



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FOURTH SECTION

**CASE OF FINANCIAL TIMES LTD AND OTHERS v. THE UNITED
KINGDOM**

(Application no. 821/03)

JUDGMENT

STRASBOURG

15 December 2009

FINAL

15/03/2010

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Financial Times Ltd and Others v. the United Kingdom,
The European Court of Human Rights (Fourth Section), sitting as a
Chamber composed of:

Lech Garlicki, *President*,
Nicolas Bratza,
Giovanni Bonello,
Ljiljana Mijović,
David Thór Björgvinsson,
Ledi Bianku,
Mihai Poalelungi, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 24 November 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 821/03) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by four newspapers and a news agency: Financial Times Ltd (“FT”); Independent News & Media Ltd; Guardian Newspapers Ltd; Times Newspapers Ltd; and Reuters Group plc (together, “the applicants”) on 20 December 2002.

2. The applicants were represented by Clifford Chance, a law firm in London. The United Kingdom Government (“the Government”) were represented by their Agent, Mr J. Grainger, of the Foreign and Commonwealth Office.

3. The applicants alleged that the decision of the High Court on 19 December 2001 to order them to deliver up a leaked document to Interbrew violated their right to freedom of expression and their right to respect for their home and correspondence. They also alleged that there was an inequality of arms during the court proceedings which constituted a breach of their right to a fair hearing and of the procedural requirements implicit in the right to respect for their home and their correspondence and the right to freedom of expression.

4. On 18 October 2005 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The facts of the case, as submitted by the applicants, may be summarised as follows.

A. The background

6. On 30 October 2001 the board of Interbrew, a Belgian brewing company, asked its investment bank advisers, Goldman Sachs (“GS”) and Lazard, to carry out work on a potential association between Interbrew and South African Breweries plc (“SAB”), a competitor in the brewing industry, with a view to a possible takeover bid for SAB by Interbrew.

7. On 18 November 2001 GS produced a document in relation to the possible takeover. The document was confidential and contained data which were likely to affect both Interbrew and SAB's share prices. It formed the basis of a presentation which, on 20 November 2001, was submitted to Interbrew's internal mergers and acquisitions department.

8. On an unknown date a person (“X”) whose identity is unknown, even by the applicants, came into possession of a copy of the presentation submitted to Interbrew. On 27 November 2001 X sent copies of a document (“the leaked document”) to various news media organisations, including the *FT*, *The Guardian*, *The Times* and *Reuters*, from an address in Belgium. On Interbrew's evidence the leaked document was very similar if not identical to the Interbrew presentation, except for the following: (a) the substitution of an offer price for SAB shares of between 500 and 650 pence in place of the price of between 400 and 550 pence, which had apparently been in the original presentation; and (b) the insertion of a timetable for making the offer.

B. The press coverage

9. On 27 November 2001 Mr Jones, a journalist at the *FT*, received a copy of the leaked document from X. At 5p.m. that day, he telephoned Mr Van Praag of GS and told him that he had received the leaked document and that he intended to publish it. Mr Van Praag reported the conversation to Mr Powell, the Chief Executive Officer of Interbrew. Mr Powell telephoned Mr Jones and told him, on the record, that Interbrew had carried out research into SAB but that it was not in the advanced stage of preparing an offer. At about 10p.m., the *FT* published an article on its website stating that Interbrew had been plotting a bid for SAB, that documents seen by the *FT* indicated that an approach could be made on 3 December 2001 and referring to the conversation between Mr Jones and Mr Powell. The article

did not state the proposed offer price but gave accurate codenames used for the advisers in the presentation and quoted from the document on the likely positive market reaction and with reference to potential rival bids. The *FT* published an article in the same terms in its newspaper the next morning.

10. At about 5.30p.m. on 27 November 2001 *The Times* received a copy of the leaked document from X. In its second edition, which reached the news stands at about 5a.m. on 28 November 2001, it published an article referring to the “confidential” document which it had seen, a supposed approach to SAB “this weekend”, a plot to bid GBP 4.6 billion for SAB and an offer expected to be pitched at up to 590 pence per share.

11. At 12.51a.m. on 28 November 2001 *Reuters* reported the *FT*'s story and the rise in the share price of SAB on the Johannesburg Stock Exchange on its wire service. *Reuters* received a copy of the leaked document from X on the afternoon of 28 November 2001 and, at 2.44p.m., published a further article referring to its receipt of the leaked document.

12. At about 8.30a.m. on 28 November 2001 GS and Lazards contacted the Takeover Panel, which asked Interbrew to make a statement. In response, at about 12.15p.m., Interbrew issued a press release confirming that it had undertaken a preliminary analysis of SAB as part of its routine annual review of the leading brewers of the world; that the analysis was at a very preliminary stage which might or might not lead to an offer at some time in the future; but that no approach had been made.

13. On 28 November 2001 *The Guardian* received a copy of the leaked document from X. On 29 November 2001 it published an article referring to the “secret document” prepared by GS and Lazards, which it stated had been “couriered” to a “large chunk” of the business press, and mentioning the leaking of previous bids by Interbrew.

14. *The Independent* did not receive a copy of the leaked document directly from X. However, it did take steps to obtain a copy from another source that it knew but undertook not to reveal it. On 29 November it published two articles about the leaked document, one of which stated that the offer price and timetable appeared bogus.

15. On 29 November 2001 Interbrew, in agreement with the Takeover Panel, published a second statement to the press, alleging that the leaked document contained fabrications. This statement was reported by each of the applicants, who continued to publish articles on the topics of doctored copies and a possible bid.

16. The impact of this press coverage on the market in shares of Interbrew and SAB appears to have been significant. Interbrew's share price at market on 27 November 2001 was EUR 29.40. By midday the next day it was EUR 27.20. It was EUR 28.25 after the press release and at market close. The SAB share price at market close on 27 November 2001 was 442.74 pence and at market close on 28 November 2001 was 478 pence.

The volume of SAB's shares traded on 27 November 2001 was less than 2 million. On 28 November 2001 it was more than 44 million.

17. On 30 November 2001 Interbrew instructed Kroll, the security and risk consultants, to assist in identifying X. Kroll did not identify X. On 6 December 2001 Interbrew made a criminal complaint to the Examining Magistrate of the Brussels Court of First Instance, together with a claim for civil damages, against a person or persons unknown.

C. The *Norwich Pharmacal* proceedings

18. On 10 December 2001 Interbrew launched proceedings against the applicants in the High Court following advice from Kroll that access to the original documents might vitally assist the investigation. Given that the applicants were not aware of the identity of X, Interbrew lodged a claim for:

“1. delivery up of documents:

1.1 containing or relating to an analysis of [SAB] prepared by [GS] and/or [Lazards]; and

1.2 evidencing or containing discussions with any journalistic source in respect of the subject matter of 1.1;

2. disclosure of such documents;

3. an order that the Defendants do disclose the name and address of:

3.1 any journalistic source who had provided them with the documents referred to in 1.1;

3.2 any journalistic source with whom they have had the discussions referred to at 1.2 ...”

19. At the same time Interbrew, without notice to the applicants, applied for, and was granted, a temporary injunction from the High Court in the following terms:

“1. The Defendants must not alter, deface, dispose of or otherwise deal with the documents referred to in Schedule 3 at paragraph 1 thereof

2. The Defendants must not alter, deface, dispose of or otherwise deal with the documents referred to in Schedule 3 at paragraph 2 thereof

3. The Defendants must within 24 hours of service of this Order deliver up the two categories of documents referred to at Schedule 3 ... to the custody of solicitors appointed on their behalf to be held until further Order herein ...

4. The Defendants must within 48 hours of service of this Order serve on the Claimant's Solicitors a list of

4.1 the Documents within their control

4.2 those of the Documents which were formerly in their control but are no longer in their control, explaining what has happened to them

and confirm the facts set out in this paragraph by means of a signed witness statement containing a Statement of Truth also within 48 hours of service of this Order

PROVIDED THAT this Order shall not require the Defendants to provide any information which would disclose the source of information contained in a publication for which the Defendants are responsible.

...

SCHEDULE 3

The Documents

1. Documents including draft documents and copy documents (whether received by the Defendants as copy documents or copies by the Defendants) provided to the Defendants by any third party subsequent to 23 November 2001 containing or relating to an analysis of [SAB] prepared by [GS] and/or [Lazards].

2. Documents evidencing or containing discussions with any journalistic source subsequent to 23 November 2001 relating to an analysis of SAB prepared by [GS] and/or [Lazards], together with the envelopes or packaging in which they were delivered to the Defendants and any additional documents contained therein.”

20. On 11 December 2001, Interbrew sought an order in different terms from the one granted on 10 December 2001. Instead of the original paragraph 4 of the order, Interbrew sought an order requiring the applicants to serve, within 48 hours, a witness statement setting out the names and addresses of every person who had provided them with the Schedule 3(1) documents and every person with whom they had had discussions evidenced or contained in the Schedule 3(2) documents and, if these identities were not known, the circumstances in which they received the documents, to the best of their knowledge. On 12 December 2001, the judge ordered that paragraphs 3 and 4 of the order of 10 December 2001 be discharged in their entirety.

21. An expedited hearing on Interbrew's application for an injunction took place on 14 and 17 December 2001 before the High Court. Interbrew invoked the *Norwich Pharmacal* principle (see paragraph 29 below) whereby if a person through no fault of his own becomes involved in the wrongdoing of others so as to facilitate that wrongdoing, he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoer.

22. On 19 December 2001 the High Court (*Interbrew v. Financial Times et al.* [2001] EWHC Ch 480) ordered delivery up of the documents under the *Norwich Pharmacal* principle in the following terms:

“1. The Defendants must not alter, deface, dispose of or otherwise deal with the documents referred to in Schedule 3.

2. The Defendants must within 24 hours of service of this Order deliver up the documents and other materials referred to at Schedule 3 ... to the Claimant's solicitor ...”

23. The judge found (at paragraph 34) that:

“What [X] has done is deliberately to admix with that confidential information false information (a lethal concoction) to create a false market in the shares of the Claimant and SAB, a serious criminal offence. There must be a real risk of repetition, if [X] is not identified. Beyond the substantial private interest of the Claimant, there is a substantial public interest in identifying [X] and taking all necessary steps to prevent any repetition. As it seems to me, the circumstances of this case are exceptional: vital public as well as individual interests are at stake in securing the integrity of the share market. There is an overriding need for the disclosure sought in the interests of justice and for the prevention of crime”.

24. The judge continued (at paragraph 37):

“As it seems to me the Claimant has sufficiently explored other avenues before having recourse to this application for relief against the press ... There have been internal investigations conducted at the Advisers' and the Claimant's businesses; the Claimant is conducting inquiries further afield. The Claimant is using investigators of the highest international calibre. The Defendants complain that full details of all the Claimant's inquiries are not given in the Claimant's evidence and that this is necessary in order to establish how thorough they have been, but there is no substance in this complaint. The evidence establishes to my satisfaction that full and proper investigations have been made and are continuing. To require disclosure of more details of these investigations is unnecessary even as such a course may prejudice the ongoing inquiries ... The evidence before me (and most particularly a report by Kroll) establishes that the Claimant needs the information which production of the Documents ought to provide to further and give impetus to these investigations ... I am satisfied that the order is required if progress is to be made whilst the trail is still warm and if an identification is to be made within the time frame necessary to safeguard the interests of the Claimant and the public.”

25. The applicants were granted leave to appeal by the Court of Appeal on 20 December 2001 and were required to file their written arguments with the court by 28 December 2001. By judgment of 8 March 2002 the Court of Appeal dismissed the applicants' appeal (*Interbrew v. Financial Times et al.* [2002] EWCA Civ 274). In the leading judgment of Sedley LJ, the Court of Appeal held that in order to justify the exercise of *Norwich Pharmacal* powers to compel production of documents or disclosure of information, Interbrew had to establish that each defendant had facilitated a civil wrong committed by an unknown person against whom they aimed to seek redress. The only civil wrong on which Interbrew could rely was that of a breach of confidence on the part of the source. While such a breach of confidence had been made out, what had not been made out was a “bigger and better cause of action in respect of the 'lethal cocktail' of fact and falsehood, since the

element of falsehood can neither form part of the protected confidence nor stand on its own as a discrete tort” (at paragraph 28).

26. Sedley LJ went on to consider the approach adopted by the High Court as follows (at paragraphs 40-41):

“Everything proceeded below on the assumption that crimes of forgery and market manipulation were proved. But both, or at least the former, depend upon the falsity of the pages in the document showing bid price and timetable. False they were if one goes on such evidence as was before the court. But by definition their falsity is alleged against an absent and silent accused. We have no way of knowing, any more than – as [counsel for the applicants] stressed – the five defendants do, whether the source, if cornered, would demonstrate that he had simply assembled authentic documents from different places within Interbrew, GS and Lazards.

I have to say that I find this aspect of the *Norwich Pharmacal* procedure troubling. A commercial enterprise which may very well have its own reasons for denying the authenticity of a document gets a clear run against a media defendant which can only, save in rare cases, take a neutral stand on the question. The court of first instance needs to be extremely circumspect before accepting evidence, especially when, as here, it is second- or third-hand, that goes to the heart of the case and cannot be controverted ...”

27. However, Sedley LJ concluded:

“49. ... I have come to the conclusion, though not without misgiving, that the order for disclosure was rightly made against all the defendants. Nothing which has been put before us suggests that the court will be significantly better placed at an eventual trial than it is now to decide the key issues; and there is at least some force in Interbrew's complaint that its hands are tied vis-à-vis South African Breweries, and possibly other targets too, unless and until it can prevent a recurrence of this spoiling operation.

50. ... Interbrew's prima facie entitlement to delivery up of the documents is established because – and solely because – it may enable them to ascertain the identity of the proper defendant to a breach of confidence action relating to the relatively anodyne, though not the explosive, parts of the document. From the sweep of Interbrew's original case and the “lethal cocktail” on which Lightman J founded his conclusions, the basis of the application now shrinks to this little measure. But though little, it is far from insignificant for Interbrew ...

51. With it, one turns to s.10 of the 1981 Act. The section begins by barring any order for disclosure in circumstances such as these, since its very object is to discover the source of information which the defendants have published. Interbrew, however, can invoke one of the listed purposes for lifting the bar: that disclosure is necessary in the interests of justice. That it may also go to the prevention of crime cannot be ruled out as irrelevant, but it is peripheral because it is not a purpose for which Interbrew themselves are entitled to disclosure. Then is the public interest in the doing of justice sufficient in the particular circumstances of this case to make disclosure necessary? Reading that question through the lens of the Convention and its jurisprudence, as we are now required to do, the following elements separate themselves out.

52. First, what is the nature and weight of the public interest in the confidentiality of sources? The right of free expression enshrined in art. 10 is undifferentiated, but as the European Court of Human Rights said in *Goodwin*, 'freedom of expression constitutes

one of the essential foundations of a democratic society', and '[p]rotection of journalistic sources is one of the basic conditions for press freedom' (paras. 39, 40). Much judicial authority in this country says the same. The news media, in consequence, enjoy in s.10 of the 1981 Act a high initial level of protection, not in their own but in the public interest.

53. The entitlement to reverse the balance is prescribed by law, as art. 10(2) requires. A required ground for doing so, founded on the no less important public interest in an effective system of justice, is present. Is it then necessary to reverse the balance? The following elements seem to me to matter here:

...

- Any invasion of the protection must meet a pressing social need – not merely an individual one. This meets the need to counterpose one public interest to another. Here the need, in terms of s.10, is to enable Interbrew to restrain by court action any further breach of confidence by the source and possibly to recover damages for losses already sustained. In terms of art. 10(2) it is to protect the rights of Interbrew.

- There must be no less invasive alternative. While I would not adopt the judge's approach of simply refusing to second-guess the view of the aggrieved parties' solicitors, I would infer from the evidence that as much has been done as can at present be done by the use of reputable private detectives to trace the source. I can see that to demand particulars of the admittedly general assertions about this could jeopardise the exercise.

...

54. It seems to me that once the legitimacy of Interbrew's intended resort to law is accepted, the relatively modest leak of which they are entitled to complain does not diminish the prospective seriousness for them of its repetition. For the media, on the other hand, the public interest in their freedom to publish is constant, and with it the public interest in the confidentiality of their sources. While I do not think that the character of the material is irrelevant as a matter of law, I agree with Laws LJ in *Ashworth* at least to this extent, that it cannot be for the court to decide how interesting or important *it* thinks the material is. That is for journalists and their editors. But it may follow that the more the press decide to make of a story, the greater will be the affected party's legitimate interest in finding and suppressing its source.

55. What in my judgment matters critically, at least in the present situation, is the source's evident purpose. It was on any view a maleficent one, calculated to do harm whether for profit or for spite, and whether to the investing public or Interbrew or both. It is legitimate in reaching this view to have regard not only to what Interbrew assert is the genuine document but also to the interpolated pages; for whether they are forged or authentic, integral or added, they were calculated to maximise the mischief. To this factual extent the 'lethal cocktail' is material, despite its legal irrelevance to the earlier stages of the inquiry. The public interest in protecting the source of such a leak is in my judgment not sufficient to withstand the countervailing public interest in letting Interbrew seek justice in the courts against the source."

28. On 9 July 2002 the House of Lords refused the applicants leave to appeal, following which Interbrew required the applicants to comply with

the court order for delivery up of the documents. The applicants have refused to comply. While Interbrew has instituted enforcement proceedings against *The Guardian*, it has not pursued these proceedings.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Duty of assistance and disclosure

29. The exercise of the power to require the delivery up of otherwise confidential information derives from the jurisdiction established by the decision of the House of Lords in *Norwich Pharmacal v. Customs & Excise Commissioners* [1974] AC 133 at page 175:

“[The authorities] seem to me to point to a very reasonable principle that 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.”

30. That power is subject to section 10 of the Contempt of Court Act 1981 (“the 1981 Act”) which provides that:

“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.”

31. Prior to the proceedings in the present case, the Court of Appeal had held in *Ashworth Hospital Authority v. MGN Ltd* [2001] 1 All ER 991 that the phrase “the interests of justice” in section 10 of the 1981 Act was wide enough to include the exercise of legal rights and the ability to seek protection from legal wrongs, whether or not by court action. This interpretation was later confirmed by the House of Lords in *Ashworth Hospital Authority v. MGN Ltd* [2002] 1 WLR 2003.

32. In *Ashworth*, the High Court granted an order compelling the *Mirror* newspaper to reveal a source to Ashworth Hospital. The *Mirror* subsequently disclosed its source as Robin Ackroyd, an investigative journalist. Ashworth brought new proceedings to seek an order for disclosure against Mr Ackroyd and applied for summary judgment on the grounds that the case was indistinguishable from that of the *Mirror* in the previous *Ashworth* case. Mr Ackroyd submitted that the facts were

materially different. The High Court granted the order requested but it was overturned on appeal to the Court of Appeal which held in *Mersey Care NHS Trust v. Robin Ackroyd* [2003] EWCA Civ 663 at paragraph 70 that:

“Protection of journalistic sources is one of the basic conditions for press freedom in a democratic society. An order for source disclosure cannot be compatible with Article 10 of the European Convention unless it is justified by an overriding requirement in the public interest. Although there is a clear public interest in preserving the confidentiality of medical records, that alone cannot, in my view, be automatically regarded as an overriding requirement without examining the facts of a particular case. It would be an exceptional case indeed if a journalist were ordered to disclose the identity of his source without the facts of his case being fully examined. I do not say that literally every journalist against whom an order for source disclosure is sought should be entitled to a trial. But the nature of the subject matter argues in favour of a trial in most cases ...”

B. Civil proceedings in England and Wales

33. The Civil Procedure Rules (“CPR”) govern procedure in civil proceedings in England and Wales. Relevant excerpts of the CPR provide as follows:

“Rule 18.1

- (1) The court may at any time order a party to –
 - (a) clarify any matter which is in dispute in the proceedings; or
 - (b) give additional information in relation to any such matter,
 whether or not the matter is contained or referred to in a statement of case.
- (2) Paragraph (1) is subject to any rule of law to the contrary.

...

Rule 32.2

- (1) The general rule is that any fact which needs to be proved by the evidence of witnesses is to be proved –
 - (a) at trial, by their oral evidence given in public; and
 - (b) at any other hearing, by their evidence in writing.
- (2) This is subject –
 - (a) to any provision to the contrary contained in these Rules or elsewhere; or
 - (b) to any order of the court.

...

Rule 32.6

(1) Subject to paragraph (2), the general rule is that evidence at hearings other than the trial is to be by witness statement unless the court, a practice direction or any other enactment requires otherwise.

(2) At hearings other than the trial, a party may, rely on the matters set out in –

(a) his statement of case; or

(b) his application notice, if the statement of case or application notice is verified by a statement of truth.

Rule 32.7

(1) Where, at a hearing other than the trial, evidence is given in writing, any party may apply to the court for permission to cross-examine the person giving the evidence ...”

C. The Press Complaints Commission Code of Conduct

34. The Press Complaints Commission has adopted a code of conduct which is regularly reviewed and amended as required. The 2003 Code of Conduct reads, insofar as relevant, as follows:

“1. Accuracy

Newspapers and periodicals must take care not to publish inaccurate, misleading or distorted material including pictures.

Whenever it is recognised that a significant inaccuracy, misleading statement or distorted report has been published, it must be corrected promptly and with due prominence.

An apology must be published whenever appropriate.

Newspapers, whilst free to be partisan, must distinguish clearly between comment, conjecture and fact.

A newspaper or periodical must report fairly and accurately the outcome of an action for defamation to which it has been a party.

...

15. Confidential sources

Journalists have a moral obligation to protect confidential sources of information.”

35. There have been no significant changes to the above provisions since 2003.

III. RELEVANT COUNCIL OF EUROPE MATERIAL

36. On 8 March 2000, the Committee of Ministers of the Council of Europe adopted a Recommendation (No. R (2000) 7) on the right of journalists not to disclose their sources of information. The Recommendation provides, at Principle 3, as follows:

“a. The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member states shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph *b*, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

b. The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:

- an overriding requirement of the need for disclosure is proved,

- the circumstances are of a sufficiently vital and serious nature,

- the necessity of the disclosure is identified as responding to a pressing social need, and

- member states enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

c. The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

37. The applicants complained that the decision of the High Court on 19 December 2001 to order them to disclose the leaked document to Interbrew violated their right to freedom of expression as provided in Article 10 of the Convention, which reads, insofar as relevant, as follows:

“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 ... for the prevention of disorder or crime, ... for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence ...”

38. The applicants also alleged that the inequality of arms during the *Norwich Pharmacal* proceedings constituted a breach of the procedural aspect of their right to freedom of expression.

A. Admissibility

1. The Government's preliminary objection

39. The Government submitted that the applicants' complaint regarding the lack of procedural guarantees in the *Norwich Pharmacal* proceedings was inadmissible due to the applicants' failure to exhaust domestic remedies within the meaning of Article 35 § 1. In the view of the Government, the applicants did not take advantage of procedural protection available to them under domestic law. The Government argued that it was open to the domestic court to make a range of orders against Interbrew for disclosure of documents, cross-examination and production of information but this would generally only be done on the application of either party. In the present case, there was no evidence that the applicants had made any formal applications of this nature. The Government further relied upon the fact that the applicants did not request a full trial of Interbrew's claim for delivery up of the leaked document. The Government concluded that the applicants did not argue before the domestic courts that the procedure adopted was unfair but instead chose to argue that Interbrew could not prove its case. Accordingly, the applicants had not raised the substance of their complaint in the domestic proceedings.

2. The applicants' response

40. The applicants disputed the Government's assessment of the domestic proceedings. They highlighted the urgent nature of the proceedings and contended that the Government's submissions did not reflect the haste with which the applicants were required to defend Interbrew's application.

41. The applicants emphasised that they had argued before the domestic courts that no findings of fact should be made on the basis of one-sided evidence in an interim application. They contested the Government's suggestion that they did not ask the judge to order a full trial of Interbrew's claim, although they accepted that a formal application was probably not made and contended that this was because the judge had made it clear that he would not grant such an order. The applicants also accepted that no formal application was made for further information, but argued that an oral application in the course of argument sufficed when time was short. They explained that they had orally requested further details of Interbrew's investigations but that the judge ruled this to be unnecessary on the basis that it might prejudice ongoing enquiries. As to their failure to seek permission to cross-examine witnesses, the applicants pointed out that the relevant witness statements were lodged either late on 16 December 2001 or early on 17 December 2001, in the closing stages of the urgent application, and in any event recounted only hearsay evidence rather than dealing with the underlying facts of the leak and the investigation. Evidence, in the form of a letter from Kroll, concerning the progress of the investigation was merely appended to the witness statement of Interbrew's solicitors which meant that the applicants were not able, under the CPR, to directly cross-examine the Kroll witness himself. They therefore contended that they had aired the substance of their procedural complaint in the domestic proceedings.

3. The Court's assessment

42. The Court reiterates that in assessing whether domestic remedies have been exhausted, account should be taken not only of the formal remedies available in the legal system concerned but also of the particular circumstances of the case in question (see *Akdivar and Others v. Turkey*, 16 September 1996, § 69, *Reports of Judgments and Decisions* 1996-IV). There should be a degree of flexibility in the application of the rule and it is not necessary to demonstrate that the arguments were advanced in exactly the same terms before domestic courts as before this Court, provided that the substance of the complaint has been aired in domestic proceedings in accordance with any formal requirements (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 37, ECHR 1999-I).

43. The Court notes that until 10 December 2001, when an injunction was granted against them without notice, the applicants were completely unaware that Interbrew was planning to take legal action to compel them to deliver up the leaked document. The applicants thereafter found themselves in the position of having to resist, at very short notice, an interim application for delivery up of documents within 24 hours, where the application by its nature would be determinative of the whole case. The Court observes that the timetable for the proceedings before the High Court was tight and that the deadline for lodging written arguments before the Court of Appeal was short.

44. The Court considers that the applicants argued in substance before both the High Court and the Court of Appeal that the court should not make findings of fact in summary proceedings and that their ability to contest the delivery up order was hindered by the fact that they were required to take it on trust that the leaked document had been falsified by X and that adequate efforts had been made to investigate the leak but had proved unsuccessful. In these circumstances the Court finds that, having regard to the haste with which the proceedings took place, the applicants have satisfied the requirements of Article 35 § 1.

45. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' observations

a. The applicants

46. The applicants argued that as a consequence of the order of the domestic court, their journalistic sources might be identified. They contended that this violated their right to freedom of expression. The applicants alleged in particular that (i) the “interests of justice” test in section 10 of the 1981 Act did not construe sufficiently narrowly the exceptions permitted by Article 10 § 2; (ii) it was wrong in principle to make an order for delivery up of documents which had the certain effect of interfering with freedom of expression when, as in this case, the seriousness of the harm done to, and the wrong suffered by, the claimant could not be determined; (iii) it was wrong in principle to make an order for delivery up of documents where the pursuit of evidence by other means had not been exhausted and/or evidence as to the adequacy of investigations was not satisfactory; and (iv) the domestic courts were wrong to treat the purposes of X as being relevant and justiciable.

47. The applicants pointed to the chilling effect that disclosure of journalistic sources had on the freedom of expression of the press in a democracy. In this regard, there was no difference between an order for disclosure of a source's identity and an order for disclosure of documents which might identify a source. The applicants argued that the courts had failed to properly balance Interbrew's interest in finding X against the vital public interest in protecting the applicants' journalistic source. They concluded that in the present case, the order for delivery up was not "necessary in a democratic society".

48. The applicants also contended that the procedure employed for requiring them to deliver up the leaked documents contained insufficient procedural safeguards to constitute a fair hearing. In particular, the applicants alleged that they did not enjoy equality of arms in the legal proceedings because the court made important findings of fact upon which it later relied in carrying out the balancing test required under Article 10 § 2 without evidence being properly tested in court. The applicants refer in particular to the following: (i) the High Court accepted the assertion by Interbrew that the leaked document had been falsified, an assertion which the applicants were not able to challenge because they did not have access to all of Interbrew's documentation; (ii) the courts took Interbrew's claim that it had conducted an adequate investigation into the leak and that the investigation had proved insufficient at face value, again in circumstances in which the applicants were unable to challenge the assertion or cross-examine relevant witnesses; and (iii) the courts found X's purpose to have been harmful without full evidence being heard.

49. The applicants pointed to the fact that all of the evidence adduced by Interbrew was in the form of witness statements – four by Interbrew's solicitors and one by Interbrew's Executive Vice-President and Advisor to the Chairman – containing second-hand or third-hand hearsay evidence. The statements referred to information or belief, rather than knowledge. The applicants alleged that inconsistencies and omissions in the witness statements could not be properly explored in court. The applicants concluded that the absence of procedural safeguards meant that the court did not determine the necessity and proportionality of the disclosure order in a properly adversarial procedure.

50. The applicants finally highlighted that failure to comply with the delivery up order could lead to penal sanctions being imposed upon them for contempt of court. They argued that in the circumstances, a greater level of equality of arms than would be required in ordinary civil proceedings ought to apply.

b. The Government

51. The Government contested the applicants' submissions, observing that Article 10 did not require the protection of journalistic sources in all

circumstances but allowed for that protection to be circumscribed where the conditions set out in Article 10 § 2 were met.

52. The Government argued that section 10 of the 1981 Act, as applied in the applicants' case, was compatible with Article 10 of the Convention. They further argued that the domestic courts were entitled to make the findings they did on the basis of the evidence and to take those findings into account in making the delivery up order. As to the harm suffered by Interbrew, the Government pointed to the drop in its share price and the rise in SAB's share price. The Government also considered that the court was justified in reaching its conclusion as to X's purpose given, *inter alia*, the anonymity, the lack of any attempt by X to justify the leak and the absence of any evidence to contradict Interbrew's assertion that the leaked documents had been manipulated. Finally, the Government argued that the applicants' contention regarding the adequacy of Interbrew's investigation into the leak was an attempt to appeal against the Court of Appeal's judgment, which had rationally concluded that as much as possible had been done to track down the source of the leak.

53. The Government pointed out that the order did not require the applicants to identify X directly. They highlighted the public interest in finding the perpetrator of what might have been serious criminal conduct and the risk of future harm to Interbrew. They concluded that the order was both necessary and proportionate and that the Court should respect the domestic court's margin of appreciation in this regard.

54. The Government accepted that the applicants were entitled to enjoy equality of arms in *Norwich Pharmacal* proceedings. However, they argued that contracting States have greater latitude in civil cases and that in such cases, it is important to assess the overall fairness of the proceedings. The Government contended that the proceedings were fair given that, *inter alia*, the questions as to whether the domestic courts were justified in concluding that X's purpose was to harm Interbrew and whether the leaked document contained untrue material were immaterial to whether the applicants had a fair trial; and the applicants were not being asked to name X.

55. The Government further argued that the applicants had available to them further procedural remedies which they chose not to use. In the circumstances, the Government concluded that the applicants had received a fair trial.

2. The Court's assessment

56. The Court notes that the disclosure order of 19 December 2001 has not been enforced against the applicants. In the Court's view, this does not remove the harm in the present case since, however unlikely such a course of action currently appears, the order remains capable of being enforced (see *Steel and Morris v. the United Kingdom*, no. 68416/01, § 97,

ECHR 2005-II). The Government do not argue to the contrary. It follows that the order of 19 December 2001 constituted an interference with the applicants' right to freedom of expression. It is therefore necessary to examine whether the interference was justified under Article 10 § 2.

a. “Prescribed by law”

57. The Court observes that the order was authorised by the common law principle in *Norwich Pharmacal* and by the operation of section 10 of the 1981 Act, as interpreted in subsequent case-law. The interference was therefore “prescribed by law” within the meaning of Article 10 § 2 (see *Goodwin v. the United Kingdom*, 27 March 1996, § 31-33, *Reports of Judgments and Decisions* 1996-II). This was not contested by the parties.

b. Legitimate aim

58. The purpose of the interference was variously suggested to be to protect the rights of others, to prevent the disclosure of information received in confidence and to prevent crime. The Court observes that investigation and prosecution of crime are generally matters conducted by the State. In the present case, the *Norwich Pharmacal* proceedings were brought by a private party. The Court further observes that in his judgment Sedley LJ emphasised that Interbrew's *prima facie* entitlement to delivery up of the documents had been established solely because it might enable them to ascertain the identity of the proper defendant to a breach of confidence action, thereby preventing future leaks of its confidential information, and to take action against X to recover damages for losses already sustained (see paragraph 27 above). In the circumstances, the Court considers that the interference in this case was intended to protect the rights of others and to prevent the disclosure of information received in confidence, both of which are legitimate aims.

c. “Necessary in a democratic society”

i. General principles

59. The Court reiterates that freedom of expression constitutes one of the essential foundations of a democratic society and that, in that context, the safeguards guaranteed to the press are particularly important. Furthermore, protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital “public watchdog” role of the press may be undermined and the ability of the press to provide accurate and reliable reporting may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the

potentially chilling effect that an order for disclosure of a source has on the exercise of that freedom, such a measure cannot be compatible with Article 10 unless it is justified by an overriding requirement in the public interest (see *Goodwin*, cited above, § 39).

60. The Court recalls that as a matter of general principle, the “necessity” of any restriction on freedom of expression must be convincingly established. It is for the national authorities to assess in the first place whether there is a “pressing social need” for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In the present context, however, the national margin of appreciation is circumscribed by the interest of democratic society in ensuring and maintaining a free press. This interest will weigh heavily in the balance in determining whether the restriction was proportionate to the legitimate aim pursued. The Court reiterates that limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court (*Goodwin*, cited above, § 40).

61. The Court's task, in exercising its supervisory function, is not to take the place of the national authorities but rather to review the case as a whole, in the light of Article 10, and consider whether the decision taken by the national authorities fell within their margin of appreciation. The Court must therefore look at the interference and determine whether the reasons adduced by the national authorities to justify it are “relevant and sufficient” (*Handyside v. the United Kingdom*, 7 December 1976, § 50, Series A no. 24 and *Goodwin*, cited above, § 40).

62. The Court reiterates that under the terms of Article 10 § 2, the exercise of freedom of expression carries with it duties and responsibilities which also apply to the press. Article 10 protects a journalist's right – and duty – to impart information on matters of public interest provided that he is acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (*Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I and *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III).

63. In the case of disclosure orders, the Court notes that they have a detrimental impact not only on the source in question, whose identity may be revealed, but also on the newspaper against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves (see, *mutatis mutandis*, *Voskuil v. the Netherlands*, no. 64752/01, § 71, 22 November 2007). While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose and disclosed intentionally falsified information, courts should be slow to assume, in the absence of compelling evidence, that these factors are

present in any particular case. In any event, given the multiple interests in play, the Court emphasises that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 § 2.

ii. Application of the principles to the present case

64. The Court recalls that, in the *Goodwin* case, it was concerned with the grant of an order for the production of the applicant journalist's notes of a telephone conversation identifying the source of the disclosure of information in a secret draft corporate plan of the claimant company which had disappeared, as well as of any copies of the plan in his or his employer's possession. The order had been made by the domestic courts primarily on the grounds of the threat of severe damage to the company's business, and consequently to the livelihood of its employees, which would arise from disclosure of the information in their corporate plan while refinancing negotiations were continuing. The Court noted that a vital component of the threat of damage to the company had already been neutralised by an injunction to prevent dissemination of the confidential information by the press. While accepting that the disclosure order served the further purpose of bringing proceedings against the source to recover possession of the missing document and to prevent further dissemination of the contents of the plan, as well as of unmasking a disloyal employee or collaborator, the Court observed that, in order to establish the necessity of disclosure for the purposes of Article 10, it was not sufficient for a party seeking disclosure to show merely that it would be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which it based its claim. The considerations to be taken into account by the Convention institutions in their review under Article 10 tipped the balance in favour of the interest of a democratic society in securing a free press. On the facts of that case, the Court stated (at § 45) that it could not find that the company's interests

“.....in eliminating, by proceedings against the source, the residual threat of damage through dissemination of the confidential information otherwise than by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, sufficient to outweigh the vital public interest in the protection of the applicant journalist's source”.

65. In the Court of Appeal in the present case, Sedley LJ found that the “relatively modest leak” of which Interbrew was entitled to complain did not diminish the seriousness for Interbrew of its repetition. He concluded that the public interest in protecting the source of such a leak was not sufficient to withstand the countervailing public interest in allowing Interbrew to seek justice against the source (see paragraph 27 above). What was said to matter critically in arriving at this conclusion was the evident

purpose of X, which was “on any view a maleficent one, calculated to do harm whether for profit or for spite ...”.

66. The Court notes that in *Goodwin*, it did not consider allegations as to the source's “improper motives” to be relevant to its finding that there was a violation of Article 10 in that case, notwithstanding the High Court's conclusion that the source's purpose, in the *Goodwin* case, in disclosing the leaked information was to “secure the damaging publication of information which he must have known to be sensitive and confidential” (see *Goodwin*, §§ 15 and 38, where it was argued by the Government that the source had acted *mala fide* and should therefore not benefit from protection under journalists' privilege of non-disclosure of sources). While the Court considers that there may be circumstances in which the source's harmful purpose would in itself constitute a relevant and sufficient reason to make a disclosure order, the legal proceedings against the applicants did not allow X's purpose to be ascertained with the necessary degree of certainty. The Court would therefore not place significant weight on X's alleged purpose in the present case.

67. As regards the allegations that the leaked document had been doctored, the Court recalls the duties and responsibilities of journalists to contribute to public debate with accurate and reliable reporting. In assessing whether a disclosure order is justified in cases where the leaked information and subsequent publication are inaccurate, the steps taken by journalists to verify the accuracy of the information may be one of the factors taken into consideration by the courts, although the special nature of the principle of protection of sources means that such steps can never be decisive but must be considered in the context of the case as a whole (see paragraph 63, above). In any event, the domestic courts reached no conclusion as to whether the leaked document was doctored, the Court of Appeal observing that it had no way of knowing, any more than the applicants, whether X, if cornered, would demonstrate that he had simply assembled authentic documents from different places within Interbrew, GS and Lazards. The Court likewise considers that it has not been established with the necessary degree of certainty that the leaked document was not authentic. The authenticity of the leaked document cannot therefore be seen as an important factor in the present case.

68. It remains to be examined whether, in the particular circumstances of the present case, the interests of Interbrew in identifying and bringing proceedings against X with a view to preventing further dissemination of confidential information and to recovering damages for any loss already sustained are sufficient to override the public interest in the protection of journalistic sources.

69. In this respect, the Court observes at the outset that where an unauthorised leak has occurred, a general risk of future unauthorised leaks will be present in all cases where the leak remains undetected

(see *Goodwin*, §§ 17-18 and 41). In the present case, the Court notes that Interbrew received notice, prior to publication of the initial *FT* article, that a copy of the leaked document had been obtained and that there was an intention to publish the information it contained. In contrast to the stance taken by the company in the *Goodwin* case, Interbrew did not seek an injunction to prevent publication of the allegedly confidential and sensitive commercial information. Moreover, the aim of preventing further leaks will only justify an order for disclosure of a source in exceptional circumstances where no reasonable and less invasive alternative means of averting the risk posed are available and where the risk threatened is sufficiently serious and defined to render such an order necessary within the meaning of Article 10 § 2. It is true that in the present case the Court of Appeal found that there were no less invasive alternative means of discovering the source, since Kroll, the security and risk consultants instructed by Interbrew to assist in identifying X, had failed to do so. However, as is apparent from the judgments of the domestic courts, full details of the inquiries made were not given in Interbrew's evidence and the Court of Appeal's conclusion that as much as could at that time be done to trace the source had been done by Kroll was based on inferences from the evidence before the court.

70. While, unlike the applicant in the *Goodwin* case, the applicants in the present case were not required to disclose documents which would directly result in the identification of the source but only to disclose documents which might, upon examination, lead to such identification, the Court does not consider this distinction to be crucial. In this regard, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources. In the present case, it was sufficient that information or assistance was required under the disclosure order for the purpose of identifying X (see *Roemen and Schmit v. Luxembourg*, no. 51772/99, § 47, ECHR 2003-IV).

71. The Court, accordingly, finds that, as in the *Goodwin* case, Interbrew's interests in eliminating, by proceedings against X, the threat of damage through future dissemination of confidential information and in obtaining damages for past breaches of confidence were, even if considered cumulatively, insufficient to outweigh the public interest in the protection of journalists' sources.

72. As to the applicants' complaint that there was an inequality of arms during the *Norwich Pharmacal* proceedings which constituted a breach of the procedural aspect of their right to freedom of expression, the Court considers that, having regard to its above findings, it is not necessary to examine this complaint separately.

73. In conclusion, the Court finds that there has been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

74. The applicants further complained of the fact that there was, in their view, an inequality of arms during the legal proceedings. They relied on Article 6 § 1 of the Convention, which provides, insofar as relevant, as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

75. The Court observes that these complaints raise the same issues and relate to the same facts as those examined in the context of the applicants' complaints under Article 10. The complaint should therefore be declared admissible. However, the Court concludes that there is no need to examine separately the complaints under Article 6 § 1 having regard to its conclusion under Article 10.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

76. The applicants complained of a violation of their right to respect for their home and correspondence as a result of the court order requiring them to deliver up the leaked documents to Interbrew. They relied on Article 8 of the Convention, which provides, insofar as relevant, as follows:

“1. Everyone has the right to respect for his ... home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime ... or for the protection of the rights and freedoms of others.”

77. The applicants also alleged that the inequality of arms during the *Norwich Pharmacal* proceedings constituted a breach of the procedural limb of their right to respect for their home and correspondence.

78. The Court observes that these complaints raise the same issues and relate to the same facts as those examined in the context of the applicants' complaints under Article 10. The complaint should therefore be declared admissible. However, the Court concludes that there is no need to examine separately the complaints under Article 8 having regard to its conclusion under Article 10.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Costs and expenses

1. The applicants' claims

80. The applicants claimed reimbursement of costs and expenses incurred in the proceedings before the domestic courts and before this Court, together with sums paid to defray the costs of Interbrew in the same proceedings. The applicants calculated the total value of their claim to be GBP 766,912.62, composed as follows.

a. The Financial Times

81. The *FT* claimed a total of GBP 141,853.12 in costs and expenses. This sum included:

- (a) GBP 72,855 in respect of professional fees;
- (b) GBP 42,211.88 in respect of counsel's fees;
- (c) GBP 2,966.01 in respect of disbursements;
- (d) GBP 2,943.38 for work by Clifford Chance in connection with the proceedings before the Court; and
- (e) GBP 20,876.85 in respect of costs ordered to be paid to Interbrew.

82. The above sums were inclusive of VAT.

b. The Independent

83. *The Independent* claimed a total of GBP 105,120.73 in costs and expenses. This sum included:

- (a) GBP 81,738.88 in respect of professional and counsel's fees and disbursements;
- (b) GBP 2,505 for work by Clifford Chance in connection with the proceedings before the Court; and
- (c) GBP 20,876.85 in respect of costs ordered to be paid to Interbrew.

84. The above sums were exclusive of VAT, with the exception of the sums paid to Interbrew which were inclusive of any VAT applicable.

c. The Guardian

85. *The Guardian* claimed a total of GBP 194,820 in costs and expenses. This sum included:

- (a) GBP 151,837.68 in respect of professional fees;
- (b) GBP 17,425 in respect of counsel's fees;
- (c) GBP 2,175.47 in respect of disbursements;
- (d) GBP 2,505 for work by Clifford Chance in connection with the proceedings before the Court; and
- (e) GBP 20,876.85 in respect of costs ordered to be paid to Interbrew.

86. The above sums were exclusive of VAT, with the exception of the sums paid to Interbrew which were inclusive of any VAT applicable.

d. The Times

87. *The Times* claimed a total of GBP 58,349.02 in costs and expenses. This sum included:

- (a) GBP 20,075.01 in respect of counsel's fees in the domestic proceedings;
- (b) GBP 400 in respect of disbursements;
- (c) GBP 16,997.16 for work by solicitors and counsel in connection with the proceedings before the Court; and
- (d) GBP 20,876.85 in respect of costs ordered to be paid to Interbrew.

88. The above sums were exclusive of VAT, with the exception of the sums paid to Interbrew which were inclusive of any VAT applicable.

e. Reuters

89. *Reuters* claimed a total of GBP 266,769.75 in costs and expenses. This sum included:

- (a) GBP 128,878.76 in respect of professional and counsel's fees in the domestic proceedings;
- (b) GBP 44,277.68 for work by solicitors and counsel in connection with the proceedings before the Court;
- (c) GBP 72,736.46 in respect of costs incurred in connection with the investigation by the Financial Services Authority; and
- (d) GBP 20,876.85 in respect of costs ordered to be paid to Interbrew.

90. With the exception of the sums paid to Interbrew, which were inclusive of any VAT applicable, it is not clear whether the above sums were exclusive or inclusive of VAT.

2. The Government's submissions

91. The Government considered the sums claimed to be excessive. They pointed to the large and unexplained discrepancies between the sums claimed by each of the five applicants. They further submitted that the work carried out by numerous lawyers on behalf of the applicants resulted in unnecessary duplication.

92. The Government also pointed to the inclusion in the applicants' claim of sums incurred in respect of a separate investigation by the

Financial Services Authority (“FSA”). They highlighted that the FSA was concerned, in pursuance of its regulatory functions, with the determination of whether an offence had been committed under the Financial Services Act 1986. This was a separate matter from the legal proceedings which formed the basis of the applicants' claim before this Court. Such expenditure was therefore, in the Government's view, irrecoverable. The Government highlighted the failure of the applicants, with the exception of *Reuters*, to specify how much of their costs and expenses were incurred as a result of the FSA investigation. On the basis that 27 per cent of the sum claimed by *Reuters* related to the FSA investigation, the Government invited the Court to make a corresponding reduction to the sums claimed by the other applicants, with the possible exception of *The Times*.

93. The Government also complained that the applicants had failed to provide adequate details of the breakdown of work carried out and had further failed to explain invoices which related to periods long after domestic proceedings had finished. It was apparent that some items included in the invoices submitted were in respect of work which was unrelated to the legal proceedings. The Government therefore invited the Court to make a further reduction to the sums claimed.

94. Finally, the Government disputed the level of costs claimed for the application to this Court. They pointed out that the two applicants which had separately listed all costs incurred in the present application had incurred GBP 64,787.32 between them, which the Government considered to be excessive.

3. *The Court's assessment*

95. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum (see, for example, *Roche v. the United Kingdom* [GC], no. 32555/96, § 182, ECHR 2005-X).

96. In the present case, the Court considers that the sums claimed by the applicants are unreasonably high and that a significant reduction is accordingly required. First, the Court agrees with the Government that sums related to the FSA investigation are not recoverable in the present proceedings. Second, in respect of the number of hours billed and the general rates charged by solicitors and counsel in the applicants' case, the Court finds these to be excessive. In *Reuters'* case, for example, the Court notes that a significant amount of work was charged at GBP 475 per hour. The Court further observes that there are significant and unexplained discrepancies between the sums claimed by each of the five applicants. Finally, the Court considers that there has been unreasonable duplication of work in the instruction of numerous solicitors, both domestically and in the proceedings before the Court. However, the Court also observes that the

sums claimed by the applicants include a total of GBP 104,384.25 paid in respect of Interbrew's costs in the domestic legal proceedings.

97. Regard being had to the information in its possession, the Court therefore considers it reasonable to award to the applicants the sum of EUR 160,000 in total, inclusive of any tax that may be chargeable to the applicants, covering costs under all heads.

B. Default interest

98. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds* that there is no need to examine the complaint under Article 6 § 1 of the Convention;
4. *Holds* that there is no need to examine the complaint under Article 8 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 160,000 (one hundred and sixty thousand euros) in total, inclusive of any tax that may be chargeable to the applicants, to be converted into pounds sterling at the rate applicable at the date of settlement, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 15 December 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Lech Garlicki
President