Neutral Citation Number: [2017] EWHC 1553 (Comm)

Case No: CL/2015/00691

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/06/2017

Before:

MR JUSTICE LEGGATT

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Between:

MR JEFFREY ROSS BLUE	**Claimant**
- and -	
MR MICHAEL JAMES WALLACE ASHLEY	
- and -	**Defendant**
TIMES NEWSPAPERS LIMITED	**Applicant**

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Jesse Nicholls (instructed by **Times Newspapers Limited**) for the **Applicant**
Adam Speker (instructed by Reynolds Porter Chamberlain LLP) for the **Defendant**
The **Claimant** was not represented

Hearing date: 22 June 2017

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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.

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MR JUSTICE LEGGATT

Mr Justice Leggatt:

1. The question of some general importance raised by this application is whether a member of the public or the press should be given access in advance of a trial to witness statements which have been prepared for use at the trial in circumstances where the witness statements have already been referred to at a pre-trial hearing. The application is made by Times Newspapers Limited ("TNL"), the publisher of the *Sunday Times*. TNL seeks access to documents which have been filed with the court in proceedings between two individuals, Mr Blue and Mr Ashley. These documents include the witness statements of the two protagonists which have been prepared for use at the trial. The claimant, Mr Blue, does not oppose TNL's application, but the defendant, Mr Ashley, does.

The action

2. The trial of the action is due to begin in a week's time on 3 July 2017. The claim brought by Mr Blue is based on an oral agreement allegedly made between himself and Mr Ashley on 24 January 2013 in relation to the share price of Sports Direct International Plc ("SDI"), a company in which Mr Ashley owns and controls the majority of the shares. The agreement allegedly made was that, if Mr Blue deployed his experience, skill and contacts in corporate finance to get SDI's share price above £8 per share before 24 January 2016, Mr Ashley would pay Mr Blue £15 million. Mr Blue contends that the condition was fulfilled and the money is therefore payable. Mr Ashley denies that any agreement was made. He also says that it was necessarily implicit in any oral agreement of the type alleged that the share price of SDI would need to rise to £8 by reason of Mr Blue's actions in order for the contractual sum to become payable and that Mr Blue cannot show that his actions were the effective cause of the rise in the share price.

The April hearing

3. The platform for this application is a hearing which took place on 7 April 2017 before Phillips J (the "April hearing") in which Mr Ashley applied for permission to rely at the trial on evidence from an expert in the field of equity markets, Mr Simon Dunn. On behalf of Mr Ashley it was argued that such evidence was reasonably required on the issue of causation in order to understand what factors influence movements in share prices and are likely to have caused the change in the share price of SDI. Phillips J dismissed the application on the grounds that it was made at a very late stage in the proceedings and that no positive case has been advanced by Mr Ashley on the issue of causation which the proposed expert evidence would go to support.

4. For the purpose of the April hearing, a bundle of documents was prepared and lodged with the court which included the witness statements which Mr Blue and Mr Ashley have each made for use at the trial. Before the hearing the judge was invited to read (amongst other material) the whole of Mr Blue's first witness statement and very short extracts from each of Mr Ashley's two witness statements. Reference was made to this material in argument by each side. In support of Mr Ashley's application, counsel for Mr Ashley argued that Mr Blue's witness statement raises matters of opinion which can only properly be addressed by an expert witness; and in opposing the application counsel for Mr Blue referred to parts of the witness statements in

arguing that the issue of causation is one of fact or alternatively that, to the extent that the issue involves opinion, expert evidence is not reasonably required to resolve it.

This application

5. The present application was issued on 31 May 2017 by TNL following a request for access to documents made in correspondence. TNL seeks an order pursuant to CPR 5.4C(2) or the common law powers of the court that it be permitted to obtain from court records or from a party to the action copies of nine specified documents. The documents are: the skeleton arguments for the April hearing; witness statements made by Ms Cullen and Mr Fearnhead (solicitors instructed by, respectively, Mr Ashley and Mr Blue) for the purpose of that hearing; the expert report of Mr Dunn on which Mr Ashley was seeking to rely; and the trial witness statements (two made by Mr Blue and two made by Mr Ashley) already mentioned. Of these documents, the skeleton arguments have subsequently been provided to TNL.

6. TNL has not served any evidence to explain why it wants access to these documents, taking the position that it does not need to do so and that it is for a party who opposes the application to show why access should not be granted. It is obvious, however, from the nature of the material and the way the application has been argued that the primary interest of TNL is in the witness statements of Mr Blue and Mr Ashley. What the *Sunday Times* wishes to do is to be able to publish some of the evidence that Mr Blue and Mr Ashley will give at the forthcoming trial before they give it. This is also what Mr Ashley is chiefly concerned to prevent.

The court's powers

7. Provision is made in the Civil Procedure Rules for the supply of documents to a non-party from court records. CPR 5.4C(1) states a general rule that a person who is not a party to proceedings may obtain from the court records a copy of (a) a statement of case (but not any documents filed with or attached to the statement of case) and (b) a judgment or order given or made in public. In addition, CPR 5.4C(2) provides that:

> "A non-party may, if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person."

TNL has applied under CPR 5.4C(2) for permission to obtain the documents that it seeks.

8. Also relevant to the arguments made on this application are rules in CPR Part 32 relating to witness statements. CPR 32.12 provides that a witness statement may be used only for the purpose of the proceedings in which it is served except where (a) the witness gives consent for some other use or (b) the court gives permission for some other use or (c) "the witness statement has been put in evidence at a hearing held in public". CPR 32.13(1) provides that:

> "A witness statement which stands as evidence in chief is open to inspection during the course of the trial unless the court otherwise directs."

9. The case law shows that, in exercising powers to permit access to documents deployed in court proceedings, courts should be guided by the principle of open justice. This principle requires court proceedings to be conducted in public except where to do so would cause injustice. The open justice principle is a fundamental principle of the common law. Its importance has been reiterated in a number of recent cases including the decision of the Court of Appeal in *R (Guardian News & Media Ltd) v Westminster Magistrates' Court* [2013] QB 618. As explained by Toulson LJ in that case, the essential purpose of the open justice principle is "to enable to public to understand and scrutinise the justice system of which the courts are the administrators" (para 79). The *Guardian News & Media* case also confirms that, subject to any statutory provision, the courts have an inherent jurisdiction to determine how the open justice principle should be applied. It follows that, even in the absence of a relevant statutory power, unless they are precluded by statute, the courts have power at common law to grant access to documents if the open justice principle requires this.

Is there power to permit access in this case?

10. Given the broad powers which the court has, I reject the arguments raised on Mr Ashley's behalf that the court has no power to grant TNL access to the trial witness statements at this stage of the case. A search made by Mr Ashley's solicitors established that Mr Blue's second statement and Mr Ashley's own trial witness statements are not on the court file, and it was argued that in these circumstances CPR 5.4C cannot be used to obtain these documents. However, CPR 5.4C(2) applies where a document has been "filed by a party", and "filing", in relation to a document, means delivering it to the court office: see CPR 2.3(1). As mentioned earlier, the trial witness statements of Mr Blue and Mr Ashley were included in a bundle of documents lodged with the court (by delivering it to the court office) for the April hearing. The statements were therefore filed for the purpose of CPR 5.4C(2). The fact that the court may no longer have a copy of a document on its file (for example, because the document was filed only in hard copy and was returned after the hearing) will not prevent the court from ensuring that a non-party can obtain a copy, if the open justice principle requires this. The court could, for example, order one of the parties to file the document again or to provide a copy directly to a non-party. Moreover, there is nothing in the Civil Procedure Rules which precludes the court from making an order under its common law powers to enable a non-party to obtain a copy of a document which has been served in the litigation, even if the document has not been filed by a party.

11. I also reject an argument made by counsel for Mr Ashley that it is implicit in CPR 32.13 that a non-party cannot be allowed to inspect a witness statement until the statement stands as evidence in chief. CPR 32.13 gives a non-party, unless the court otherwise directs, an automatic right to inspect a witness statement which stands as evidence in chief during the course of the trial, without the need to obtain the court's permission to do so. But there is nothing in CPR 32.13 which prevents a non-party from applying for permission – or which prevents the court from granting permission – to inspect a witness statement before the automatic right conferred by CPR 32.13 has arisen. Even if CPR 32.13 could reasonably be read as having that implication, which to my mind it cannot, the rules of court (which are contained in a statutory instrument) are not to be interpreted in the absence of language which makes such an

intention plain beyond possible doubt as limiting or controlling the powers of the court in this context: see the *Guardian News & Media* case at para 73.

12. It is one thing to conclude, however, as I do, that the court has power to direct that a non-party should be given access to witness statements before a trial, and another to decide that the power ought to be exercised in a given case. There are, in my view, good reasons why the court should not generally make witness statements prepared for use at a trial publicly available before the witnesses give evidence. Those reasons follow from the role that witness statements play in the litigation process.

The role of witness statements

13. Historically in civil cases (as it still is today in criminal proceedings) the giving of evidence by witnesses at a trial was an entirely oral process. First, counsel for the party calling the witness would ask questions to elicit evidence from the witness "in chief". Then counsel for the opposing party would cross-examine the witness. Traditionally, the parties to the litigation and their counsel would have no notice of what witnesses of fact called by opposing parties were going to say in evidence until they said it. That began to change after provision for written witness statements was first introduced in certain parts of the High Court, including the Commercial Court, in 1986. Under the modern Civil Procedure Rules parties are required to serve witness statements in advance of a trial. A witness statement is defined in the rules as "a written statement signed by a person which contains the evidence which that person would be allowed to give orally" (see CPR 32.4). The purpose of requiring such statements to be served is twofold. First, it enables parties to prepare for trial with notice of the evidence which the other side may adduce. This avoids unfair surprise and enables rebuttal evidence to be obtained where necessary and cross-examination to be better prepared. It also allows each party to make a fuller assessment of the strength of the other party's case, which may facilitate settlement. The second purpose of witness statements is to make the trial process more efficient by saving the time that would otherwise be taken up by oral evidence given in chief. Instead of such oral evidence, the witness is simply asked to identify their statement and confirm their belief that its contents are true.

14. It is, however, important to notice that, it is only when a witness is called to give oral evidence in court that their statement becomes evidence in the case (see CPR 32.5). Until then, its status is merely that of a statement of the evidence which the witness may be asked to give. Thus, it quite often happens that a party serves a witness statement from a person who is not in the event called to give oral evidence at the trial. In that event the person's statement may be admissible as hearsay evidence and may then be admitted in written form; or the statement may not be put in evidence at all – in which case it never becomes part of the material on which the case is decided.

15. When a witness statement forms part of the evidence given at a trial, the principle of open justice requires that a member of the public or press who wishes to do so should be able to read the statement – in just the same way as they would have been entitled to hear the evidence if it had been given orally at a public hearing in court. That is the rationale for the right of a member of the public under CPR 32.13 to inspect a witness statement once it stands as evidence in chief during the trial, unless the court otherwise directs. But there is no corresponding right or reason why a member of the public or press should be entitled to obtain copies of witness statements before they

have become evidence in the case. Conducting cases openly and publicly does not require this. Nor is it necessary to enable the public to understand and scrutinise the justice system. The advance notice that a witness statement provides of what evidence its maker, if called as a witness, will give is provided for the benefit of opposing parties (for the reasons I have indicated), not the public. The trial is an event which must (save in exceptional circumstances) be conducted in public so that justice can be seen to be done. But preparations by the parties for the trial for the most part are not, and do not need to be, public.

16. I also accept the argument made by Mr Speker on behalf of Mr Ashley that there are positive reasons why it is generally undesirable for witness statements to be made public before such statements are put in evidence at a court hearing. A witness statement may contain assertions which are defamatory of another party and the truth of which is disputed. When such assertions are made by a witness in evidence given in court, the witness is protected by immunity from suit. As explained by Lord Wilberforce in *Roy v Prior* [1971] AC 470 at 480:

> "The reasons why immunity is traditionally (and for this purpose I accept the tradition) conferred upon witnesses in respect of evidence given in court, are in order that they may give their evidence fearlessly and to avoid a multiplicity of actions in which the value or truth of their evidence would be tried over again. Moreover, the trial process contains in itself, in the subjection to cross-examination and confrontation with other evidence, some safeguard against careless, malicious or untruthful evidence."

The safeguards referred to by Lord Wilberforce do not apply to statements made by a prospective witness which have not been given in evidence. Yet if such statements were made public pursuant to an order of the court, a person who complained that a statement contained assertions that were untrue and defamatory of him would have no recourse against the author of the statement, who would not be responsible for its publication, nor against the publisher (who would be protected by qualified privilege unless the publication was malicious) and at the same time would also lack the opportunity for rebuttal and correction provided by the trial process. That does not strike a fair balance between the relevant interests. In addition, fair and accurate reporting of proceedings is promoted if a witness statement is put into the public domain only when it becomes evidence and its contents can also be tested and contested in a public trial.

TNL's arguments

17. On behalf of TNL, Mr Nicholls accepted that members of the public and the press have no general right to inspect witness statements before they are put in evidence at trial and would not normally be allowed to do so if the statements had not been referred to at a hearing held in public. He argued, however, that in the present case the position is different because the witness statements of Mr Blue and Mr Ashley were referred to at the April hearing.

18. Mr Nicholls went so far as to contend that those witness statements were "put in evidence" at the April hearing in the sense of CPR 32.12(2)(c). If that contention

were correct, it would mean that Mr Blue is now free to provide Mr Ashley's trial witness statements to the *Sunday Times* if he chooses without needing the permission of the court. But in my view it is not correct. Although the parties' witness statements were referred to at the April hearing, the reason for referring to the statements and placing them before the court was to enable the court to see the scope of the factual evidence that will be given at the trial. A similar situation arises where, for example, witness statements are placed before the court at a pre-trial review. The statements will only be put in evidence if and when the trial takes place and the witnesses are called to give oral evidence – at which point their statements will stand as their evidence in chief.

19. Nevertheless, Mr Nicholls is undoubtedly correct that the trial witness statements were placed before a judge and were referred to at the April hearing; and his central submission was that the decision of the Court of Appeal in the *Guardian News & Media* case establishes a "strong default presumption" that, in these circumstances, access to the documents should be permitted on the open justice principle. Mr Nicholls noted that Mr Ashley has served no evidence to attempt to rebut this presumption and submitted that Mr Ashley's representatives have not identified any plausible risk of harm to any legitimate public or private interest if access to the witness statements is permitted. It follows, he submitted, that access to the statements should be allowed.

20. In the *Guardian News & Media* case the application by the *Guardian* newspaper was for access to documents which had been placed before a district judge and referred to in the course of extradition hearings. The documents consisted of affidavits or witness statements, written arguments and correspondence. The Court of Appeal was satisfied that the *Guardian* had a serious journalistic purpose in seeking access to these documents, namely, to stimulate informed debate about the way in which the justice system deals with suspected international corruption and the system for extradition of British subjects to the USA (see para 76). Toulson LJ (with whose judgment Lord Neuberger MR and Hooper LJ agreed) observed that this was a purpose which the courts should assist rather than impede, unless some strong contrary argument could be made out (para 77). He considered the various countervailing arguments which had been advanced and found them all unpersuasive. The Court of Appeal accordingly directed that access to the documents should be allowed. The key statement of principle on which Mr Nicholls relies is contained in paragraph 85 of the judgment:

> "In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons. ... I do not think that it is sensible or practical to look for a standard formula for determining how strong the grounds of opposition need to be in order to outweigh the merits of the application. The court has to carry out a proportionality exercise which will be fact-specific. Central to the court's evaluation will be the purpose of the open justice principle, the

> potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others."

21. This decision establishes that, once documents have been placed before a judge and referred to at a public hearing, access to the documents should be permitted other things being equal. But it does not remove the need for the court to consider the particular circumstances, including the nature of the documents in question, their role and relevance in the proceedings and, importantly, the purpose for which access to the documents is sought. Toulson LJ made it clear that the court has to make an evaluation which involves assessing the extent to which affording access to documents will serve the public interest in open justice and weighing this against any countervailing factors. He also emphasised that this exercise cannot be reduced to the application of a standard formula. It seems to me that this is the error in TNL's argument, which approaches the determination in too mechanistic a fashion and treats what is no more than a "default position" as if it were a "strong presumption".

22. A critical consideration in the present case, as I see it, is the purpose for which TNL is seeking access to the trial witness statements. If its purpose were to facilitate a better understanding of the arguments made at the April hearing, then, in the absence of a sufficient countervailing reason, the open justice principle would indicate that access to the statements should be allowed. However, TNL has not served any evidence to suggest – and I see no reason to assume – that this is its purpose. The *Sunday Times* has already published a report of the April hearing two days after it took place. That hearing happened some 2½ months ago and Mr Ashley's application to introduce expert evidence is of little, if any, current relevance – all the more so as the application was refused so that Mr Dunn's report will not form part of the material before the court at the forthcoming trial. There is no reason to think that TNL's purpose in seeking access to the trial witness statements at this stage is to enable the *Sunday Times* to report in more detail than it has already done on the attempt made by Mr Ashley in April to obtain permission to adduce expert evidence and the reasons why that attempt failed. As I mentioned earlier, common sense and the thrust of TNL's arguments indicate that its purpose is to be able to report what the evidence of Mr Blue and Mr Ashley will be at the trial which is about to start.

23. For the reasons already indicated, an interest in reporting what evidence witnesses will give at a trial before they give it does not engage the open justice principle and is not a good reason to be allowed access to witness statements before the statements are put in evidence (if they are). Nor does it become a good reason just because of the adventitious fact that reference was made to the statements at a pre-trial hearing which it is not TNL's current purpose to report. In so far as the bare fact that such reference to the statements was made makes granting access to them the "default position", that position is displaced by the general undesirability of the court supplying a witness statement to a non-party before the statement has been deployed in the proceedings to seek to prove the truth of its contents.

24. There is no doubt that, if the trial proceeds and Mr Blue and Mr Ashley give evidence, TNL (and indeed any interested member of the public) will be entitled to inspect their witness statements. The only issue is one of timing. I do not consider that a legitimate basis has been shown for making an order to enable the witness statements which have been prepared for use at the trial to be made public in advance.

The other documents

25. Much less attention was directed in argument to the three other documents to which TNL has requested access. The first of these is Mr Dunn's expert report. In circumstances where the report has not been put in evidence and permission to do so at the trial was refused, some evidence would in my view be needed to explain why access to it is sought before the court could conclude that such access should be ordered on the open justice principle. However, no such evidence has been provided. The other two documents are the witness statements of Ms Cullen and Mr Fearnhead which were prepared specifically for the April hearing. Those documents seem to me to fall into a different category. They were put in evidence at the April hearing and, like the skeleton arguments, were prepared solely for the purpose of that hearing. In the case of these documents it seems to me that no evidence or explanation is needed to justify a request for access to them in the absence of any legitimate objection. The only reason advanced for resisting the application was that access to these documents is not needed for the purpose of reporting the proceedings. But, as the *Guardian News & Media* case and the decision of Bean J in *NAB v Serco Ltd* [2014] EWHC 1225 (QB) make clear, that is not a sufficient reason for denying access.

Conclusion

26. I will make an order under CPR 5.4C(2) that TNL be permitted to obtain from the court records on payment of the specified fee copies of the witness statements of Ms Cullen and Mr Fearnhead. The application is otherwise refused.