



Neutral Citation Number: [2019] EWHC 177 (QB)

IN THE MATTER OF AN INTENDED ACTION
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2019

Before :

MR JUSTICE WARBY

Between :

(1) Linklaters LLP
(2) Linklaters Business Services

Intended
Claimants

- and -

Frank Mellish

Intended
Defendant

Andrew Caldecott QC and Aidan Eardley (instructed by Linklaters LLP) for the Claimants
The Intended Defendant was neither present nor represented

Hearing date: 31 January 2019

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. On Thursday 31 January 2019, I heard an urgent application for an injunction to restrain an ex-employee from disclosing information obtained from and relating to his employment by the claimants, which the claimants say is confidential information, protected by express duties of confidence owed to them by the defendant, pursuant to his contract of employment. The threat, according to the claimants, was to provide such information for publication in the media by unidentified organisations.
2. I granted the injunction for a short period, until a return date on Monday 11 February 2019, in substantially the terms sought. Those terms prohibit the disclosure of eleven specified categories of information. They allow (that is, they do not prohibit) the discussion of some issues which the defendant has said he wishes to raise, and the disclosure of some information about one of the topics covered by the order, even though that information may originally have been confidential in nature.
3. This public judgment summarises the case, and my reasons for granting the injunction. It will be in somewhat general terms. That is only fair and proper, when the hearing took place in the absence of the defendant, the injunction is only temporary, and the nature of the case and my decision upon it mean that some of the facts cannot fairly or properly be set out in a public judgment. There is a confidential annex to the judgment, which may not be inspected or reported, at least not until after judgment or further order.

The facts

4. For the purposes of this judgment it is sufficient to provide this summary, which is based on the evidence filed by the claimants.
5. The claimants are a well-known multi-national law firm (“Linklaters”), and the company through which it employs its UK-based employees (“LBS”). The defendant is an Australian national, aged in his late 50s, who previously worked for Deloitte. He is not a lawyer. His specialist training and experience lies in other fields. From 27 March 2017, the defendant was employed by LBS to work as Linklaters’ Director of Business Development and Marketing.
6. Clause 10 of the defendant’s contract of employment, dated 8 March 2017, included an express obligation of confidentiality which provide so far as relevant:

“Confidential Information

...

You must not at any time, other than for the proper performance of your work:

- disclose to a third party (unless required to do so by law, regulation or an order of the court); or
- make use of

Confidential Information (as defined below) relating to a client, LBS, the Firm, or its or their partners or employees which you acquire in the course of your work and you shall use your best endeavours to prevent the use or disclosure of the same. This

obligation continues for so long as such information remains confidential, including after you have ceased to work for LBS. The obligation shall cease to apply to information which comes into the public domain other than by reason of your default.”

7. Clause 10 contained a non-exhaustive definition of “Confidential Information”:

“Confidential Information” shall include (without limitation) client lists of the Firm, information regarding existing or prospective clients, partners and employees of LBS and/or the Firm, information concerning the marketing and promotional plans of the Firm and financial information relating to the performance of the Firm.”
8. The contract also contained an English law clause and an irrevocable submission by both parties to the exclusive jurisdiction of the Courts of England and Wales, in the event of “any claim, dispute or difference arising out of or in relation to this Agreement” (clause 16).
9. The claimants maintain that in his capacity as Linklaters’ Director of Business Development and Marketing the defendant will have acquired a substantial amount of information about Linklaters, its partners and employees, that falls within the scope of this restriction. For present purposes that general proposition seems hard to dispute. In addition, the defendant was a member of Linklaters’ Executive Committee. It is the claimants’ case that this Committee handled matters of particular importance and sensitivity.
10. In June 2018, the defendant was given six months’ notice his contract would be terminated. He left on terms that he would be paid his contractual entitlements and a substantial additional sum, which – it would presently appear, rightly – was characterised as *ex gratia*. The letter of termination expressly stated that this obligation was to persist after his employment came to an end. Given the gratuitous nature of the additional payment, that would appear to be by way of a reminder, rather than giving rise to any independent legal obligation.
11. On 11 January 2019, the defendant received his final termination payment. On 23 January, he emailed Linklaters’ senior partner and the firmwide managing partner. He expressed dissatisfaction with the termination of his employment which, given his age, he suggested was effectively the end of his career. He acknowledged that the terms on which his employment had been ended were in accordance with the law. He stated that he intended to “share my impressions of the current culture at Linklaters” with particular reference to what he called “the ongoing struggle Linklaters has with women in the workplace”. He said that, to that end, he would be giving “interviews” in the first two weeks of February.
12. The email identified three “specific examples” which the defendant said “I will be using to demonstrate the Linklaters culture”. According to the e-mail, the defendant’s motive was to allow Linklaters to prepare for the questions from the media. The three examples are the focus of the present claim. They are all matters that involve what the claimants say is confidential information relating to partners and/or employees of the firm, falling within the scope of clause 10. Details are set out in the Confidential Annex to this

judgment. To allow some open discussion about them, they have been referred to, and I shall refer to them, under neutral labels (1) the Munich Incident, (2) the NY Settlement and (3) the London Settlement.

13. The claimants' application was for an injunction to restrain disclosure of (1) one specific item of information relating to the Munich Incident – the identity of the female complainant involved; (2) the identity of a Linklaters' staff member who has been given the pseudonym "CP1" and those about whose conduct CP1 complained, along with two other categories of information about the NY Settlement; (3) the identity of another Linklaters staff member described as "CP3" and those about whom complaint was made by CP3, including a former Linklaters partner described as "CP2"; (4) any detail as to the internal discussions within Linklaters as to their public response to any third party interest or questions in relation to any of the above matters. The claimants did not seek to restrain the defendant from publicising in general terms his "impressions of the current culture at Linklaters". In respect of the Munich Incident they sought only the restriction I have identified. They acknowledge, and it is clear from the evidence, there is much about the Munich Incident that is already in the public domain, both here and in Germany. The claimants have nonetheless reserved their right to claim damages in respect of anything that is published.
14. The evidence of Mr Bennett states that CP1 and CP3 have been consulted about the prospect of publication. Neither wished information about their cases to be made public. The claimants have not approached the complainant in respect of the Munich Incident out of sensitivity. Indeed, it does seem obvious that an approach would not be necessary. It can easily be assumed that the individual concerned would not wish their identity as the victim of a sexual assault to be revealed. The evidence is that the identity of this individual is not in the public domain, as one would expect.

Procedure

15. The application was made by Mr Caldecott QC for the claimants, before any proceedings had been issued. Strictly, therefore, the parties are the "intended claimants" and the "intended defendant". I have described them as claimants and defendant for ease of reference.
16. The application papers included a draft order, following the form of the Model Order attached to the Master of the Rolls' *Practice Guidance on Interim Non-Disclosure Orders* [2012] 1 WLR 1003, and two witness statements in support, supported by a statement of truth, from Michael Bennett of the claimants.
17. The defendant was not present or represented at the hearing. Nor did he instruct any lawyer, or send anyone else to represent his interests. Nor did he submit any evidence or written representations. The Court is always wary of granting injunctions against absent parties. That includes, in particular, injunctions which affect free speech – protected by the Convention right to freedom of expression under Article 10. Section 12(2) of the Human Rights Act 1998 (HRA) prohibits a court from granting such an injunction unless it is satisfied either (a) that the applicant has taken all practicable steps to notify the respondent or (b) that there are compelling reasons why the respondent should not be notified. No such compelling reasons were suggested. But I was satisfied that all practicable steps have been taken to notify the defendant.

18. Normally, that should be done by means of an application notice. This can be dispensed with in cases of “exceptional urgency” (CPR 23.4(2) and PD23A 3) It was initially suggested that this was such a case. The claimants pointed out that the defendant had received written notice and all the application papers. I would not have accepted the suggestion that there was exceptional urgency here. But the claimants had wisely reconsidered their position, so that by the time of the hearing there was an application notice before me.
19. Communication with the defendant had all been done by email, the claimants’ evidence being that they did not know where the defendant is currently resident. He might have been in London, having settled in Belgravia when he took the job with the claimants. It was possible that he was in Australia. That seemed unlikely given the timing of some of the communications. The better view was that he was probably in France. Given the possible locations of the defendant, I had to consider the question of jurisdiction, and the method of service outside the jurisdiction if service abroad was legitimate.
20. I was satisfied that, if he was in France, another EU jurisdiction, service could be effected without the Court’s permission, on the basis of the exclusive jurisdiction clause, pursuant to the Judgments Regulation and CPR 6.33(2)(b)(v). If, by chance, the defendant was in Australia or another non-EU country, and permission was required for service abroad, that could be granted because the claims pass through the gateways in 6BPD 3.1(6)(a), (c) and (d) (claims in relation to contracts) and, if necessary, 3.1(21)(a) and/or (b) (claims for breach of confidence or misuse of private information). The detriment threatened would be suffered within the jurisdiction. On the merits, I was satisfied that the relevant threshold requirements were met.
21. Given the claimants’ ignorance of the defendant’s whereabouts, I granted permission, pursuant to CPR 6.15 and 6.27, for service of the claim form and other documents in the case to be effected by an alternative method, namely email in combination with text messages to alert the defendant to the existence of the emails. I was satisfied that this was legitimate, notwithstanding the limits on the permissible methods of service abroad that are laid down by CPR 6.40. Email is not a method of service allowed under French law, so I am told. But, as Mr Caldecott pointed out, the prohibition in r 6.40(4) relates to methods of service that are “contrary to the law of the country where the claim form or other document is to be served”. There is nothing to suggest that French or for that matter Australian law prohibits the service of English proceedings by email or text. And CPR 6.15 applies to authorise service “by a method or at a place not otherwise permitted” *Abela v Baadarani* [2013] UKSC 44 [2013] 1 WLR 2043 [24].
22. When deciding to proceed on short notice I also bore in mind that an absent defendant has three important safeguards. The first is that a claimant seeking an injunction against such a defendant owes the Court a duty to make full and frank disclosure of any matter of fact or law that is material to the decision the Court is being asked to make. If that duty is not performed the injunction may be discharged, with appropriate costs orders as well as the possibility of compensation for the respondent. The skeleton argument for the claimants and the witness statements of Mr Bennett expressly acknowledge this, and that the duty includes drawing the court’s attention to any relevant public domain material, and to any facts which might be said to support a public interest defence. I was satisfied that the claimants had conscientiously sought to fulfil this duty. The second safeguard is the requirement that the applicant’s lawyers make a note of the

hearing, and provide it to the respondent. Thirdly, there should always be a judgment explaining the Court's reasoning.

23. Sometimes, third parties are to be treated as respondents to an application such as this. They certainly would be if the claimants intended to serve them with the order, if obtained. The purpose of serving or notifying third parties in a case like this is to bind them with the so-called "*Spycatcher*" effect. Action, in the knowledge of such an injunction, that defeats or undermines its purpose will often if not usually amount to contempt of court. There do appear, on the evidence, to be third parties whom the claimants would want to bind in that way. But the defendant has declined to say who he intends to contact with his story, so nobody can be notified directly. I did not consider that it was necessary or indeed appropriate to require the claimants to issue a general notification.
24. The start of application was heard in public. Much of the remainder – dealing with details of the allegedly confidential information - had to be in private, as otherwise the confidentiality claimed by the claimants would have been lost or undermined by the very process of seeking to protect it. It is well-established that the Court must adapt its procedures to ensure that rights of confidence or privacy asserted by those who come before it for protection are safeguarded unless and until the Court has concluded that they are not made out, or that they should be overridden.
25. The hearing lasted the best part of two hours. I had read into the papers in advance, but Mr Caldecott took me carefully through the key aspects of the evidence, which filled more than a lever arch file, to ensure that I had a good understanding of the nature of the information which the claimants sought to protect, the context in which it arose, and of any factors which might count against the grant of relief. He also made submissions on the law, including points that might have been made by or on behalf of the defendant, had he been present or represented.

The law

26. I shall not outline all that was said in submissions. The law of breach of confidence is summarised and considered in the recent judgment of the Court of Appeal in *ABC v Telegraph Media Group Ltd* [2018] EWCA Civ 2329 [2019] EMLR 5. In summary, however, the matters that have to be proved to establish a claim for an injunction in breach of confidence are: (1) That the information has the necessary quality of confidence; (2) That the information has been imparted to or acquired by the defendant in circumstances importing an obligation of confidence; and (3) That the defendant threatens or intends to misuse the information. Defences or justifications in a breach of confidence claim include loss of confidentiality due to prior disclosure in the public domain, and a compelling public interest in the disclosure of the information in question, which requires the duty of confidence to be overridden.
27. Whenever a person threatens or intends to publish information, the Convention right to freedom of expression must be considered by the Court. An injunction which restrains publication is an interference with that right, which can only be justified if it pursues one of the legitimate aims identified in Article 10(2) of the Convention, and is necessary to and proportionate for the pursuit of such aim(s). The method by which the Court should strike the balance between competing considerations in this field is discussed in the *ABC* case, which emphasises the weight to be given to obligations of confidence

which are assumed under a contract, freely entered into, for good consideration. There is, as the Court of Appeal emphasised, an important public interest in upholding contractual bargains which cannot be impeached for fraud, undue influence or any other vitiating factor. That aspect of the matter is highlighted in *Mionis v Democratic Press SA* [2018] QB 662, a case on which the Court of Appeal drew heavily in *ABC*. The authorities indicate that the right approach for the Court to take, when faced with a contest between public interest considerations and a contractual duty of confidence, is to ask itself not just whether the information is matter of public interest but “whether in all the circumstances it is in the public interest that the duty of confidence should be breached”: *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776 [2008] Ch 57 [68].

28. In this case, as in many others, the Court has to take account of the Convention rights of third parties involved, and in particular those of ex-employees with complaints and grievances, which they take to their employer for resolution. The matters they brought forward plainly engage their rights to respect for their private lives, and their correspondence, protected by Article 8 of the Convention.
29. The applicant for an interim injunction of this kind must meet some threshold conditions. First, and fundamentally, it must satisfy the Court that there is a threat or risk that, if not restrained, the respondent will publish. The Court must be persuaded that the threat or risk is sufficient to justify the intervention of the Court, assuming the other threshold conditions are met. Next, the applicant must satisfy the court that it is “likely to establish that publication should not be allowed”: HRA, s 12(3). This requirement looks forward to the time of a trial, and to what would happen then. “Likely” in this context normally means “more likely than not”, though a lesser prospect of success may suffice where the Court needs a short time to consider evidence/argument, or where the adverse consequences of publication might be extremely serious: *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 [16]-[23] (Lord Nicholls); *ABC v Telegraph Media Group Ltd* [2018] EWCA Civ 2329 [2019] EMLR 5 [16].
30. This means that the Court must be persuaded that the claimant is likely to establish the three elements of the cause of action, and that there is no defence or justification for breach of confidence, which would be likely to succeed at trial. The extent to which the information at issue is already in the public domain, and the extent to which its publication would be in the public interest will always need to be considered. HRA, s 12(4) requires the Court to have regard to these factors, in any case which concerns “journalistic [or] literary material”. This is to be treated as such a case. All these requirements must be addressed by the Court, as best it can, on the evidence before it at the time of the application, which may be (as in this case) from one side only.
31. Even if all of these requirements are met, the Court retains a discretion. An injunction may be refused if, for instance, damages would be an adequate remedy, or the defendant could not be adequately compensated if the Court eventually concluded that the injunction was wrongly granted. A court might refuse relief if it concluded that the nub of the claim was defamation, and the claimant was abusing the Court’s process by relying on another cause of action in order to circumvent the restrictions on interim relief against alleged libel: *McKennitt v Ash* [2006] EWCA Civ 1714 [2008] QB 73 [79] (Buxton LJ). A further factor which can play a part in deciding whether to exercise the Court’s discretion in favour of granting an injunction is whether it can be effective

in practice. Where the information which is the subject of an injunction application is or may be of worldwide interest, and publication has taken place or is imminent abroad, the Court must take account of those facts in its decision-making. But in a case such as the present, where the claim seeks to enforce against a contracting party an express contractual obligation which is territorially unlimited, the Court can grant an injunction with worldwide effect against that party: *Attorney General v Barker* [1990] 3 All ER 257 (CA).

Discussion

32. I was satisfied that the likelihood that the claimants would succeed at a trial was sufficient to justify the relief that I granted. There was clear evidence of a threat or intention to give interviews for publication about matters that came to the attention of the defendant in the course of his employment. Whether that threat was likely to be carried out was unclear. But there was clear evidence of a risk. It may well be possible to speak publicly in general terms about the “culture” at Linklaters, or any other large firm or organisation, without breaching duties of confidence. But although the defendant has claimed that he intends to observe his contractual obligations, it is not easy to see how he could do so if he were to illustrate his points by reference to the three areas which he specified in his correspondence. These all related to present or former employees or partners of Linklaters, and the information referred to was of an inherently sensitive and confidential nature. On the face of it, those matters all came firmly within the scope of clause 10 of the defendant’s contract of employment. None of the information in the eleven categories specified in the draft Order was, on the evidence, in the public domain.
33. The rights of the third parties involved, and in particular those of the individual complainants, bolstered the case in favour of granting an injunction. I see the force of Mr Caldecott’s submission, that internal grievance processes are confidential in nature. Those interviewed as part of such a process are entitled to expect that what they say will be kept confidential. There are strong policy reasons for upholding those legitimate expectations, to encourage genuine complainants to come forward rather than risk having sensitive material of the kind in issue here made public by a third party, against their wishes and (on the evidence) without consultation.
34. It is accepted by the claimants that there is, in general terms, a legitimate public interest in the due performance by large firms such as Linklaters of their social and moral duties towards their staff. But the existence of such an interest cannot justify indiscriminate disclosure of otherwise sensitive confidential information which others have a legitimate interest in keeping confidential. A general desire to talk publicly about the “culture” of a large firm is not enough to justify the disclosure of such details. There may be cases in which the details of individual acts of alleged or established misconduct, combined with one another, create a compelling picture of persistent or habitual wrongdoing, serious enough to satisfy the tests to which I have referred. In some cases, the public interest in correcting misleading public statements could come into the picture. But nothing of that kind emerges from the evidence presented to me in this case at this stage.
35. The claim is partly motivated by concern for the reputational harm disclosure might cause, but that is not the sole or main purpose behind this application, which I did not regard as an abuse of process. Damages would not be an adequate remedy. I saw no

reason to doubt that the injunction, if granted, would be effective against the defendant. Its effects on third parties will depend on where they are, what they know, and the local laws. But this was not a case in which it was apparent that the Court's decision was likely to be defeated or undermined by third party conduct over which the Court had no jurisdiction or control.

36. I granted the order sought by the claimants for the disclosure by the defendant of the identity of any journalists, press or media organisations, agents or publicists or third party to whom the defendant has disclosed all or any part of the Information with a view to publication in the press or media. I also made orders restricting access to the Court file and the use of the hearing papers, following the format of the Model Order.