Al bij al nog maar eens een Straatsburgs arrest dat geen schoonheidsprijs verdient. Andermaal een arrest ook waarin het Europees Mensenrechtenhof nalaat om de hoge standaard van expressievrijheid en het recht op kritiek die het introduceerde en ontwikkelde in talloze eerdere arresten te handhaven.[27] Het is duidelijk dat sommige Straatsburgse rechters zich nog moeilijk in deze neerwaartse trend in verband met de toepassing van art. 10 EVRM kunnen vinden. De lectuur van de talrijke en soms felle *dissenting opinions* in zaken betreffende de expressievrijheid van de voorbije jaren en maanden wijst er duidelijk op dat de neuzen in Straatsburg niet allemaal in dezelfde richting staan.[28] Een verontrustende gedachte toch dat er zo weinig eenstemmigheid is op het hoogste niveau waar ultiem de expressievrijheid bewaakt wordt in de context van mensenrechten en democratie.

Nog finaal meegeven dat het arrest bij het schrijven van deze noot nog niet definitief was. Het zal niet echt verbazing wekken mocht het arrest aanleiding geven tot een verzoek tot verwijzing naar de Grote Kamer van het Hof, in toepassing van art. 43 EVRM.

27 Zie ook D. Voorhoof, 'Europees Mensenrechtenhof in de knoei met recht en journalistieke ethiek', *Mediaforum* 2008-11/12, p. 421.

28 D. Voorhoof, 'Europees Hof niet langer op de bres voor de persvrijheid?', *Auteurs & Media* 2009, p. 7-9, met verwijzing naar felle *dissenting opinions* in verband met vaststelling door meerderheid van Hof van niet-schending art. 10 EVRM. Naast de *dissenting opinion* van Power in EHRM, *Aguilera Jiménez e.a./Spanje*, 8 december 2009, zie recent ook de *dissenting opinion* van Power en Guylumyan in EHRM, *Saygili and Falakaoğlu (n° 2)/Turkije*, 17 februari 2009, van rechter Power, bijgetreden door Guylumyan en Ziemele in EHRM, *Sanoma Uitgevers B.V./Nederland*, 31 maart 2009 (zaak doorverwezen naar de Grote Kamer, panelbeslissing van 14 september 2009), van Jungwiert in EHRM, *Willem/Frankrijk*, 16 juli 2009 (arrest definitief sinds 12 december 2009) en van Sajó, bijgetreden door Zagrebelsky en Tsotsoria in EHRM, *Féret/België*, 16 juli 2009 (arrest definitief sinds 12 december 2009).

Nr. 5 Financial Times et al./The United Kingdom

EHRM 15 december 2009, nr. 821/03

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:

I. 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).

[Samenvatting van de feiten en de procedure in Engeland, WKA]

Op 18 november 2001 produceert Goldman Sachs in opdracht van Interbrew, een Belgische brouwerij, een stuk over een mogelijke overname door Interbrew van South African Breweries (SAB). Dit stuk vormt de basis voor een presentatie op 20 november 2001 voor de afdeling M&A van Interbrew. Op enig moment komt een onbekende persoon (X) in het bezit van dit document. Op 27 november 2001 stuurt X vanaf een adres in België kopieën naar o.a. de *Financial Times* (FT), *The Guardian*, *The Times* en *Reuters* (de klagers in deze zaak). Dit document, zo verklaart Interbrew later, is vrijwel identiek aan het aan haar gepresenteerde stuk, met uitzondering van een wijziging van de aangeboden prijs voor aandelen SAB (tussen 500 en 650 pence in plaats van tussen 400 en 500 pence) en de vermelding van een termijn voor het maken van het aanbod.

Na ontvangst van de kopie laat verslaggever Jones van de Financial Times op 27 november 2001 om 17.00 uur medewerker Van Praag van Goldman Sachs weten dat hij overweegt het stuk te publiceren. Interbrew CEO Powell belt Jones dan en vertelt hem ('*on the record*') dat Interbrew wel onderzoek naar SAB heeft gedaan, maar nog niet in het stadium van het doen van een aanbod verkeert. Om 22.00 uur publiceert de FT, onder referte naar een gesprek tussen Powell en Jones, een artikel waarin staat dat Interbrew met een bod op SAB bezig is en dat FT bekeken documenten aanwijzingen opleveren dat SAB op 3 december 2001 zal worden benaderd. In het artikel staan geen bedragen, maar wel andere gegevens uit het document. Het artikel staat de volgende dag ook in de krant.

Op 28 november 2001 om 5.00 uur publiceert The Times, die de dag ervoor om 17.30 uur eveneens een kopie van het document van X heeft

ontvangen, een artikel dat gewag maakt van een 'vertrouwelijk' document dat zij heeft gezien, en van een plan van Interbrew GBP € 4.6 miljard voor SAB te bieden met een aanbod van 590 pence per aandeel. Later die dag brengt ook Reuters het nieuws over de mogelijke overname. The Guardian schrijft op 29 november 2001 over het uitgelekte document. Aan *The Independent* wordt geen kopie toegestuurd, maar deze krant weet een kopie van een andere bron te verkrijgen. Op 29 november 2001 brengt Interbrew een persbericht uit. Daarin staat dat het uitgelekte document onjuistheden bevat. Alle hiervoor genoemde media doen hiervan verslag.

Het effect van de berichtgeving is aanzienlijk, vooral op SAB. De prijs van de aandelen SAB stijgt van 442.74 pence op 27 november 2001 tot 478 pence op 28 november 2001. De handel in aandelen SAB bedraagt op 27 november 2001 2 miljoen stuks, op 28 november 2001 44 miljoen. Op 30 november 2001 geeft Interbrew aan beveiligingsbedrijf Kroll opdracht uit te zoeken wie X is. Dat levert niets op.

Op 10 december 2001 vraagt Interbrew de Engelse rechter de genoemde media te bevelen het document uit te leveren. Het High Court geeft het bevel op 19 december 2001 af. Het Court of Appeal bevestigt deze uitspraak op 8 maart 2002. De rechters nemen het (geclausuleerde) Engelse wettelijke recht of bronbescherming en de jurisprudentie van het EHRM daarover in het kader van artikel 10 EVRM in aanmerking. Doorslaggevend in het nadeel van de media is voor hen echter het doel dat X met het lekken van het document moet hebben gehad. Zij beschrijven het als kwaadaardig en berekend op het toebrengen van schade, ongeacht of daarachter een financieel of ander motief schuilt en ongeacht of het investerende publiek of Interbrew of beide daarvan het slachtoffer zijn. Op 9 juli 2002 weigert het House of Lords de media toestemming te verlenen appel in te stellen. Zij doen dan een beroep op het hof in Straatsburg.

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/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/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/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/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/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/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/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/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/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/France [GC], no. 29183/95, § 54, ECHR 1999 I and Bladet Tromsø and Stensaas/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/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/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/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 — Lech Garlicki
Registrar — President

Noot

Mr. W.F. Korthals Altes is vicepresident van de Rechtbank Amsterdam en Visiting Professor, New York Law School, New York.

De uitspraak van 15 december 2009 van het EHRM in de zaak van de Financial Times en een aantal andere Engelse media tegen het Verenigd Koninkrijk werpt onwillekeurig haar schaduw vooruit naar de op handen beslissing van de Grote Kamer in het beroep van Sanoma tegen het arrest van – een andere kamer van – het EHRM van 31 maart 2009 in het geschil tussen deze uitgeverij en de Nederlandse Staat. In deze noot wordt getracht daarop al een beetje in te spelen.

Het oordeel van het EHRM

Zoals zo vaak draait het bij de toepassing van artikel 10 EVRM om het noodzakelijkheidscriterium. Het hof herhaalt de inmiddels bekende strofen uit eerdere zaken. Het besteedt met name aandacht aan zijn eerste uitspraak op dit gebied (*Goodwin/UK*[1]), omdat het ook daarin

1 *Goodwin/United Kingdom*, 27 maart 1996, No. 17488/91, *NJ* 1996, 577, m.nt. E.J. Dommering, *Mediaforum* Bijlage 1996-5, B69-B76, m.nt. W.F. Korthals Altes.

ging om een vertrouwelijk document over een bedrijf (een bedrijfsplan) dat aan een journalist ter beschikking was gesteld. Nadruk ligt op het feit dat een bevel informatie te verstrekken niet alleen een nadelig effect op de specifieke informant kan hebben, maar ook op de krant waartegen het bevel is gericht. Haar reputatie is daarbij in het geding, zowel bij toekomstige informanten als bij het publiek, dat belang bij het ontvangen van informatie afkomstig van anonieme bronnen heeft en waaronder zich zulke bronnen zouden kunnen bevinden. Verder mogen rechters niet te snel aannemen dat van schade aan deze belangen geen of minder sprake zal zijn, als een informant evident handelt met het doel schade te berokkenen en bewust vervalste informatie verspreidt. Het gedrag van een bron kan hooguit als – eventueel zelfs belangrijke – factor in aanmerking worden genomen, maar nooit bepalend zijn.

In de *Goodwin*-zaak was het gevaar voor schade al geneutraliseerd, doordat de rechter de pers in het belang van het bedrijf en zijn werknemers had verboden de vertrouwelijke informatie te publiceren. Het belang van bronbescherming woog zwaarder dan het belang van het bedrijf bij het voorkomen van eventuele extra schade. Het motief van de informant speelde in *Goodwin* geen rol. In de *Financial Times*-zaak komt het eventuele motief van de bron volgens het hof in de procedure in Engeland onvoldoende uit de verf om daaraan aanzienlijk gewicht toe te kennen. Hetzelfde geldt voor de mate waarin het uitgelekte document was vervalst.

Naar het oordeel van het hof blijft dan over de vraag of het belang van Interbrew bij het identificeren en eventueel vervolgen van X met het doel verdere verspreiding van vertrouwelijke informatie te voorkomen en schadevergoeding te verkrijgen zwaarder weegt dan het publieke belang bij bescherming van journalistieke bronnen. Het hof wijst erop dat Interbrew – anders dan het bedrijf in de *Goodwin*-zaak – geen publicatieverbod had gevraagd, hoewel het daartoe wel de kans had gehad. Verder rechtvaardigt het doel verder uitlekken te voorkomen een bevel tot onthulling van de bron alleen in de uitzonderlijke situatie dat geen alternatieve en minder ingrijpende manier voorhanden is om achter de identiteit van de informant te komen. Of dit laatste het geval was, blijkt niet duidelijk uit de procedures voor de Engelse gerechten. Het feit dat het hier om het uitleveren van documenten en niet om het onthullen van iemands identiteit gaat, is niet cruciaal.[2] Uiteindelijk ging het er wel om die identiteit te achterhalen. Aldus het hof, dat unaniem beslist dat het – overigens niet ten uitvoer gelegde – bevel aan de vier media het van Interbrew afkomstige document uit te leveren in strijd met artikel 10 EVRM was.

Opmerkingen

Het is altijd riskant gevolgtrekkingen te maken uit verschillen in samenstelling van kamers binnen eenzelfde gerecht. Opvallend is echter hoe welwillend het hof in de *FT*-zaak de media tegemoet treedt in vergelijking met, bijvoorbeeld, de kleinste meerderheid van de uit zeven andere rechters bestaande kamer die zich over de Sanomazaak[3] heeft gebogen. Nu gaat het hier om de *crème de la crème* van de Britse journalistiek en moet het blad *AutoWeek*, dat in *Sanoma* centraal staat, het alleen al daarom afleggen. Verder lijkt het justitiële belang in de Nederlandse strafzaak (de opsporing van ramkrakers) op het eerste gezicht groter dan het civielrechtelijke belang van Interbrew (wie is schuldig aan het lekken van de interne notitie?). Maar ook op andere onderdelen lijkt het hof de Britse media weinig in de weg te willen leggen.

Zo stapt het met schijnbaar gemak over de vraag of wel van een vertrouwelijke informant sprake is. Waar het EHRM in eerdere zaken steeds meer of minder nadrukkelijk heeft overwogen dat journalisten bronnen niet hoeven te noemen van wie zij *in vertrouwen* inlichtingen hebben ontvangen, lijkt deze kamer daarvan geen punt te willen maken. Dat is opvallend, omdat uit de vastgestelde feiten blijkt dat de klagende media ook zelf niet wisten wie X was (r.o. 8: '*a person ("X") whose identity is unknown, even by the applicants*'). Een vertrouwensband tussen hen en de mysterieuze X kan er dus niet zijn geweest. Zou dit betekenen dat het hof (als geheel) daaraan weinig waarde (meer) hecht? Of zou anonimiteit op zichzelf ook al een vertrouwensband inhouden? Dat zou erg ver gaan, want bij volledige anonimiteit heeft de journalist geen enkele mogelijkheid te verifiëren wie de bron van de verstrekte informatie is en met die bron over het vertrouwelijk houden van die informatie afspraken te maken.

Misschien gaat de Grote Kamer in *Sanoma/The Netherlands* daarover uitsluitsel geven. De Nederlandse regering nodigt haar daartoe in ieder geval wel uit. In haar memorie ten behoeve van de behandeling van de zaak[4] attaqueert zij nogal heftig de vaststelling van de kleine kamer dat de medewerkers van AutoWeek de deelnemers voor de illegale streetraces de garantie hadden verstrekt dat hun identiteit niet zou worden onthuld. Volgens haar blijkt dat nergens uit. [5] De overwegingen van het hof in de *FT*-zaak zouden ertoe kunnen leiden dat dit alles niet zoveel uitmaakt.

Het EHRM laat in de *FT*-zaak ook overigens duidelijk merken dat het grote waarde aan het journalistieke privilege hecht. Zo mag aan mogelijk kwaadaardige motieven van de informant (die er ook in *Goodwin* waren) slechts in uitzonderlijke gevallen een doorslaggevende rol worden toegekend en maakt het hof nauwelijks een punt van het feit dat de informatie die in de vertrouwelijke notitie stond, kennelijk was gemanipuleerd. In ieder geval waren deze zeven rechters niet bereid daarnaar uitgebreid onderzoek te doen, zeker niet nu de nationale rechters dat evenmin nodig hadden gevonden.

Kortom, het wordt nu des te interessanter af te wachten wat de Grote Kamer met *Sanoma* gaat doen. Waar een kamer in klein verband zich vooral op de feiten en omstandigheden van de zaak zelf zal concentreren, mag men van het volledige EHRM meer algemene bespiegelingen verwachten. Ongetwijfeld wordt dat een heftige discussie, als de felheid van de minderheid in *Sanoma* in aanmerking wordt genomen.

2 Zie hierover ook *Wouters & Oranje/Voute*, Hof Den Haag 27 juli 2006, *Mediaforum* 2006-9, nr. 28 m.nt. F. Fernhout, en *Van Helvoirt/Toering & TOP Oss*, Hof Den Bosch 11 juli 2006, *Mediaforum* 2007-1, nr. 2 m.nt. R.D. Chavannes.

3 *Sanoma Uitgevers BV/The Netherlands*, 31 maart 2009, No. 38224/03, *Mediaforum* 2009-5, nr. 17, *NJ* 2009, 452 m.nt. E.J. Dommering, EHRC 2009, 70, m.nt. A.J. Nieuwenhuis. Zie ook A.W. Hins, 'Wat is de belofte van een journalist waard? Vrijheid van nieuwsgaring na het arrest Sanoma tegen Nederland', *Mediaforum* 2009-5, p. 202-206.

4 Memorial of the Government of The Netherlands on the merits of Application No. 38224/03 van 9 november 2009.

5 Zij maakt er ook een punt van dat van een in vertrouwen door een informant verstrekte informatie geen sprake kan zijn, als de informatie inhoudt dat de journalist bij een gebeurtenis op een op zichzelf openbare plaats aanwezig mag zijn. Dat lijkt mij voor discussie vatbaar, als deze informatie voor het overige verborgen blijft voor, bijvoorbeeld, de politie. Vergelijk de beschikking van – toen nog – rechter-commissaris Egbert Myjer in de Vordense Dierenbevrijdingsfront zaak (Rc Rb Zutphen 29 september 1982, *NJCM-Bulletin* 1982, 413 m.nt. F. Kuitenbrouwer).