Neutral Citation Number: [2019] EWHC 96 (QB)

Case No: HQ18M02611

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/01/2019

Before :

MR JUSTICE WARBY

- -

Between :

(1) Arcadia Group Limited
(2) Topshop/Topman Limited
(3) Sir Philip Green **Claimants**

- and –

Telegraph Media Group Limited **Defendant**

- -
- -

James Price QC, Robert Marven QC and **Chloe Strong** (instructed by **Schillings International LLP**) for the **Claimants**
Desmond Browne QC and **Jonathan Price** (instructed by **Ince Gordon Dadds LLP**) for the **Defendant**

Hearing date: 21 January 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE WARBY

MR JUSTICE WARBY :

Introduction

1. A number of pre-trial applications are now before the Court in this case, which has already received a good deal of publicity. It is a claim by two companies and one individual for an injunction to restrain the Telegraph Media Group from publishing information about the claimants. The claimants' case is that the information is confidential information, received by the defendant in the knowledge that the disclosure to it was made in breach of duties of confidence owed to the claimants. The claimants are Arcadia Group Ltd, Topshop/Topman Ltd, and Sir Philip Green. I shall refer to the corporate claimants as "Arcadia" and "Topshop" or, collectively, "the Companies", and to the third claimant as "Sir Philip".

The case in summary

2. The claim was prompted by an email ("the Foggo Email") sent on 16 July 2018 by Daniel Foggo, a journalist working for the Daily Telegraph, to Sir Philip and Neil Bennett of Arcadia's advisers Maitland. The Foggo Email notified its addressees that the paper was preparing for publication an article containing allegations of misconduct on the part of the claimants, which had been the subject of non-disclosure agreements ("NDAs"). The Foggo Email gave details of the alleged misconduct, referring to five named individual complainants. It was said, among other things, that "there is a significant public interest in investigating and reporting on the use of NDAs in employment cases." The email asked seven questions, asking for responses by 4pm the following day.

3. The claimants applied for an interim injunction to restrain disclosure of the information pending trial, asserting rights of confidentiality under or by virtue of the NDAs. Haddon-Cave J (as he then was) refused the application, for reasons given in a public judgment ([2018] EWHC 2177 (QB)), and a more extensive private judgment. But the claimants appealed. The defendant undertook not to publish pending a decision on the appeal. And after a hearing in September 2018, the Court of Appeal reversed the Judge's decision, and imposed an interim injunction to preserve the alleged confidentiality until after judgment in the action, directing a speedy trial. Again, there was a public judgment, dated 23 October 2018 ([2018] EWCA Civ 2329), and a private one containing more detail.

4. Up to and including that stage the case had been known as *ABC, DEF, and GHI v Telegraph Media Group*. The claimants had all been anonymised by order of the Court, from the outset. The Court of Appeal made a further anonymity order. But after the Court of Appeal decision, the third claimant was publicly identified in Parliament, and the disclosure of his identity was very widely reported. The anonymity orders became pointless. So, by consent, those orders have been discharged.

5. The Parliamentary disclosure did not include details of the underlying information, which remains protected by the interim injunction. The parties have exchanged written statements of their cases. Stated very broadly, the statements of case give rise to the following main issues:-

(1) Whether the defendant came under a duty of confidence in respect of the information at issue.

(2) If so, whether the disclosure of the information is nevertheless required or justified in the public interest.

6. The trial is due to begin before me in two weeks' time, on 4 February 2019. The parties have given disclosure of documents. Trial witness statements are yet to be exchanged.

Applications

7. The matters before me now are as follows:

(1) An application filed by the claimants on 20 December 2018, by which they seek orders requiring the defendant to identify certain of its sources of information ("the Source Disclosure Application"). This first came before me on 28 December 2018, when I directed that it should be heard on the first available date in January 2019.

(2) An application filed by the claimants on 27 December 2018, and amended on 31 December 2018, seeking orders for further and better disclosure of documents by the defendant. This ("the Claimants' Disclosure Application") was dealt with in part by Lambert J on 3 January 2019, but some issues remain in dispute.

(3) An application filed by the defendant on 20 December 2018, seeking further disclosure from the claimants. This ("the Defendants' Disclosure Application") was also dealt with in part by Lambert J on 3 January 2019, but she gave the defendant liberty to restore some aspects of the application, and on 11 January 2019 it served notice that it wishes to do so (the "Notice to Restore").

(4) I was also due to deal also with an application filed by the defendant on 15 January 2019, seeking an order for disclosure against three third-party individuals ("the Defendants' Third-Party Disclosure Application"). The defendant (as it now appears, by accident) sought an immediate disposal on paper. I directed that these matters should be dealt with at this hearing. Late last Friday, the defendant withdrew the application.

(5) Costs budgeting. Directions given by the Court of Appeal's Order of 30 October 2018 provided for the filing, exchange and service of budgets and budget discussion reports, with a costs management conference scheduled for the first available date after 11 January 2019. My Order of 28 December 2018 provided for any remaining disputes as to costs budgeting to be dealt with simultaneously with the Source Disclosure Application.

Privacy and reporting restrictions

8. In their application notice of 20 December 2018, the claimants sought an order that the hearing of the Source Disclosure Application be in private, and subject to a reporting restriction order. They also sought orders protecting the application documents from disclosure to third parties. At one stage it appeared that the parties were approaching agreement that the hearing could take place in public provided steps were taken to anonymise the complainants to whom reference had to be made, discretion was used in

what was said in open court, and suitable protection was put in place for the contents of sensitive documents. In the end, however, Leading Counsel were agreed that it would be impossible to do justice to their clients' cases if the hearing took place in public. After hearing argument, I was persuaded that this was so, and directed that the hearing of the disclosure applications would proceed in private, pursuant to CPR 39.2(3) (a), (c) and (g). I granted the application for reporting restrictions, and for restrictions on access to and disclosure of documents. A factor in my decision was that there would in any event be a public judgment. This is that judgment, which is not subject to any reporting restriction.

Conclusions and orders

9. During the hearing I made the following decisions on the applications, reserving my reasons to this Judgment:

(1) In the light of some further concessions by the defendant, and an undertaking on behalf of the defendant to formalise these by amendments to the Defence, I decided that no order should be made on the Source Disclosure Application. But I did not dismiss it. I will keep the issue under review in the light of developments in the case. I explain this decision further in the next section of this judgment.

(2) I made no order on the Claimants' Disclosure Application. As Ms Strong conceded, it was hard to press this application given my conclusion on the Source Disclosure Application; the two were closely linked. There was some force in Ms Strong's complaints about the inadequacy of the Defendant's Disclosure Statement, which was less than detailed. A witness statement seeking to explain and justify the extremely succinct account of the documents that were or had been in the defendant's possession seemed to me to undermine its own point. It gave more details than the list (thus making clear that the list could have been fuller than it was) yet failed to explain why, or even to state unequivocally that, the defendant could not give yet further details of the documents or parts of documents inspection of which was objected to. Nonetheless, in the end, I was not persuaded that the time, effort and expense that would be consumed by the preparation of a further and better list of documents would be proportionate to any legitimate aim pursued by the claimants.

(3) On the Defendant's Disclosure Application, I ordered the claimants to disclose some without prejudice correspondence relating to the claims settled by NDAs, in so far as it was relevant to issues raised in Confidential Schedule B to the Defence. My decisions on four other aspects of the application as presented by Mr Browne were as follows:-

a) An application for disclosure of the decision letter relating to an internal appeal hearing of 19 April 2018, concerning an employee grievance. I was not satisfied that any such document existed. Ms Strong told me on instructions that the appeal was settled, so there was no hearing, and that the settlement documents had been disclosed. Mr Browne was in no position to controvert this, by evidence or otherwise.

b) Two categories of document referred to in a substantial witness statement served the night before the hearing. It was much too soon to deal with this

disclosure application, which had not been formalised and to which the claimants had not had any chance to respond.

c) Metadata of certain documents. This application was outside the scope of the original application notice filed on 20 December 2018 and the Notice to Restore, and not yet ripe for decision. The claimants' position was not only that the necessary formalities had not been observed. It was also said that there were some documents, disclosed in hard copy, of which no metadata was held. Otherwise, it was impracticable to disclose the metadata. The relevance of such disclosure was questioned. The alleged impracticability was unexplained. But the defendant's case as to the relevance of this material, and the need for its disclosure, was heavily reliant on the very recently served evidence. Indeed, as Mr Browne made clear, the defendant intends to amend its defence in reliance on that evidence, to expand one aspect of its case. The disclosure application, properly analysed, is largely consequential on the amendments which have yet to be made, or even formulated. It was premature to pursue it on this occasion.

d) A requirement to conduct fresh electronic searches using two specified search terms, referring to an internal operation of the Companies. The claimants had already carried out searches of certain document categories using these terms, in conjunction with 13 other search terms contained in an agreed list compiled when drawing up the Order of Lambert J dated 3 January 2019. The defendant's application was for a yet further search, using these two terms in conjunction with the 79 search terms adopted at an earlier stage of the litigation, and applying them to a broader class of documents. The argument of Mr Jonathan Price was straightforward: these were codenames which – unbeknown to the defendant – had been adopted by the claimants at an early stage and, in those circumstances, they should have been included in the original long list of search terms drawn up on the claimants' behalf. I can see the force of that, but I noted that the shorter list of search terms had been adopted (at the instigation of Mr Price, it was said), in order to ensure that the searches in early January were proportionate. On the evidence before the Court, I concluded that there was only a remote prospect that the new and more elaborate searches that were now proposed would yield anything of significance. I was not persuaded that an order would be proportionate.

As I made clear during the hearing, the defendant can pursue the matters at (b) and (c) above, if so advised, at the PTR next week. To do so, it will need to give proper notice of application and file evidence in support.

(4) The Defendant's Third-Party Disclosure Application was not pursued, and if anything remains to be dealt with it is only the matter of costs.

(5) Costs Budgeting. I approved budgets for the remaining phases of this action, namely the PTR, Trial Preparation and Trial. The total sums approved for those three phases are £541,059.16 (claimants) and £495,477.38 (defendant). Further details are contained in the formal Order made on the issue, and in paragraphs [34-38] below.

10. There is one other separate and distinct matter, which was discussed in open Court, and to which I shall refer: the question of whether one aspect of the dispute may engage and potentially infringe the privileges conferred on Parliament by Article 9 of the Bill of Rights 1689. I shall come to that at the end of this judgment.

The Source Disclosure Application

11. The application notice seeks two orders:

(1) "An order pursuant to CPR 18.1 that the Defendant must identify its source or sources for the information contained in [the Foggo Email] under [two specified headings] on the ground that such identification is necessary in the interests of justice."

(2) "An order pursuant to CPR 31.19 (5) that the objection made by the Defendant in its disclosure statement to the Claimants inspecting any documents which may enable directly or indirectly the identification of the Defendant's sources of information" ... shall not be upheld in respect of … pages from notebooks … and the Telegraph's records of interviews with its sources … and accordingly the Claimants shall be permitted to inspect those documents in their unredacted form."

12. The information which is the subject of the first of these applications relates to two individuals named in the Foggo Email, who were employees of Arcadia and entered into NDAs following the settlement of claims by them against the company for compensation for alleged misconduct. The second application is potentially of wider scope, as it relates to all the Telegraph's sources of information, and these may not be limited to those who provided the information in the specified sections of the Foggo Email.

Legal principles

13. The starting point for any such application is to establish that the information sought is relevant, and hence disclosable in principle. This means identifying and defining the issue in the proceedings which is said to require disclosure of sources: *Maxwell v Pressdram Ltd* [1987] 1 WLR 298, 309A (Parker LJ). If it is not relevant, disclosure will inevitably be refused. If it is, then the Court has to assess whether to order disclosure, notwithstanding the law on source protection. Rights of source protection have a long history in English law, and are also implicit in the right to freedom of expression protected by Article 10 of the Convention. Today, these rights – which I shall call "the Source Protection Rights" - find domestic expression in s 10 of the Contempt of Court Act 1981, which provides as follows:

> "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."

14. These provisions must of course be interpreted and applied in conformity with Article 10. The scope of the protection is somewhat wider than it might appear on its face. The

protection is not confined to sources who provide information that finds its way into the public domain; it embraces those who provide information that is communicated and received *with a view to* publication: *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1, 40 (Lord Bridge). And the section not only confers a right not to disclose information which identifies a source, it extends to information which *may* do so. Source identification need not be probable. The protection exists if identification "may" follow, or there is a "reasonable chance" that it will follow: *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] 1 AC 339, 349 (Lord Diplock), *Morgan Grampian*, 372 (Lord Bridge).

15. The following principles are now clearly established, and not controversial:-

(1) The onus lies on the applicant to show that disclosure should be ordered.

(2) It must be shown that disclosure is *necessary* for one of the four legitimate purposes identified in s 10. It is not enough, for this purpose, to show that the information is relevant to the claim or defence: *Maxwell v. Pressdram* 310G-H (Parker LJ). It is not even enough to show that the claim or defence cannot be maintained without disclosure: *Goodwin v UK* [1996] 22 EHRR 123 [39], [45]. The need for the information in order to bring or defend a particular claim is not to be equated with necessity "in the interests of justice".

(3) In *In re An Inquiry under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660, 704, Lord Griffiths gave this guidance as to the meaning of the term "necessary" in this context:

> "I doubt if it is possible to go further than to say that 'necessary' has a meaning that lies somewhere between 'indispensable' on the one hand, and 'useful' or 'expedient' on the other, and to leave it to the judge to decide towards which end of the scale of meaning he will place it on the facts of any particular case. The nearest paraphrase I can suggest is 'really needed.'"

(4) This requires proof that the interests of justice in the context of the particular case are "so pressing as to require the absolute ban on disclosure to be overridden": *Morgan-Grampian* 53C (Lord Oliver). In the language of Strasbourg, the disclosure order must correspond to a pressing social need, and must be proportionate. It must be "justified by an overriding requirement in the public interest": *Goodwin* [39].

(5) Hence, it is necessary for the applicant to satisfy the Court, on the basis of cogent evidence, that the claim or defence to which the disclosure is relevant is sufficiently important to outweigh the private and public interests of source protection, and that disclosure is proportionate.

(6) When making this assessment, the Court must bear in mind that incursions into journalistic confidentiality may have detrimental impacts on persons other than the individual source(s). Disclosure may have a "detrimental impact … 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": *Goodwin* [69].

(7) The court must be satisfied that there is, "no reasonable, less invasive, alternative means" of achieving whatever aim is pursued by a source disclosure application: *Goodwin* ibid..

16. Whether in the particular case the requirement for disclosure is necessary for one of those purposes is a question of fact, not discretion: *Secretary of State for Defence v Guardian Newspapers Ltd*, 345 (Lord Diplock). However, as Lord Bridge observed in *Morgan-Grampian* at 44:

> "… like many other questions of fact, such as the question whether somebody has acted reasonably in given circumstances, it will call for the exercise of a discriminating and sometimes difficult value judgment. In estimating the weight to be attached to the importance of disclosure in the interests of justice on the one hand and that of protection from disclosure in pursuance of the policy which underlies section 10 on the other hand, many factors will be relevant on both sides of the scale".

So, for instance, if the very livelihood of the applicant for disclosure is shown to be at stake his claim for disclosure will be correspondingly strong. If the information is of great legitimate public interest, that will count against source disclosure. But the manner in which the information was obtained is also relevant. "If it appears that the information was obtained illegally, this will diminish the importance of protecting the source" (Lord Bridge, ibid.)

Procedural background

17. One key feature of the judgment of the Court of Appeal is that, unlike the Court at first instance, it was prepared to infer from the evidence before it that "it is likely that *substantial and important* parts of the information which the Telegraph wishes to publish were passed to it in breach of a duty of confidence to the Claimants and that it was aware of the breach, or the likelihood of breach, of confidence": [32] (my emphasis) (see also [47]). The closed judgment goes into more detail, some of which cannot be included here without prejudicing the claim. But it is legitimate to say this about the closed judgment.

18. In paragraph [110] the Court concluded that it was likely, in the case of the first of the two employees, information about whom is the subject of the present application, that either (1) the defendant received the information from that employee himself/herself, in breach of their NDA, or (2) that "another employee of the claimant companies, in breach of their duties of confidence to their employer disclosed to the Telegraph [the employee's] letter of grievance and [an investigator's] response to it and [the employee's] grounds of complaint to the [Employment Tribunal]…". The Court further concluded that "If the disclosure was by another employee, it seems likely that any such disclosure would have been with knowledge of the NDA since only the existence of the NDA would explain why the documents had not been obtained from [the employee himself/herself]. In any event, the Telegraph itself was aware of the NDA ...". Findings

to similar effect in relation to the second of the two employees are to be found in paragraph [112] of the closed judgment.

19. Thus, the breach of duty which the Court of Appeal found the claimants were likely to establish was not just a breach of an equitable duty imposed by the law. It was a direct contravention of a contractual restriction imposed by an NDA, committed by the contracting party; or alternatively, it was a disclosure by another employee of information obtained in the course of their employment, in breach of that employee's contractual duties to the employer, in the knowledge that the information was protected by an NDA between the employer and the other employee. These were important points of divergence from the conclusions of the Court below, and they made a major contribution to the Court of Appeal's conclusion that the claimants were likely to succeed at trial in showing that publication should not be allowed.

20. The claimants' case, as pleaded on 9 November 2018, after the Court of Appeal's decision, is on similar lines. It is set out in paragraphs 5 and 11 of the Particulars of Claim as follows:-

> "5. At some time on or before 16 July 2018 the Defendant obtained all or part of the Confidential Information from either one or more of the Individuals or another person employed or formerly employed by the Claimants who communicated that information to the Defendant well knowing its confidential nature and in breach of the duties of confidence they owed to the Claimants (or any one of them). On receiving the Confidential Information (or part thereof) the Defendant well knew that it was confidential and that it was not permitted to use, publish or further disclose that information for any purpose whatsoever.
>
> …
>
> 11 … the Confidential Information was imparted to and improperly obtained by the Defendant in breach of the Claimants' confidence from one or both of the following sources:-
>
> 11.1 One or more of the Individuals, acting in breach of the contractual duty of confidentiality owed by them to the Claimants (or any one of them); or
>
> 11.2 Another employee of Arcadia or Topshop who was privy to the grievance processes and/or the negotiation of the Settlement Agreements and who, by reason of their employer having undertaken obligations of confidentiality within the Settlement Agreements in respect of the relevant parts of the Confidential Information, would also have been under an equitable obligation of confidence, owed to the Claimants as their employers, pursuant to those employees' general duty of good faith and fidelity, matching their employer's obligation and of no less weight."

21. On 30 November 2018, the Defence was served. This (at paragraph 9) declines to admit the first sentence of paragraph 5 above, relying on the Source Protection Rights and Clause 14 of the Editors' Code of Practice of the Independent Press Standards Organisation. Paragraph 11 of the Defence responds similarly to paragraph 11 of the Particulars of Claim. The only admissions made are that "the Defendant had knowledge of settlement agreements pertaining to two of the individuals named in Confidential Schedule 1, was aware that they contained NDAs and considered it likely that the other individuals named in Confidential Schedule 1 were parties to similar agreements with similar provisions ..." The Defence goes on (in paragraph 11) to aver that "the Court is not bound by the inferences drawn by the Court of Appeal on the evidence placed before it at the interlocutory stage." On the face of these statements of case, therefore, there is a substantial dispute of fact. This way of pleading the case leaves it open to the defendant, in principle, to assert that it is at least possible that the information reached it from somebody who was not themselves subject to an NDA, or possessed of any knowledge that would impose an equivalent duty of confidence upon them. The claimants are required to prove their primary case, that the information derived from a signatory to an NDA, or their alternative case.

22. This area of dispute appears to be a matter of some real significance. In addition to drawing factual inferences which had not been drawn below, the Court of Appeal concluded that the Judge had failed "to weigh in the balance, when considering whether a defence of public interest is likely to succeed at trial, the various public policy considerations relevant to upholding NDAs in general and the ones in issue in the present case in particular": open judgment, [47(4)]. One previous decision of the Court of Appeal loomed large in the Court's legal analysis: *Mionis v Democratic Press SA* [2017] EWCA Civ 1194, [2018] QB 662. That was a case where media defendants had entered into a confidential settlement agreement with the claimant, a businessman, who had sued them for libel in respect of a series of articles in a Greek newspaper which accused him of involvement in tax evasion. Subject to certain limited exceptions, the agreement included a complete ban on the publication by the media defendant of any reference to the claimant and his immediate family, in print or online, in any jurisdiction. Citing at length from the judgment of Sharp LJ, the Court of Appeal emphasised the importance of giving effect to contracts, freely entered into for good consideration, with the benefit of expert legal advice. The Court was clear that when assessing whether a duty of confidence should be overridden in the public interest, considerable weight needs to be given to the fact that the person who has made or who seeks to justify disclosure has bargained away the right to disclose information; and to the fact that if disclosure is allowed, the other contracting party will be deprived of all or much that he has bargained and (in the present case) paid for.

23. On 21 December 2018, after pleading its Defence, the defendant made some further admissions. The matter then came before me, on 28 December 2018. At that stage, the defendant asserted that the admissions it had made were sufficient to make a hearing of the Source Disclosure Application otiose. I did not agree that this was so clear. In the written reasons for directing this hearing I said this:-

> "I would venture this observation. I have not read into this case but it is not obvious to me at present why the Defendant could not go further than it has so far gone and state, one way or the

> other, whether its source(s) were or were not subject to NDAs. Nor is it obvious that, if the Defendant went that far, there would be a need to identify the source(s)."

24. Apparently in response to this, on 8 January 2019, the defendant expanded its admissions. By the time the matter came before me this time, the admissions were as follows:-

> "(1) The Confidential Information contained in [the Foggo Email] was passed to TMG in breach of a duty of confidence to the claimants, and
>
> (2) TMG was aware at the time of receiving that Confidential Information of the breach or the likelihood of a breach of confidence.
>
> (3) TMG knew at the time of receiving the Confidential Information that it was or likely was covered by NDAs, to which the subjects of the information were party."

Submissions

25. For the claimants, Mr Price accepts that there would be no need to identify the source(s) if the defendant accepted that they were subject to NDAs. He accepted that if that were not the case the matter might be more complex, as the Court would have to "investigate whether the sources were to be treated as bound to observe the obligations of confidentiality undertaken in the settlement agreements by their employer, on the basis inferred by the Court of Appeal." It is the claimants' case that on either of the factual cases pleaded by them in paragraph 5 of the Particulars of Claim, the disclosing employee was under what Mr Price dubs a "*Mionis* duty", which would be of equal weight.

26. But the defendant's admissions do not go that far. To say that they knew the information "was covered by NDAs" or was likely to be covered by them, is not the same as admitting any part of the claimants' case. And it is not enough, submits Mr Price, for the defendant to accept that the source(s) was or were subject to a duty of confidence. There might be many grounds on which such a duty could exist, not all of equal weight. The difference, he argues, could be decisive. He refers to the words of Sharp LJ in *Mionis* at [75] where she noted that in *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57: *"*The court regarded the fact that confidential information had been disclosed to a newspaper by a disloyal employee as *a separate and important factor adding to the weight when applying the test of proportionality*" (my emphasis). In summary, says Mr Price, if this case is decided by applying the *Mionis* principles, the claimants may well win. If it is decided simply on the basis of an assumed (and admitted) breach of confidentiality of unknown origin and weight, the claimants may well lose, even if the Court is in a position to make a proper decision on such an undefined basis.

27. For the defendant, Mr Browne acknowledges the force of the Court of Appeal's inferential reasoning. This is said to be the motivating factor behind the admissions made by the defendant on 21 December 2018 and 8 January 2019. It was said that these

admissions provide the claimants with what they need to establish a cause of action in confidentiality. Justice could be done to the claimants' case on confidentiality without source disclosure. The truth of this proposition was said to be borne out by the response of the claimants' solicitors to the first set of admissions. Their response was to assert that in the light of those admissions the main issue had become whether the allegations of misconduct were true, and that the defendant, bearing the onus of proof on that issue, should open the trial (a position which has since been agreed). In all these circumstances it was submitted, source disclosure is not necessary in the interests of justice. In the skeleton argument for the defendant it was also said that the three admissions quoted above went as far as the defendant could go without risking the identification of its sources, or unduly narrowing the class of people who might be a source.

28. In the course of argument Mr Browne went a little further. He submitted that it was clear that the defendant knew there had been settlement agreements in which significant sums changed hands, and NDAs were entered into between the two employees and Arcadia. It was also clear that they knew that the information set out in the Foggo Email was the subject of the NDAs. That, he said, was clear beyond argument. He went on to say that the first sentence of paragraph [110] of the Court of Appeal's closed judgment was undeniable, given the contents of the Foggo Email. He said that the defendants "bow" to the reasoning of the Court of Appeal.

29. I then pressed him for an explanation as to why, if the defendants were so ready to concede the force of the Court of Appeal's reasoning, they should not make clear that they would not seek to gainsay the inferences that had been drawn at that stage, as set out in paragraphs [110-112] Their pleaded case was and remained that this Court is not bound by those inferences, which is of course formally speaking correct. The pleading indicated that the defendant intended to contest or at least dispute or resist the drawing of those inferences at trial. That raised an issue of some potential importance, for the reasons I have set out above. Mr Browne's argument was not in line with that stance, but the defendant had not amended or indicated an intention to amend the Defence in this respect. The admissions in correspondence were a further complicating factor, as they were plainly not in harmony with the Defence. Nor, however, did they go as far as Mr Browne had been willing to go in the course of argument.

30. Ultimately, after taking instructions, Mr Browne offered a way to draw a line under this issue. On behalf of the defendant he offered to remove from the third admission above the words "or likely was" and to amend paragraphs 11 and 12 of Defence so as to make clear that the defendant would not invite the Court to draw any inference different from those drawn by the Court of Appeal in [110], [112] of the Closed Judgment.

Assessment

31. That appeared to me to go significantly beyond the previous admissions, and to be a suitably discreet way of addressing what I acknowledge to be a delicate issue on the defendant's side. I concluded it was sufficient for the claimants' purposes. Mr Price quarrelled with that assessment, arguing that what his clients required in order for justice to be done was something more: an admission that the duty imposed on the source was one that matched and was of equal weight to the duty owed by a signatory to the NDA. Absent that admission, or disclosure of the defendant's sources, there remained a possibility that the claimants would be deprived of the ability to make their

best case. There may perhaps be something in this argument. I do not rule against it at this stage. But the issue is largely one of law, on which at present it seems to me the claimants have a fairly strong argument.

32. My conclusion is that in the light of the defendant's further concessions, it has not been demonstrated that source disclosure now is necessary in the interests of justice. The claimants have not shown that at this stage there is a pressing need for source disclosure which outweighs the private and public interests in upholding the statutory privilege. Given the concessions now made, the prospect that the claimants might fail in their claim because the Court could not be satisfied that the source, and hence the defendant, came under a duty of equivalent weight to that undertaken by a signatory to an NDA seems to me remote.

33. As I indicated in the course of the hearing, those conclusions are subject to (a) satisfactory implementation of the defendant's undertaking to amend and (b) review in the light of any further significant developments in the case which bear on this issue. These conclusions relate to paragraph (1) of the claimants' application notice, but it is accepted by Mr Price on behalf of the claimants that they also dispose of paragraph (2) of the application notice.

Costs Budgeting

34. It is unfortunate that costs budgeting in this case has only been possible two weeks before trial. That, however, is commonplace when a case begins with an urgent application for an interim injunction, and an order is made for a speedy trial. In this case there has also been the Christmas vacation, which has made it harder to get the pre-trial hearings dealt with promptly. What this means in practice is that a large proportion of the costs of the action had already been incurred by the time I came to conduct costs management. Parts of the costs of Disclosure and Witness Statements remain to be spent, but I have no figures for the split and hence I have had to treat all those costs as already incurred. For practical purposes, I have only been able to conduct an approval exercise in relation to the costs of the PTR, Trial Preparation and Trial phases. Budgeting of costs incurred by the time that costs management is undertaken is not possible: PD3E 7.4. All I can do in respect of incurred costs is make comments.

35. It is fair to note that some of the incurred costs on the claimants' side are very high, and much higher than those incurred by the defendant. I refer in particular to the claims for witness statements, which are £472,757 which is roughly five times the defendant's figure of £80,942.78. In the event, I do not think it helpful or fair to go further, as the time available for this part of the hearing was in the event quite short, and it was not possible to engage in any detailed examination of the reasons for such disparities or the justification for the claimants' figures.

36. I have set approved budgets for the remaining phases of the litigation: the PTR, Trial Preparation, and Trial. I have done this on the basis of the parties' Precedent H forms and Budget Discussion Reports coupled with (1) written summaries of their position on disputed issues, which the parties submitted last week, pursuant to my Order of 28 December 2018, (2) the oral submissions of Mr Marven QC for the claimants and Mr Jonathan Price for the defendant, and (3) a helpful schedule prepared by Mr Price, setting out among other things the hourly rates claimed.

37. The Schedules to the Order that I am making set out in detail the approved sums, with footnotes containing explanatory comments. It is unnecessary to add much more, but I will say this. In cases like this, proportionality cannot be assessed by reference to any damages claim, or any other financial yardstick. Although budgeting is not the same as detailed assessment, it is almost inescapable for the court to give some thought to the hours and hourly rates that are justified for the work in question. The hourly rates claimed by the claimants range from £190 (for a Grade D lawyer, a trainee) to £690 (for a Grade A lawyer, a partner). Other partners' rates claimed by the claimants are between £510 and £635 per hour. All these figures are well in excess of the guideline rates, which are £126 for Grade D to £409 for Grade A.

38. Of course, fees in excess of the guidelines can be and often are allowed, and in this case the defendant (which itself claims up to £450 per hour) and I both accept that fees above those rates are justified. But not to the extent of the differences here. I do not consider that hourly rates in excess of £550 can be justified, and proportionate reductions should be made in the lower partners' rates. I also consider that the claimants' estimates reflect an unnecessary degree of partner involvement, and a degree of overmanning that cannot be justified, as between the parties, whatever may be the position between solicitors and clients. I reject the claimants' criticism of the defendant's use of partner time. Given the nature of the issues, the tasks to be undertaken, and the relatively modest rates charged by the defendant's solicitors, the devotion of partner time is proportionate in their case.

Parliamentary Privilege

39. Before going into private session to deal with disclosure issues, I raised in open Court a question arising from some aspects of the statements of case. In summary, the claimants' case includes a claim for damages to compensate for the harmful consequences of the publicity that followed the naming of Sir Philip by Lord Hain. It is said that the defendant is directly or indirectly responsible for those consequences, having "*directly or indirectly participated, procured, colluded in and/or facilitated the provision of the information regarding Sir Philip's identity to Lord Hain for the purpose of it being disclosed under the cover of Parliamentary privilege, after the Court of appeal had granted the injunction ...*" (paragraph 15 of the Particulars of Claim).

40. The defendant denies being responsible for the consequences, and asserts that paragraph 15 "*raises issues which are non-justiciable having regard to Article 9 of the Bill of Rights ...* [they] *invite investigation of a Parliamentarian's source for something said in proceedings in the chamber.*" The claimant resists that proposition. Mr Price makes clear that the claimants intend to press on to determine, if they can, who provided Sir Philip's identity to Lord Hain, and what role (if any) the defendant played in that disclosure.

41. Article 9 of the Bill of Rights 1689 provides, of course, that "Proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament".

42. After hearing from Counsel, I determined that I should draw these issues to the attention of the Lord Speaker, in order to give the Parliamentary authorities an opportunity, if so advised, to make representations on questions of Parliamentary Privilege. I have therefore written to Lord Fowler accordingly. To allow proper consideration of the issues I have made a limited exception to paragraph 3(a)(i) of the Order which the Court

of Appeal made on 30 October 2018, in terms agreed by the parties. That Order provided that no copies of the statements of case should be made available to any non-party without further order of the Court. The issue may need to be revisited at the Pre-Trial Review next Tuesday, 29 January 2019.