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IN THE MATTER OF AN APPLICATION BY

DETECTIVE INSPECTOR TODD CLEMENTS

(APPLICANT)

and

ED MOLONEY

(RESPONDENT)

JUDGMENT OF HIS HONOUR JUDGE HART QC

RECORDER OF BELFAST

2 SEPTEMBER 1999

Appearances:

Mr David McAllister of counsel on behalf of the Applicant, instructed by the Crown Solicitor

Mr Michael Lavery QC and Mr John O'Hara of counsel, for the Respondent, instructed by Francis Keenan, Solicitor

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Well as I say I will reserve my decision and I will give it as soon as possible.

[COURT ROSE 4.35]

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This is an application by Mr Moloney that the Court should set aside an order which it made on the application of Detective Inspector Clements on 8 July 1999 under the provisions of paragraph 3, schedule 7 of the Prevention of Terrorism (Temporary Provisions) Act 1989 (the 1989 Act), to the effect that Mr Moloney, who is the Northern Editor of The Sunday Tribune newspaper, produce to the police within seven days of the order:-

"notes (whether in hand-written form, type-written form, on tape or on computer disc or any other means of storage) taken by (him) in the course of interviews with Mr William Stobie which took place between 12 February 1989 and the time of his being charged on 23 June 1999 for the murder of Mr Patrick Finucane on 12 February 1989 (which) is in (Mr Moloney's) possession, custody or power"

Patrick Finucane, a prominent Belfast solicitor, was murdered on 12 February 1989. Following the charging of William Stobie with Mr Finucane's murder on 23 June 1999, a long and extremely detailed article by Mr Moloney relating to the murder of Mr Finucane, the alleged involvement in that murder of Stobie and Stobie's activities as a Special Branch informer appeared in The Sunday Tribune of 27 June 1999. The article also described in considerable detail events concerning Stobie, or to which Stobie was a party, from before Mr Finucane's murder, up to and including the murder, as well as his subsequent arrest and detention by the police. As can be seen from the article, to which I shall have to refer in greater detail later in this judgment, the information contained in it purports to come largely, though not entirely, from Stobie himself.

Before I consider the principal issues raised by the present application, it is appropriate to

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refer to a number of preliminary and procedural aspects of the application. As is provided for by paragraph 3 of schedule 7 of the 1989 Act, the original application was made to the Court ex parte. However, by virtue of paragraph 4 of schedule 7 of the 1989 Act, Mr Moloney has applied to the Court that the order be discharged. It is common ground that the application to discharge the order of 8 July is in the nature of a rehearing and that there is no onus upon Mr Moloney to satisfy me that the ex parte order was wrongly made. See Stuart-Smith LJ in R -v- Crown Court at Middlesex Guildhall, ex parte Salinger and another [1993] 2 AER at page 320d.

In the course of the hearing of 23 August 1999 a number of procedural issues arose and I propose to refer to those before turning to the substantive issues raised by the application. Before doing so, it may be helpful to set out the background to this matter as contained in the statement of facts made by D/C/I Turner in support of the application of 8 July and as amplified by his oral evidence on 23 August.

On the evening of Sunday 12 February 1989 Mr Finucane was eating a meal with his wife and three children in the kitchen of their home at 11 Fortwilliam Drive, Belfast when a number of masked gunmen forced their way into the house at about 7.30 pm. Several shots were fired from two firearms and Mr Finucane was fatally wounded. The gunman left in a vehicle which had been parked adjacent to Mr Finucane's home and drove away. A murder investigation was immediately set in train by the RUC and, although there were a number of arrests, no one was charged until Stobie was charged with the murder of Mr Finucane on 23 June 1999. At present, the police do not allege that Stobie was one of the masked gunmen.

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In 1990 Stobie met a journalist, Neil Mulholland, and, as a result, Mr Mulholland made contemporaneous notes of what Stobie admitted to him. Subsequently, Mr Mulholland spoke to police officers about what he had been told by Stobie, and informed them that Stobie admitted that he was involved in the planning of Mr Finucane's murder, in the supply of the weapons which were used in the murder and in the recovery of the murder weapons. However, at that time Mr Mulholland refused to make a witness statement relating to what Stobie had told him, or, as I understand it, to produce his contemporaneous notes.

As a result of what the police had learned, Stobie was arrested in September 1990 and interviewed on thirty two occasions over a period of seven days in connection with Mr Finucane's murder. During those interviews Stobie denied that he had actually being present when Mr Finucane was murdered but made certain admissions. These were that he was a UDA quarter master at the time, was asked to supply certain firearms and that he recovered these firearms after Mr Finucane's murder. However he denied that he knew that Mr Finucane was to be the target, although he knew that the target was a person whom he described as a "top provo".

Following questioning Stobie was released and a file submitted to the Director of Public Prosecutions but no prosecution was directed at that time.

Around 19 April 1999 the Chief Constable of the Royal Ulster Constabulary requested Deputy Commissioner Stevens of the Metropolitan Police to come to Northern Ireland and to investigate the murder of Mr Finucane. D/C/I Turner is one of the officers from the Metropolitan Police who is assisting Deputy Commissioner Stevens. The Detective Chief

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Inspector interviewed Mr Mulholland who confirmed what he had said in 1990, and unlike in 1990, has made a written witness statement to the police and produced his original contemporaneous notes of the admissions allegedly made to him by Stobie in 1990.

Stobie was subsequently arrested and questioned. He made a short statement in which he denied all allegations of criminal activity made against him. This statement was, it appears, read out by his solicitor at the first remand hearing at Belfast Magistrates' Court. In the course of that statement Stobie alleged that he had been a paid police informer from 1987 until 1990. He further alleged that on the day of Mr Finucane's murder he informed his Special Branch "handlers" twice by telephone that a man was to be shot, and that his handlers realised the full significance of this information. Stobie also referred to other matters connected with the finding of weapons by the police at his home in North Belfast in November 1989, following which he stood trial at Belfast Crown Court in January 1991, but was found not guilty when the crown offered no evidence against him.

When the matter first came before me, as it was an ex parte application there was a heavy onus upon the court in dealing with an application of this type to see that the procedure was not abused. At the initial hearing I requested, and was shown a number of documents by D/C/I Turner which I read in order to satisfy myself that the application was properly made. These were (1) the witness statement of Neil Mulholland made on 3 June 1999, (2) a summary of the questions put to, and answers given, by Stobie during interview and (3) his police statement of 23 June 1999. In addition I had (4) the two page undated statement of facts in support of the application prepared and given to the court by D/C/I Turner on 8 July 1999.

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When the application to set aside the order first came before the court on 27 July, Mr O'Hara applied to the court to have all four documents disclosed to the respondent. Having heard argument from counsel, and in the light of Mr McAllister's indication that the applicant was willing to furnish the two page statement of facts, I ruled that I was not prepared to direct that the applicant should hand over documents (1), (2) and (3), because to do so might prejudice the police inquiries at that stage. However, I indicated that the matter would have to be kept under review and could be reconsidered by the Court depending on the stage reached by the police investigations at that time, and the Court could not pre-empt any decision that might be made in the light of those circumstances.

At the resumed hearing on 23 August Mr Lavery applied to the court that (1) either these documents should be provided by the applicant to enable the respondent to meet the case being made against him, or (2) if the applicant was not prepared to do so, that the application should be stayed. In the alternative, he submitted (3) that if the court considered that the applicant should not be ordered to disclose this material, then the matter should be heard by another judge who had not seen the material placed before the court on 8 July. Mr McAllister was prepared to provide a copy of Stobie's police statement and therefore the issue related only whether Mr Mulholland's written statement and the summary of the questions and answers should be produced. Mr McAllister accepted that Mr Mulholland's witness statement and the evidence relating to Stobie's interviews would, in all probability, ultimately emerge into the public domain. Clearly this would be the case during any committal proceedings or trial that may take place. However, he resisted the application to order the documents disclosure at the present time on the basis that to do so might hinder the continuing police inquiries.

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Having considered the matter I was satisfied to order the applicant to disclose those documents at the present time may prejudice the continuing police inquiry. The allegations against Stobie and made by him relate to exceptionally grave matters and I was satisfied that the inquiries are continuing. It is clear from Salinger's case that whilst the respondent should be given as much information as he properly can be given as to the grounds upon which the application is made, either at the time the order is served upon him, or before, or at the time of, any application to set the order aside, that overall objective is subject to the limitation that it must be consistent with the security of the operation upon which the investigating authorities are engaged. In deciding whether it was proper to order the disclosure of this material I had to balance the security of the continuing inquiries by the police against the ability of the respondent to deal with the case being made against him. In any police investigation there are matters which the police properly may wish to withhold from public scrutiny during an inquiry lest those who may be made subject to further questioning or arrest are alerted to the nature of the case against them. In view of the contents of Mr Moloney's article there is, as I shall later refer to in this judgment in a different context, substantial evidence to indicate that there are obvious lines of inquiry to be pursued against people who have not yet been arrested. I also took into account that the extremely detailed nature of Mr Moloney's article, and the fact that the applicant would call witnesses who would be available for cross examination, would enable Mr Moloney to present his case fully and forcefully. I further ruled that if an issue should arise during the questioning of an officer as to whether a specific question ought to be answered then the court would have to decide whether that question should be answered.

It is also clear from Salinger's case that the court may have been made aware of information

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at the ex parte stage which cannot be disclosed to the respondent at an application of this sort. If the court takes the view that that sensitive information was decisive then the court should tell the respondent that that is the case. In the present case I was satisfied that the documents shown to the Court on 8 July were not decisive and that it is possible for me to consider the present application entirely upon the basis of the evidence which was to be placed before the court on 23 August. In those circumstances I did not consider it necessary to discharge myself in order that the matter be heard before another judge.

When the application first came before the court on 8 July the police sought an order in respect of the notes taken by Mr Moloney of his interviews with Stobie between 1990 and his arrest in June 1999, as well as any background material which came into existence in connection with Mr Moloney's research which preceded the publication of the article in The Sunday Tribune of 27 June 1999. I refused to make an order in such a broad terms and limited it, as the order at the beginning of this judgment makes clear, to the notes, in whatever form they may exist, taken by Mr Moloney during his interviews of Stobie. That there exist such notes is not disputed, and I am satisfied that the notes (in whatever form they may be recorded) consist of "excluded material" within the meaning of Article 13 (1)(c) and Article 15 of the Police and Criminal Evidence (Northern Ireland) Order 1989, and so fall within the terms of paragraph 3(1) of schedule 7 of the 1989 Act. The police do not now seek to pursue the wider application originally made.

By virtue of paragraph 3(5) of schedule 7 of the 1989 Act the applicant has to establish "that a terrorist investigation is being carried out". I am satisfied that Mr Finucane's murder was "an act of terrorism connected with the affairs of Northern Ireland" within section 14(2)(a)

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of the 1989 Act and that there is an investigation being carried on by Deputy Commissioner Stevens and his officers into the circumstances of, and surrounding, Mr Finucane's death. In his article Mr Moloney described certain admissions allegedly made by Stobie concerning other very grave offences which were not connected with his role in the murder of Mr Finucane. The most serious of these offences relates to Stobie's admission that he provided a getaway van used by UDA gunmen who murdered a 19 year old County Fermanagh protestant called Adam Lambert at a building site not far from Stobie's home in North Belfast. I accept D/C/I Turner's evidence that these matters were not originally within the remit of Depury Commissioner Stevens inquiry but will now be investigated following discussions with the Chief Constable and the DPP. However, it is the investigation into the murder of Mr Finucane to which this application relates and in respect of which the court has to consider whether the remaining conditions contained in paragraph 3(5)(a) and (b) of schedule 7 of the 1989 Act are satisfied.

These are -

(a) "... that there are reasonable grounds for believing that the material is likely to be of substantial value (whether by itself or together with other material) to the investigation for the purpose of which the application is made; and

(b) that there are reasonable grounds for believing that it is in the public interest, having regard -

(i) to the benefit likely to accrue to the investigation if the material is obtained; and

(ii) to the circumstances under which the person has the material in his possession, custody or power

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that the material should be produced or that access to it should be given."

Before considering the arguments placed before the Court as to the extent to which these criteria were or were not met in the present case, it is appropriate at this stage to consider the wider issues of principle which Mr Lavery raised. He asked the court to keep in mind throughout that what Mr Moloney was not prepared to do was to go into the witness box, produce his notes and in any circumstances give evidence against Stobie. He submitted that steps ought not to be taken which are going to damage the relationship between the press and the people from whom they gather information, unless it is absolutely necessary and unless there is some tangible benefit. He continued by submitting that if Mr Moloney

"... is seen as well as to be a journalist to be a gatherer of evidence for the crown and to become a witness for the crown, this would clearly be utterly destructible (sic) of his position as a journalist and destroy his credibility in the future and would inhibit him and other journalists greatly in the investigative function that is so essential to our free society."

In support of this he referred to the decision of the European Court of Human Rights in Goodwin -v- United Kingdom 22 EHRR 123. When construing domestic legislation, the Court will presume that Parliament intended to legislate in conformity with the European Convention on Human Rights, not in conflict with it. R -v- Home Secretary, ex-parte Brind [1991] 1 A.C 696 at 747 per Lord Bridge.

Although the provisions of the European Convention on Human Rights are not yet directly operative in the domestic law of the United Kingdom. when a judge is considering the

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common law and statutory discretionary powers under domestic law, the jurisprudence of the European Court concerning a relevant provision of the Convention can have a valuable role to play, even though the Convention and decisions of the European Court under it are not yet binding upon the courts of this country. R -v- Khan (Sultan) [1996] 3 AER p 289, per Lord Slynn of Hadley at page 292d and Lord Nicholls of Birkenhead at page 302j. In Goodwins' case the European Court had to consider the provisions of Article 10 of the Convention which, so far as is relevant, provides:-

> "1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers ...
>
> 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Mr Lavery relied upon the conclusions of the Court as set out in paragraphs 39 and 40 of the judgment which I set out below:-

> "39 The Court recalls that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance.
>
> Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States

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and is affirmed in several international instruments on journalistic freedoms. 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 information 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 an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.

These considerations are to be taken into account in applying to the facts of the present case the test of necessity in a democratic society under Article 10(2).

40 As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess 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. Similarly, that interest will weigh heavily in the balance in determining, as must be done under Article 10(2), whether the restriction was proportionate to the legitimate aim pursued. In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court."

Mr Lavery naturally stressed the reference in paragraph 39 to the "potentially chilling effect of an order of source disclosure", and his submission that disclosure of his notes should not be ordered unless that was absolutely necessary, and unless there was some tangible benefit from doing so, gains support from the statement that an order of source disclosure "cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest."

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The provisions of paragraph 3(5) of schedule 7 of the 1989 Act provide very considerable safeguards for a journalist against whom an application such as this is made. First of all, the Court has to be satisfied that there are reasonable grounds for believing that each of the specified conditions are met. Secondly, that the material is likely to be of value to the investigation. Thirdly, that it is in the public interest that the order be made. Fourthly, in considering whether it is in the public interest the Court has to have regard to the benefit which is likely to accrue to the investigation. Fifthly, the Court is expressly required to have regard to the circumstances under which the person against whom the order is sought has the material in his possession, custody or power. As Woolf LJ (as he then was) pointed out in DPP -v- Channel 4 Television Company Limited & Anor [1993] 2 AER 517 at page 524f, this allows the court to take into account any undertaking which was given to the source by the journalist concerned.

I am therefore satisfied that the provisions of paragraph 3(5) of schedule 7 of the 1989 Act are compatible with the terms of Article 10 of the Convention because they require the Court to have due regard to the importance and relevance of the information sought to the investigation into a terrorist offence being carried out, whilst having due regard to the interest of democratic societies in ensuring and maintaining a free press.

The first matter I have to consider is, therefore, whether there are reasonable grounds for believing that Mr Moloney's notes are likely to be of substantial value, whether by themselves or together with other material, to the investigation into Mr Finucane's murder. The first, and principal, reason given by D/C/I Turner in his statement of facts was that the notes were sought to establish whether they directly corroborated Mr Mulholland's

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credibility. An 'investigation' may encompass all the stages from the initial gathering of evidence prior to a person being charged up to and including the trial itself. In certain circumstances, as, for example, where others are being sought or considered for prosecution, it may continue even after a trial. I see no reason to limit the scope of the investigation to the pre-trial process, and it may well be justifiable for the police to obtain material which will directly bear on the credibility of a person from whom they have a witness statement. A relevant consideration is whether the material sought would be admissible, and, in the light of Mr Moloney's stated refusal to contemplate giving evidence against Stobie, D/C/I Turner conceded that it would not be admissible unless, for example, Mr Moloney gave evidence for Stobie. This also touches upon the question of whether there is likely to be a benefit to the investigation, as these conditions are interrelated to some extent.

In the present case the prosecution already have evidence from Mr Mulholland against Stobie, and whilst Mr Moloney's notes would be of value to supporting the credibility of Mr Mulholland's evidence I am not persuaded that the benefit to the prosecution of Stobie would be sufficiently substantial to justify the notes being produced to the police. One consequence of such an order would be that the prosecution would have advance notice of admissions by Stobie to someone else who is not willing to give evidence for the prosecution when they rely on alleged admissions by him to a person who is willing to give evidence on their behalf. There may be good reasons for making such an order where the person against whom it is sought is not a journalist. However, that does not have to be decided in this case as there is sufficient information in Mr Moloney's article for the prosecution to decide whether Mr Mulholland's evidence appears to be credible or not.

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D/C/I Turner advanced another reason why the order should be made, namely that there are further lines of enquiry that the police wish to follow into Mr Finucane's murder. This was advanced by him in his oral evidence in the ex parte application of 8 July and again on 23 August. His evidence is that there are facts referred to in the article that were not contained in Mr Mulholland's statement and notes. D/C/I Turner was very guarded in his evidence, and understandably so. As I have already stated, the police may properly wish to withhold matters from public scrutiny during an enquiry lest those who may be made subject to further questioning or arrest are alerted to the nature of the case against them. Whilst such reticence is, in general, entirely understandable, nevertheless the police have to point to the existence of sufficient material which enables the Court to decide for itself whether there are reasonable grounds for believing that the material sought will be of substantial value to the investigation.

D/C/I Turner pointed to the references in the article by their initials to those who actually took part in Mr Finucane's murder. He said that it was very important for the police to examine Mr Moloney's notes to see whether the initials were expanded and, if they were, so ascertain the identity of those involved. Mr Lavery said that this was a spurious point and that the police knew who were referred to, but D/C/I Turner said some of the initials appeared to refer to names not mentioned by Mr Mulholland.

If that is the case, then that material alone is potentially of very great value indeed to the investigation, as it would enable the police to positively identify some of those involved in Mr Finucane's murder. I see no reason to disbelieve D/C/I Turner's evidence and this alone is sufficient to satisfy me that the material sought is likely to be of substantial value to the

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investigation. It must also be remembered that the majority of the references to Stobie's admissions are in the third person, and so it is important that the original notes be inspected to see whether they contain additional material evidence unknown to the police and which may lead to those still at large being brought to justice for this very grave crime. Naturally, there is a degree of speculation involved at this stage in accessing how significant such material may prove to be, but that is inherent in any application of this kind where the police have not seen the original material and are relying on a description of it by a third party, in this case by Mr Moloney.

I am therefore satisfied that the applicant has established that there are reasonable grounds for believing that the contents of Mr Moloney's notes are likely to be of substantial value (whether by themselves or together with other material) to the investigation into Mr Finucane's murder. That they may also have a benefit which would not justify the making of an order is not a basis for refusing to make the order on other grounds if, as I am satisfied is the case, these other grounds are made out.

I now turn to consider the benefit likely to accrue to the investigation if these notes are produced. For the reasons I have already given it is plain that there are reasonable grounds for believing that they will be a very considerable benefit. but the Court has to consider whether it is in the public interest that the notes be produced, not withstanding that benefit, and this brings me to the question of the competing public interests which have to be balanced.

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On the one hand there is the public interest in protecting the legitimate role of the press. As was said by the European Court of Human Rights in Goodwins' case. "The potentially chilling effect of an order of source disclosure" must "be justified by an overriding requirement in the public interest". When Goodwins' case was before the House of Lords in X Ltd -v- Morgan Grampian (Publishers) Ltd [1990] 2 AER 1, at page 7f Lord Bridge stated that a judge must engage in a balancing exercise, in which he must:-

> "... start with the assumption, first that the protection of sources is in itself a matter of high public importance, second, that nothing less than necessity will suffice to override it, third, that the necessity can only arise out of concern for another matter of high public importance."

Whilst these remarks were in the context of section 10 of the Contempt of Court Act 1981, I consider them to be equally applicable in the present case. That those involved in Mr Finucane's murder may be brought to justice is clearly a matter of the highest public importance, not just for his family, but for the maintenance of the rule of law itself, as attacks on those who play their part in the administration of justice directly attack the rule of law which is a cornerstone of our democratic society.

One must also take into account the reasons why Stobie gave this information to Mr Moloney and the basis upon which Mr Moloney accepted that information. Mr Moloney chose not to give or to call any evidence and so one is left with the contents of the article itself. At the end of the article Mr Moloney summarized the agreement between Stobie and himself in these words:

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> "When I made contact with Stobie in 1990 we made a deal. I would not publish a word of his story without permission. The risk that the UDA would shoot him if the story surfaced in an uncontrollable fashion was too great. In return he would tell me the full story so that if the day ever arrived it could be told in full. The deal has today been honoured."

In the article Stobie's motives for giving the information are described in some detail. As stated earlier, following Mulholland's discussions with the police in 1990 Stobie, by his own account an active terrorist and police informer, had been questioned by the police about his involvement in Mr Finucane's murder and was frightened in case his terrorist colleagues discovered that he was a police agent.

> "He feared that his life was in danger and he needed reliable insurance, someone who would make his story public if anything happened to him.
>
> More than that, he claimed that the Special Branch had fitted him up by planting guns in his apartment in a bid, he believed, to force his silence over the Finucane killing. At the time of our first interview he was facing charges of possessing guns with intent and the prospect of a lengthy spell in jail. He would consider going public if the alternative was the Maze prison. That's why we were talking."

On Stobie's account, he eventually evaded conviction on charges he maintained were fabricated. It seems reasonable to infer that Stobie gave information to Mr Moloney on the express understanding that his name could be published, along with details of the crimes he had committed. That Stobie was prepared for, and indeed wanted, his name and details of his activities to be placed in the public domain is the opposite of the continued anonymity sought by those who provide information for journalists in the vast majority of, if not

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virtually all, cases where a journalist seeks to protect his sources. It is therefore very different from Goodwins' and the Channel Four cases.

Stobie's motive for this is stated to be a form of "insurance", and it seems a reasonable inference to draw that the events he wished to "insure" against included his being convicted of the serious crimes he has allegedly admitted. No doubt he wished that any information which Mr Moloney published as part of their arrangement would only work to his (Stobie's) advantage and not to his detriment, but one has to ask what is the public interest to be served in protecting all information given by a self confessed criminal deeply implicated in a very grave crime when that person has deliberately placed much of it in the public domain and when that information may assist in bringing others involved to justice? In such circumstances it is hard to see how the protection of sources in the future will be imperilled if the court makes the order sought where a journalist conceals the information for many years and only releases it into the public domain after his source has been arrested and charged in connection with crimes arising out of the events the source has requested the journalist to make public, including his name.

A further aspect of this question relates not to Stobie's motives and actions, but whether Mr Moloney should have accepted the information on the basis he did.

Woolf LJ addressed this in the Channel Four case at page 532h where he pointed out that those who give undertakings to sources should not do so where they may be placed in the dilemma of breaking their undertakings or contravening a court order. He also pointed out that there may be circumstances where a journalist may be legally required not to keep an

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undertaking and the source must be taken to have appreciated this. Woolf LJ pointed out in the following passage at [1993] 2 AER p 532:-

> "1. The companies were at fault in authorising the giving of an unqualified undertaking to source A when they should have recognised the obvious risk of either having to break their undertakings or to contravene an order of the court.
>
> 2. Even having given an unqualified undertaking, they should recognise that there are some circumstances when they are legally required not to keep their undertaking and source A must be taken to have appreciated this. For example, if it had been ascertained that source A himself was a serial murderer and disclosure of his identity to the authorities was the only way in which we could avoid him killing again, would Channel Four, in those circumstances, think that they should not disclose his identity to the authorities?"

I am satisfied that in the circumstances of this case Mr Moloney was not justified in accepting Stobie's confidence on the basis that he would only publish material favourable to Stobie's interests, but would not provide material to the authorities which may have a very important role to play in helping to bring to justice one or more people involved in this very serious crime.

Taking all of the factors to which I have referred into account, I am satisfied that the balancing exercise which the Court is obliged to perform comes down in favour of the applicant.

The investigation into the murder of Mr Finucane is, to adopt the words of Lord Bridge quoted earlier, a matter of the highest public importance, as is the bringing to justice of those implicated in the murder who are still at large. The details of the article in question show

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that Stobie conveyed to Mr Moloney much detailed information relating to the identity of those persons and to the circumstances surrounding the murder. I am satisfied that there are reasonable grounds for believing that it is likely that if the police inspect the original notes they may be materially assisted in their investigations, and therefore disclosure of the notes is necessary for that investigation. This necessity is so strong that it outweighs the competing high public interest in preserving journalistic sources in the circumstances of the present case, not least because the nature and content of that material has been placed in the public domain at the behest of a self-confessed participant in the events surrounding the death of Mr Finucane. By doing so Stobie cannot be legitimately considered to have been, nor can anyone in a similar position in the future be deterred from imparting such information by the fear of his identity, or the details, becoming public. In such circumstances Stobie has effectively abandoned any protection for his information which the law might otherwise consider, and the balance of the competing public interests is in favour of the order sought by the applicant being granted.

I therefore refuse the respondent's application to discharge the original order of 8 July. However, I will vary the order in certain respects. First of all, for the avoidance of doubt, Mr Moloney will have seven days from today to produce his notes. Secondly, the order will make it clear that the notes must be returned to him as soon as possible once the investigation or criminal proceedings are over or they cease to be of value to the investigation. Thirdly, they must only be used for the purposes of the investigation into the murder of Patrick Finucane and any criminal proceedings arising out of that investigation.

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PREVENTION OF TERRORISM (TEMPORARY PROVISIONS) ACT, 1989

SCHEDULE 7

ORDER

County Court Division of Belfast

Whereas it appears from the application on Oath of Todd Clements, a Detective Inspector of the Royal Ulster Constabulary of Antrim Road CID -

1 That there is reasonable cause to believe that certain material, to wit, notes (whether in handwritten form, type-written form, on tape or on computer disc or any other means of storage) taken by you in the course of interview with Mr William Stobie which took place between 12 February 1989 and the time of his being charged on 23 June 1999 for the murder of Mr Patrick Finucane on 12 February 1989 is in your possession, custody or power.

2 You are hereby directed to produce it to a constable within seven days of this order.

3 The applicant must return to Mr Moloney any material delivered to the applicant pursuant to this order as soon as reasonably practicable after the conclusion of the investigation into the murder of Mr Patrick Finucane, or criminal proceedings arising out of that investigation, as the case may be, or as soon as practicable after it is apparent to the applicant that this material or any significant part of it will be of no value to that investigation.

4 The material is only to be used for the applicant's investigation into the murder of Mr Patrick Finucane and any resulting proceedings.

Order directed to: **Mr Ed Moloney**

Address: **28 Bawnmore Road, Belfast, BT9 6LB**

Dated this day of 1999

County Court Judge

for the said County Court Division

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