European Court of Human Rights: Case of Financial Times a.o. v. UK

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Eight years ago the British courts decided in favour of a disclosure order in the case of Interbrew SA v. Financial Times and others. The case concerned an order against four newspapers (FT, The Times, The Guardian and The Independent) and the news agency Reuters to deliver up their original copies of a leaked and (apparently) partially forged document about a contemplated takeover by Interbrew (now: Anheuser Bush InBev NV) of SAB (South African Breweries). In a judgment of 15 December 2009, the European Court of Human Rights (Fourth Section) came to the conclusion that this disclosure order constituted a violation of the right of freedom of expression and information, which includes press freedom and the right of protection of journalistic sources, as protected by Article 10 of the European Convention of Human Rights.

On the basis of a leaked report by a person X and further investigations by journalists, the British media in November and December 2001 reported that Interbrew (now: Anheuser Bush InBev NV) had been plotting a bid for SAB. The media coverage had a clear impact on the market on shares of Interbrew and SAB, with Interbrew's share price decreasing, while both the share price and the volume of SAB's shares traded obviously increased. At the request of Interbrew, the High Court on 19 December 2001 ordered delivery up of the documents under the so-called Norwich Pharmacal principle. This principle implies that 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. The four newspapers and the news agency were ordered not to alter, deface, dispose or otherwise deal with the documents received by person X and to deliver up the documents to Interbrew's solicitor within 24 hours. The newspapers and Reuters appealed, but the disclosure order was confirmed by the Court of Appeal. In the London Court's judgment it was emphasised that what mattered critically in this case was the source's purpose: "It was on any way a maleficent one, calculated to do harm whether for profit or for spite, and whether to the investing public or Interbrew or both." The public interest in protecting the source of such a leak was considered not sufficient to withstand the countervailing public interest in letting Interbrew seek justice in the courts against the source. It was also underlined that there is "no public interest in the dissemination of falsehood", as the judge had found that the document, leaked by

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person X to the media, was partially forged. The Court of Appeal said: “While newspapers cannot be asked to guarantee the veracity of everything they report, they in turn have to accept that the public interest in protecting the identity of the source of what they have been told is disinformation may not be great.” Accordingly, the Court of Appeal dismissed the appeals. On 9 July 2002, the House of Lords refused the newspapers leave to appeal, following which Interbrew required that the newspapers and Reuters comply with the court order for delivery up of the documents. The newspapers and Reuters however continued to refuse to comply and applied to the European Court of Human Rights, arguing that their rights under Article 10 of the Convention had been violated.

The European Court of Human Rights came to the conclusion that the British judicial authorities in the Interbrew case did indeed neglect the interests related to the protection of journalistic sources, by overemphasising the interests and arguments in favour of source disclosure. The Court accepted that the disclosure order in the Interbrew case was prescribed by law (Norwich Pharmacal and Section 10 of the Contempt of Court Act 1981) and was intended to protect the rights of others and to prevent the disclosure of information received in confidence, both of which are legitimate aims. The Court however did not consider the disclosure order to be necessary in a democratic society. First, the Court in general terms reiterated 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: “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” (§59). Disclosure orders in relation to journalistic sources 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. The Court accepted that it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage when overridden in circumstances where it is clear that a source was acting in bad faith with a harmful purpose and disclosed intentionally falsified information. The Court made clear however that domestic courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. The Court emphasised most importantly 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” (§63).

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Applying these principles to the Interbrew case. the European Court of Human Rights came to the conclusion that the British Courts had given too much weight to the alleged bogus character of the leaked document and to the assumption that the source had acted *mala fide*. While the Court considered 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 four newspapers and Reuters did not allow X's purpose to be ascertained with the necessary degree of certainty. The Court therefore did not place significant weight on X's alleged purpose in the present case, but did clearly emphasise the public interest in the protection of journalistic sources. The Court accordingly found that 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. The judicial order to deliver up the report at issue was considered to constitute a violation of Article 10 of the Convention. The European Court was unanimous in its judgment, although it took the Court seven years to come to its conclusion.

Judgment by the European Court of Human Rights (Fourth Section), case of Financial Times v. The United Kingdom, Application no. 821/03 of 15 December 2009

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