



Neutral Citation Number: [2008] EWHC 2852 (QB)

Case No: TLJ/08/0156

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/11/2008

Before :

THE HON MR JUSTICE TUGENDHAT

Between :

Carmen May Briscoe Mitchell

Claimant

- and -

(1) Hodder & Stoughton Ltd (2) Constance Briscoe

Defendants

Jonathan Barnes (instructed by **Reynolds Porter Chamberlain**) for the **Third Party**
Kate Wilson (instructed by **Russell Jones & Walker**) for the **Defendants**

Hearing date: 14th November 2008

Reasons for Judgment
Approved

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 Tugendhat :

1. At the end of the argument on 14 November 2008 I indicated that my judgment was to refuse disclosure sought by the defendants and to discharge the order I made on 31st October. I said I would give my reasons later and these are they.
2. The Claimant is the second defendant's mother. The Claimant commenced proceedings against her daughter and her daughter's publisher in respect of passages in a book entitled "Ugly" ("the Book"), published in January 2006. This purports to be a true account of what the second defendant claims she suffered at the hands of the claimant, and the claimant's then partner (not the Second Defendant's father).
3. At a pre trial review on 31st October 2008 I made, amongst other orders, an order that the defendants be permitted to issue a witness summons pursuant to CPR Part 34.3 against Mr Braithwaite of Associated Newspapers Limited, returnable on 7th November. Mr Braithwaite is a lawyer and it is common ground that any order ought properly to be directed to Associated Newspapers Limited ("ANL").
4. The order required production of the following documents:
 - 1) "Any and all notes and/or tapes and/or any other record of the interview(s) and/or other communications with Patsy Briscoe relating to the article of January 22nd 2006 in the Mail on Sunday, for which she was the principle interviewee.
 - 2) Any and all notes and/or tapes and/or any other record of any interview and/or other communication with Christine Briscoe, Norma Eastman and/or Martin Briscoe relating to the above article of January 22nd 2006 in which each of them is also quoted.
 - 3) Any and all notes and/or tapes of any interview or any other communication with the Claimant (Carmen Briscoe) and /or Mr Neil Aiston, Mr Eastman's solicitor relating to the article of January 28th 2006 in the Mail on Sunday, where both are quoted".
5. The Mail on Sunday had serialised the Book, and on 22nd and 28th January it had published two further articles setting out statements from the Second Defendant's sister Patsy and her other siblings identified in the order. The effect of these two articles was that the members of the family quoted in them stated that the contents of the Book were untrue.
6. The only defence in the action, and the main issue, is whether the allegations in the Book are true or not. This will be for the jury to decide in the trial commencing on Monday 17th November. After the making of the order on 31st October there was correspondence between the defendants and ANL. Miss Wilson, who appeared for

the defendants, accepted that the application should have been, not for a witness summons, but for a disclosure pursuant to CPR 31.17. This provides as follows:

- 1) “This rule applies where an application is made to the court under any act for disclosure by a person who is not a party to the proceedings.
 - 2) The application must be supported by evidence.
 - 3) The court may make an order under this rule only where
 - a) The documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings;
 - b) Disclosure is necessary in order to dispose fairly of the claim or to save costs.
 - 4) An order under this rule must
 - a) Specify the documents or the classes of documents which the respondent must disclose; ...”
7. Miss Wilson states that the documents of which the defendants now seek disclosure are limited to documents, memos, and records of the interviews conducted by journalists for ANL with Patsy and Martin Briscoe and Norma Eastman.
8. In the article dated 22 January 2006, which covers nearly two full pages of the newspaper, there are included the following passages:

“[Attributed to Patsy Briscoe] there were no rages from our mother there was no abuse and [the second defendant] was never treated any differently

a half-sister Norma, 38 says:

“My sisters and brothers and I are very confused and disappointed by [the second defendant’s] behaviour. None of us have any recollections of the events she describes”

and brother Martin, 45, says

“I don’t know where these accusations are coming from. Mum and the second defendant had their mild disputes, like mother and daughters do. I didn’t get on with my mum all of the time, but she was a brilliant mother...”

...The huge family were squeezed into a three-storey house in Walworth South London.....

But Patsy remembers it very differently. She says:

“Actually mum tried everything to help [the second defendant] she took her to lots of doctors. [The second defendant] was given a room by herself to give her some privacy”.

9. It is expected that at the trial evidence will be adduced from the claimant and from Patsy Briscoe, Norma Eastman, Cynthia Eastman (another half sister of the second defendant), Georgina Eastman, her full brothers Martin Briscoe and Carlton Briscoe and from her half brother Winston Eastman. It is also expected that oral evidence will be given by the second defendant herself, and by other people who knew her when she was growing up.
10. The first issue is whether the application can surmount the conditions set out in Part 31.17(3)(a).
11. Miss Wilson submits that the documents she is seeking are likely to assist in resolving what she submits are minor discrepancies between statements by Patsy Briscoe as to the age at which the second defendant started to live (together with two of her sisters) in a separate house from the rest of the family, and which the second defendant characterises as abandonment of herself by the claimant. Miss Wilson submits the position is similar in respect of what she submits is an inconsistency between Patsy Briscoe’s witness statement and what she is reported by the Mail on Sunday to have said with respect to the sleeping arrangements at the family home. She submits that this is important in relation to the allegations of abuse.
12. Miss Wilson also submits that the documents are likely to go to the credit of Ms Patsy Briscoe and the other children who are expected to give evidence in support of the claimant their mother. Miss Wilson also refers to allegations contained in the witness statement of Norma Eastman against the second defendant. These do not go to any pleaded issue in the case, and in the skeleton argument prepared for the trial Mr Caldecott submits that the allegations cannot be adduced in evidence in chief, but at most put to the second defendant in cross examination. Miss Wilson submits that family life and relations in the Briscoe-Eastman household will form a material part of the issues at the trial.
13. For ANL Mr Barnes submits that what the witnesses in question said in interview to a journalist for ANL in 2006 would not be likely to be of any material assistance to the jury as to what actually happened when the witnesses were all growing up together as children. He submits that whatever relevance the material has is confined to the credit of the witnesses and that disclosure ought not to be granted against a party to an action in relation to matters going only to credit, and still less so against a non party. He cites *Thorpe the Chief Constable of Greater Manchester Police* [1989] 1 WLR 665. He also submits that disclosure should not be ordered against a newspaper in circumstances where the request is speculative or oppressive and he cites *Senior v. Holdsworth, ex party ITN* [1976] 1 QB 23 at page 34H to 35A. He submits that the jurisdiction to make an order against a non party must be exercised with some caution (see *Re Howglen Limited* [2001] 1 All ER 376 at page 382 H.

14. There is no dispute that the Court of Appeal in *Three Rivers DC v. Bank of England (No 4)* [2003] 1 WLR 210 gave a meaning to the word “likely” in CPR 31.17(3) as follows:

“Where “the documents” might well support or adversely affect a party’s case: that the word “likely” took its meaning from its context and, where the context was a jurisdictional threshold to the exercise of a discretionary power, a modest threshold of probability was sufficient and it was not necessary to show that the disclosure was more probable than not to support or adversely affect a party’s case”.
15. At the present stage of the proceedings, I have difficulty in seeing what relevance the documents sought might have to any matter other than the credit of the witnesses who gave the interviews reported in the 22nd January article. Such discrepancies as Miss Wilson submitted existed appear, at this stage, to be of relatively minor significance. So even on the issue of credit the case for disclosure is not strong.
16. I am prepared to assume that the defendants can cross the threshold of showing that the documents are likely to support their case or adversely affect the case of the complainant. But I make no decision to that effect.
17. The difficulty that the defendants face, on that assumption, is in showing that disclosure is necessary in order to dispose fairly of the claim or to save costs and that even if it is, the court should exercise its discretion to make the order.
18. The witnesses in question who gave interviews to the journalist for ANL are expected to give evidence at trial. If they do, then it is hard to see what necessity there may be for disclosure of the records of the interviews, whether they support the case of the defendant or the claimant. Such suggestion as Martin Briscoe is reported in the article to have made about disagreements with his mother go no where near the gravity of the allegations which the defendants have made against the claimant. Insofar as the documents are likely to have an adverse effect on the claimant’s case, they may show that the witnesses in question gave a different account from the account they gave in evidence to the court, or did not mention to the journalist matters which they mention to the court at trial. In my judgment disclosure is not necessary to dispose fairly of the claim, and the alternative as to saving costs has no material relevance in this case.
19. In any event I would at this stage of the proceedings refuse the application as a matter of discretion. In my judgment there is at least some element of confidentiality in what an interviewee says to a journalist for the purpose of the journalist publishing an article. Journalists select what they publish and there may be many different criteria by which they make the selection they do. There may be no confidentiality left in respect of the part of what has been disclosed to the journalist which is published in the newspaper, but it does not follow that there remains no element of confidentiality in the unpublished material. On the facts as they are, or seem to me to be, at present, I proceed not only with the caution advised by Pumfrey J (as he then was) in *Howglen*, but with an added caution by reason of the fact that the communications were with a journalist who (on the hypothesis advanced by the defendants) has chosen not to disclose what the interviewee said.

