Neutral Citation Number: [2011] EWHC 296 (QB)

Case No: HDO9D04958

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 February 2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

SYLVIA HENRY	**Claimant**
- and -	
NEWS GROUP NEWSPAPERS LTD	**Defendant**

- -
- -

Adam Wolanski (instructed by **Farrer & Co LLP**) for the **Defendant**
Rex Howling (instructed by **The Borough Solicitor**) for **London Borough of Haringey**
Richard O'Dair (instructed by **Neumans LLP**) for **Mr Preece**
The Claimant did not appear and was not represented

Hearing date: 15 February 2011

- -

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.

.....

THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. This is the adjourned hearing of News Group Newspapers Ltd ("NGN')'s application for third party disclosure against the London Borough of Haringey ("Haringey"). The hearing was adjourned on 13 January to give an opportunity for other person affected to be contacted and to express their views.

2. The Claimant Ms Henry has not attended and has not given notice of any objection to the application. Mr Preece attended by counsel Mr O'Dair.

3. The application is made in a libel action brought by Ms Henry against NGN. Ms Henry is a senior social worker employed by Haringey. On 11 December 2006 Peter Connolly ("Peter") was referred to hospital. He was a child aged 17 months who came to be known as Baby P. Ms Henry was responsible for Peter until about 25 January 2007, when responsibility for him was transferred to others. Peter died on 3 August 2007. On 11 November 2008 Peter's mother, her boyfriend and his brother were convicted of causing Peter's unlawful death.

4. NGN publishes The Sun and the News of the World. It gave very extensive coverage to the death of Peter, as did many other news media. Ms Henry sues in respect of some 35 separate publications by NGN. The meanings she attributes to these publications differ in detail. But for the most part she alleges that the meanings include that she was to blame for the horrific killing of Peter by her gross and disgraceful incompetence as a social worker in deciding to return him to his mother when she was already on bail for assaulting him, and by allowing obvious, severe and protracted abuse to go unchallenged. There is a plea of justification to a *Lucas-Box* meaning substantially to the same effect.

5. In her Reply to the Particulars of Justification Ms Henry sets out her case. It is, in summary, that she was aware that Peter was at risk, and that her view, as expressed to others within Haringey, was that Haringey should apply for an Emergency Protection Order if the mother would not consent to Peter being taken into local authority foster care accommodation. Her case is that this course was opposed by others within Haringey. The others in question included Ms Agnes White, Ms Henry's team's most senior social worker, and Mr Clive Preece, the Senior Service Manager, who overruled her, and whose decisions she reluctantly accepted.

6. From this it can be seen that the interests of Mr Preece are similar to those of NGN. Mr Preece supports NGN's application, and on his behalf Mr O'Dair adopted all the submissions of Mr Wolanski. Mr O'Dair stated that the death of Peter, and subsequent events relating to it, have devastated his life. I assume the same is true in the case of Ms Henry. Given the form of Ms Henry's Reply, any vindication she might achieve in this action is likely to have a correspondingly adverse impact on the reputations of Mr Preece and (it seems likely) on the reputations of others who were concerned in the making of the decisions concerning Peter in the period 11 December 2006 to 25 January 2007. The libel action is of also of great significance to NGN.

7. Another person whose interests are affected by this litigation is Ms Janet Lamb. She chaired the child protection conference held on 22 December 2006. Ms Lamb has been contacted, and has spoken by telephone to Mr Burn of Haringey. He sent to her a copy of a statement she had made, but she has not given any indication of her

intentions concerning this hearing. Attempts to contact Ms White have been unsuccessful. The Secretary of State for Education has been informed of this application. By letter dated 11 February 2011 the Treasury Solicitor wrote that the Secretary of State did not wish to make any comment in this matter.

8. Initially NGN sought from Haringey a lengthy list of documents of which it required disclosure. Mr Wolanski has acknowledged the seriousness with which Haringey has addressed NGN's request, and the co-operative and conscientious manner in which Haringey has responded, acting through Mr Burn and Mr Howling of counsel. In addition, two of the documents NGN sought from Haringey are to be provided to it by Mr Preece. The result of this is that NGN has abandoned its applications against Haringey in relation to all but two of the seven categories of documents to which the request had been reduced at the hearing in January. Those two are:

> "(3) Records of interviews conducted for the purpose of Individuals Management Reviews [IMR] by Haringey of [Ms Henry], Ms White, Mr Preece and Ms Lamb, in so far as those interviews concern consideration of decisions for [Peter] in the period December 2006 to January 2007;
>
> (5) The Second Individual Management Review for Social Care, dated February 2009, in so far as this refers to matters concerning [Peter] for the period 11 December to the end of January 2007".

Applicable law

9. CPR 31.17 provides:

> "(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) ….
>
> (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; and
>
> (b) disclosure is necessary in order to dispose fairly of the claim or to save costs...."

10. CPR 31.19 provides for the withholding of disclosure if that would damage the public interest.

11. In CPR 31.17(a) "likely" means "may well": *Three Rivers DC v Governor of Bank of England (No 4)* [2003] 1 WLR 210 para 32. In *Franson v Home Office* [2003] 1 WLR 1952 the Court of Appeal said, in relation to the discretion given in the opening words of CPR 31.17(3):

> "The third and final stage under rule 31.17(3) is for the court to exercise its discretion whether or not to make an order. Here, wider considerations may come into play, but the court only reaches this stage if the two conditions in (a) and (b) are met. It is at this point, in my judgment, that public interest considerations fall to be taken into account and, if necessary, to be balanced. Two competing public interests have been identified in the present case, on the one hand the public interest of maintaining the confidentiality of those who make statements to the police in the course of a criminal investigation, and on the other the public interest of ensuring that as far as possible the courts try civil claims on the basis of all the relevant material and thus have the best prospect of reaching a fair and just result."

12. In *Flood v Times Newspapers Ltd* [2009] EWHC 411 (QB); [2009] EMLR 18 Eady J noted that other considerations that might come into play at this third stage included whether or not disclosure would infringe third party rights in relation, for example, to privacy or confidentiality. By the same token, in my judgment, the rights of third parties may be taken into account as supportive of the application. The rights of third parties may also be relevant to condition CPR 31.17(b). Disposing fairly of a claim normally means disposing of it fairly as between the parties. But if third parties may be affected, then the court is required to take them into account. Where the rights of third parties are Convention rights (such as Art 8 rights), as is not infrequently the case, then s6 of the Human Rights Act 1998 requires the Court to have regard those rights.

13. The various considerations which the parties invoke include:

    i) The public interest of maintaining what Haringey submits is the confidentiality of the statements made to interviewers preparing IMRs

    ii) The reputation rights (that is Art 8 rights) of Ms Henry and Mr Preece (Ms Henry's Art 8 rights are engaged, but she has not asked the court to take account of them in relation to this particular application)

    iii) The freedom of expression rights (Art 10) of NGN.

14. As to the meaning of "necessity", Mr Howling submits that the test under CPR 31.17(b) may not be satisfied in respect of a relevant document if an applicant already has received disclosure of sufficient documents to enable it to advance its case. I accept that that may be so in principle. There must be a limit beyond which it is not reasonable to require third parties to assist litigants by giving disclosure.

15. In relation to the IMR (document (5)), Haringey accepts that it is clearly relevant within CPR 31.17(a). The only point it takes is that disclosure would damage the public interest.

16. In relation to the IMR interviews (document (3)) Haringey accept that the interviews of Ms Henry, Ms Lamb, Ms White and Mr Preece are all relevant. It does not accept that disclosure is necessary, having regard to all the other information disclosed,

whether in the action, voluntarily by Mr Preece, or by Haringey itself while addressing NGN's request. In addition, Haringey submits that disclosure would damage the public interest.

17. The issue of necessity, as advanced by Mr Howling, is not easy to address on the facts of this case. While I accept that there has been substantial disclosure given to NGN, I have not been taken through all the disclosed documents. I doubt if that would have been a useful exercise in any event. Given the apparent clear contradiction between Ms Henry and the other members of her team, it is likely that much will depend on the oral evidence. For that purpose, I think it would be difficult to conclude that it was not necessary, on the facts of this case, to order the disclosure of those documents which are relevant in the sense of CPR 31.17(a).

IMR and SCR and the public interest

18. It is normal for there to be a Serious Case Reviews ("SCR") following the death of a child at the hands of the adults who should be caring for him. The case of Peter is unusual in a number of respects. In his case there have been two SCRs and both of those have been published. In the past it has not been the practice to publish SCRs, and I am told that in fact only four have been published in total. So at least some information from IMRs has been disclosed to the public in this case.

19. Mr Burn has explained the importance of IMRs in a letter to NGN's solicitors dated 1 October 2010. IMRs are a significant aspect of the process for carrying out a SCR. The purpose of a SCR, as explained in *Working Together to Safeguard Children* (2006: the edition applicable to the present case) para 8.3 is to:

> "1. establish whether there are lessons to be learnt from the case about the way in which local professionals and organisations work together to safeguard and promote the welfare of children;
>
> 2. identify clearly what those lessons are, how they will be acted on, and what is expected to change as a result;
>
> 3. as a consequence, improve inter-agency working and better safeguard and promote the welfare of children".

20. The aim of SCRs is to look openly and critically at individual and organisational practice. Individuals who are interviewed as part of the process of compilation of an IMR should be able to discuss and reflect on the case freely and frankly. Mr Burn remarks that prejudice to that process is likely to occur where those individuals are aware that the content of an IMR may be disclosed to the world. Individuals may become defensive. IMRs are not part of a disciplinary process, and the focus and scope of an IMR is not that required of a disciplinary process. But there may be disciplinary procedures, and they are confidential. Interviewees might be concerned about press coverage if they believed that IMRs were liable to be disclosed to the public.

21. As to the public interest and other interests engaged, Mr Burn explained the following. There is the confidentiality of the child and the family, but he accepts that

this interest can generally be maintained by appropriate measures (including redaction). The legitimacy of the process will be threatened if there is a reasonable suspicion that full and open participation of interviewees has been inhibited by concern about possible future disclosure. I accept that these are real concerns to which I must have regard.

22. Mr Howling also relies on a letter of 10 June 2010 from Mr Tim Loughton MP, the Parliamentary Under Secretary of State for Children and Families, on the publication of SCR reports. He referred to para 8.50 of *Working Together to Safeguard Children* (2010). He said it should be read as meaning that the IMRs should not be made publicly available (but the overview report should be published). It was because of Haringey's reliance on this letter that the Secretary of State was notified of this application. But as mentioned above, the Treasury Solicitor has written that there is to be no comment from the Secretary of State. That is all that the letter says. So I regard the public policy as expressed in the letter of 10 June 2010 as neutral in relation to the issues I have to decide.

23. Mr Howling also notes that in related judicial review proceedings which Mr Preece has instituted, he states that he was sent a redacted extract of the IMR, and that he was told that his interview was solely for the purpose of the IMR.

24. Mr Wolanski draws attention to the absence of any mention by Haringey of future disclosure or confidentiality. It is not said in the present case that any specific assurance was given to any of the interviewees in question that there would be no disclosure in the future.

25. Mr Wolanski also refers to two authorities. In re *William Ward* [2010] EWHC 16 (Fam) Munby J reviewed the jurisprudence on disclosure at para [121-[122]. He also noted at para [127] that what social workers were asked about in interview was not about their own private affairs, but what they have done in their professional capacities. That case concerned anonymity, and he refused it: [174]. In *Science Research Council v Nassé* [1980] AC 1028 at p1070 Lord Salmon rejected the notion that production of the documents in question in that case would affect the candour of candidates for promotion.

26. Mr Howling accepts that in the case of a public authority such as Haringey seeking to enforce an obligation of confidence, the burden of persuading the court that documents are confidential and should not be disclosed lies on the authority. In *A-G v Guardian (No 2)* [1990] 1 AC 109, 283C-D Lord Goff said:

> "… although in the case of private citizens there is a public interest that confidential information should as such be protected, in the case of Government secrets the mere fact of confidentiality does not alone support such a conclusion, because in a free society there is a continuing public interest that the workings of government should be open to scrutiny and criticism. From this it follows that, in such cases, there must be demonstrated some other public interest which requires that publication should be restrained."

27. In the present case, Haringey is not seeking to enforce an obligation of confidence against NGN. It is resisting an application for disclosure. But it became apparent just before the adjourned hearing that Mr Preece had received copies of the IMR and interview relating to himself. He was willing to disclose these to NGN, but Haringey made clear that it would object to that. I am not in a position to resolve in this judgment any issue there may be on this point between Haringey and Mr Preece. But if Haringey were to seek to enforce an obligation of confidentiality against Mr Preece, the remarks of Lord Goff would be in point.

28. Those remarks also cast light on what the public interest is in relation to a public authority. There is a public interest that the workings of local government in child protection matters should be as open as possible to scrutiny and criticism.

The balancing exercise

29. I must weigh in the balance the difference interests that have been invoked by the parties. Whether or not a local authority should be required to produce documents of the classes sought in this action is a question that must be answered in the light of the particular facts of the case. There is no general answer.

30. Of notable significance in this case is the seriousness of the issues at stake in this libel action, in particular the Art 8 rights of Ms Henry, Mr Preece, and, I shall assume Ms White and Ms Lamb. If I do not order disclosure by Haringey, and if Ms Henry were to succeed on a false basis (that is on a basis on which she would not have succeeded if the disclosure sought had been given), the consequences may be of the utmost seriousness for those individuals, as well of course for NGN.

31. In one sense the death of Peter, horrific as it was, is sadly not exceptional. There are all too many cases of abuse of children at the hands of those who are responsible for their care. This is sadly something with which local authorities have to deal almost on a weekly basis (so I am told by Haringey). Very many of these deaths occur, as did Peter's, following abuse at home, perpetrated by the mother or her friends. But very few such cases give rise to libel actions.

32. The fact that an order may be made in this libel action seems to me to be likely to have a limited impact on interviewees in future IMR interviews. That is particularly the case because the application has been made with the active support of one of the interviewees. It may well be that there will be other such libel actions in future, and that this case is not unique. But each case is different and this one must be considered unusual.

33. Mr Howling invited me to read the documents disclosure of which was sought. I declined to do that. One reason for this is that in his careful and detailed Skeleton Argument he had set out the passages from the documents in question which in his view were, or might be, relevant.

34. What is sought here is not publication of the whole of the IMRs and interviews, but those parts which concern Peter and the period 11 December 2006 to the end of January 2007. The parties may at any stage of the proceedings submit to the court proposals for limiting the extent to which any part of any document which may be disclosed will be available to the public. The court will in any event be under a duty to

keep this under review, pursuant to s.6 of the Human Rights Act 1998 and Art 8, in so far as living individuals are concerned.

35. In my judgment the documents of which disclosure is sought may well support the case of NGN or adversely to affect the case of Ms Henry, and disclosure is necessary in order to dispose fairly of the claim, including what is fair to third parties whose reputations may be affected by the outcome of these proceedings.

Conclusion

36. Having weighed the various submissions, I am satisfied that the conditions in CPR 31.17(3)(a) and (b) are satisfied in this case, and that it is a case in which I ought to order the disclosure which is sought and remains in issue.