Neutral Citation Number: [2010] EWHC 2979 (QB)

Case No: HQ10X03121

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2010

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

JIH	**Claimant**
- and -	
NEWS GROUP NEWSPAPERS LTD	**Defendant**

- -
- -

Mr David Sherborne (instructed by **Berwin Leighton Paisner LLP**) for the Claimant
Mr Richard Spearman QC (instructed by **Farrer & Co**) for the Defendant
Mr Anthony Hudson appeared for **Telegraph Media Group Ltd**

Hearing dates: 12 November 2010

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Judgment

Mr Justice Tugendhat :

1. A week ago, on 5 November, I handed down my judgment in this matter: [2010] EWHC 2818 (QB) ("my judgment"). The Order I made that day ("my Order") included the following:

> "1 The Defendant must not publish, republish, syndicate, use, communicate or disclose to any person:
>
> (a) Any information concerning the subject matter of these proceedings save for that contained in the public judgment of the Court handed down on 5 November 2010 and/or
>
> (b) Any of the information set out in the Confidential Schedule to this Order
>
> (together "the Information")…
>
> 10. The Claimant's application for an Order requiring that his identity be not disclosed be refused…

> 12. It is ordered that the identity of the Claimant shall not be disclosed pending the renewal of his application for permission to appeal to the Court of Appeal…"

THE APPLICATION

2. On 10 November the Claimant gave notice of an application to vary para 10 of my Order so as to provide that the Claimant's identity be not disclosed. The reasons are set out in the second witness statement of Mr Shear also dated 10 November.

3. This was not an attempt to re-argue matters I had determined on 5 November. The application is based on events that occurred subsequently, namely two publications in the press relating to my judgment and order. No relief was sought on this occasion against any person, other than the variation of the anonymity provided for in para 10 of my Order.

EVENTS SINCE MY ORDER

4. The first event was a publication in the online edition (and only the online edition) of the Daily Telegraph published at 7.00 am on 6 November. The article reported my judgment.

5. The second event was a publication in both the online and the print editions of another newspaper ("the other newspaper"). The article reported my judgment. It included a quotation which the Claimant submits breaches the terms of my Order.

6. On 5 November solicitors for the Claimant ("the solicitors") had prepared, and sent to the editor and the legal department of the publishers of the Daily Telegraph, Telegraph Media Group Ltd ("the Telegraph") and of the other newspaper (amongst others), a letter which set out the effect of my Order. On Monday 8 November they wrote to the Editor and Legal Department of the Telegraph, referring to my Order and to their previous letter, and complaining that the Telegraph was in breach of para 1(a) of my Order. No complaint is made of a breach of para 1(b).

7. The title to the article contained words which the Claimant submits are a breach of the terms of my Order. There is also a complaint of a breach of para 12 of my Order, by publication of information about the Claimant (although not his identity). The solicitors asked for the article to be removed. It was removed from the website that day.

8. Mr Anthony Hudson appeared before me and apologised on behalf of the Telegraph. He explained how the publication had occurred, and the steps that had been taken to ensure that it would not occur again.

9. The solicitors wrote a letter in similar terms to the other newspaper. There was a reply the same day stating:

> "The article was … taken down from the website immediately upon receipt of your e-mail. A warning has been circulated to all journalists not to repeat the matter referred to. A similar warning has been place on the electronic library cutting".

SUBMISSIONS

10. Mr Shear states that it is deeply troubling and distressing for the Claimant that these events have occurred, the more so because the Claimant had feared that they would occur. He referred to his previous witness statement which included passages about publications concerning the Claimant in the past.

11. Mr Sherborne submits that the effect of these two publications is that, if and when the anonymity provision in my Order expires, then the publication of the identity of the Claimant, taken together with these two publications that have already occurred, will lead to the public knowing information about the subject matter of the action. This will frustrate or undermine the purpose of para 1(a) of my Order. Therefore, in order to preserve the effect of my Order, the only possible step to take is to impose a new anonymity order.

12. Mr Sherborne submitted that this step is necessary to protect the Art 8 rights of the Claimant. He reminds me of para 62 of my judgment in which I said:

> "Having considered the evidence, I too have no doubt that the private life considerations of Art 8 are engaged here, both as to the subject matter of the action, and, to a much lesser extent, as to the identification of the Claimant. The proceedings are likely to attract publicity, and if the Claimant is identified that will result in some interference with the private life of himself and his family. There is no suggestion of any public interest or other possible justification in disclosure of the information which is the subject matter of the action."

13. I accept that there is a prima facie case that the two publications complained of do disclose information about the subject matter of the action.

14. I make no determination as to whether either or both of these are a breach of my Order. If that issue arises in the future, then it will be necessary to give to the two publishers concerned an opportunity to make representations as to whether that is so or not. Mr Hudson's apology on behalf of the Telegraph was not an admission of contempt of court.

15. Mr Sherborne also submitted that:

> "At the time of lifting the anonymity order the Court regarded itself as being faced with two alternatives, namely to allow publication of the Claimant's identity or to allow publication of the nature of the material which was being injuncted and that since it would not be possible to do the latter (although that was not the submission of Counsel for the Claimant), it ruled that anonymity should be lifted".

16. This submission is mistaken. As my judgment makes clear, the Court was never faced with a choice between the two alternatives referred to in para 8 of my judgment. In the present case, on 22 October and now, the parties have been at one in presenting the court with only both alternatives together. The two together are to be found in the

form of the consent order proposed on 22 October (para 7 of my judgment) and again in the form of consent order proposed following the circulation of my judgment in draft (para 74 of my judgment and para 1 of my Order). At no time, then or today, has counsel for the Claimant submitted that I should allow publication of the subject matter of the action. On 22 October counsel (not Mr Sherborne) was precluded from doing so by the agreement that the parties had reached between themselves.

17. The position today is the same. I asked Mr Sherborne whether he was seeking an order in terms different from the draft consent order. He made clear he was not. So the only choice the court is offered today is the choice that it was offered on 22 October, and set out in para 7 of my judgment: to order that there be no publication of the subject matter of the action together with anonymity, or to order that there be no publication of the subject matter of the action but without anonymity.

18. Para 63 of my judgment reads:

> "It is implicit in the form of the consent order, and I accept, that in the present case it would not be possible to make an order or give a judgment which disclosed any information about the subject matter of the action which did not thereby make it likely that the Claimant would be identified. To identify both the subject matter and the Claimant would defeat the purpose of the proceedings. Accordingly, the only practical question open to the Court is whether to withhold the identity of the Claimant, in addition to withholding all information about the subject matter of the action. In this case the alternatives canvassed by Mr Tomlinson (para 8 above) are theoretical not real. The only real choice is to allow the public to know the Claimant's identity or to allow them to know nothing at all about the action".

19. That remains the position today. In saying what I said in that paragraph, I accepted what was implicit in the form of the consent order, and the submissions of both counsel that I should make the consent order as consented to by them. I was not deciding any issue. There was no issue between the parties for me to decide. I was simply endorsing a decision already made by the parties in the agreement by which they settled the action. As I said in para 6 of my judgment:

> "It is important to record that the arguments of the parties before me were not adversarial. The parties have reached an agreement, and neither of them has resiled from it. Both parties were asking me to make the order in the form they had consented to. However, both counsel were able to give their assistance to the court, and they did so from the perspective of a claimant and a defendant respectively."

20. I turn now to consider the Claimant's submissions as to the order that is necessary in the circumstances as they are today. For this purpose I assume in favour of the Claimant that the two publications complained do in fact disclose information about the subject matter of the action (although not the information in the Confidential Schedule).

21. Mr Sherborne submitted that the information disclosed in the two publications complained of is now in the public domain. It follows that there is a further risk of disclosure by other newspaper publishers. It is not alleged that the Telegraph or the other newspaper are threatening to repeat what they have done.

22. Mr Spearman again made clear that the Defendant is bound by the settlement agreement and does not seek to resile from it. His submissions were, again, not adversarial, but with a view to assisting the court. He referred to the public domain proviso in para 1 of my Order. That reads:

> "PROVIDED THAT nothing in this Order shall prevent the publication, disclosure or communication of any of the Information:
>
> (i) ...
>
> (ii) by the Defendant of any part of the Information that is in the public domain as the result of national media publication (otherwise than as a result of breach of this Order)".

23. While I have not determined today that there has been a breach my Order, Mr Spearman submits that any editor considering whether or not to republish the information already published on 6 November would have to bear in mind the risk of an application to commit for contempt if he did that. The court considering the matter at that stage might have to determine whether there had been a breach of my Order by the Telegraph or the other newspaper. And if the court did have to decide that issue, it might well decide that there had been a breach of my Order by one or other or both of the Telegraph and the other newspaper. If so, the proviso would not assist the respondent to the motion to commit for contempt.

24. There is force in that submission. I need say no more than that. The effect of that consideration is, in my judgment, that the risk of any newspaper republishing what was published by the Telegraph and the other newspaper is not as great as Mr Sherborne would submit. The quick response of these two newspapers in removing the publications complained of on 8 November, immediately upon receipt of the solicitors' letters, also suggests to me that the risk of republication is not as great as Mr Sherborne submits it is.

25. Next I turn to consider the extent of the interference in the Claimant's private life that will occur if the Claimant's identity is disclosed in accordance with my Order. For this purpose I must assume either that there is no appeal, or that the appeal fails. If the appeal succeeds, the anonymity order will remain in place as the Court of Appeal may direct, and the publications complained of today will not have interfered with the Claimant's private life (because he has not been identified).

26. Mr Hudson stated that according to the information at present available to the Telegraph there were about 12,000 hits on the article in question on the two days it was available to be viewed. There are no figures before me as to the circulation of the Daily Star, or the hits on its website. But I assume that there were many thousands of people who read the publication between 6 and 8 November.

27. Mr Sherborne submits that each of the readers of those publications will, when they know the identity of the Claimant, come to know the subject matter of the action, and that will constitute an interference with his private life.

28. I accept that submission. And I repeat that nobody (not the Defendant nor any of the Media Organisations) has ever suggested to the court that there is any public interest in the disclosure of the subject matter of the action.

29. On the other hand, the extent of the information disclosed by the Telegraph and the other newspaper is very limited. It does not include the information in the Confidential Schedule. Para 1(a) of my Order is similar to the order of Sharp J in her judgment in *DFT v TFD* [2010] EWHC 2335 (QB) (which I referred to in para 67 of my judgment). As she explained in paras [35] to [39], the purpose of that provision in that case was to reduce the risk of jigsaw identification of the claimant. The orders of Nicol J did not include the words that were inserted in Para 1(a) of my Order: they were added following submission on 22 October, with the support of counsel for both parties. In the present case, if and when the claimant is identified, that provision will have the effect of limiting the risk of jigsaw disclosure of the information in the Confidential Schedule.

30. A threatened interference with the Art 8 rights of a claimant is not, by itself, always sufficiently serious to necessitate the imposition of an injunction or anonymity order. Assuming, as I do, that there would an interference with the private life of the Claimant and others if and when his identity is disclosed, by reason of the publications on 6 November, I must consider what further order, if any, is necessary and proportionate to prevent that.

31. While I assume that what has been disclosed by the two publications complained of before me would in each case amount to an interference with the private life of the Claimant and others, on the scale of possible interferences, the disclosure does not rank high. What was published was at a high level of generality, lacking all detail. Further, in reaching this conclusion I have in mind the evidence of Mr Shear in his first witness statement. I referred to it in paras 30 and 31 of my judgment. I cannot explain the relevance in more detail without undermining the purpose of my Order.

CONCLUSION

32. I conclude that having regard, as I must, to the need to protect the Art 8 rights of the Claimant and others concerned, it is not necessary to vary my Order. I will not order that the identity of the Claimant be not disclosed. In my judgment, notwithstanding the events that have occurred since 5 November, it remains the position that the general principle of open justice provides, in this case, sufficient general, public interest in publishing a report of proceedings which identifies the Claimant to justify any resulting curtailment of the rights of the Claimant and his family to respect for their private and family life

FURTHER OBSERVATIONS

33. What has occurred is a matter for great concern. Editors and others will take note of the submission of Mr Spearman set out in para 23 above. If the court is to give effect to Art 10 to the fullest extent, it is essential that editors and publishers have regard to

the "duties and responsibilities" referred to in Art 10(2) itself. These duties and responsibilities include a requirement that they comply with orders of the court, and that they take all necessary steps to ensure that journalists understand this necessity.