

Case No: QB-2021-004520

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

Royal Courts of Justice,
Strand,
London WC2A 2LL

Date of hearing: Wednesday 16th February 2022

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Before:

THE HONOURABLE MRS JUSTICE COLLINS RICE

Between:

VERLINGUE LIMITED

**Claimant/
Applicant**

- and -

PERSONS UNKNOWN

responsible for obtaining data from the Claimant's IT systems on or about 27 November 2021 and/or who has disclosed or is intending or threatening to disclose the information thereby obtained

**Defendants/
Respondents**

Adam Speker QC and Clara Hamer (instructed by DAC Beachcroft LLP) appeared for the Claimant/Applicant

The Defendants/Respondents did not attend and were unrepresented

PROCEEDINGS

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MRS JUSTICE COLLINS RICE: Good morning.

CLAIMANT'S COUNSEL: My Lady, I appear with my learned friend Ms Hamer for the claimant.

The defendant is on notice but not here and has not responded at any stage.

INTRODUCTORY & BACKGROUND

MRS JUSTICE COLLINS RICE: No. That is not surprising, I suppose. Just before we start, in my mind in these circumstances is this. There are a number of decisions that I will need to make. And we are here today, having an oral hearing in public rather than dealing with matters on the papers, because of Nicklin J's concerns about open justice and the public record. So what is in my mind, subject to your thoughts, is whether the right thing to do would be to take today's proceedings rather slowly, issue by issue, with a view to there being an approved record at the end which we can send to the Defendant via the email address that we have, and perhaps publish in some other way. I just leave that thought with you.

CLAIMANT'S COUNSEL: I am very happy to proceed on that basis.

What your Ladyship should have is a bundle from us which deals with the documents to date and also the skeleton from Ms Hamer and myself, chronology and draft order from the previous hearing. As I said, this is an application for default judgment and also for relief. The only relief sought from us is permanent injunctive relief which mirrors the injunctive relief that had been granted on an interim basis to date.

At the hearing on 12th December 2021 Jay J granted the interim injunction. His Lordship did so in private and without notice. There is a note, which I hope your Ladyship has seen. He gave very brief reasons, but he was satisfied that this was an overwhelming case for relief, whether one applied the test in *American Cyanamid* or indeed section 12(3) of the Human Rights Act. Either way, his Lordship

granted the injunction. Nicklin J extended it on 12th January. As his Lordship's reasons identified, he was reluctant on that date to grant relief on paper, because he did not have a chance to give a judgment at the same time, and therefore set directions for today's hearing, and as is indicated in the second witness statement of Mr Paterson, those directions have been complied with. The documents have been provided to the defendant and there has been no response from the defendant.

PROCEEDING IN THE ABSENCE OF THE DEFENDANT

E MRS JUSTICE COLLINS RICE: As I say, I think if we are taking this stepwise, then probably the first issue we need to address is proceeding in the absence of the defendant. So if you would be kind enough to take me through those preliminary issues I can record a decision on that.

A CLAIMANT’S COUNSEL: Indeed. The power to proceed in the absence of a party is at 23.11, page 826 of the White Book. The court has the power to proceed in the absence where an applicant or respondent fails to attend the hearing. It can, on an application or of its own initiative, relist the hearing. There is no application from the respondent that there is any reason why he cannot attend this hearing and indeed, as the evidence of Mr Paterson B shows, is on notice of the existence of it and the purpose of it.

MRS JUSTICE COLLINS RICE: Take me briefly to the witness statement which establishes the facts of service and compliance with Nicklin J’s note.

C CLAIMANT’S COUNSEL: It is page 96 of the bundle, my Lady. This is Mr Paterson’s second witness statement where he explains at paragraphs 5 and 6 on page 97 that, pursuant to Nicklin J’s order, he has served on the respondent by email a copy of the January order and a written notice of this hearing.

D MRS JUSTICE COLLINS RICE: Yes.

CLAIMANT’S COUNSEL: And those can be seen on pages 103 and 104 in the bundle.

E MRS JUSTICE COLLINS RICE: I am very grateful. So I have before me a signed witness statement to the effect that the order of Nicklin J has been complied with; the defendant is on notice – that notice being service at the email address previously approved by Jay J; that no response has been received, no application, no explanation; there is a pattern in this case of non-engagement. So it appears there is no reason to think that adjourning or taking other measures would secure the attendance of the defendant. I am satisfied in all these circumstances that it is fair and right to proceed in the defendant’s absence. The defendant of course has protections in relation to decisions made in the absence of a party. They can apply to have those decision set aside should it turn out after all that there is good reason for the non-attendance.

APPLICATION FOR DEFAULT JUDGMENT

CLAIMANT’S COUNSEL: I am obliged, my Lady. Then the next question is whether it is appropriate to grant default judgment in these proceedings.

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MRS JUSTICE COLLINS RICE: Yes.

CLAIMANT'S COUNSEL: The claim form was sent to the email address of the defendant on 10th December.

MRS JUSTICE COLLINS RICE: Yes.

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CLAIMANT'S COUNSEL: That can be seen at page 28 of the bundle. Then the sealed order, the claim form and the particulars, the order of Jay J and the application notice were sent by email. Just to provide proof of that, that is on page 44, with the certificate of service on page 45.

MRS JUSTICE COLLINS RICE: Yes. Thank you.

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CLAIMANT'S COUNSEL: CPR rule 6.14, which is on page 328 of the White Book, this being service of a claim form served within the United Kingdom on the second business day after completion of the relevant step under 7.5 (page 483), but in essence it is Monday 20th December 2021.

MRS JUSTICE COLLINS RICE: Yes.

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CLAIMANT'S COUNSEL: And other documents would be deemed in accordance with 6.26 to have served on 17th December. In any event – it is slightly confusing – in paragraph 5 of Jay J's judgment granting permission to serve documents and deeming service to be effective on 16th December 2022.

MRS JUSTICE COLLINS RICE: Yes.

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CLAIMANT'S COUNSEL: We are now on 16th February 2022. If the defendant was within the jurisdiction, he would have had to serve the acknowledgement of service or the defence within 14 days.

MRS JUSTICE COLLINS RICE: Yes.

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CLAIMANT'S COUNSEL: That is rule 10.3(1). And has not done so. If he is not within the jurisdiction, he would have had to serve the acknowledgement of service or the defence within the time limit set out in the table in practice direction 6B.

MRS JUSTICE COLLINS RICE: Yes.

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CLAIMANT'S COUNSEL: The longest time period is 50 days for the New Zealand Island Territories, and we are, by our calculation, we are over 60 days since the hearing. So wherever he is in the world, he has missed the deadline to file acknowledgment of service or a defence.

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MRS JUSTICE COLLINS RICE: I see that.

CLAIMANT'S COUNSEL: Therefore the next question is what to do in these circumstances where he has failed to do so and we invite your Ladyship to grant default judgment. The law on default judgment has been helpfully set out by Nicklin J in the

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case of *Glenn v Kline* [2020] EWHC 3182. We have provided a copy to---MRS
JUSTICE COLLINS RICE: That I do not have, I'm afraid.

A CLAIMANT'S COUNSEL: I will hand up a copy.

MRS JUSTICE COLLINS RICE: (Handed) I am grateful, thank you.

B CLAIMANT'S COUNSEL: The facts are not very important, but his Lordship set out the law on default judgment beginning at paragraph 24. The essential points other than what the rule says in CPR 12.11 "...judgment shall be such judgment as it appears to the court that the claimant is entitled to on his statement of case", are (a) at paragraph 25 that the effect of default judgment is that the pleaded facts are treated as established.

MRS JUSTICE COLLINS RICE: Yes.

C CLAIMANT'S COUNSEL: And at 26 the same point is made in a different way, that the evidence going to the merits is not required.

MRS JUSTICE COLLINS RICE: Yes.

D CLAIMANT'S COUNSEL: So one goes to the particulars of claim to consider what the claim is and what remedy may be appropriate.

MRS JUSTICE COLLINS RICE: Yes. And one of the reasons, as I recall it, that the authorities say that we do not get into the merits is precisely to keep matters simple should there be an application in the future to set this default judgment aside.

E CLAIMANT'S COUNSEL: My Lady, that is correct, and that point is made by Nicklin J at paragraph 28 of his judgment, that the safeguard, for the respondent, is the ability to apply to set aside or vary the default judgment under CPR 13.3.

MRS JUSTICE COLLINS RICE: Yes, indeed. So we are looking at the particulars of claim.

F CLAIMANT'S COUNSEL: They start at page 37 of the bundle.

MRS JUSTICE COLLINS RICE: Yes.

G CLAIMANT'S COUNSEL: The facts as pleaded here establish the 3 criteria to establish breach of confidence in essence that the information is confidential.

MRS JUSTICE COLLINS RICE: Yes.

H CLAIMANT'S COUNSEL: That there is an obligation on a duty to keep it confidential and that there is a threatened or actual misuse of that information.

MRS JUSTICE COLLINS RICE: Yes.

H CLAIMANT'S COUNSEL: If your Ladyship wishes more on the law in that regard, it is set out in the original skeleton at paragraph 31.

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MRS JUSTICE COLLINS RICE: I am grateful, and I have addressed myself to what the authorities say about the definition of the duty of confidence.

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CLAIMANT'S COUNSEL: The necessary quality of confidence in the information is set out at paragraph 4 of the particulars of claim and also paragraph 4 of the confidential schedule to the particulars of claim. The duty aspect, the obligation is at paragraph 5, and the fact that there has been a misuse by the obtaining of it and the fact that it is still out there and still on the auction site is a continuing threat that justifies, in my submission, the continuation of the injunction already granted.

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MRS JUSTICE COLLINS RICE: Yes.

CLAIMANT'S COUNSEL: As identified in the original injunction, there is no defence and no defence has ever been raised to the defendant's actions. So on the basis of the particulars of claim as they stand, they identify a meritorious claim of breach of confidence.

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MRS JUSTICE COLLINS RICE: So a meritorious claim *prima facie*, considered on the basis of the particulars of claim, and no response, no defence, are the basis of an entitlement to judgment in default, yes. I am satisfied on that basis.

CLAIMANT'S COUNSEL: That is all we seek, which is injunctive relief. I am not asking for damages or other such remedies.

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FORM OF ORDER

MRS JUSTICE COLLINS RICE: Yes. So in terms of the relief sought, do you just want to take me through all the aspects of that? There is clearly the restraining dimension, but there are other aspects to the relief sought, so we had better have a look at those I think.

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CLAIMANT'S COUNSEL: If I could take you to the draft order, the slightly revised one was sent up with the skeleton argument, which I hope---

MRS JUSTICE COLLINS RICE: Let me have a look at the version that I have.

CLAIMANT'S COUNSEL: I can hand up---

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MRS JUSTICE COLLINS RICE: If that is the very latest version, why don't we look at that.
(Handed) Thank you.

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CLAIMANT'S COUNSEL: We will fill in your Ladyship's details at the top on the front page.

MRS JUSTICE COLLINS RICE: Yes.

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CLAIMANT'S COUNSEL: Paragraph 1 sets out the relevant recitals, but it is probably sensible for us to include at 1.4 that consideration has been given to proceeding without notice and that that has been---

MRS JUSTICE COLLINS RICE: Yes.

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CLAIMANT'S COUNSEL: We can add some wording in and hand it to your Ladyship for consideration.

MRS JUSTICE COLLINS RICE: Yes, thank you.

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CLAIMANT'S COUNSEL: Paragraph 2 deals with default judgment. There was some confusion over the numbering of the case. I can take you to the explanation given in Mr Paterson's first witness statement if you wish to---

MRS JUSTICE COLLINS RICE: Let us have whatever is the right number.

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CLAIMANT'S COUNSEL: The final injunction is in 3 parts. The first is a negative injunction not to use the stolen information. That is in the standard form of the interim model of disclosure---

MRS JUSTICE COLLINS RICE: Yes.

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CLAIMANT'S COUNSEL: Paragraph 4 is a mandatory injunction for delivery up of the information.

MRS JUSTICE COLLINS RICE: Yes.

CLAIMANT'S COUNSEL: He has already failed to comply with that on an interim basis, but this is the final attempt to do so.

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MRS JUSTICE COLLINS RICE: And that gives one week in order to do it.

CLAIMANT'S COUNSEL: Yes. As I have said, he has not done so to date as he was required to do so. Then in 5 perhaps more wishful thinking is again that he confirms what is expected of him and required of him in paragraph 4.

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MRS JUSTICE COLLINS RICE: Yes. So these are the positive or mandatory aspects of the injunction.

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CLAIMANT'S COUNSEL: Paragraphs 6 and 7 deal with access to documents. They only seek to keep copies of confidential schedules and witness statements sealed. This hearing has taken place in public and open court. The name of the client is revealed and it is on the claim form.

MRS JUSTICE COLLINS RICE: Yes

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CLAIMANT'S COUNSEL: The witness statements of Mr Paterson are not confidential, nor are the particulars of claim or the claim form.

MRS JUSTICE COLLINS RICE: Yes.

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CLAIMANT'S COUNSEL: The only sensitivity relates to any confidential information itself in case that gives the defendant, should he see it, some indication of what is considered to be valuable, and the steps taken in the investigation in case that alerts them to what has been done or what they should not do or steps that they might take differently in the future.

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MRS JUSTICE COLLINS RICE: I understand that, and I am satisfied that the basis on which the confidential schedules have been sealed to date, that those reasons continue to require an equivalent provision to be made now. It may be desirable just while you mention it to add in the recitals that this hearing has been held in public.

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CLAIMANT'S COUNSEL: Paragraph 8 deals with service of documents in the same form as in the earlier interim injunction. The only difference to the normal state of affairs is that we seek permission, as we have had in previous cases of this kind, not to serve the documents on the defendant unless and until he identifies himself. So he gets the documents that allow him to understand what is going on, and he gets the orders and the non-confidential information, but unless and until he identifies himself he does not get the confidential information.

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MRS JUSTICE COLLINS RICE: Yes, I follow the logic of that.

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CLAIMANT'S COUNSEL: Paragraphs 9-11 are in standard form that if he does identify himself and he is provided with the papers he must protect them.

MRS JUSTICE COLLINS RICE: Yes.

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CLAIMANT'S COUNSEL: Paragraph 12 is that we seek the costs of the application and the action, but I make no application today for those to be assessed or any summary assessment---

MRS JUSTICE COLLINS RICE: So to be assessed if not agreed.

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CLAIMANT'S COUNSEL: Indeed. Then paragraphs 13-17 are all in standard form. They provide for the variation or discharge of the order, the interpretation of it, the names of the legal representatives and communications with the court.

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MRS JUSTICE COLLINS RICE: Yes. Paragraph 13 is an important safeguard for the defendant.

CLAIMANT'S COUNSEL: Yes.

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MRS JUSTICE COLLINS RICE: Giving them the opportunity to return to court at any point and apply for these requirements to be varied, or discharged altogether. So that is a very important safeguard.

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CLAIMANT'S COUNSEL: Over the page Confidential Schedule 1 simply identifies the confidential witness statement that was relied upon in the first hearing. Confidential 2 identifies the email address for service as we know it and a description of the information referred to in the order.

MRS JUSTICE COLLINS RICE: Yes.

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CLAIMANT'S COUNSEL: Subject to the points raised, adding to the recitals that this is a public hearing and your Ladyship's order without notice, I would ask that the order be granted in the form of the draft provided.

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MRS JUSTICE COLLINS RICE: Yes. I am grateful. I am content to do that on the basis that you have set out. It may also be desirable to include on the face of the order the direction for the obtaining of an approved record for service on the defendant. It would be interesting to hear what you say about whether there is any suitable way of placing the transcript into the public domain generally.

CLAIMANT'S COUNSEL: It is 39.2.

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MRS JUSTICE COLLINS RICE: I am just mindful of Nicklin J's concerns.

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CLAIMANT'S COUNSEL: It is 39.2(5), which is page 1331 of the White Book. This deals with hearings to be held in public unless it is necessary to hold the hearing in private or maintain the anonymity of a party. Paragraph 39.2(5): "Unless and to the extent that the court otherwise directs, where the court acts under paragraph (3) or (4) a copy of the court's order shall be published on the website of the Judiciary of England and Wales."

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MRS JUSTICE COLLINS RICE: A transcript as well? Or the transcript attached to the order? Is that a convenient---

CLAIMANT'S COUNSEL: That could be done. It will take longer, but at the very least your Ladyship's order, and indeed Jay J's order, absent the confidential schedules, could go on the Judiciary website. That is what happened in Four New Square.

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MRS JUSTICE COLLINS RICE: I am content for the order to be made without delay. That is fairly straightforward. I am just concerned about publication of the reasons for the order. So would it be very unusual to direct the attachment in due course of a transcript of the order? Or is there a better way forward?

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CLAIMANT'S COUNSEL: Once a transcript has been obtained it could be provided to Westlaw or Bailii.

MRS JUSTICE COLLINS RICE: Then let's do that. I think that is straightforward, once approved, yes. Very good. Is there anything else for this morning?

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CLAIMANT'S COUNSEL: No, my Lady.

MRS JUSTICE COLLINS RICE: I am grateful. Thank you for setting everything out so clearly and for going so carefully through the various stages of today's application. Thank you.

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Marten Walsh Cherer hereby certifies that the above is an accurate and complete record of the proceedings or part thereof.

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