



Neutral Citation Number: [2012] EWHC 367 (QB)

Case No: HQ12X00490

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/02/2012

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

(1) Jacqueline Gold & (2) Ann Summers Ltd

Claimants

- and -

(1) Allison Cox & (2) Leanne Bingham

Defendants

Godwin Busuttil (instructed by Henri Brandman & Co) for the Claimants
The Defendants did not appear and were not represented

Hearing dates: 23 February 2012

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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THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. On 17 February 2012 I handed down in writing (Neutral Citation Number: [2012] EWHC 272 (QB)) the reasons why I had granted a non-disclosure injunction against the Defendants on 15 February. As set out in that judgment, I adjourned the hearing in order to enable the Defendants to put in evidence, if they wished (see paras [3] and [23]).
2. Miss Cox was formerly employed as nanny to Miss Gold's young daughter. Miss Bingham was formerly employed by each of the Claimants, and is a friend of Miss Cox. It came to the attention of the Claimants that Miss Bingham was seeking a publisher for a manuscript containing information about the private and family life of Miss Gold. The factual background of this matter is set out in my earlier judgment and I do not need to repeat it in further detail.

THE REASONS FOR MAKING A FINAL ORDER

3. In the event both Defendants have consented to final non-disclosure orders being granted. Accordingly I entered judgment in this action in favour of the Claimants.
4. Miss Bingham wrote a second e-mail, this one dated 22 February, in which she stated that her consent was given reluctantly. She sets out her reasons over four pages. Notwithstanding that she gave her consent to the final injunction, I considered these reasons. Non-disclosure injunctions can affect the right to freedom of expression of members of the public who are not parties to the proceedings, and the court will not make any non-disclosure order that a claimant may apply for simply because a defendant consents to it.
5. Miss Bingham understandably expresses her concern as to the risk as to costs which she would face if she opposed the application. She accepts that while working for the Claimants she had access to confidential information, but she had not understood, she says, that she might be bound by duties of confidentiality to her employer in circumstances where she had never been asked to sign a contract of employment or a confidentiality agreement.
6. By 22 February the Claimants had obtained, and exhibited to a witness statement, a copy of the manuscript which Miss Bingham had written. Miss Bingham and Miss Cox deny that any information she wrote in the manuscript came from Miss Cox. The Claimants submit that there are strong grounds for questioning that denial. I cannot make a finding of fact as to whether the denial is true or false in proceedings where there is no oral evidence. But it makes little difference in any event.
7. Miss Bingham states in general terms that the information about Miss Gold and her family came to her knowledge whilst she was working in the Human Resources Department of the Second Claimant, and she thought that it was common knowledge. She does not identify a source more precisely than that. The Claimants question that account, but even if what she writes about her sources is true, it is likely that that would be of little assistance to Miss Bingham. The information is obviously private and confidential. It concerns the First Claimant and her children, and other equally intimate details of the First Claimant's private and family life. In any event it is likely

that her fellow employees in the HR Department would be bound by the same duties of confidentiality owed to the Claimants as these two Defendants.

8. Miss Bingham identifies a small number of Tweets made by the First Claimant. While they refer to Miss Cox, none of them disclose any private or confidential information about the First Claimant or about Miss Cox. They can provide no arguable justification for disclosure of the private and confidential information about the First Claimant and her family. For example, when Miss Cox was released from jail after serving three months of her twelve months sentence, the First Claimant tweeted: “Can someone tell me what is the point of #victimssupportservice shouldn’t they have told me of her early release – a journalist told me”. Miss Bingham states that it is this tweet that prompted her to think about writing her manuscript.

THE FORM OF THE NON-DISCLOSURE ORDER

9. The Order is a public document. The form of it is substantially that of the Model Order in the Practice Guidance issued by the Master of the Rolls in August 2011, so far as relevant. But the form of order that Mr Busuttil invited me to make contained an important change in the wording of the Public Domain proviso. His draft read:

“PROVIDED THAT nothing in this Order shall prevent the use, publication, communication or disclosure by the Defendants of any of the Information (i) for the purposes of carrying this Order into effect; or (ii) any part of the Information that was already in or thereafter comes into, the public domain in England and Wales as a result of publication in the national media (other than as a result of a breach of this Order or a breach of confidence or privacy). (*For the avoidance of doubt, in the event that a Defendant wishes to rely on this Proviso in response to a claim that she has breached this Order, the burden will be on that Defendant to establish that the relevant information was in fact in the public domain in England and Wales at the material time as the result of publication in the national media (other than as a result of a breach of this Order or a breach of confidence or privacy) on the balance of probabilities.*)”

10. I declined to include in the Order the words that are in italics “For the avoidance of doubt ...balance of probabilities”. These words purport to reverse what would normally be the burden of proof.
11. The Order that I made commences in the usual way with a Penal Notice, that is a warning that disobedience may be punished with imprisonment. To disobey an injunction is what is known as a civil (as opposed to a criminal) contempt of court. But it is nonetheless punishable with imprisonment. Accordingly the burden of proof lies upon the person alleging the disobedience, and the standard of proof of such a contempt of court is the criminal standard. See *Arlidge Eady and Smith on Contempt* 4th ed ch 12, and *Re Bramblevale* [1970] Ch 128 and *Spectravest Inc v Aperknit* [1988] FSR 161, 174.
12. A public domain proviso is necessarily somewhat vague. As discussed in *Spectravest*, in non-disclosure, defamation and intellectual property claims injunctions have to be framed with a degree of vagueness, if they are to provide an effective remedy to a claimant. Otherwise they would be too easy to circumvent. But the burden still lies on

a claimant to prove that any disclosure alleged to be a breach of the order is a disclosure of information which is not in the public domain. Once a claimant has established that, then there is a prima facie case of disobedience. At that point what is called the evidential burden of proof may shift to the alleged contemnor. That is the same as in any criminal proceedings. But it would be wrong in principle to embody into an injunction a reverse burden of proof, as submitted by Mr Busuttil.

13. It is for these reasons that I made the Final Order.