Neutral Citation Number: [2011] EWHC 1326 (QB)

Case No: HQ11X01432

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 May 2011

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

CTB **Claimant**

- and -

(1) NEWS GROUP NEWSPAPERS LIMITED
(2) IMOGEN THOMAS **Defendants**

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Hugh Tomlinson QC and **Sara Mansoori** (instructed by **Schillings**) for the **Claimant**
Richard Spearman QC (instructed by **Farrer & Co**) for the **First Defendant**
David Price QC (of **David Price Solicitors & Advocates**) for the **Second Defendant**

Hearing date: 16 May 2011

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Judgment

Mr Justice Eady :

1. The background to the present applications is to be found in the circumstances which led to the earlier claim for an injunction against the Defendants restraining publication of material in respect of which the Claimant had a reasonable expectation of privacy and which might legitimately be regarded as confidential. The context is more fully set out in my judgment of 16 May at [2011] EWHC 1232 (QB). I now give my rulings following the subsequent arguments that took place on that date.

2. Mr Spearman QC for News Group Newspapers Ltd ("NGN") seeks to vary the terms of that injunction because, he submits, there has been such widespread coverage on the Internet since the order was first granted on 14 April 2011 that it would now be pointless for the court to maintain the Claimant's anonymity – notwithstanding the absence of any legitimate public interest. He also argues, unusually, that in any event NGN should be allowed to pass on such information as it has, accurate or not, to the Claimant's wife. I shall need to return to that shortly in an attempt to explain the reasoning.

3. Although Ms Imogen Thomas was represented by Mr David Price QC, as she had also been on 20 April, he took no part in the argument. Her stance, once again, was that she did not oppose the continuance of the injunction.

4. Meanwhile, Mr Tomlinson QC for the Claimant applies for an order under CPR 31.12 for specific disclosure of documents against NGN. He recognises, of course, that disclosure applications are rarely made at such an early stage in proceedings. Nevertheless, he says that it is a course warranted by these particular circumstances. In particular, he argues that it would be both necessary and proportionate to have disclosure of certain documents at this juncture because Mr Spearman seemed to be placing emphasis, in support of his application to vary the injunction, upon the "clean hands" of NGN and its employees. He argues that there is no reason to blame NGN for the emergence of allegations or deductions on Twitter or elsewhere on the Internet and that, accordingly, it should not be placed at a disadvantage *vis-à-vis* its commercial rivals as to what it can publish. (That is not easy to follow, since NGN is in no worse position than any other media group served with the order.) In effect, Mr Tomlinson submitted that I could not fairly decide the outcome of Mr Spearman's application to vary unless I had seen the extent of any email traffic passing between NGN staff and third parties on this subject-matter. In other words, he invited the court to be sceptical and not accept Mr Spearman's "clean hands" case at face value.

5. I asked that Mr Spearman clarify to what extent he was actually relying on "clean hands", as opposed to merely observing that the Claimant's advisers had not produced any direct evidence of NGN collaboration with tweeters and bloggers. He replied rather neutrally. I think the effect of what he said was that it would be rather time-consuming and burdensome for NGN to carry out the necessary research to enable them to advance a positive "clean hands" case. All he was doing, therefore, was to point out that Mr Tomlinson could not directly attribute any responsibility, on the evidence as it stands at the moment, to NGN employees for the material appearing on the Internet. That is probably true, for the time being at least, but Mr Tomlinson was ready to draw realistic inferences and invited the court to do the same. He suggests it

is merely fanciful to suppose that no one at NGN has breached the confidence and/or sought to undermine the order.

6. Nonetheless, for present purposes, there is a potentially important distinction between Mr Spearman's advancing a positive "clean hands" case, as he appeared to be doing at the outset, and his merely saying that the Claimant is unable to prove a direct link. The potential significance is that the court does not have to make a finding on that point and, therefore, does not need disclosure to assist in its task.

7. I am satisfied that Mr Spearman's application to vary the injunction can be resolved without a prolonged investigation of email traffic within NGN. The outcome need not depend on the extent to which NGN employees have or have not leaked the Claimant's identity themselves. While I would not agree with Mr Spearman that the application is based on "flawed logic", I do take the view that the disclosure sought is unnecessary and would be disproportionate to the present exercise.

8. What Mr Tomlinson did rely on, however, were the terms of a broadcast by Mr Kelvin MacKenzie on BBC Radio on the morning of 30 April, when he claimed that he regularly passed on the identities of claimants who had been granted injunctions to anyone who asked him. He obviously does not approve of the current law of privacy and makes it his business to undermine court orders accordingly. He also likes to drop hints in his articles to give any interested readers a steer as to who might be covered by an order. Mr Tomlinson described this as "playing games". It is necessary to remember in this context that Mr MacKenzie is no longer an employee of NGN. He seems to be, in legal terms, an independent contractor. His activities could not necessarily, therefore, be attributed to NGN.

9. The order sought on the Claimant's behalf was that NGN should:

    a) conduct a search of its email system including any backup servers;

    b) disclose all emails located as a result of that search sent by Kelvin MacKenzie to any external email address during the period 14 April 2011 to 13 May 2011 which refer to the Claimant or tend in any way to identify the Claimant;

    c) disclose any other emails located as a result of that search sent by anyone employed by the First Defendant to any external email address during the period 14 April 2011 to 13 May 2011 which refer to the Claimant or tend in any way to identify the Claimant;

    d) disclose the recipient email address of any emails disclosed pursuant to (b) and (c) above;

    e) disclose any other documents including SMS text messages created by Kelvin MacKenzie between 14 April 2011 and 13 May 2011 which refer to the Claimant or tend in any way to identify the Claimant;

    f) disclose any other documents including SMS text messages created by anyone employed by the First Defendant between 14 April 2011 and 13

May 2011 which refer to the Claimant or tend in any way to identify the Claimant;

g) disclose each and every recipient of any document disclosed pursuant to (e) and (f) above.

10. What was suggested was that these requirements should be complied with by 20 May 2011, although Mr Spearman suggested that if it were to be carried out, the exercise would take far longer. I do not find that surprising. Mr Tomlinson accordingly confined his request at the hearing to a search for any documents evidencing traffic between NGN staff and Mr MacKenzie and also for any communications from Mr MacKenzie's *Sun* email address (as prominently displayed at the head of his weekly column) to third parties. It still seems to me, however, to be unnecessary for the purpose in hand to spend precious time and money in enquiring into the detail of what Mr MacKenzie was up to. It would be something of a sledgehammer to crack a nut.

11. There is another aspect to this application which causes me some concern. The proposed exercise, if carried out, might reveal attempts to undermine the orders of the court and thus suggest that one or more employees of NGN was committing contempt of court. Although the law relating to self-incrimination in this context cannot be said to be crystal clear, it would seem that the modern approach adopted by the courts is that such a risk cannot be regarded as an absolute bar when the court is invited, as a matter of discretion, to order disclosure, but it remains a factor to be taken carefully into account: see e.g. *Cobra Golf Inc v Rata* [1996] FSR 819, 830-832; *Dendron GmbH v University of California* [2005] 1 WLR 200; *C Plc v P (Att.-Gen. intervening)* [2008] Ch 1. It would certainly need to be borne in mind if I were otherwise of the view that an order for disclosure should be made.

12. On the material before me, in any event, I would reject the Claimant's application for specific disclosure.

13. Needless to say, if the Claimant's advisers have come to the conclusion that contempts of court have been committed, it is open to them to provide their evidence to the Law Officers of the Crown. It is they who have traditionally had the responsibility of representing the public interest in relation especially to allegations of criminal contempt: see e.g. *Gouriet v UPOW* [1978] AC 435, 483D – 484B, 495E-F, 499G – 500F and 518-519; *Att.-Gen. v Newspaper Publishing Plc* [1988] Ch 333, 362D, 367H – 368A.

14. I turn next to Mr Spearman's application to vary the injunction and, in particular, so as to remove the anonymity of the Claimant. He says that many tens of thousands of people can, if they are sufficiently interested, find out who the Claimant is by making appropriate searches on the Internet, although it is fair to say that there was speculation about a number of possible candidates. Mr Spearman argues, as did Mr Kelvin MacKenzie in the radio programme of which I was supplied with a transcript, that in effect privacy injunctions (and no doubt other forms of injunction also) have ceased to serve any useful purpose in the age of the Internet. Not only can information be put out on various networks from within this jurisdiction, but it can obviously be done also by anyone who wishes in other jurisdictions.

15. Parliament may at some stage wish to change the law and make specific provision in the light of these developments, but in the meantime the courts are obliged to apply the law as it currently stands. The logical conclusion of Mr Spearman's argument is, perhaps, that the court should always refuse injunctive relief to applicants on the basis that, to a greater or lesser extent, the defendants or others may simply ignore its orders. It would not be right, however, for courts to ignore their responsibilities and to refuse relief in circumstances where it is properly sought. My attention was drawn to a recent decision of King J in a case called *NEJ v News Group Newspapers Ltd*, where a similar argument was apparently unsuccessfully advanced. It is not clear to me, however, at the moment that the judgment has yet been made public. For this reason, I shall not make reference to its content, germane though it appears to be.

16. The principle, however, is clear. One has only to pose the question for the answer to become obvious. Should the court buckle every time one of its orders meets widespread disobedience or defiance? In a democratic society, if a law is deemed to be unenforceable or unpopular, it is for the legislature to make such changes as it decides are appropriate.

17. Meanwhile it is not right to say that the law of privacy is unclear or "confused". As I illustrated in the earlier judgment, there are a significant number of appellate authorities which have explained it in great detail. It is not easy to see, therefore, how any significant changes could be achieved other than by legislation.

18. Reference was made by Mr Spearman to the refusal of injunctive relief in yet another of his client's cases: *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB). It was there said:

> "The court should guard against slipping into playing the role of King Canute. Even though an order may be desirable for the protection of privacy, and may be made in accordance with the principles currently being applied by the courts, there may come a point where it would simply serve no useful purpose and would merely be characterised, in the traditional terminology, as a *brutum fulmen*. It is inappropriate for the court to make vain gestures."

The circumstances here are rather different. In *Mosley*, I took the view that there was no point in granting an injunction because, even before the application was made, several hundred thousand people had seen the intimate video footage which NGN had put on line – conduct that was recently characterised by the European Court of Human Rights as a "flagrant and unjustified intrusion": *Mosley v UK* (App. No. 48009/08), 10 May 2011 at [104]. In a real sense, therefore, it could be said that there was nothing left for the court to protect by an injunction.

19. Here, the Internet allegations prayed in aid by Mr Spearman took place after the order was made. Different policy considerations come into play when the court is invited to abandon the protection it has given a litigant on the basis of widespread attempts to render it ineffective. Furthermore, unlike the *Mosley* case, there is no doubt other information that Ms Thomas could yet publish, quite apart from this Claimant's identity, which is not yet in the public domain. The injunction thus continues to serve

a useful purpose, from the Claimant's point of view, for that reason alone, since she is amenable to the jurisdiction of the court. Otherwise, he would not seek to maintain it.

20. Mr Spearman's application is therefore quite narrow. He seeks only to vary the injunction so as to permit the Claimant to be identified. The basis of this argument appears to be closely related to one of the "limiting principles" explained by Lord Goff in *Att.-Gen. v Guardian Newspapers (No. 2)* [1990] 1 AC 109, 282B-F, to the effect that the principle of confidentiality only applies to information to the extent that it is confidential:

> "In particular, once it has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it."

The law thus recognises that a time may come, at least in relation to state secrets or commercial confidentiality, when the information in question has become so widely available that there is really nothing left for the law to protect. At an earlier stage in the same litigation, relating to *Spycatcher*, Sir John Donaldson MR had famously likened confidential information to an ice cube. Once it has melted, of course, it is simply too late to afford any effective remedy. That is Mr Spearman's argument in a nutshell.

21. Yet even at the time of the *Spycatcher* litigation in the House of Lords, over 20 years ago, a distinction was being already flagged up between confidential information in the context of state or commercial secrets, on the one hand, and personal information on the other: *ibid.* at 260E-H and 287C-D.

22. Whereas it may be possible to a draw a bright line boundary as to commercial secrets between being public and private, that is not so easy, nor even generally appropriate, when it comes to publications infringing a person's rights under Article 8 of the European Convention on Human Rights and Fundamental Freedoms. As was explained in *Campbell v MGN Ltd* [2004] 2 AC 457, the law nowadays is required to protect information in respect of which there is a *reasonable* expectation of privacy and for so long as that position remains. What is "reasonable" depends on the circumstances. It is a concept that is not susceptible in itself to bright line boundaries.

23. It is important always to remember that the modern law of privacy is not concerned solely with information or "secrets": it is also concerned importantly with *intrusion*. That is one reason why it can be important to distinguish between the way the law approaches public domain arguments in relation to commercial or state secrets, for example, and that which is appropriate to personal information. It also largely explains why it is the case that the truth or falsity of the allegations in question can often be irrelevant: see e.g. *McKennitt v Ash* [2008] QB 73 at [80] and [87].

24. It is fairly obvious that wall-to-wall excoriation in national newspapers, whether tabloid or "broadsheet", is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet or in foreign journals to those, however many, who take the trouble to look it up. Moreover, with

each exposure of personal information or allegations, whether by way of visual images or verbally, there is a new intrusion and occasion for distress or embarrassment. Mr Tomlinson argues accordingly that "the dam has not burst". For so long as the court is in a position to prevent *some* of that intrusion and distress, depending upon the individual circumstances, it may be appropriate to maintain that degree of protection. The analogy with King Canute to some extent, therefore, breaks down.

25. It may be thought that the wish of NGN to publish more about this "story", with a view to selling newspapers and perhaps achieving other commercial advantages, demonstrates that coverage has not yet reached saturation point. Had it done so, the story would no longer retain any interest. This factor tends, therefore, to confirm my impression that the court's attempts to protect the Claimant and his family have not yet become wholly futile.

26. In these circumstances, it seems to me that the right question for me to ask, in the light of *JIH v News Group Newspapers Ltd* [2011] 2 All ER 324 and *Re Guardian News and Media Ltd* [2010] UKSC 1, is whether there is a solid reason why the Claimant's identity should be generally revealed in the national media, such as to outweigh the legitimate interests of himself and his family in maintaining anonymity. The answer is as yet in the negative. They would be engulfed in a cruel and destructive media frenzy. Sadly, that may become unavoidable in the society in which we now live but, for the moment, in so far as I am being asked to sanction it, I decline to do so. On the other side, as I recorded in my judgment on 16 May, it has not been suggested that there is *any* legitimate public interest in publishing the story.

27. Mr Spearman raises the alternative argument, verging on the bathetic, that *The Sun* should at least be allowed to tell the Claimant's wife what it knows, or thinks it knows. This is a difficult one to follow. NGN is a media group legitimately interested in making profits from communicating to the world at large. It surely does not aspire to the role of social worker or "relationship counsellor". Its Article 10 rights are hardly engaged by this subsidiary argument at all. It was faintly suggested, therefore, that it should be allowed to pass on the story to the Claimant's wife in the furtherance or protection of *her* Article 8 right to family life. The Claimant regards this as so much humbug. The point of Article 8 is that it is not supposed to be any of NGN's business.

28. These are my reasons for rejecting the Defendant's application to vary the injunction.