Neutral Citation Number: [2019] EWHC 223 (QB)

Case No: HQ18M02611

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/02/2019

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 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 dates: 29 January and 1 February 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 :

1. The claimants are Arcadia Group Ltd, Topshop/Topman Ltd and Sir Philip Green. Their claim was for an injunction to prevent publication by the defendant newspaper group in breach of confidence. The information at issue had been the subject of non-disclosure agreements (NDAs) agreed in the context of the settlement of complaints or claims by employees, under which substantial sums of money were paid to and accepted by the employees.

2. The case has attracted publicity, and the general background is well-known. It is set out in some detail in the public judgment handed down by the Court of Appeal last October, [2018] EWCA Civ 2329 and, in shorter form, in a judgment of mine, handed down on 21 January 2019, [2019] EWHC 96 (QB).

3. The Court of Appeal, reversing the Judge at first instance, granted an injunction until after judgment in the action. It ordered the trial should be expedited, and the trial was scheduled to start before me on Monday 4 February 2019. On Tuesday 29 January 2019, I was due to hear the Pre-Trial Review, at which I would have given whatever directions remained necessary to ensure it was ready for the trial that was to start on Monday 4 February 2019. There were applications pending from the defendant, for permission to amend the Defence, and permission to serve witness summaries in place of signed statements.

4. On Monday 28 January, however, I learned that the claimants had decided to discontinue the claim, and thereby to abandon the interim injunction. So what in fact took place on Tuesday 29 January was a hearing of the claimants' formal application, filed the previous day, for permission to discontinue. Under the Civil Procedure Rules, a claimant may discontinue a claim at any time (CPR 38.2(1)), but a claimant that wishes to discontinue after obtaining an interim injunction requires the Court's permission: r 38.2(2)(a)(i).

5. In addition, the claimants sought various specific orders: continued confidentiality for documents generated by the claim, and departures from the default position in relation to costs on discontinuance, which is that the discontinuing claimant pays the defendant's costs up to the time of discontinuance, to be assessed on the standard basis: r 38.6(1). There was some dispute over costs but, as I shall explain, the main contest related to the defendant's contention that the Court should only allow the claimants to discontinue on certain specified conditions.

6. I heard argument for half a day, and made one order which was not controversial. I then adjourned the application part-heard, to allow the claimants an opportunity to respond evidentially and by way of argument to the defendant's demand for the imposition of conditions. That demand was first indicated in the skeleton argument filed by the defendants on the day of the hearing. It came as a surprise to the claimants and their legal team, who had not prepared evidence or argument to meet it. The defendant itself had not filed evidence on the matter. None of this is in any way a criticism of the defendant. This was all dealt with on short notice because of the way the claimants had handled things.

7. The hearing resumed on Friday 1 February 2019. At the end of the further hearing I reserved my decision, though it will have been obvious that I had concluded that there would be no trial.

Issues and conclusions

8. There are three main issues for decision. The first is whether the Court should, as a condition of granting permission, impose an order in the form which the defendant was proposing by the time of the adjourned hearing, or some similar form:-

> "in addition to the provisions of CPR rule 38.7, the Claimants may not without the permission of the court bring any further claim against any person including the Defendant insofar as any such claim asserts that:
>
> (i) The publication of any information contained in the email from Daniel Foggo dated 16 July 2018 annexed to this order amounts to a breach of any of the agreements identified in the confidential schedule hereto ("the NDAs"), either by the Defendant or by any party to any such NDA;
>
> (ii) Any publication derived from the Defendant's journalistic investigations and not derived from documents disclosed by the Claimants in these proceedings amounts to a breach of any of the NDAs; and/ or
>
> (iii) The Claimants are entitled to any relief against the Notetaker (whose name is set out in the confidential schedule hereto) arising out of the provision by her to and/ or the publication by the Defendant of any of the documents or information referred to or contained in her witness statement dated 20 January 2019."

9. The defendant's position was that unless such conditions were imposed, I should refuse permission to discontinue. The claimants' position was that no such requirements should be imposed, but Mr Price QC made clear on their behalf that the application to discontinue was not conditional. I have concluded, for the reasons that follow, that the claimants should be allowed to discontinue, without the imposition of any additional requirements or conditions beyond those imposed by the CPR.

10. The other two issues were as follows:

(1) Whether the Court should continue the confidentiality which the rules and orders of the Court presently confer on the following documents: closed judgments, judgments given in private, orders, witness statements, disclosed documents and statements of case.

This aspect of the claimants' application was, in the end, uncontroversial. For the reasons shortly stated later in this judgment, I grant the orders sought to preserve confidentiality.

(2) Whether the Court should depart, and if so how, from the presumption that the discontinuing claimants should pay the defendant's costs.

The claimants accepted that the general rule should apply, except as regards the costs of the interim injunction proceedings, and of applications for source disclosure and disclosure of documents that were dealt with by me. The claimants maintained that these were all applications that they had won. My conclusion, for the reasons given at the end of this judgment, is that the claimants should have their costs of the applications which I heard, for disclosure of sources and documents, but that there should be no order as to the costs of the application and appeal in relation to the interim injunction.

Key aspects of the background

11. To put these issues and decisions in context, it is necessary to explain some more of the background.

12. On 16 July 2018 a journalist, Daniel Foggo, sent Sir Philip and Neil Bennett of Arcadia's advisers, Maitland, an email ("the Foggo Email") giving notice that the Daily Telegraph 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 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. At first instance, relief was refused. But the Court of Appeal reversed that decision.

13. The Court of Appeal judgment explains in detail why that Court decided to grant an interim injunction to protect the rights of confidentiality asserted by the claimants, pending the expedited trial which it ordered. In short, the Court took the view that, on the evidence before it, the NDAs had been entered into freely, with the benefit of legal advice, and that the claimants were likely to persuade the court at a trial that publication of the information in question should not be allowed. The Court of Appeal gave an outline of the information which was the subject of the claim, but made orders continuing the anonymity which had been granted to the claimants by previous Court orders. This is the normal course, when claimants seek to protect information which is alleged to be confidential or private. The Court of Appeal judgment was given on 23 October 2018.

14. On 24 October 2018, the Daily Telegraph ran a front-page article prominently headed "The BRITISH #MeToo SCANDAL WHICH CANNOT BE REVEALED. Leading businessman facing allegations of sexual harassment and racial abuse gags the Telegraph from publishing detail." The opening paragraphs contained reference to the #MeToo campaign and "revelations" about Harvey Weinstein:

> "A leading businessman has been granted an injunction against the Daily Telegraph to prevent the newspaper revealing alleged sexual harassment and racial abuse of staff.
>
> The accusations against the businessman, who cannot be identified, would be sure to reignite the MeToo movement

> against the mistreatment of women, minorities and others by powerful employers.
>
> MeToo became a worldwide social media campaign last year after revelations about Harvey Weinstein, the American movie mogul. Like Weinstein, the British businessman used controversial non-disclosure agreements (NDAs) to silence and pay off his alleged victims with 'substantial sums' …"

15. The story therefore told readers the nature of the information which was the subject of the claim, but it respected the anonymity order which had been made by the Court. The story did however occupy almost all the front page, and reporting and comment on it, or related to it, covered the entirety of pages 2, 3, 4 and 5 of the paper. There was an editorial on page 17, maintaining that the exposure of NDAs was in the public interest "where they point to a pattern of immoral or reprehensible behaviour" because NDAs risked "other potential targets for harassment or abuse unwittingly taking a job with an employer who they might otherwise have given a wide berth".

16. The Daily Telegraph ran a further front page story the following day, 25 October 2018. The main story related to a woman described as making a "fresh #MeToo accusation in wake of Telegraph's revelations about businessman …". There was a sidebar headed, "With their fortress of injunctions, these men feel safe to do as they please." There was further reporting on pages 2 and 3, a comment piece by a third party on page 18, and a further editorial on page 19.

17. Later on 25 October 2018, in the House of Lords, Lord Hain identified the third claimant, Sir Philip Green, as the "leading businessman" involved.

18. This was the subject of a further front page article in the Daily Telegraph for 26 October 2018, headed "Sir Philip Green named as #MeToo scandal businessman". There was a sub-headline: "Lord Hain uses Parliamentary privilege to identify Topshop owner as the man whose injunction gagged the Telegraph". Again, the front-page story occupied nearly all of that page. There was further reporting on pages 2 and 3, a comment piece by Jess Phillips MP on page 19, and a further editorial on page 20. That is not to say that the Telegraph was alone in its reporting of the parliamentary statement. Far from it. Reporting was widespread, so much so that the anonymity orders became pointless and were later discharged by consent – as was inevitable.

19. In the meantime, by letter dated 26 October 2018, the defendant (by its solicitors) invited the claimants to withdraw the action and agree to the discharge of the key part of the Court of Appeal injunction, prohibiting the defendant from "publishing any details of the claims made by the identified individuals and the NDAs entered into by them". The defendant's position was that "In the circumstances, including the very wide coverage given to this matter throughout the media, we do not see what continuing purpose there can be in maintaining the injunction any longer." The claimants, by return mail, declined the invitation. They continued with the claim.

20. In November and December 2018, pursuant to directions given by the Court of Appeal, the parties set out their cases formally in Particulars of Claim, a Defence, and a Reply, and gave disclosure of documents. The statements of case were, as is conventional in cases of this kind, split between an "open" version, lacking names and specific details,

and Schedules marked "confidential". By virtue of the order which I made on 1 February 2019, the "open" versions of these documents are now publicly accessible. I can summarise the issues arising from those statements of case quite shortly.

21. The claimants sought injunctions to prevent the defendant from inducing breaches of contract by its present or former employees by disclosing what the claimants described as "information of a confidential character relating variously to the allegations, complaints, grievance processes and/or Employment Tribunal (ET) claims … brought against the Claimants by five individual employees … each of whom had signed settlement agreements with the Claimants or some of them." The claimants' case was that on or before 16 July 2018, the defendant obtained all or part of this information from one or more of the five individuals or from someone else employed or formerly employed by the claimants, in circumstances where the disclosing party and the defendant well knew that it was confidential.

22. The claimants invited the inference that the defendant's sources were all either signatories to NDAs or people who were "privy to the grievance processes and/or the negotiation of the Settlement Agreements", who were under duties of loyalty and/or confidence owed to the claimants. The Court of Appeal concluded that the Court was likely to draw those inferences of fact at trial, and in a hearing before me it was conceded by the defendant that it would not seek to contest such inferences: see my judgment of 23 January 2019 at [17-19], [30]. The claimants' case, which the Court of Appeal thought likely to prevail, was that on those facts the sources and the defendant all came under duties of confidence of equivalent weight to those assumed by the signatories.

23. The claimants sought damages for the consequences of Lord Hain's statement in the Lords, seeking to attribute responsibility to the defendant for the making of that statement. The defendant's response was to deny responsibility and to assert that the issue was non-justiciable in view of Article 9 of the Bill of Rights 1689: see my judgment of 23 January 2019 at [39-42]. Following that judgment, the clerk to the Parliaments wrote to the Court submitting that an investigation into Lord Hain's source(s) would infringe Parliamentary Privilege. The claimants accepted that Lord Hain himself was immune from suit in respect of what he had said.

24. The defendant alleged that the information in respect of which the claimants sued was "low grade from a confidential, as opposed to a reputational, perspective", and that it was the same as or similar to misconduct which had already been widely reported and discussed. But the primary defence advanced by the defendant was that disclosure would be in the public interest. The defendant set out in the Confidential Schedule to the Defence a range of alleged facts and matters, and asserted that those matters "insofar as they include the Confidential Information, and in any event, are of very substantial public interest, the nature and importance of which are such that the Defendant should be at liberty to use, publish, and/ or further disclose them".

25. The Defence went on to assert that Sir Philip's "misconduct" as set out in the Confidential Schedule was "sufficiently serious to engage the public interest, including as it does unwanted contact of a sexual nature; general sexual harassment; racist language; and intimidation and bullying; many amounting to criminal offences, and all having serious consequences for employees in particular for their health and wellbeing". His conduct was said to be "gross and unlawful", involving "habitual behaviour over a substantial period by an extremely wealthy and powerful man abusing his position". It

was further alleged that such misconduct was "normalised and facilitated" by the corporate claimants, giving rise to a culture in which such misconduct was "tolerated and condoned at the expense of employees' wellbeing". The public interest in the exposure of such misconduct was identified:

> "… a deterrent effect on the persons exposed and more generally. The disclosure of it enables people to make informed decisions about whether they wish to take employment with the Claimants or otherwise conduct business with any of the Claimants. By contrast, keeping it secret perpetuates the culture."

26. On Friday 25 January 2019, the parties were due to exchange witness statements for trial, with a deadline of 4pm. The defendants served their statements and witness summaries. These were delivered in a sealed package, with the covering letter inside. The claimants did not serve any statements. Instead, they first invited an agreement to delay exchange until the Monday to allow for settlement discussions, and when that was declined they gave notice of an intention to seek an extension of time for service. Someone was sent to Court to file an application notice for that purpose, but it seems that, although the application notice was filed with the Court, that was probably not until after 4pm. It was at about 16:10 that the claimants' legal team sent a draft of the application notice to the defendant's solicitors.

27. By the time the decision was made not to serve statements, or at some point over the weekend that followed, the claimants had decided to discontinue. They had certainly done so by Sunday 27 January 2019, when – it seems – they provided at least one newspaper with information about the decision, with a view to publication. The hard copy of the Daily Mail for Monday 28 January 2019 reported on Sir Philip's "climbdown". The Mailonline had already carried the story overnight, with a midnight time stamp. That, as Mr Browne QC pointed out, must mean that it had been given the story some hours earlier. There was a similar story in The Sun for 28 January 2019, first published online at 01:38. The Mailonline story referred to the claimants' public statement as something which, at the time of writing, had not yet been issued. So it looks as if the story was provided to the Mail on some kind of exclusive basis.

28. The claimants' public statement was dated 28 January 2019, but had clearly been drafted beforehand. It began by announcing the claimants' intention to discontinue. It referred to the Court of Appeal decision, and Lord Hain's intervention, concluding in these terms:

> "After careful reflection, Arcadia and Sir Philip have therefore reluctantly concluded that it is pointless to continue with the litigation which has already been undermined … and risks causing further distress to the Arcadia's employees.
>
> Consequently, Arcadia and Sir Philip will be seeking the Court's permission to discontinue these proceedings on Monday."

29. It was on Monday 28 January that the claimants filed their application notice seeking permission to discontinue and the other orders I have identified, which led to the hearings before me on Tuesday 29 January and Friday 1 February 2019. The defendant's legal team was first notified of the intention to make that application by email timed at

07:09 on 28 January, though it came as no surprise because they had seen the Mail and Sun stories online.

The hearing

30. The hearing took place in public, subject to limited reporting restrictions. I directed that the names and any identifying details of the five individual employees who are identified in the Confidential Schedules to the statements of case should be withheld from the public. Having done so, I made an order under s 11 of the Contempt of Court Act 1981, prohibiting reporting of any identifying details. The five were given gender-neutral pseudonyms: Alex, Chris, Cameron, Charlie and Robin. A sixth individual referred to in the case papers was not anonymised by order of the Court (I declined to make any such order), but both parties were discreet in their references to this person, who was referred to as "the Notetaker". I shall use the same description.

31. The claimants' application was supported by the fourth confidential witness statement of Rachel Atkins. Although described as a confidential statement, it is fair and reasonable to identify and explain aspects of its content, much of which was rehearsed by Mr Price QC in his skeleton arguments (not marked confidential) and in oral argument in open court. Two main reasons are identified as lying behind the decision.

    (1) The first is that a combination of the Daily Telegraph's own articles, and reporting of what was said by Lord Hain has made the continued pursuit of the action pointless or worse. It is said that Sir Philip has become "little short of a public pariah", with no ability to respond to what has been alleged against him. It is argued that success at trial (and the permanent injunction that would be granted in that event) would have left Sir Philip in a worse position than he would occupy "if the truth were known". He has been branded as "the face of the British #MeToo scandal", and compared to Harvey Weinstein when, he says, the truth is entirely different, but cannot be made public because of the mutual contractual obligations which arise under the NDAs.

    (2) The second main reason given for discontinuance is that staff of Arcadia have been harassed by journalists acting for the defendant.

32. In summary, it is said, the claimants have now concluded that "there is insufficient confidentiality left in the information concerned in this case … to justify the risk, and the staff time and disruption, involved in pursuing it."

33. By the time of the adjourned hearing, further evidence had been filed on behalf of both parties. I received a fifth confidential witness statement of Ms Atkins, and a statement of Robin Shaw, solicitor for the defendant. Again, I can properly refer to the content of Ms Atkins' statement, without infringing any genuine confidentiality, and I have relied upon it when outlining the events of Friday 25 January, above.

Discontinuance

The law

34. CPR 38.2 is headed "Right to discontinue claim". The general rule is that a party may discontinue a claim at any time, without the need for permission: r 38.2(1). The ordinary consequence is that a costs order is deemed to have been made, for the claimant to pay

the defendant's costs up to the date of discontinuance, assessed on the standard basis: r 38.6(1), 44.9(1)(c). If discontinuance occurs after a Defence has been filed, a claimant wishing to bring another claim against the same defendant which arises out of the same or substantially the same facts, will need the Court's permission: r 38.7.

35. There are exceptions or qualifications to these general rules. They include the following:-

(1) CPR 38.2(2)(a) imposes a requirement for the Court's permission to discontinue where, as here, the Court has granted an interim injunction. The same restriction applies if any party has given an undertaking to the Court.

(2) A party against whom a claimant discontinues without permission can apply, within 28 days, to have the notice set aside: r 38.4. If, upon such an application, the Court is persuaded that the discontinuance was an abuse of the Court's process, it may set it aside and impose terms: see *High Commissioner for Pakistan v National Westminster Bank* [2015] EWHC 55 (Ch) [78-79] (Henderson J), where the discontinuance was found to be an improper attempt to extract the claimant state from the consequences of an unequivocal waiver of immunity; the court imposed terms preventing any fresh claim against the bank and any renewed claim to immunity.

(3) CPR 38.6 allows the Court to make a different costs order, so either party can apply for a modification of the default position in that respect, as the claimants have done in this case.

Submissions

36. The defendant's opening position was that "Cs have had the advantage of seeing D's witness statements without having disclosed any of their own. The fact that notice of discontinuance followed the service of D's statements and Cs' unwillingness to disclose their own, justifiably gives rise to the inference that Cs had by then recognized the inevitable; that the defence of public interest was bound to succeed." Mr Browne submitted that the claimants had seen that "the writing was on the wall" and effectively abandoned their claim on the merits. Hence, it was argued, the claimants should only be allowed to discontinue on condition that the defendant, its sources, and the Notetaker should all be immune from any claim for breach of any NDA in respect of the publication of (a) any information contained in or referred to in the Foggo Email; (b) any article derived from the defendant's journalistic investigations and not from documents disclosed by the claimants in these proceedings; and (c) the contents of the Notetaker's witness statement. I shall call these the "Protected Publications".

37. Another strand in the defendant's arguments was that the claimants had been writing to the five individuals "in strong and threatening terms", reminding them that they remained subject to the NDAs. It was said that it would be "deplorable" if, once the injunction was lifted, the defendant published the information described in the Foggo Email and the employees were then exposed to litigation. More than this, such litigation would be an abuse of the process of the Court, as it would involve re-litigation of issues that had been or should have been raised and dealt with in the present action: see *Johnson v Gore Wood* [2002] 2 AC 1, 31 (Lord Bingham). The solution, submitted Mr Browne, was for the Court to grapple now with the question of whether any further

claim would be an abuse of the Court's process, conclude that it would, and forestall any oppressive conduct by the claimants by means of the order proposed. He referred in this regard to *Aldi Stores v WSP Group plc* [2008] 1 WLR 748, which he relied on as authority for the proposition that the question of whether it would be abusive to bring future litigation on the same or similar issues should be raised with and addressed by the Court in advance; it should not be left to the defendant sued in the second proceedings to raise the question of abuse. He was critical of the claimants for failing to abide by this rule of practice.

38. There were several major difficulties with this argument. First, and fundamentally, the defendant's contention was contrary to the explanation given by Ms Atkins in her fourth statement. And the factual basis for the inference that lies at the root of the argument was swiftly undermined, when Mr Price explained that the claimants' legal team had decided not to open the bag containing the defendant's statements. The claimants' lawyers had not told the defendant's lawyers of their decision. In the circumstances, it was understandable that the defendant's team took the position that they did. But Mr Browne was in no position to dispute what had been said by Mr Price, which was later confirmed by Ms Atkins in her fifth statement.

39. Secondly, as I pointed out in argument on 29 January 2019, the absolute bar for which the defendant was contending represented a far broader and more restrictive regime than is provided for by CPR 38.7. That merely imposes a permission filter on the pursuit by the discontinuing claimant of the same or substantially the same claim against the same defendant. It would seem paradoxical to put up an absolute barrier to the pursuit of related claims against non-parties.

40. The principal argument for the claimants put up a further obstacle. Mr Price pointed out that an order in the terms proposed by the defendant would debar his clients from seeking to enforce the contractual rights conferred on them by the settlement agreements, to recoup some of the monies paid in settlement if the ex-employees disclosed information of the kind described in the definitions of the Protected Publications. There is no doubt that, on the face of it, the claimants have that right. The relevant provisions of the settlement contract with "Alex" are set out in the Appendix to this judgment. The enforceability of those aspects of the agreements had not been touched on in the statements of case or the evidence in this litigation, to which the ex-employees are not parties.

41. By the time of the adjourned hearing the defendant's position had shifted and developed. It was accepted that the claimants should be no worse off than under CPR 38.7, and the form of order proposed sought conditional rather than absolute immunity for the Protected Publications. The proposal was that if the claimants wished to bring any claim in respect of any such publication, they should be required to seek the Court's permission: see para [8] above. Mr Browne pointed to the claimants' decision to press on with the claim, despite the invitation to discontinue last October. He maintained his submission that the decision to discontinue was tantamount to an admission of the defendant's case. He no longer suggested that the claimants had capitulated upon reading the defendant's statements and summaries. But he did maintain that they must have known what was in these, not least because of what Mr Shaw had said to Ms Atkins on 25 January. He said that litigation in respect of the Protected Publications might or might not amount to an abuse. Following *Aldi,* the Court should have an opportunity to review any such litigation in advance, and decide whether, making "a broad merits-

based judgment", it would be an abuse of process. He submitted that the onus had shifted to the claimants to show why they should be allowed to raise "the self-same" issues again. The potential defendants should enjoy the protection that a permission filter would provide. Mr Browne sought to bolster his arguments by adding that the claimants, by missing the deadline for exchange of statements, had put themselves in a weak position, such that relief from sanctions would be needed, if they wished to lead any evidence at trial.

Discussion

42. I readily accept that the Court's power to control its own process includes the power, in appropriate circumstances, to refuse permission to discontinue proceedings, or to impose conditions upon the grant of permission. This has been clear ever since *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 where Lord Scarman made plain that the Court would not allow a claimant which had secured interim payments and an admission of liability in this jurisdiction to discontinue his action here "in order to improve his chances in a foreign suit" without being put on terms "which could well include not only repayment of the moneys received but also an undertaking not to issue a second writ in England." I suspect that the present rule, expressly requiring the Court's permission in such a case, may stem from that decision. A claimant who has secured an interim injunction or undertaking will often have obtained advantages which ought to be given up, or caused losses which ought to be compensated, as a condition of being allowed to abandon the claim.

43. The best modern summary of the applicable principles would seem to be that contained in the recent decision of the Court of Appeal, in *Stati v Republic of Kazakhstan* [2018] EWCA Civ 1896 [29], where David Richards LJ, speaking for the Court, approved the following extract from the judgment of HHJ Simon Barker QC (sitting as a Judge of the High Court) in *Singh v The Charity Commission* [2016] EWHC B33 (Ch):

> "(1) the rules do not prescribe any particular test for permitting discontinuance or, for that matter, for setting aside a notice of discontinuance; (2) a claimant's desire to bring proceedings to an end where there is no counterclaim should be respected, not least because a claimant cannot be compelled to prosecute a claim; (3) the court has an inherent discretion including as to the timing of any discontinuance; (4) as with any judicial discretion, it may only be exercised in accordance with principle but is otherwise unfettered; (5) the court's objective, both substantively and procedurally, is to achieve a just result according to law and to limit costs to those proportionate to the case; (6) the consideration required of the court is of all the circumstances and not merely those concerning only one party or only some of the parties; (7) when considering all the circumstances, conduct, particularly that aimed at abusing or frustrating the court's process or securing an unjust tactical advantage, is relevant and may well be important, but it is by no means conclusive; and, (8) when considering all the circumstances, the court should also have in mind its realistic options, which may include imposing conditions while the proceedings remain extant."

44. Applying those principles, I do not consider it would be an appropriate exercise of my discretion to impose the conditions sought, or any similar conditions. It would be wrong to proceed on the footing that the defendant has won the case. There has been no trial. I have not even been shown the witness statements and summaries served by the defendant. I cannot draw the inference on which Mr Browne founded his original argument, that the claimants have abandoned the claim for fear of losing. We now know that the claimants had not seen the defendant's statements. As Mr Price submitted, they will readily have inferred that the five individuals would not have signed witness statements. The existence of summaries would have come as no surprise. Nor is it obvious that proof of the defendant's factual case would necessarily have resulted in success overall, given the public interest factors relied on in favour of upholding agreements to settle litigation. The Court of Appeal's view was that those interests would have been likely to prevail at trial. I cannot say with confidence that any of the evidential or other developments since then would have led to a different assessment.

45. There is thus no basis on which I can reject the evidence of Ms Atkins, that the reasoning behind the claimants' decision to discontinue was quite different. I cannot assess the merit of the allegations of harassment, which are hotly disputed by the Telegraph. But I do not need to resolve that issue. The proposition that the claim became substantially pointless from the claimants' perspective from the time of Lord Hain's intervention is one that the defendant itself advanced three months ago. It is now common ground. It is true that the claimants have taken their time to reach this decision. The key justification for discontinuance that is now put forward would seem to have been present, and apparent, some three months ago. That may have consequences when it comes to costs. But I am not persuaded by Mr Browne's submission that the claimants' persistence with the action means that I should reject their explanation for dropping it now. The argument that the unusual third-party intervention in this case has meant that a trial would not have achieved anything of real value, or of a value proportionate to the costs in terms of adverse publicity, time and expense, is logical and legitimate.

46. In those circumstances, I must reject Mr Browne's invitation to treat the application for permission to discontinue as abusive, or aimed at achieving an illegitimate tactical advantage. I do not regard the point about relief from sanctions as having any real weight, given that the application to extend time was late by a matter of minutes only. It would be impracticable and disproportionate to investigate this aspect of the matter further, in current circumstances. The submission that the claimants should have sued the defendant's sources in the present action, if they were to sue them at all, is a surprising one from a media defendant. It is unattractive, when advanced by a defendant which has fought hard and successfully to protect the identity of its sources. I regard it as untenable, on the facts of this case. Nor do I see good reason for imposing a permission filter on any future action falling within the scope of the Protected Publications. The rules already require the claimants to obtain the Court's permission if they wish to sue the Telegraph Media Group again, over the same or substantially the same matters. As for non-parties, I can see that in the light of what has happened in this case, and what has been said by the claimants, some kinds of claim might arguably be an abuse of process. But, as I shall explain more fully later, the scope of the qualified immunity proposed is over-broad and unsatisfactory. It remains to be seen whether any and if so what litigation will be brought, against whom, for what remedies. It cannot be said that every possible claim would be improper.

47. One claim that might be brought, for example, is to enforce the contractual clawback provisions. It is not established that these are unenforceable. The only argument advanced on that score was the suggestion, which Mr Browne put forward orally, without reference to authority, that the clauses might amount to unenforceable penalties if (contrary to the defendant's case) the payments represented compensation. It would be a remarkable step under the circumstances for the Court to prohibit the pursuit of such a claim, as a condition of discontinuing litigation against a media defendant to restrain publication.

48. There are, I think, some additional problems with the defendant's overall approach. One is that it seems to leave out of account the rights and interests of the five ex-employees. It is impossible to be sure what their current positions are, with respect to the publication of information about their grievances, allegations, and settlement terms. But four things seem clear: (a) none of them wanted to have information about their cases disclosed in conjunction with his or her name; (b) four of them did not want the information published at all; (c) two of them supported the claimants' claim; and (d) none of them has gone so far as to sign a witness statement in support of the defendant's case. The defendant points out that this would seem to be prohibited by the NDAs, but I am in no position to investigate whether that is the, or a reason. In any event, the defendant's approach would seem to give it a free pass to act contrary to the wishes, and arguably contrary to the rights of the five individuals. It is not obvious that the defendant's answer to this - that they have never intended to identify any ex-employee without consent - is sufficient.

49. The problems also include the definition of the Protected Publications. The attempt to obtain immunity, whether absolute or qualified, for a category of publication as broad and ill-defined as "any article derived from the defendant's journalistic investigations" seems not only wrong in principle, being broader than the issues in the case, but also fraught with difficulty. It does not define with sufficient clarity either the subject-matter that is immune, or the persons benefiting from the immunity. There are also uncertainties as to what causes of action are meant to be barred. The first two categories of Protected Publication are limited in terms to allegations of breach of the NDAs, but it is unclear whether they are meant to cover claims for inducing breach of contract (the cause of action presently sued upon), or other allegations of breach of confidence, or other causes of action based on the same or similar facts, such as misuse of private information or data protection. The third category of Protected Publication is framed in broad terms, which would appear to include a bar on claims in any of these causes of action, and in libel.

50. It is hard to see how immunities in these terms could be effectively policed. And any immunity would surely need to be defined with more precision, for instance by reference to the issues raised in the Defence, or the witness statements served by the defendant, and the identities of those who should benefit. But each of those options would seem to contain its own problems, on the facts of this case. The Notetaker's statement was first served less than a week before the date for exchange, and had not been reflected in the Defence before the date of discontinuance. An application for permission to amend in that respect was pending at the time. Five of the defence "statements" were not signed statements but unsigned witness summaries, for which permission had not been granted (the application to that end having been overtaken by the notice of discontinuance.)

51. I also find it hard to accept that the *Aldi* case stands as authority for the proposition relied on by Mr Browne. That was multi-party commercial litigation, of a complex nature, with an unusual procedural history. One can well see that on the facts of such a case the Court would want an opportunity to consider at an early stage whether the claimants had made the right or appropriate choices of defendant, and take some control over who might properly be sued, and when. Media litigation such as this case is very different. It is unusual for claimants to sue media sources. For one thing, their identities are often unknown, as they are in the present case. If media sources are known, and are sued, media defendants are apt to criticise the claimant for doing so, on the grounds that it is unnecessary and oppressive – arguments which may have some force in many cases.

52. In my judgment, therefore, the better course by far is to grant unconditional permission to discontinue.

53. The statements of case in this action are now public property, so any third party interested in finding out can ascertain what the issues were. It will be open to any defendant sued by the claimants or any of them after discontinuance to apply to the Court for a determination that the claim or part of it represents re-litigation of claims which were or should have been advanced in the present action, and for that reason is an abuse of the Court's process. The Court will be in a far better position to assess the merit of any such argument, and to do justice between the parties, in the context of a particular defined claim against an identified defendant, for specific relief.

54. I do not consider that this decision is likely to result in unfairness or oppression. It is true that the third parties who, it seems, have received letters from the claimants' solicitors may not have the same resources as the claimants. But the letters are not framed in oppressive terms, nor is it fair to describe them as "intimidation", and there is nothing in this aspect of the matter that could suffice to make any subsequent litigation an abuse.

Costs

55. The claimants submit that despite the general costs rule in cases of discontinuance they should recover the costs of the Source Disclosure Application, which was the subject of my judgment of 23 January 2019. I agree. I would have made an order as to costs at the end of that hearing, had time permitted me to do so. I would have followed the general rule, that the unsuccessful party should pay the costs of the successful party. Although I refused the application for source disclosure, I did so only on the basis of a concession made by the defendant part-way through the hearing: see the judgment at [9(1)] and [30-32]. The claimants had made clear that source disclosure would not be sought if the defendant made sufficient concessions. In substance, albeit not in totality, the claimants were the successful parties on that application.

56. The claimants were also on balance the winners of another contest dealt with on the same occasion, relating to the outstanding aspects of the defendant's disclosure application dated 19 December 2018. I dealt with this in paragraph [9(3)] of my judgment of 23 January 2019. The defendant was either unsuccessful or did not press on with the majority of the relief that it sought at that hearing. I order the defendant to pay 75% of the claimants' costs of that part of this application as well. These orders for costs in favour of the claimants will be for costs to be assessed on the standard basis if not agreed.

57. The claimants also seek an order for the defendant to pay the costs of the interim injunction application made to Haddon-Cave J and the appeal to the Court of Appeal. Commonly, the order in such a case would be for the costs of the party obtaining an injunction to be paid in any event by the party against whom the injunction was granted. In such a case, upon discontinuance, that would remain the order. But that is not the order made by the Court of Appeal in this case. The order was for the costs to be reserved. The effect of an order for costs to be reserved is set out in PD44 para 4: "The decision about costs is deferred to a later occasion, but if no later order is made the costs will be costs in the case." That would lead to the same result as the default rule on discontinuance. Hence the need for the claimants to ask for an order in their favour now.

58. I am told that the argument for the defendant before the Court of Appeal was that the costs should be reserved because it might turn out at trial that the claimants' factual case was knowingly false. In that case, they should not recover the interim costs. Mr Browne submits that I should infer that the Court of Appeal accepted that line of reasoning, and leave the costs to be swept up by the default rule. Mr Price's submission to the contrary is simple. If the case had gone to trial, and the defendant had won, they could have argued for recovery of the costs of the interim application, even though it was the claimants who had succeeded at that stage. But that is not what has happened. What has in fact occurred is that third-party conduct has made the pursuit of the claim pointless. Mr Price goes on to submit that the defendant could have avoided the costs of the interim injunction proceedings by giving an undertaking, and that the claimants were the successful party at that stage.

59. These last two submissions seem to me to be an invitation to second-guess the Court of Appeal. If these were compelling arguments, they would have prevailed at that stage. But I find the primary argument persuasive. I cannot determine what would have happened at a trial. I should not assume or infer that the defendant would have shown Sir Philip to be a liar. Nor should I assume or conclude that the claimants would have won, on the facts or the law. In a more "ordinary" case of discontinuance, the Court's inability to determine which side would have won could fairly be reflected by applying the default rule on costs. The justification for that would seem to be that whatever the rights and wrongs of the case, a party who brings another to court and then gives up should generally compensate the other for the costs incurred. But the exceptional factor of third-party intervention and its impact justifies a departure from that general rule in this case. There will be no order as to the costs of the interim injunction proceedings in this Court and in the Court of Appeal; each side will pay its own costs of that part of the case.

60. The costs of the arguments with which I have dealt in this judgment remain to be dealt with. My provisional view is that the claimants should recover the costs of these issues, but I will hear argument if the defendant wishes to contend otherwise.

61. All these costs orders are, or would be, by way of exception to the general rule in favour of the defendant pursuant to CPR 38.6(1), and the order which is deemed to have been made under r 44.9. As to the costs payable by the claimants under that deemed order, I direct that if not agreed they shall be assessed on the standard basis up to and including 26 November 2018, but on the indemnity basis from 27 November 2018 to the date of this judgment. This order gives effect to the defendant's argument, which I accept (and which is now adopted by the claimants), that from about 25 October 2018 this litigation became substantially pointless. Indeed, as the claimants would now say, it has become

more counter-productive than useful. Costs since that date, or whatever later date the claimants should have decided to discontinue, have been wasted. The responsibility for that cannot be laid at the door of the claimants or the defendant.

62. I would accept that in the unusual if not wholly exceptional circumstances that prevailed after Lord Hain said what he did, the claimants were entitled to take time to reflect on their options. Bearing in mind the complexity of the issues they confronted, and how much else had to be done in a case that was proceeding swiftly towards trial, I have allowed a full month for that. But whatever may have been the thinking behind the scenes I am unable to identify any sufficient justification for proceeding thereafter. To do so, and then drop the case for that very reason (albeit coupled with another) was in my judgment conduct well outside the norm, which justifies the unusual measure of indemnity costs.

Confidentiality

63. The claimants sought an order that the closed judgments given in this litigation (that is to say, the closed written decisions of Haddon-Cave J and the Court of Appeal) and the judgment given in private by Lambert J, DBE on 3 January 2019, should remain confidential. This is not controversial, and it seems to me to be clearly right that judgments only given in private should remain private.

64. The claimants sought continued protection for other documents, including witness statements and disclosed documents. The CPR contain some default provisions about confidentiality for these classes of document. By CPR 32.12, witness statements may not be used except for the purpose of the proceedings, unless the Court gives permission for some other use. Accordingly, the starting point is that the witness statements used in the interim injunction and other hearings in this action remain confidential unless and until the Court orders otherwise. By CPR 31.22, disclosed documents may not be used except for the purpose of the proceedings, except where the Court gives permission. CPR 31.2 provides that a party "discloses" a document by stating that the document exists or has existed. In the past, a distinction was drawn for this purpose between documents disclosed by compulsion and those disclosed voluntarily. But under the rules as they now stand, the restriction on collateral use applies to all documents the existence of which is stated by a party: see *SmithKline Beecham plc v Generics (UK) Ltd* [2003] EWCA Civ 1109, [2004] 1 WLR 1479, [29] (Aldous LJ), *IG Index Ltd v Cloete* [2014] EWCA Civ 1128, [2015] ICR 254 [45] (Christopher Clarke LJ). Again, therefore, the starting point is that the witness statements and their exhibits, and any other documents disclosed by the parties in the course of the proceedings, are subject to these presumptions against collateral use. The defendant accepts that those provisions should prevail, and I agree.

65. Those restrictions do not apply to other documents in the case, but most of these are protected by orders of the court, including but not limited to the order of the Court of Appeal. I have lifted that order, in so far as it protected the "open" versions of the statements of case, but the other restrictions will remain in place. The restrictions should not apply to the orders of Haddon-Cave J or the Court of Appeal (other than any confidential schedules to those orders) or to my orders of 21 January and today.

APPENDIX

Extracts from the settlement agreement involving "Alex"

4. SETTLEMENT

4.1 Without any admission of liability, we agree to pay to you (for ourselves and also on behalf of Sir Philip) the following:

> 4.1.1 the sum of … ("the Tribunal Claim Compensation Sum") as compensation for injury to feelings and aggravated damages in full and final settlement of the Tribunal Claim;
>
> 4.1.2 the sum of … ("the Compensation Sum") as compensation for the termination of your employment and any and all claims you have or may have against the Employer, Sir Philip or any Associated Persons or any Associated Employer, subject to the warranties given by you and subject to your acceptance of and compliance with the other terms of this Agreement; and
>
> 4.1.3 between the date of this Agreement and 30 November 2018, you will also be paid a further monthly compensation sum on or around the 24th of each month which is … ("the Monthly Compensation Sum"). The Monthly Compensation Sum is further compensation for the termination of your employment and any and all claims you have or may have against the Employer, Sir Philip or any Associated Persons or any Associated Employer, and it will be paid strictly subject to the warranties given by you and subject to your acceptance of and compliance with the other terms of this Agreement. If there is any breach by you of any of the terms of this Agreement, you acknowledge and agree that we and Sir Philip will be under no obligation to pay to you or any or all of the Monthly Compensation Sum.

…

9. CONFIDENTIALITY OF AGREEMENT

9.1 …

9.2 You warrant that except for in accordance with clause 13 you will not disclose in the future to anyone the circumstances relating to the Grievance, the termination of your Employment; the submission of the Tribunal Claim and the contents therein; and/or the fact of, negotiation and/or terms of this Agreement (except to your immediate family in confidence and your professional advisers, or where required by any governmental, regulatory or other competent authority or by a Court of law or Her Majesty's Revenue and Customs).

9.3 The Employer confirms that it will not authorise its directors, officers and employees to disclose the circumstances relating to the Grievance and the Tribunal Claim, the termination of your Employment and the fact of, negotiation and/or terms of this Agreement (except where required by any governmental, regulatory or other competent authority or by a Court of the law or Her majesty's Revenue and Customs or as required for any of our internal reporting purposes or for the purposes of ensuring compliance with or enforcing the terms of this Agreement).

…

13. DISCLOSURE OF INFORMATION

13.1 For the avoidance of doubt, nothing in this Agreement shall prevent you disclosing information:

13.1.1 pursuant to any order of any Court of competent jurisdiction; or

13.1.2 which has come into the public domain otherwise than by breach of confidence by you or on your behalf.

13.2 Equally, nothing in this Agreement, including but not limited to clauses 9, 11 and 12, shall prevent you from:

13.2.1 making a protected disclosure within the meaning of Part IVA of the Employment Rights Act 1996;

13.2.2 raising concerns, including reporting misconduct or a serious breach of regulatory requirements, with regulatory and other appropriate statutory bodies pursuant to your professional and ethical obligations, including those obligations set out in guidance issued by regulatory or other appropriate statutory bodies from time to time;

13.2.3 reporting a criminal offence to any law enforcement agency; and/or

13.2.4 co-operating with any law enforcement agency regarding a criminal investigation or prosecution,

13.3 You warrant, however, that you do not know of any circumstances which would lead you to making a disclosure in the form of or in the circumstances referred to in this clause.

…

15. WARRANTIES

15.1 You warrant that: ….

…

15.1.8 you will not:

15.1.8.1 directly or indirectly speak to, contact or be interviewed by any journalist, press, news agency, author, presenter, blogger, blogger, or reporter about; the Grievance; the Tribunal Claim; or any circumstances relating to the complaints set out in the Grievance or the tribunal Claim or any story or allegation about discrimination, harassment, bullying or victimisation about or relating to Sir Philip or the Employer or any Associated Employer or Associated Persons; or

15.1.8.2 publish or cause to be published, including via social media (either directly or indirectly or instructing or condoning someone to do the same), any article, commentary, video, confirmation, clip or story relating to; the Grievance; the Tribunal Claim; or any circumstances relating to the complaints set out in the Grievance or the Tribunal Claim; or any story or allegation about

discrimination, harassment, bullying or victimisation about or relating to Sir Philip or the Employer or any Associated Employer or Associated Persons;

…

18. FULL AND FINAL SETTLEMENT

18.1 You agree to accept the payment of the Tribunal Claim Compensation Sum in full and final settlement of the Tribunal Claim and also the Compensation Sum and the Monthly Compensation Sum in full and final settlement of all or any claims identified by you in clause 17.1 above and any other claims that you have or may have against Sir Philip, the Employer or any Associated Employer or any Associated Persons …

18.2 In entering into this Agreement and paying the Compensation Sum and the Monthly Compensation Sum to you, both Sir Philip and we are relying on the warranties and undertakings you have given in this Agreement. … If you issue any claim … or you otherwise breach of any of the warranties or terms of this Agreement (including without limitation the terms of clause 12 (Confidential Information) you will immediately repay to the Employer, on demand, the Compensation Sum in full and any part of or all of the Monthly Compensation Sum (as may have been paid to you) and you agree that we may recover the Compensation Sum and/ or any of the Monthly Compensation Sum from you as a debt, together with our costs, including legal fees, in doing so.