable for that anonymity to be extended so that neither the decision-maker nor even the investigating officers were able to directly test that which the informants had to say, but had to rely substantially on the belief of the human resources officers that the informants were reliable and trustworthy. However, the employment tribunal heard evidence as to the approach of the human resources officer and the fact that she had explored the detail of their evidence with them. Also she knew the workforce well enough to cover the point made by Wood J in *Linfood* concerning the need to consider the character and background of the informants and whether there was likely to be any form of personal grudge in play.

**12.06**

The demands of anonymity meant that even in their original form the statements could not contain the sort of detail that the *Linfood* guidelines suggested they should contain, but the tribunal had made the clearest of findings that the informants were not willing to put their name to paper unless there was sufficient editing.<sup>3</sup> In the circumstances the EAT upheld the tribunal’s finding that dismissals for theft were fair even though the statements given to the employees had been lacking in detail and the informants had not been questioned by management involved in the disciplinary process. The interest in encouraging

**12.07**

---

<sup>2</sup> In the form of theft from the production line.

<sup>3</sup> See also *Asda Stores Limited v Thompson and others* [2002] IRLR 245 where the claimants applied to the employment tribunal for a disclosure order in respect of the witness statements taken from informants who had been promised anonymity. The employment tribunal granted the order but the EAT said that it was within the power of an employment tribunal to direct disclosure of documents in anonymized or redacted form, and the employment tribunal in that case should have made such a direction in order to conceal the identity of the witnesses and maintain the employer’s promise of confidentiality to those who had made the statements. The case returned to the EAT on issues relating to the extent to which the employees’ lawyers could participate in the redaction process: see [2004] IRLR 598. A promise of anonymity was again upheld in *Fairmile Kindergarten v MacDonald* (EAT/0069/05/RN) where the claimant was alleged to have struck a child. The child’s parents were promised anonymity by the respondent’s solicitor, who had compiled a report upon the basis of which the claimant had been dismissed. The employment tribunal chairman ordered disclosure of the identities of the parents and their child. On the respondent’s appeal (unfair dismissal and sex discrimination) the EAT (Lady Smith) held that it was not necessary for the claimant’s claim that she knew those identities. The issue of whether or not the claimant had in fact struck the child was irrelevant; the issue was whether the respondent had acted on the basis of the information before it (the report of the solicitor) and whether it had done so reasonably. In these circumstances, the tribunal should have been slow to interfere with the promise of anonymity. The interests of justice did not require that it be breached.

the informants to come forward, and honouring the promise of anonymity, was found to be compelling.

- 12.08** In *Linfood* and *Ramsey* the essential elements of the alleged offence could be communicated to the accused without revealing the identity of the informant, albeit in *Ramsey* in particular the statements provided were lacking in detail. This was not the case in *Surrey County Council v Henderson* (EAT/0326/05, 23 November 2005), where it was alleged against the employee that various sources had claimed that he had made threats of violence towards various parties, and he was not told the identity of persons who said that they had been threatened. His complaint of unfair dismissal was upheld by the employment tribunal but the EAT allowed the employer's appeal on the basis that the tribunal had applied the wrong test as to whether the dismissal was substantively fair. The question then arose as to whether the decision could be upheld on the basis that it was plainly and unarguably correct since, having not been given the basic details of the allegations, the employee had been given no opportunity to defend himself properly. The EAT said that it could see the force of those submissions. However, it noted that this was a new point since the previous cases relating to informants had not concerned a situation where it had not been possible to give the employee the basic details of the allegations due to the need to protect the informants. In those circumstances the EAT was not persuaded that such an outcome was so plain and obvious that it could affirm the decision of the tribunal, and the case was remitted.
- 12.09** In *A v B* [2010] IRLR 844 the EAT considered the position where the informant is an official source, in this case the Police's Child Abuse Investigation Command (CAIC). One of the allegations raised by the officers verbally to the employer (B) was that the claimant (A) had visited child brothels in Cambodia. The allegations were then raised by B at a disciplinary hearing and notes of the meeting with the officers were provided to A, who denied the allegations, including the visits to the brothel. The judgment confirmed that an employer is entitled 'to take the view that to continue to employ, in the position in question, a person who it had been officially notified was a child sex offender and a continuing risk to children, would—if he were subsequently exposed . . . severely shake public confidence in it'. Underhill P stated that 'it sticks in the throat that an employee may lose his job, and perhaps in practice any chance of obtaining further employment, on the basis of allegations which he has had no opportunity to challenge in any court of law—or may indeed have successfully challenged'. The judgment noted that an employer cannot simply take an uncritical view of the information received, and addressed the issue of what steps an employer must take. Given the seriousness of the allegation the employer should insist on a 'sufficient degree of formality and specificity' to the allegations. Nevertheless, should any employer receive official information it is 'subject to certain safeguards, [to] be entitled to treat that information as reliable'.

### C. Forcing disclosure of the identity of informants

- 12.10** In the cases discussed above the question for the tribunal was, in the end, whether the employer acted reasonably in dismissing the employee. An accused employee might also have an interest in knowing the identity of his/her accuser in order to protect his/her reputation. An organization might have a legitimate interest in finding the source of a leak so that action can be taken against the employee who has been prepared to disclose confidential information before and may do so again.
- 12.11** The court's jurisdiction to force disclosure of the identity of an informant (and ancillary information or documentation) takes its name from *Norwich Pharmacal Co v Commissioners of Customs and Excise* [1974] AC 133. The *Norwich Pharmacal* jurisdiction allows a claimant to seek disclosure from an 'involved' third party who had information enabling the claimant

to identify a wrongdoer, so as to be in a position to bring an action against the wrongdoer where otherwise s/he would not be able to do so. In *Norwich Pharmacal* Lord Reid said:<sup>4</sup>

. . . if through no fault of his own a person gets mixed up in the tortious acts of others so as to facilitate their wrong-doing he may incur no personal liability but he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoers. I do not think that it matters whether he became so mixed up by voluntary action on his part or because it was his duty to do what he did. It may be that if this causes him expense the person seeking the information ought to reimburse him. But justice requires that he should co-operate in righting the wrong if he unwittingly facilitated its perpetration.

The required disclosure may take any appropriate form, not only by way of production of documents, but also providing affidavits, answering interrogatories, or attending court to give oral evidence. The Civil Procedure Rules do not limit the powers of the court to order disclosure before proceedings have started or against a person who is not a party to proceedings.<sup>5</sup> Since *Norwich Pharmacal* the courts have extended the application of the basic principle:<sup>6</sup> **12.12**

- (a) It is not confined to circumstances where there has been tortious wrongdoing and is now also available where there has been contractual wrongdoing: *P v T Limited* [1997] 1 WLR 1309; *Carlton Film Distributors Ltd v VCI plc* [2003] FSR 47.
- (b) It is not limited to cases where the identity of the wrongdoer is unknown: relief can be ordered where the identity of the claimant is known but where the claimant requires disclosure of crucial information in order to be able to bring its claim or where the claimant requires a missing piece of the jigsaw: *Axa Equity & Law Life Assurance Society plc v National Westminster Bank* [1998] CLC 1177; *Aoot Kalmneft v Denton Wilde Sapte* [2002] 1 Lloyd's Rep 417; see also *Carlton Films*.
- (c) Further, the third party from whom information is sought need not be an innocent third party—s/he may be a wrongdoer him/herself: *CHC Software Care v Hopkins and Wood* [1993] FSR 241; Hollander, *Documentary Evidence*, (10th ed., London: Sweet & Maxwell, 2009).
- (d) The relief is a flexible remedy capable of adaptation to new circumstances: *Ashworth Hospital Authority v MGN Ltd* [2002] UKHL 29, [2002] 1 WLR 2033 at 2049F (Lord Woolf).

The three conditions to be satisfied for the court to exercise the power to order are: **12.13**

- (a) a wrong must have been carried out, or arguably carried out, by an ultimate wrongdoer;
- (b) there must be the need for an order to enable action to be brought against the ultimate wrongdoer, and
- (c) the person against whom the order is sought must:
  - (i) be mixed up in and so have facilitated the wrongdoing; and
  - (ii) be able or likely to be able to provide the information necessary to enable the ultimate wrongdoer to be sued.<sup>7</sup>

Scott V-C dealt with a *Norwich Pharmacal* application in *P v T Limited*<sup>8</sup> [1997] IRLR 405 **12.14** where P, a senior employee, was notified that his employer had received serious allegations about him from a third party. He was not told what the allegations were or by whom they were made other than that they related to gross misconduct in the way he had conducted himself

---

<sup>4</sup> At p 175.

<sup>5</sup> CPR 31.18.

<sup>6</sup> See Lightman J in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch) at para 18.

<sup>7</sup> *ibid* at para 21.

<sup>8</sup> Also reported as *A v Company B Limited*.

with external contractors. The employer stated that it would not disclose more as to the nature of the allegations since this would disclose the identity of the informant and the employer considered that the informant's request for anonymity was reasonable. P was dismissed for gross misconduct. In subsequent proceedings the employer admitted unfair and wrongful dismissal but P also sought an order against the employer compelling it to disclose the precise nature of the allegations against him and the identity of the informant. Scott V-C made the order notwithstanding that no wrongdoing by the informant had yet been made out. There were potential claims of defamation (which would depend upon the information being false) and malicious falsehood (which would depend on the information being given maliciously). P could not establish that these claims could be made out unless the order was granted. Justice demanded that the order be made in order to give P a chance to clear his name.

- 12.15** Whilst the informant in *P v T Limited* was an outside source, the same considerations would have been relevant if it had been another employee. However, there would then be the additional complication that by revealing the identity of the employee, the employer might be said to be subjecting the employee, who may have made a protected disclosure, to a detriment. That is not necessarily an insuperable difficulty. In most situations the proper course would be for the employer not to proceed with the disciplinary action unless at least able to put the substance of the allegations to the employee against whom the allegations are made and, as we have seen, guidelines have evolved as to the proper approach. Indeed, Scott V-C said that the conduct of the employer in *P v T Limited* was outrageous. Further, if the employer is then ordered by the court to disclose the identity of the informant, it can be said that any detriment which the informant worker then suffers is not on the ground of having made the disclosure but on the ground of the employer's obligation to comply with the order of the court.

**(1) Protection for informants through section 10 of the Contempt of Court Act**

- 12.16** Special protection is offered to the media against *Norwich Pharmacal* applications. Section 10 of the Contempt of Court Act 1981 provides under the heading '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 sources 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.

- 12.17** Section 10 was enacted to reflect Article 10 of the European Convention on Human Rights, which is considered in more detail in Chapter 11. It provides:

- (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 . . .
- (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 reputational rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

- 12.18** The test set out in section 10 of the Contempt of Court Act enables the court to distinguish between those cases where the employee is raising issues of public concern and other cases where there is no wider public interest to be protected beyond the general interest in freedom of expression. In *Camelot v Centaur Communications Limited* [1998] IRLR 80, for example, the Court of Appeal upheld an order of Maurice Kay J against a magazine ordering it to return documents which would lead to the identification of an employee of Camelot who had leaked

confidential draft year-end accounts. Schiemann LJ (at paras 12 to 20) set out the following principles:<sup>9</sup>

- (a) There is an important public interest in the press being able to protect the anonymity of its sources.
- (b) The law does not, however, enable the press to protect that anonymity in all circumstances.
- (c) When assessing whether an order forcing disclosure of the source should be made, a relevant but not conclusive factor is that an employer might wish to identify the employee so as to exclude him from future employment.
- (d) Whether sufficiently strong reasons are shown in a particular case to outweigh the important public interest in the press being able to protect the anonymity of its sources, will depend on the facts of the particular case.
- (e) In making its judgment as to whether sufficiently strong reasons are shown in any particular case to outweigh the important public interest in the press being able to protect the anonymity of its sources, the domestic court will give great weight to the judgments, in particular recent judgments, made by the European Court of Human Rights in cases where the facts are similar to the case before the domestic court.

Whilst there was no continuing threat to Camelot by further disclosure of the draft accounts, there was unease and suspicion amongst the employees of the company which inhibited good working relationships. There was a risk that an employee who had proved untrustworthy in one regard might be untrustworthy in a different respect and reveal the name of, say, a public figure who had won a huge lottery prize. Schiemann LJ emphasized that this was not a case of disclosing iniquity, nor was it a whistleblowing case (at para 23). He continued (at para 25):

12.19

there is a public interest in protecting sources. But it is relevant to ask, 'what is the public interest in protecting from disclosure persons in the position of the source in the present case?' Is it in the public interest for people in his position to disclose this type of information? Embargoes on the disclosure of information for a temporary period are a common and useful feature of contemporary life. It does not seem to me that if people in the position of the present source experience the chilling effect referred to by the ECHR the public will be deprived of anything which it is valuable for the public to have.

The effect of disclosing the identity of one source who has leaked unimportant material might be to have a chilling effect on the willingness of other sources to disclose material which is important. However, 'the well-informed source is always going to have to take a view as to what is going to be the court's reaction to his disclosure in the circumstances of his case'.<sup>10</sup>

12.20

The decision in *Camelot* was followed by Neuberger J in *O'Mara Books Limited v Express Newspapers plc* [1999] FSR 49 where stolen manuscripts of the book *Fergie—Her Secret Life* were found in the possession of two of the defendants and they were ordered to disclose their source. Neuberger J noted that whoever had stolen the manuscript had done so with a view to making a profit. Further, there was a likelihood that the source was an employee of either the publishers or their American printers. As in *Camelot* the existence of a dishonest employee was damaging to employer/employee relations and to relations between employees. There was also an obvious risk of the dishonest employee making further unlawful disclosures. As such, the only public interest against disclosure was the general public interest (underlying

12.21

---

<sup>9</sup> By reference to *X Ltd v Morgan Grampian (Publishers) Ltd* [1991] 1 AC 1, HL; *Goodwin v United Kingdom* (1996) 22 EHRR 123, ECHR.

<sup>10</sup> Schiemann LJ in *Camelot* at p 138.

section 10 of the Contempt of Court Act) in encouraging freedom of expression and the interests of justice were clearly in favour of disclosure.<sup>11</sup>

## (2) The public interest defence to a *Norwich Pharmacal* application

- 12.22** Neither *Camelot* nor *O'Mara* were concerned with the case of a whistleblower and this aspect does not seem to have been suggested in *P v T Limited*. Where a whistleblower makes a disclosure covered by the provisions of the ERA inserted by the PIDA it is, we suggest, unlikely that this would be regarded as wrongdoing or that the interests of justice require disclosure. This is, however, subject to an important qualification. At the point at which the court comes to consider whether to require disclosure of the identity of the whistleblower it might not be possible to identify whether the disclosure was made in accordance with the protected disclosure provisions of the ERA. Even if an allegation was reasonably believed to be substantially true, and even if it is in fact true, only a disclosure in the course of obtaining legal advice would be protected if not made in good faith. Yet testing good faith will often be impossible without disclosure of the identity of the whistleblower. As such, any reference to the protected disclosure provisions as a guide to material considerations in relation to whether the informant's identity should be protected will, in many cases, be only an imprecise guide because not all the criteria for a protected disclosure can be tested. We suggest, however, that it remains a useful guide in weighing competing considerations as to whether to order disclosure.
- 12.23** This is borne out by the detailed consideration of section 10 and its relationship with Article 10 at an appellate level in *Ashworth Hospital Authority v MGN Limited*, in the Court of Appeal ([2000] EWCA Civ 334, [2001] 1 WLR 515) and then the House of Lords ([2002] UHKL 29, [2002] 1 WLR 2033) which was followed by the decisions of Gray J and the Court of Appeal in the proceedings subsequently brought by Mersey Care Trust against Robin Ackroyd<sup>12</sup> and, eventually, the decision at full trial of those proceedings by Tugendhat J.<sup>13</sup>
- 12.24** This litigation originated in the publication by the *Daily Mirror* of extracts from the 'PACIS' medical records of the Moors murderer, Ian Brady, who was being held at the hospital run by Ashworth (the hospital subsequently became the responsibility of Mersey Care NHS Trust). MGN declined to disclose its source. When it was ordered by Rougier J to do so (and the order confirmed by the Court of Appeal and subsequently the House of Lords) it transpired that Mr Ackroyd, an investigative journalist, was the *Mirror's* source. Ackroyd was in turn made the subject of an application for an order that he disclose *his* source(s), admitted to be 'at Ashworth', whose identity Ackroyd had promised not to disclose.
- 12.25** In the House of Lords in *Ashworth Hospital Authority* Lord Woolf CJ (at para 26) said that 'the exercise of the [*Norwich Pharmacal*] jurisdiction requires that there should be wrongdoing . . . of the person whose identity the claimant is seeking to establish'. Subsequently, in the Court of Appeal in *Mersey Care Trust* (at para 65) May LJ stated that he was prepared to assume without deciding that, if there were no wrongdoing by the source, because the source had a public interest defence to a claim against him by the hospital, then the *Norwich Pharmacal* jurisdiction would not be established for want of a wrongdoer. However, the Court of Appeal did not consider this issue further because it considered that the appeal succeeded on grounds that were available to Mr Ackroyd even if the source were a wrongdoer.
- 12.26** At the trial Tugendhat J accepted the principle suggested by the *dicta* of Lord Woolf and May LJ as to the need to establish wrongdoing by the source. He further concluded that

---

<sup>11</sup> See also *John Reid Enterprises Limited v Pell* [1999] EMLR 675, Carnwarth J.

<sup>12</sup> [2002] EWHC 2115 (QB) and [2003] EWCA Civ 663, [2003] EMLR 36 respectively.

<sup>13</sup> *Mersey Care NHS Trust v Ackroyd* [2006] EWHC 107 (QB) (7 February 2006).



in a claim just for a disclosure order, the burden of proving that there was wrongdoing by the informant fell on the Trust even though in a claim against the informant the burden would probably have been upon the informer to establish a public interest defence. The judge further referred to the difficulties in establishing that the source had acted in the public interest, without direct evidence from the source (at para 70):

the court may gain little assistance from the interpretation or use that the journalist or a subsequent publisher places on the information disclosed. The manner in which the story is reported, if it is reported, may or not be what the source intended. Journalists and publishers are not the puppets of their sources. They may not know, or may fail to understand, the source's purpose, and they may have purposes of their own which are different.

Plainly, therefore, if the court had been required simply to apply the template of the protected disclosure provisions it would be difficult to do so since key evidence as to whether the disclosure was in good faith would be absent. However, it was emphasized that, in this context, the test of whether the source had a public interest defence for having disclosed medical records was an objective one. It was not enough that the source might have intended to act in what s/he thought was the public interest. Nevertheless, the tests that play an important role in the protected disclosure template were taken into account. In all the circumstances the court concluded that there was no such public interest defence, having regard in particular to the nature of the information disclosed and the failure to explain why there were not other persons in the NHS or the police to whom the disclosures could be made, or that internal or limited disclosures had been made and had not had the appropriate effect. **12.27**

However, the degree of wrongdoing that the judge had found to have taken place at the hospital was a relevant consideration in relation to other questions. In particular, the fact that the source did not commit a wrong against Ian Brady, and that his/her purpose was to act in the public interest, formed part of the factual matrix by which the judge reached his eventual conclusion, as an application of the discretionary and proportionality tests resulting from the synthesis of the equitable remedy and Article 10. In his judgment, it had not been convincingly established that there was, by the time of the trial, a pressing social need that the sources should be identified. An order for disclosure of Mr Ackroyd's sources would not be proportionate to the pursuit of the hospital authority's legitimate aim to seek redress against the source, given the vital public interest in the protection of a journalist's source. In other words, the balance that had gone in favour of disclosure in the *Camelot* and *O'Mara* cases went the other way in the circumstances of *Mersey Care Trust*. **12.28**

A further appeal in the *Mersey Care* case was dismissed by the Court of Appeal in the single judgment of Sir Anthony Clarke MR to which Neuberger and Leveson LJ contributed.<sup>14</sup> Their Lordships reiterated that the wrongdoing which was required to be established was the wrongdoing of the person whose identity the claimant was seeking to establish (ie the informant/source), and that a threshold requirement was for the person against whom the proceedings were brought to have become involved in that wrongdoing (albeit that this could have been innocent). The court did not interfere with the balancing exercise undertaken by Tugendhat J at first instance, noting (at paras 35–36) that the nature of the balancing exercise was highly fact-dependent and should be respected by the appeal court unless persuaded that the trial judge had erred in principle or reached a conclusion that was plainly wrong. The court was, however, critical of the fact that at an early stage it was not understood that the source to the paper was another investigative journalist who then possessed rights which could be relied upon to seek to refuse to disclose the ultimate source from Ashworth Hospital. Accordingly, the court stated that it could see no reason why any future editor should not disclose the fact **12.29**

---

<sup>14</sup> *Mersey Care NHS Trust v Ackroyd (No 2)* [2007] EWCA Civ 101, [2008] EMLR 1.

that the source used was another journalist and thereby focus the court's attention on that journalist's rights when undertaking the balancing exercise under Article 10 and section 10 of the Contempt of Court Act 1981. In relation both to Article 10 and section 10 of the 1981 Act, the test was whether, balancing the interests of the claimant and the journalist, the claimant had shown that it was both necessary, in the sense of there being an overriding interest amounting to a pressing social need, and proportionate for the Court to order the journalist to disclose the name of his source.<sup>15</sup>

---

<sup>15</sup> *ibid* at paras 12–18.