Neutral Citation Number: [2018] EWHC 2177 (QB)

Case No: HQ18X02611

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/08/2018

Before :

MR JUSTICE HADDON-CAVE

- -

Between :

(1) ABC
(2) DEF
(3) GHI

Claimants

- and -

TELEGRAPH MEDIA GROUP LIMITED

Defendant

- -

Mr James Price QC and Ms Chloe Strong (instructed by **Schillings**) for the **Claimants**

Mr David Price QC and Mr Jonathan Price (instructed by **DPSA** until 23rd July and by **Gordon Dadds** from 23rd July) for the **Defendant**

Hearing date: 23rd July 2018

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OPEN JUDGMENT

ON APPLICATION FOR AN INTERIM INJUNCTION

MR JUSTICE HADDON-CAVE:

Introduction

1. The Claimants seek an interim non-disclosure order pursuant to CPR rule 25.3 restraining the Defendant from publishing certain information on the grounds that such information is confidential.

2. The application and these proceedings were prompted by receipt by the Claimants of emails on 16th July 2018 from a journalist working for *The Daily Telegraph* stating the Defendant's intention to report certain matters.

3. At 08:48 hours on 18th July 2018, the Claimant's solicitors, Messrs Schillings, alleged a breach of confidentiality and threatened an injunction if suitable undertakings were not given by 12.00 noon. A rapid hearing was arranged before Nicklin J later that afternoon, who fixed a return date for 23rd July 2018 and invited the Defendant to volunteer undertakings until the adjourned hearing in accordance with the procedure outlined in paragraph [22] of *Cream Holdings Ltd & Ors v. Banerjee* [2005] 1 AC 253. In order to preserve the position and without prejudice to the merits, Nicklin J made a temporary order for anonymity and for the Court file to be sealed.

4. The matter came before me on Monday 23rd July 2018. I heard submissions from Counsel on both sides and was taken to detailed documentary written evidence. I received further written submissions from both sides and further evidence on 25th and 26th July 2018. I sat *in camera* pursuant to CPR 39.2 (3) (a), (c) and (g) and continued the order of anonymity and sealing of the Court file on a temporary basis.

Open and Closed Judgments

5. The full reasons for my decision on the Claimants' application are set out in my Closed Judgment which currently remains confidential to the parties and is not for publication. This Open Judgment comprises a brief summary of my decision.

The Law

Breach of confidence doctrine

6. The equitable doctrine of a breach of confidence seeks to protect confidential information from being disclosed or used for unauthorised purposes. The doctrine serves the public interest by encouraging trust, candour and good faith in legal relationships. The courts will, however, refuse to grant a request to protect confidential information where to do so would contradict the prevailing public interest. A confidant may rely on the 'public interest' defence as a means of justifying that which would otherwise constitute a breach of confidentiality.

Origins of the 'public interest' defence

7. The origins of the 'public interest' defence can be found in the 'iniquity rule' as articulated by Wood VC in the case of Gartside v Outram (1856) 26 LJ CH 113. In that case, the Court refused an application by the plaintiff to restrain the defendant from disclosing information in relation to their fraudulent business practices. As Wood VC

memorably said: "The true doctrine is that there is no confidence as to the disclosure of iniquity".

8. Lord Denning MR widened the public interest defence in *In Initial Services Limited v Putterill* [1968] 1 QB 396. In that case, the Court refused an application by the plaintiff to restrain a former sales manager from informing the press as to the plaintiff's involvement in price fixing. Lord Denning MR emphasised the need for a recognisable public interest (at page 405):

> "The exception should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always – and this is essential – that the disclosure is justified in the public interest. … There may be cases where the misdeed is of such a character that the public interest may demand, or at least excuse, publication on a broader field even to the press."

9. Bingham LJ sought in *W v Edgell* [1990] 1 WLR 471 to introduce the concept of 'reasonableness' as an element to the public interest defence.

10. Lord Goff gave the following general guidance in the *Spycatcher* case [1990] 1 AC 109 (at pages 281-283):

> "To this broad general principle [i.e. the duty of confidence], there are three limiting principles…. The first limiting principle… is that the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it. …"
>
> The second limiting principle is that the duty of confidence applies neither to useless information, nor to trivia. …
>
> The third limiting principle is of far greater importance. It is that, although the basis of the law's protection of confidence is that there is a public interest that confidences should be preserved and protected by the law, nevertheless that public interest may be outweighed by some other countervailing public interest which favours disclosure. This limitation may apply, as the learned judge pointed out, to all types of confidential information. It is this limiting principle which may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure.
>
> Embraced within this limiting principle is, of course, the so called defence of iniquity. …"

Modern law relating to non-disclosure applications

11. The law relating to non-disclosure applications has developed in the wake of the Human Rights Act 1998 ("HRA") and the European Convention on Human Rights ("ECHR). Before the HRA came into force, the circumstances in which the public interest in publication overrode a duty of confidence were limited. The issue was whether 'exceptional circumstances' justified disregarding the confidentiality that would otherwise prevail. Today the test is different. The modern law is stated below.

Statutory provisions

12. When a party seeks to restrain the publication of information, section 12 of the HRA and article 10 of the ECHR are engaged. Article 8 of the ECHR may also be engaged. Articles 8 and 10 of the Convention have equal status and neither has automatic precedence over the other (see generally *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, paragraph 17). Lord Goff explained in the *Spycatcher* case (supra, at page 283) that there was no inconsistency in relation to freedom of expression between the approach in English Common Law and Article 10 of the ECHR.

13. Section 12(3) of the Human Rights Act 1998 gives enhanced protection to a media respondent to a non-disclosure application. This reflects the long-recognised dangers of prior restraint of the media. The balance of convenience test does not apply. Instead, the court cannot restrain publication before trial unless satisfied that the applicant is likely to establish that publication should not be allowed. "Likely to" means "more likely than not": the court must make its best prediction on the material before it as to the outcome at trial. It follows that where a potential defence stands in the applicant's way to the relief sought, the applicant should direct attention and evidence to it (see generally *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, paragraphs 22–23).

14. Section 12(4) requires the court to have "particular regard to the importance of the Convention right to freedom of expression". Section 12(4)(a) extends the requirement to have "particular regard" to three matters: (i) what is available to the public, (ii) the "public interest" in publication and (iii) any relevant privacy code. The IPSO Editor's Code is one such relevant code (see further below).

General principles

15. The law and practice of interim non-disclosure orders, namely applications for interim injunctive relief to restrain the publication of information, is well-established. The general principles are set out in *Practice-Guidance (Interim Non-disclosure Order) (SenCts)* [2012] 1 WLR 1003. Such applications are founded on rights guaranteed by the ECHR or on grounds of privacy or confidentiality. I rehearse the main principles below.

16. First, the fundamental principle is open justice. Hearings, judgments and orders should be heard and made in public (article 6.1 of the ECHR; CPR r 39.2; *Scott v Scott* [1913] AC 417). This includes applications for interim non-disclosure orders (*Micallef v Malta* (2009) 50 EHRR 920, para 75; *Donald v Ntuli (Guardian News & Media Ltd intervening)* [2011] 1 WLR 294, para 50).

17. Second, derogations from this general principle can only be justified in exceptional circumstances when strictly necessary to secure the proper administration of justice (*R v Chief Registrar of Friendly Societies, Ex p New Cross Building Society* [1984] QB 227, 235; *Donald v Ntuli* [2011] 1 WLR 294, paras 52—53). Derogations should be no more than strictly necessary to achieve their purpose.

18. Third, derogation is not a question of discretion but duty. The court is under a duty either to grant the derogation or refuse it, having applied the relevant test (*M v W* [2010] EWHC 2457 (QB) at [34]).

19. Fourth, there is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if, and to the extent that, the court is satisfied that justice cannot be done other than by exclusion of the public. Exclusions must be no more than the minimum strictly necessary to ensure justice is done. The parties are expected to consider whether something short of exclusion can meet their concerns, as will normally be the case (*Ambrosiadou v Coward* [2011] EMLR 419, paras 50—54). Anonymity will only be granted where it is strictly necessary, and then only to that extent.

20. Fifth, the burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence (*Scott v Scott* [1913] AC 417, 438—439, 463, 477; *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103, paras 2—3; *Secretary of State for the Home Department v AP (No 2)* [2010] 1 WLR 1652, para 7; *Gray v W* [2010] EWHC 2367 (QB) at [6]-[8]; and *H v News Group Newspapers Ltd (Practice Note)* [2011] 1 WLR 1645, para 21).

21. Sixth, when considering the imposition of any derogation from open justice, the court will have regard to the respective, and sometimes competing, Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of Article 8 of the Convention, where it is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their Article 8 Convention right is entitled (see generally *H's case* [2011] 1 WLR 1645).

22. Seventh, a 'super-injunction', namely an interim non-disclosure order containing a prohibition on reporting the fact of proceedings, will only be justified in the rarest cases on grounds of strict necessity, *i.e.* anti-tipping-off situations where short-term secrecy is required (*T v D* [2010] EWHC 2335 (QB)). It is then only in truly exceptional circumstances that such an order should be granted for a longer period (*Terry v Persons Unknown* [2010] EMLR 400, para 41).

Specific principles

23. There are three main elements of a claim in breach of confidence, namely that (i) the information has the necessary quality of confidence, (ii) it has been imparted in circumstances importing an obligation of confidence (owed by the defendant to the claimant), and (iii) there has been unauthorised use.

24. The fact that there is a contractual bar on the disclosure of information in the form of a written non-disclosure agreement does not mean *ipso facto* that the information has the necessary quality of confidence. Further, no injunction based on breach of confidence will be ordered where the claimant's primary concern is the protection of his reputation (*Tillery Valley Foods v Channel Four Television & Anor* [2004] EWHC 1075 (Ch) at [21]).

25. Where a third party has acquired confidential information he may also come under an obligation of confidence depending upon the circumstances in which he acquired it. The third party's duty is parasitic on the duty of the person imparting the information.

The modern approach to the 'public interest' defence

26. The modern (*i.e.* post-HRA) approach as to the public interest defence is set out in the Court of Appeal's judgment in *Associated Newspapers Limited v HRH Prince of Wales* [2006] EWCA Civ 1776 [65] to [69]. The four main tenets can be summarised as follows:

    (1) There is an important public interest in the observance of duties of confidence since those who engage employees, or who enter into other relationships that carry with them a duty of confidence, ought to be able to be confident that they can disclose, without risk of wider publication, information that it is legitimate for them to wish to keep confidential (*ibid* at [67]).

    (2) The modern approach as to the circumstances in which the public interest in publication can be said to override a duty of confidence is whether a fetter of the right of freedom of expression is, in the particular circumstances, "necessary in a democratic society". The test is one of proportionality: the court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public (*ibid* at [67]).

    (3) It is arguable that a duty of confidentiality that has been expressly assumed under contract carries more weight, when balanced against the restriction of the right of freedom of expression, than a duty of confidentiality that is not buttressed by express agreement; but the extent to which a contract adds to the weight of duty of confidence arising out of a confidential relationship will depend upon the facts of the individual case (*ibid* at [69] citing *Campbell v Frisbee* [2003] ICR 141).

    (4) Thus, in essence, the Court must consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public.

27. In *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] AC 109, Lord Goff stated as follows (at page 283A – B):

> "[A] mere allegation of iniquity is not of itself sufficient to justify disclosure in the public interest. Such an allegation will

> only do so if, following such investigations as are reasonably open to the recipient, and having regard to all the circumstances of the case, the allegation in question can reasonably be regarded as being a credible allegation from an apparently reliable source."

28. Thus, it is not necessary to prove the truth of an allegation of misconduct in order for a public interest defence to a breach of confidence to succeed at trial. It is simply necessary to prove (a) that there is a legitimate public interest in the misconduct alleged, and (b) the allegation(s) are reasonably credible.

29. Article 10(3) contains an express confidentiality exception. In these circumstances, I agree with Mr James Price QC, in practical terms reliance upon Article 8 adds little in the present context. The balancing exercise and ultimate question is the same, namely whether, in all the circumstances, the public interest in publication outweighs the public interest in maintaining confidentiality. It is to this question and exercise to which I now turn.

Decision

30. I have carefully considered the evidence variously relied upon by the Claimants and Defendant. I have also carefully reflected on the detailed submissions made on both sides. In my judgement, the Claimants are not likely to establish at trial that publication of the information by the Defendant should be prohibited. In other words, that Claimants have not shown that they will succeed at the ultimate trial of this matter. I have concluded that, in all the circumstances, the public interest in publication outweighs any confidentiality attaching to the information.

31. My reasons are, in summary as follows:

    (1) First, the information is reasonably credible.

    (2) Second, there can be little or no reasonable expectation of confidentiality or privacy in respect of the information.

    (3) Third, a considerable amount of the information is already in the public domain.

    (4) Fourth, it has not been demonstrated that the information has been obtained in breach of the NDAs.

    (5) Fifth, in my view, publication of the information would be in the public interest.

32. As regards (5), English Common Law has always been fiercely protective of comment and opinion.

33. Strasbourg jurisprudence has reinforced the importance of freedom of political debate in a democratic society. The right to freedom of expression is accorded a high level of protection in the Convention jurisprudence, especially when exercised by the media. As the learned editors of *The Law of Privacy and the Media, 3rd edition*, explain in paragraph 11.121, the following (powerful) formulation has been adopted by the European Court in a number of cases (including *Gaweda v. Poland App no 26229/95* (ECtHR, 14 March 2002) paragraph 34):

> "The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does it have the task of imparting such information and ideas: the public has a right to receive them. Were it otherwise, the press would be unable to play its vital role of 'public watchdog'."

34. In *Hannover v. Germany (No 1)* (2005) 40 EHRR 1, the European Court expressed the view that, where the justification for interfering with private life was under consideration, the crucial question is whether the reporting of the facts in question is "capable of contributing to a debate in a democratic society" or of making a "contribution… to a debate of general interest" (*ibid*, n 325 [63]). Although the actual decision on the facts was somewhat restrictive in that case, European Court decisions since 2005 have tended to move back towards an approach more protective of rights of free speech (see *The Law of Privacy and the Media, 3rd edition*, paragraph 11.125; *Axel Springer AG v. Germany (No.2)* (2012) 55 EHRR 6; and *Hannover v. Germany (No 2)* (2012) 55 EHRR 15).

35. In my view, publication by the Defendant of the information in question is clearly capable of significantly contributing to a debate in a democratic society. Indeed, in my view, publication of the information would be in the public interest, notwithstanding the confidentiality which the Claimants' assert attaches to it.

Conclusion

36. In conclusion, for the above reasons and those set out in my Closed Judgment, in my judgment the Claimants are not likely to succeed at the ultimate trial of this matter. I am satisfied that the public interest in publication outweighs any confidentiality attaching to the information. Accordingly, the Claimants' application for interim relief is dismissed.