Neutral Citation Number: [2011] EWHC 3375 (QB)

Case No: HD11D02716

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/12/2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

	DOMINIC RAAB MP	**Claimant**
	- and -	
	ASSOCIATED NEWSPAPERS LIMITED	**Defendent**

- -
- -

Mark Warby QC & Adam Speker (instructed by **Taylor Wessing**) for the **Defendant**
William Bennett (instructed by **Russell Jones & Walker**) for the **Claimant**

Hearing dates: 8 December 2011

- -

Judgment

Mr Justice Tugendhat :

1. The claimant in this libel action is the Member of Parliament for Esher and Walton. He was elected in May 2010 as a member of the Conservative Party. Before he became an MP, in the period August 2006 to 2008, he had worked as Chief of Staff to David Davis MP. Also employed in that office was a lady who I shall refer to as E. Her identity is not secret, but that is the course which counsel adopted at the hearing, rightly in my view. Her employment ceased in August 2007, pursuant to the terms of an agreement ("the Compromise Agreement") which included a term imposing duties of confidentiality ("the Confidentiality Agreement").

2. On 30 January 2011 the Defendant published in *The Mail on Sunday* an article about the Claimant. It was under the heading "Payout for Woman Who Claimed Workplace Bullying Under Raab". The article said the payout was £20,000 and it added that E "is banned from talking about her treatment in the office run by Dominic Raab….. following

the settlement".

3.On 22 July 2011, following exchanges of letters, the Claimant issued proceedings for libel. The meaning the Claimant attributes to the words complained of in his Particulars of Claim is that:

> "1. there was overwhelming evidence that the Claimant bullied and sexually discriminated against [E] and that his behaviour towards her was so bad that it caused her, an extremely intelligent and accomplished young woman who had worked her way up from humble beginnings, to become traumatised, to feel worthless and to leave a job which she had otherwise enjoyed; and
>
> 2. the Claimant's behaviour would have gravely embarrassed if it had become public therefore the Tory party had instituted a cover up and paid £20,000 in hush money to [E] to keep the Claimant's appalling behaviour secret".

4. The Claimant had written a letter of claim in accordance with the Defamation Pre-action Protocol dated 7 February 2011. In the Pre-Action Protocol, under the heading "Defendant's Response to Letter of Claim", para 3.5 provides that the Response should include the following:

> - "… If more information is required, then the Defendant should specify precisely what information is needed to enable the claim to be dealt with and why.
>
> - If the claim is rejected, then the Defendant should explain the reasons why it is rejected, including a sufficient indication of any facts on which the Defendant is likely to rely in support of any substantive defence.
>
> - It is desirable for the Defendant to include in the response to the Letter of Claim the meaning(s) he/she attributes to the words complained of."

5. The Defendant's letter of 18 February 2011 may be interpreted as a request for further information, namely "precisely what you say is wrong with the Article". But the Defendant has never fulfilled the requirements of the second and third bullet points cited from para 3.5 of the Pre-Action Protocol.

6. On 27 May 2011 solicitors for the Claimant replied: "these allegations are untrue. Most importantly Mr Raab is neither a workplace bully and nor did he bully [E]…" On 26 August 2011 the Claimant acceded to the Defendant's request for an extension of time for service of the defence until 23 September 2011. No defence has been served.

7. On 20 September the Defendant issued an application for a further extension of time before filing his Defence. The ground given was that

> "[E] and her parents are in principle willing to assist our client, but they need to be released from the confidentiality obligations which are referred to in the enclosed Notice. Please confirm, as a matter of urgency, that E and her parents are released from any confidentiality obligation they may be bound by".

8. The Claimant agreed a further extension. But on 4 October 2011 the Claimant's solicitors wrote declining to release E or her parents from their obligations under the agreement by which E's employment claim had been settled. They gave reasons which in due course became the submissions made to me.

9. On 6 October 2007 Mr Dougans, the solicitor for E, wrote to the Defendant an e-mail:

> "This is to confirm that [E] is willing in principle to assist your client in this matter. However, she will not be willing to do so unless she is released from her obligations of confidentiality by either the Court or Mr Raab".

10. The Claimant did not release E from her obligations. On 26 October 2011 the Defendant issued an Application Notice asking the Court to make:

> "An order that the claim be stayed pursuant to CPR 3.1(2)(f) or the Claim Form or Particulars of Claim be struck out pursuant to CPR 3.4(2)(b) and/or the claim be dismissed pursuant to the court's inherent jurisdiction, because the Claimant has conducted himself, and threatens and intends to continue to conduct himself, in a way that is intended to and/or has and will have the effect of improperly interfering with the Defendant's ability to deal with and defend his claim, thus obstructing the fair disposal of this action; by such conduct the Claimant is in breach of his duty under CPR 1.3, because he disables the court from performing its task of achieving the overriding objective (and in particular those aspects identified in CPR 1.1(1), (2)(a) and (d)); and for so long as he continues so to conduct himself it would be an abuse of the court's process for him to continue with the claim".

11. The provisions of the CPR referred to are as follows:

> "1.1(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.
>
> 1.1(2) Dealing with a case justly includes … (a) ensuring that the parties are on an equal footing; … (d) ensuring that [the case] is dealt with expeditiously and fairly;…
>
> 1.3 The parties are required to help the court to further the overriding objective.
>
> 3.1(2) … the Court may …(f) stay the whole or part of any proceedings or judgment either generally or until a specified date

or event;

3.4(2) The court may strike out a statement of case if it appears to the court … (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings;…"

12. In support of the Defendant's application there is a witness statement made on 26 October 2011 by Mr Niri Shanmuganathan. He includes the following:

"The Difficulties Faced by the Defendant

21. The Defendant believes:

(a) that the Article is likely to be true, based on evidence from source(s) whose identity the Defendant must keep confidential;

(b) that [E] and her parents have information that is likely to support the allegations made in the Article;

(c) that if the allegations are true, or if [E] or her parents have information that would support a case that they are true, then it is in the public interest that they should be permitted to communicate that information to the Defendant; and

(d) that it is contrary to the public interest for an alleged confidentiality obligation, the terms of which are not disclosed by the Claimant, to be employed to prevent [E] and her parents from communicating on this topic with the Defendant.

22. The Defendant wishes to speak to [E] and her parents to find out whether they would support an assertion of the truth of the factual allegations in the Article.

23. The Defendant has asked the Claimant to release [E] and her parents from the Confidentiality Obligation on several occasions. The Defendant has also asked the Claimant to disclose a copy of the Confidentiality Obligation and the identity of the third party to the Settlement Agreement. The Claimant has refused to release [E] and her parents form the Confidentiality Obligation. The Claimant has also refused to disclose a copy of the Confidentiality Obligation to the Defendant's solicitors so that they may make their own assessment of whether [E] and her parents are bound by it. In addition, the Claimant has refused to identify the third party to the Settlement Agreement, who the Defendant believes will also have to release [E] and her parents from the Confidentiality Obligation.

24 The Defendant's decision on whether or not to justify the allegations depends on [E] and her parents' evidence and/or on information they are believed to be in a position to supply. The Claimant knows this, yet the

Claimant has to date prevented both [E] and her parents from speaking to the Defendant.

25 In the event that (as the Defendant believes) the allegations are true, the Claimant's behaviour should be subject to public scrutiny, as the Article relates to the important issues of bullying and /or sexism in the workplace by a Member of Parliament.

26. Given the circumstances outlined above, the Claimant is preventing the Defendant from assessing the merits of its case and, potentially, from justifying the allegations in the Article".

13. On 6 December 2011 Mr Clarke-Williams, the solicitor to the Claimant, made a witness statement. He exhibited correspondence. Because this witness statement was made so shortly before the hearing, the Defendant has not had an opportunity to respond to it. But the following passages from the correspondence speak for themselvess

14. On 27 May Mr Clarke-Williams wrote to E referring to the words complained of and included the following:

> "You will recall that on 3 August 2007 you, Mr Raab and Mr Davis entered into a compromise agreement which brought both your claim in the Employment Tribunal and your employment with Mr Davis to an end. … You will see at paragraph 7.2 you undertook to keep a number of matters concerning your appointment with Mr Davis confidential. We are extremely concerned that it appears from the content of the article that you either gave information directly to T*he Mail on Sunday* or that you supplied it to someone described in the article as a "friend". If this is the case, you have acted in breach of the Compromise Agreement".

15. On 10 June 2011 E wrote in response to a number of specific questions asked in the letter of 27 May 2011. She wrote:

> "I can confirm that I have complied with the terms of the Compromise Agreement.
>
> If your client is under the impression that I welcomed the article to which he refers he is much mistaken. I do not wish to re-open this unfortunate matter and I believe the article to be an unwarranted intrusion on my privacy.
>
> In the event that I am the focus of similar coverage in the future, I intend to refer the article to the PCC. Please can you confirm that your client would not regard my referring such matters to the PCC to be a breach of the Compromise Agreement".

16. On the same day solicitors for the Claimant gave the assurance that he would not object to her making a complaint to the PCC on the grounds that that was a breach of the

Compromise Agreement.

17. On 20 September 2011 solicitors for the Defendant wrote to the Claimant stating that the extension of time for service of the defence was requested because E and her parents "are in principle willing to assist our client but they need to be released from the confidentiality obligations which …"

18. On 23 September 2011 solicitors for the Claimant wrote to E referring to that letter and adding:

> "It appears that the newspaper is looking to you for evidence to defend the libel action brought by our client.
>
> This letter seemed to contradict the letter of 10 June which we received from you and we are concerned to establish the true position. You are of course free to change your mind about this matter, but under the settlement agreement (which you freely entered into with the benefit of your own independent legal advice) a decision to breach the terms of the confidentiality obligations will carry certain consequences.
>
> If it is your desire to speak to *The Mail on Sunday* about the matters covered by the confidentiality agreement, then, before doing so, we assume that you will be writing to us seeking the agreement of David Davis and Mr Raab to release you from the undertaking which you have given. We further assume that any such request would be strictly for the purposes of this litigation and not otherwise. We should make it clear that we do not act for Mr Davis and, therefore, it would be necessary to contact him to establish his position in respect of the confidentiality obligation.
>
> If, however, it is your intention to breach the confidentiality obligations unilaterally by speaking to *The Mail on Sunday*… then it is likely at the very least that you will be required to repay the sum you were paid in consideration for the confidentiality obligations. The other members of the office who might be affected by such breach will also need to be notified.
>
> Please could you clarify what your intention is.
>
> Depending on your response, it may be necessary for us to obtain statements from a number of witnesses in support of our client's libel case against the newspaper. Mr Raab is absolutely determined to obtain vindication of his reputation from The Mail on Sunday…".

19. On 7 November 2007 Mr Robert Dougans of Bryan Cave made a witness statement. He is a solicitor instructed by E. He included the following based on her instructions. E ceased work at the House of Commons and signed the Compromise Agreement. She spent the next several years working to qualify as a solicitor. She is now employed by a

well known firm where she works as a tax lawyer. The parties to the Confidentiality Agreement include not only her, but also her parents. She did not speak with a representative of *The Mail on Sunday*, or authorise anyone else to speak on her behalf. She has no idea as to the identity of the source for the article in question, but to the best of her knowledge and belief she is not the ultimate source of the information in it. The Defendant's solicitors have asked if she would speak with them regarding the conduct of their defence in this claim. She has informed them that she would be willing in principle to speak with them or with the Claimant's solicitors. However, she would require to be released from her obligations under the Confidentiality Agreement, either by the consent of the Claimant or by order of the court, before she would speak with the Defendant's solicitors. She has informed the Defendant's solicitors that, until and unless she is released from her obligations, she feels unable to provide any material information at all to the Defendant's solicitors. She has had no contact with them other than as required to set out her position.

20. On 17 November 2011 Mr Dougans wrote to the Claimant's solicitor a letter which included:

> "As you are aware, she has simply sought to draw a line under this part of her life and, whilst willing to speak with your firm or the Defendant's solicitors in this matter, does not see it as her role to take the lead in this matter".

21. In reply on 21 November 2011, the Claimant's solicitors wrote:

> "Dominic Raab attributes proper importance and respect to the confidentiality clauses in the agreement with your client. They are not to be breached lightly. It seems that your client and Mr Davis accord them equal respect.
>
> The fact of the matter is that breaching the confidentiality agreement will only become relevant when and if [the Defendant] chooses to put a justification defence on the record. If they do so, then the client feels he will have no option but to breach the confidentiality agreement in order to meet that defence and set out his case in his Reply. On our analysis, this will mean that in that event the confidentiality agreement will cease to bind those persons who entered into it. Our client cannot and will not take such a step unless and until it becomes necessary. The Confidentiality Agreement forms part of a freely entered into contract between the relevant parties which was meant to draw the matters in issue to a close. It should not be torn up lightly".

22. On 30 November 2011 (at a time when they were assuming Mr Davis was a party to the Confidentiality Agreement, but were not sure), the solicitors for the Defendant wrote to him asking for confirmation that he was a party to the agreement, and if so, confirmation that he was willing to release E and her parents from the confidentiality obligation for the limited purpose speaking to them in the context of these legal proceedings. Mr Davis had not replied by the time of the hearing. When he did so afterwards he did not consent to the

release of E.

23. On 5 December 2011 Mr Dougans wrote to the Claimant's solicitors letter including:

> "Until this set of circumstances arose, she had no desire whatsoever to discuss the matters covered by the Confidentiality Agreement in any circumstances. She wishes any disclosure of information covered by the Confidentiality Agreement to be solely for the purpose of this litigation, and to be as limited as possible….
>
> Lastly our client would not wish to see the Confidentiality Agreement set aside other than for the very limited purpose which the court may consider necessary for this litigation, and she would wish to oppose any such proposal. Even if the court gives her leave to assist the parties to this litigation for the purposes of this litigation… [she] would wish to abide by the Confidentiality Agreement after any assistance had been given".

24. On 7 December 2011 Mr Dougans wrote to the Defendant regarding a statement by E which had been served on the Claimant's solicitors that day. He wrote

> "my client's clear instructions are that the statement covers matters which she considers to be covered by the Confidentiality Agreement. Unless either the Claimant consents to the disclosure of this statement (having confirmed that he will waive any potential breach of the Confidentiality Agreement) or the court so orders, this statement is not to be provided to the Defendant".

25. At the start of the hearing Mr Warby asked that I direct that this witness statement be disclosed pursuant to my case management powers. It was not an application under Part 31 or any other part of the CPR. I refused to do so and stated that I would give my reasons in this judgment.

THE POSITION OF E

26. While Mr Dougans has given the court the information that E is willing to speak to the Defendant, plainly that is not her wish or desire. That is clear from her letter of 10 June, and Mr Dougans letters of 17 November and 5 December 2011. There are likely to be very good reasons for her adoption of this position of reluctant willingness.

27. What her preferences are could vary with time, according to her perception of the range of choices open to her, and the possible risks that she might face. It is because her present position is as it is that her name has not been mentioned in court, or in this judgment. The fact that her name is not a secret does not mean that it can fairly or properly be referred to in public.

28. It may be that if E were to speak to the Defendant, that would be the only disclosure that

she would be required to make. Only she knows what she would say. But there appears to be a possibility, as Mr Warby invites me to infer, that any disclosure by her to the Defendant could lead to the Defendant pleading justification, and then to E being required to give, in the High Court in 2012 or later, the evidence that, but for the settlement recorded in the Compromise Agreement, she might have given to the Employment Tribunal in 2007.

29. Mr Warby submits that the fact that the Claimant wrote as he did on 27 May (that it appeared from the content of the article that E had given information) leads to the inference that if E were to speak to the Defendant then she would confirm that the contents of the words complained of were true.

SUBMISSIONS FOR THE DEFENDANT

30. Mr Warby reminded me what is not before the Court. As he stressed, he is not making an application for disclosure of documents (save for the witness statement of E). So there is no occasion to apply the rules relating to disclosure of documents before an action is brought or before a defence is served, or the rules relating to disclosure from third parties. The Defendant has asked the Claimant to release E from her obligations under the Confidentiality Agreement, but the Defendant is not asking the court to make an order to that effect. There is no application by the Claimant for an injunction to restrain E from breaching the Confidentiality Agreement. There is no occasion for such an injunction. She has made clear that she is not threatening to act in breach of her obligations. Nor is E making any application to the court. Since Mr Davis has not released E, and is not a party to this application, even if the Claimant were to give the consent that the Defendant seeks, it seems unlikely that that would achieve the effect that the Defendant is seeking, namely that E would be released from her obligations under the Confidentiality Agreement, and thus freed to make disclosures to the Defendant. However, for the purposes of the application, I acceded to Mr Warby's invitation that I should assume that if the Claimant were willing to release E from her obligations, the effect would be that she would become free to talk to the Defendant's solicitors.

31. Mr Warby cited a number of authorities in support of the proposition that the court may properly exercise its discretion to stay proceedings for so long as a fair trial is impossible, and to strike out a claim if it is clear that a fair trial is not possible. These cases include: *Carpenter v Associated Newspapers Ltd* (unreported, Gray J, 30 November 2001) (where the claimant had intentionally brought about an inequality of arms by disabling the one witness who was in a position to enable the newspaper to advance a plea of justification: see para 53); *Jackson v MGN Ltd* (The Times, 29 March 1994) (where the claimant declined to submit to a medical examination necessary to establish whether or not he had disfigured himself by plastic surgery); *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 (where Parliamentary privilege required the exclusion of all the evidence that would have been necessary to prove the truth of the words complained of); and *Buttes Gas v Hammer (No 3)* [1982] AC 888 (where a defamation claim was stayed on the ground that the defence of justification raised issues relating to the acts of sovereign states and international treaties that were not justiciable). Mr Warby could have given other examples.

32. Mr Warby accepts that Art 10(2) allows for confidentiality as a legitimate basis for restricting the right to freedom of expression. But he submits that obligations of

confidentiality may also be overridden by the public interest, and in particular such obligations may be overridden to give effect to the right to a fair trial, or to a right to freedom of expression.

33. Art 10 of the Convention provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers…
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, … for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

34. Mr Warby cites *McDonald's Corp v Steel* [1995] 3 All ER 615, 621-622a, where Neill LJ said:

> "…before a plea of justification is included in a defence the following criteria should normally be satisfied: (a) the defendant should believe the words complained of to be true; (b) the defendant should intend to support the defence of justification at the trial; and (c) the defendant should have reasonable evidence to support the plea or reasonable grounds for supposing that sufficient evidence to prove the allegations will be available at the trial…. It is to be remembered that the defences of justification and fair comment form part of the framework by which free speech is protected. It is therefore important that no unnecessary barriers to the use of these defences are erected, while at the same time the court is able to ensure that its processes are not abused by irresponsible and unsupported pleadings".

35. Mr Warby also referred to the words of Lord Bingham MR (cited in *Carpenter* at para 35) in *Basham v Gregory* (unreported, 21 February 1996 CA):

> "the plaintiff brings this action to vindicate his reputation, no doubt hoping that the jury will accept that he has been seriously libelled and award him damages appropriately. There must, I think, be a serious question as to how valuable a vindication it is if it is won against a defendant who is not able to advance the defence he would wish. There is also, I think, a further consideration which is that if the plaintiff is successful, and if he recovers damages at the hands of the jury, it is not in any way unlikely that he will recover relief by way of injunction, restraining further circulation of the book, and so on. That involved a restriction on the freedom of

> publication, both of the defendants to publish and the public to read, and while, where a libel has been substantially established, that is an altogether appropriate remedy, it is one which has an undesirable implication if, in truth, the defendant has not enjoyed — even if as a result of his own fault — a full opportunity to make good whatever defence he has".

36. He also cited *McPhilemy v Times Newspapers Ltd* [1999] EMLR 751, 771(d), and *Ex parte Coventry Newspapers Ltd* [1993] QB 278.

37. Mr Warby relied on the principle that no impediment should be placed in the way of witnesses willing to give evidence. He does not allege that the Claimant is in contempt of court in the present case, but he cites *HM Attorney-General v MGN Ltd* [2011] EWHC 2074, where Lord Judge CJ said

> "At common law material which would deter a witness from coming forward to give evidence was capable of constituting contempt of court (see *Greenwood v The Leather Shod Wheel Co Limited* [1898] 14 TLR 241). More recently, in civil proceedings, in *Re Lonrho Plc* [1990] 2 AC 154 at 208, Lord Bridge addressed the question whether the course of justice in particular proceedings would be impeded or prejudiced by publication:
>
> > (This) "must depend primarily on whether the publication will bring influence to bear which is likely to divert the proceedings in some way from the course which they would otherwise have followed. The influence may affect the conduct of witnesses, the parties or the court. Before proceedings have come to trial and before the facts have been found, it is easy to see how critical public discussion of the issues and criticism of the conduct of the parties, particularly if a party is held up to public obloquy, may impede or prejudice the course of the proceedings by influencing the conduct of witnesses or parties in relation to the proceedings".
>
> In our judgment, as a matter of principle, the vilification of a suspect under arrest readily falls within the protective ambit of section 2(2) of the Act as a potential impediment to the course of justice."

38. Mr Warby also cites other cases relating to Art 10, both in Strasbourg and domestic law.

39. Mr Warby advances his submissions on the assumption that (as the Claimant contends) the Confidentiality Agreement does prevent E from talking about the 2007 case to the Defendant. He does not argue that the inclusion of the confidentiality obligation was improper in 2007. He submits that the question is whether it is proper now that the Claimant should continue to enforce it against E in the present circumstances, in particular while he is pursuing a libel action against the Defendant. He submits that the answer must be in the negative. E is a key witness to the facts: the probability is that E has information

which would serve to justify the allegations of which the Claimant complains, or assist in doing so. The Claimant knows what statement she would be likely to make, whereas the Defendant does not. So there is inequality of arms, brought about by the Claimant's conduct. It is normal for a defendant to wish to interview witnesses before deciding whether or not to plead justification.

40. Further, the Claimant is invoking no more than a contractual right to confidentiality. He is not invoking any Art 8 right that he may have. In any event, the conduct of a person who is now an MP towards a woman who was recently a fellow employee does not engage the Art 8 rights of the MP. What the Claimant is seeking to protect is not "information received in confidence" within the meaning of Art 10(2).

41. The form of the draft order annexed to the Application Notice was that the claim be struck out as an abuse of process. That was not the only alternative referred to in the Application Notice itself, as noted in para 10 above. At my invitation Mr Warby submitted an alternative form of order at the end of the hearing. That provided (subject to permission to Mr Davis MP to make an application to the court) that

> "the action is stayed unless and until each of the Claimant and [Mr Davis MP] has confirmed in writing to [E] or her solicitors that he shall not at any time seek to assert against [E] any claim or right to restitution, damages, costs or other relief or remedy of any kind in respect of any disclosure or communication that may be made by [E] to the Defendant for the purposes of this litigation".

42. Mr Bennett objected in writing to this form of order. It subjects the Claimant's right to obtain vindication to a decision to be made by Mr Davis MP. It makes no provision governing the rights between one another of E, the Claimant and Mr Davis MP if E's obligation under the Confidentiality Agreement is set aside.

SUBMISSIONS FOR THE CLAIMANT

43. Mr Bennett makes clear that the Claimant accepts that, if the Defendant pleads justification, and if there is then a dispute of fact to which E's evidence may be relevant, then the Claimant will not contend that in those circumstances E will be prevented by the Confidentiality Agreement from speaking the Defendant's solicitors. In the letter dated 21 November and Mr Bennett's Skeleton Argument the claimant's position was expressed in terms of his 'breaching' the Confidentiality Agreement. But it is not a case of an obligation being breached, but of an obligation ceasing to have effect. What the Claimant accepts is that if and when justification is pleaded, and there is an issue of fact, the public interest in the administration of justice will override the obligation of confidentiality preventing E from talking to the Defendant's solicitors.

44. Mr Bennett submits that the Defendant's application has nothing to do with its ability to plead justification. The purpose is to avoid the Defendant having to plead justification on the basis of the material available to it, and upon which it decided to publish the words complained of. The words complained of refer to sources by the words "a friend", "one

source" and "another source". The information attributed to the second and third sources suggest that they worked with E and were thus able to give first hand evidence. The Defendant did not give a substantive Response to the Letter of Claim, as it ought to have done pursuant to the Pre-Action Protocol. Although the Defendant now says it wishes to advance a defence of justification, it has still not specified the defamatory meaning of the words complained of which it says it wishes to prove to be true (as is required by PD53 para 2.5). The Letter of Claim asserts that the words complained of are themselves a breach of confidence (although no claim is brought on that basis), and the letter of 27 May makes clear that if there is an issue to which E's evidence is relevant, then the court would rule that the obligations of confidentiality would cease to apply.

45. Mr Bennett submits that the burden of proof in regard to justification falls upon a defendant. Until a defendant discharges that burden a claimant benefits from the presumption of falsity. There is no reason why the Defendant should not, either plead justification on the basis of the information from the sources relied on when it decided to publish, or serve a Defence omitting such a plea. Unless and until there is a plea of justification, the evidence of E is irrelevant to any issue in the action. There is no interference with the Defendant's Art 10 rights, because if it is able to plead justification, the obligations imposed on E under the Confidentiality Agreement will lapse. The order sought by the Defendant would, on the contrary, interfere with the right of the Claimant to access to the Court (Art 6). Further, the court ought not to interfere with the rights of the third parties under the Compromise Agreement.

DISCUSSION

46. None of the cases cited by Mr Warby is close on its facts to the present case. The nearest is *Carpenter,* but that differs materially, in that it was the intention of the claimant in obtaining the witness's signature to an affidavit to prevent him from giving evidence for the newspaper. There is no suggestion in the present case that in entering into the Confidentiality Agreement in 2007 anyone intended to prevent the Defendant from defending a claim brought in respect of words published in 2011. Moreover, whereas the making of the affidavit by the witness in *Carpenter* was a most unusual occurrence, what happened in the present case is not unusual at all, namely that litigation was settled on terms including a confidentiality agreement. On the contrary, it is the policy of the law to encourage parties to settle their disputes out of court, and in order to do that effectively it is often necessary or appropriate that the parties undertake obligations of confidentiality.

47. The *Coventry* case also has some apparent similarity with the present case. But it too is very different on its facts. In that case a newspaper had been unable to plead justification to a claim brought against it by some police officers. An appellant in an appeal against conviction made allegations of corruption against the same police officers. The newspaper learnt from the proceedings in the Criminal Division of the Court of Appeal that there existed confidential witness statements used in the appeal which, if released to it, would enable it to plead justification in the libel action. Those to whom the duty of confidentiality was owed were the witnesses. It is a significant distinguishing fact that the newspaper was unable to plead justification without the confidential witness statements (*Coventry* p284F). And unlike the Claimant in the present case, the persons to whom the duty of confidentiality was owed were not resisting the disclosure. In fact the case seemed so clear

that the Court of Appeal did not consider it necessary for them to be consulted, saying at p292G:

> "We summarise our reasoning thus. Given the central objective of this category of public interest immunity as "the maintenance of an honourable, disciplined, law-abiding and uncorrupt police force," given the grave public disquiet understandably aroused by proven malpractice on the part of some at least of those who served in the now disbanded West Midlands Serious Crime Squad, given the extensive publicity already attaching to the documents here in question following the appellant's successful appeal, it seems to us nothing short of absurd to suppose that those who co-operated in this investigation - largely other police officers and court officials - will regret that co-operation, or that future generations of potential witnesses will withhold it, were this court now to release the documents to [the newspaper] to enable them to defeat if they can an allegedly corrupt claim in damages."

48. The words complained of in this case include the assertion that E "was banned from talking about her treatment in the office run by Dominic Raab". But there is no evidence before the court that the requirement of confidentiality was a ban imposed upon E (rather than a term requested by her, or a term that all parties to the Compromise Agreement desired). The complaint made before me is not that the Claimant imposed the ban upon E, but that he is declining to release her from it.

49. Mr Warby refers to E as being "gagged". But there is no evidence that she has been gagged, or whether it is she who gagged the Claimant and Mr Davis. The fact that a claimant settles a claim on terms which include a confidentiality agreement does not imply that the defendant accepted that what the claimant has alleged gives rise to a claim that would have succeeded if pursued in open court. Each of the parties can take a different view of the strength of the claim at different stages of an action. I do not have information as to whether the Compromise Agreement represented total vindication for E, or a small part of her claim, acceptance of which by her represented substantial success for Mr Davis, or something inbetween.

50. The fact that E states that she is willing to talk to the Defendant does not mean that she wishes or desires to do so. Whatever her wishes may be today or in the future, it is very clear that when she has expressed wishes since the publication of the words complained of, the wish she has expressed is not to have to talk about the subject.

51. I accept that if a defendant is prevented from advancing a defence that he wishes to advance, that may be an interference with his Art 10 rights.

52. In the present case there is no evidence that the Defendant is prevented from advancing any defence that it may wish. The furthest the evidence goes is in the solicitor's witness statement para 19(a):

> "that the Article is likely to be true, based on evidence from

source(s) whose identity the Defendant must keep confidential"

53. The procedural barriers in the way a defendant contemplating a plea of justification are set out in the citation from *McDonalds* cited in para 34 above. When I asked Mr Warby for further assistance on this point, he did not refer to the practical restraints addressed in that case. He said that the decision to plead justification "raises the stakes" in an action, and may lead to aggravated damages if the plea fails. Once a defence of justification is raised, the option of a defence of offer of amends is lost. The Defendant should not be required to take the decision whether or not to plead justification on imperfect evidence.

54. However, the Defendant gives no explanation of why it says that the identity of the sources "must" be kept confidential. There is no evidence that any promise of confidentiality was given to any source, or as to the terms of any promise made to the sources. Journalists sometimes choose to identify their sources, and sometimes they choose not to identify them, and sometimes they enter into agreements with their sources (express or implied) to give them confidentiality. When a journalist chooses not to disclose a source, then there are well known provisions of the law by which they may be permitted not to disclose the source, even where the identity of their sources is relevant. But those provisions of the law do not apply in the present case, because the Claimant is not asking the Defendant to disclose its sources.

55. Nor is this a case about whether (as opposed to when) the rights of the Claimant to enforce the Confidentiality Agreement can be maintained consistently with his bringing this claim to a conclusion: there is no dispute that any right to confidentiality the Claimant may have would be overridden if the matters claimed to be confidential were relevant to an issue arising on the pleadings. The question is one of timing only. It is whether the Claimant should, at this stage of these proceedings, that is before a defence is served, have to give up rights of confidentiality in order to be free to continue the claim.

56. Since there is no evidence that the Defendant is prevented from pleading justification in the present case, in my judgment there is either no interference with its Art 10 rights, or at least no substantial interference. I accept that the Claimant has not shown that his Art 8 rights are engaged either. So this is not a case where these two Convention rights have to be balanced. I also accept Mr Warby's point that the Claimant has not told the court what consequences would follow for the parties to the Compromise Agreement if he were to waive E's obligations under the Confidentiality Agreement. But it is the Defendant who is seeking an order which would undoubtedly restrict the Claimant's access to the courts, and interfere with his contractual rights, and it is for the Defendant to establish the need for such an order.

57. In para 21(c) of the witness statement for the Defendant it is submitted: "that if the allegations are true, or if [E] or her parents have information that would support a case that they are true, then it is in the public interest that they should be permitted to communicate that information to the Defendant". But the question whether public interest outweighs confidentiality depends on the facts. On the facts available to the court, it is not established that the public interest in the present case would outweigh the rights of the parties to the Compromise Agreement to keep the obligations of confidentiality in place.

58. There must also be concerns as to the implications of the Defendant's arguments. I accept that the Defendant is not in terms seeking disclosure of documents, but to interview a witness. But the distinction is a narrow one, and may disappear if (as seems likely) E has documents that are relevant to which she needs to refer. There are confidential relationships to which most claimants in libel proceedings are parties, and one or more of these may be with persons who could, like E, be described as important witnesses. In a case involving matters of finance, there will most likely be such relationships with one or more financial institutions. If the submissions for the Defendant are well founded, it seems to me that the effect of an order of the kind sought by the Defendant might be to prevent a claimant from pursuing a libel action unless he is willing to give what may amount in practice to disclosure before defence.

59. In my judgment, looking at the matter as between the parties only, justice does not require that the Claimant give up rights of confidentiality at this stage, on the facts of the present case. The fact that he is a claimant should not mean that he be required to give up more of his rights than is necessary to achieve justice for the Defendant. The fact that a decision to plead justification, if made now, is one that the Defendant might regret once it had learnt what E has to say, is not sufficient reason to override the terms of the Confidentiality Agreement that was entered into by the Claimant and E. To strike out the whole claim now would be a disproportionate interference with the Claimant's right of access to the court. And an order in the revised terms set out in para 41 above appears to require the Claimant to give up more than his rights in confidentiality. The draft provides for him to give up all rights against E that might flow from that under the Compromise Agreement, whatever those rights may be.

60. The court must also have regard to the effect upon third parties of any order it may make. Confidentiality agreements are very common in the settlement of legal disputes. It is the policy of the law to encourage settlements of disputes by agreement. Confidentiality is required to achieve this, not only in the form of confidentiality clauses in settlement agreements, but also in procedures such as marking letters "without prejudice", in mediations, and, of course, in the form of legal professional privilege. All of these advance the public interest for all litigants. Newspaper publishers make use of confidentiality agreements in the settlement of disputes as much as any other litigants. If a party minded to settle litigation knows that any confidentiality agreement included in the terms of settlement is liable to be set aside if a newspaper subsequently publishes a report of the proceedings in respect of which he may wish to sue for libel, but which the newspaper cannot claim to be true on the information available to it, then that would tend to make parties less willing or able to settle disputes. A newspaper or journalist minded to settle a claim on confidential terms might not do so if it appeared that a rival publisher would report the settlement in terms defamatory of the journalists, and then claim the right to see the terms of the settlement before serving its defence. It is not common for journalists and newspapers to criticise one another in this way, but it is not unknown.

61. For these reasons, I dismiss this application.

62. The question whether or not I should order disclosure to the Defendant of E's witness statement seems to me to raise similar issues. I decline to order its disclosure for the same reasons that I refuse the relief that the Defendant is claiming.

CONCLUSION

63. For the reasons set out above, the application by the Defendant that this libel action be struck out or stayed is dismissed.