Neutral Citation Number: [2006] EWHC 11 (Ch)

Case No: HC05C03452

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
INTELLECTUAL PROPERTY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 January 2006

Before :

THE HONOURABLE MR JUSTICE KITCHIN

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Between :

HIS ROYAL HIGHNESS THE PRINCE OF WALES	**Claimant**
- and -	
ASSOCIATED NEWSPAPERS LIMITED	**Defendant**

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- -

Hugh Tomlinson QC and Lindsay Lane (instructed by **Harbottle & Lewis**) for the **Claimant**
Mark Warby QC and Christina Michalos (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

Hearing dates: 19, 21 December 2005

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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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THE HONOURABLE MR JUSTICE KITCHIN

The Honourable Mr Justice Kitchin:

1. This is an application for directions in a summary judgment application. The matter has come before me for two short hearings. The first hearing took place on 19 December and at its conclusion I hoped that the parties would be able to agree a form of order. Regrettably that proved not to be the case and accordingly it was listed again for 21 December. At the end of that hearing I made an order protecting the confidentiality of certain documents relied upon by the Claimant and was asked by counsel for the Defendant to give my reasons in a judgment. That I now do.

2. The background to the application is set out in a witness statement of Sir Michael Peat. The Claimant has, over a number of years, kept hand written journals detailing his personal impressions and private views of his overseas tours. On the Claimant's return to the United Kingdom he circulates copies of the journals to members of his family, close friends and advisors. These proceedings concern a number of such journals, the dates and titles of which are set out in Confidential Schedule 1 to the Particulars of Claim. The Claimant contends that these journals are confidential and protected by copyright which he owns. One of the journals, described as the Hong Kong Journal, contains recollections of the official visit of the Claimant to Hong Kong in 1997. Sir Michael explains it was circulated to 13 recipients, counting husbands and wives who were sent a copy jointly as one, together with a letter from the Claimant or from his Personal Assistant or Secretary in an envelope marked "Private and Confidential". A list of the recipients of the Hong Kong Journal and an example of a copy covering letter are contained in pages 1 and 2 of Confidential Exhibit 2 to Sir Michael's witness statement.

3. A Ms Sara Goodall was employed by the Household of the Claimant as a secretary to the Deputy Private Secretary at St James's Palace between 23 May 1988 and 21 December 2000. The Claimant contends she wrongly copied a number of the journals, including the Hong Kong Journal, removed those copies from the Claimant's private office and gave copies of them, through an intermediary, to The Mail on Sunday. Thereafter and, it is said, knowing of their confidential nature, The Mail on Sunday published quotations and other material from the Hong Kong Journal and threatens to make further use of the journals in future newspaper articles. In these circumstances the Claimant contends that the Defendant has acted in breach of confidence and infringed his copyright and threatens so to do.

4. The Defendant resists the claim and intends to contest the application for summary judgment. Through counsel it has said that it anticipates serving reasonably substantial evidence dealing with a range of factual matters including the Claimant's constitutional role and functions, the Claimant's history of private lobbying of democratically elected persons on topics of political importance, the Claimant's history of voluntary disclosure to the public of his views on a range of topics and the Claimant's boycotting of certain official dinners.

5. The parties have agreed a timetable for the further hearing of the application which will allow them sufficient time to gather and address this evidence and the application is to be listed for hearing not before 13 February 2006 with a time estimate of 1 day. However the parties were unable to agree as to what, if any, order should be made in the meantime to protect the identities of the journals listed in Confidential Schedule 1 to the Particulars of Claim and the contents of pages 1 and 2 of Confidential Exhibit

2. This lack of agreement had two aspects: first, whether the information is at least arguably confidential and secondly, whether it was appropriate to make an order under CPR 31.22.

6. As to Confidential Exhibit 2, the Defendant accepted shortly before the hearing on the 19 December:

> "1. That the information contained in pages 1 and 2 of Confidential Exhibit 2 to the Witness statement of Sir Michael Peat will not be disclosed until after judgment on the Claimant's summary judgment application, even if these pages are read by the court or referred to in open court.
>
> 2. That it will not disclose or copy or cause to be disclosed or copied pages 1 and 2 of Confidential Exhibit 2 to the Witness statement of Sir Michael Peat except for the purposes of these proceedings.
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> SAVE that these undertakings will not apply to any information:
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> (a) that has entered into the public domain otherwise than by virtue of a breach of undertaking;
>
> (b) disclosed with the written consent of the Claimant's solicitors."

7. In my judgment it was right to do so. I am satisfied that the Claimant has established at least an arguable case that the names of the recipients of the Hong Kong Journal and the copy private letter constitute private confidential information which the Claimant is entitled to protect. There is no suggestion that preservation of the confidentiality of this information over until the hearing in February will cause the Defendant any damage.

8. As to the identities of the journals listed in Confidential Schedule 1, the position is a little more complicated. By letter dated 9 December the Defendant's solicitors wrote giving the following undertaking:

> "The Defendant undertakes that it will not disclose or copy or cause to be disclosed or copied Confidential Schedule 1 to the Particulars of Claim except (1) for the purposes of these proceedings or (2) to the extent that it has entered into the public domain otherwise than by virtue of a breach of undertaking or (3) with the written consent of the Claimant's solicitors."

9. However, I gained the impression from the Defendant's skeleton argument before the hearing on the 19 December that it was not prepared to continue any undertaking in respect of Confidential Schedule 1. Further, on that day a witness statement of Ms

Elizabeth Hartley, a partner in the Defendant's solicitors, was served. That statement exhibited extracts from the Clarence House website showing official visits made by the Claimant and giving their dates, a press notice dated 18 October 2005 and extracts from the biography of the Claimant by Jonathan Dimbleby. In the light of this evidence it appeared that it was not accepted that any of the information contained in Confidential Schedule 1 was confidential.

10. At the hearing on 19 December I was taken to some of the materials exhibited to the statement of Ms Hartley. These do indeed show that the visits which the Claimant has made are in the public domain. It is also in the public domain that the Claimant makes private journals. However, the materials do not identify the journals written by the Claimant and taken by Ms Goodall and delivered into the hands of the Defendant. Nor has the information come into the public domain in any other way. This is the information which is set out in Confidential Schedule 1 and which the Claimant seeks to protect pending the full hearing of the summary judgment application. The fact that the Claimant has written particular journals which have been taken by Ms Goodall is personal private information of a sensitive nature. Accordingly, it is, at least arguably, confidential private information which the Claimant is entitled to protect.

11. I should also note that during the course of the hearing on the 19 December, I understood counsel for the Defendant to accept that, contrary to the impression I had gained from the skeleton argument, the undertaking offered in the letter of 9 December and to which I have referred would be continued over until the summary judgment application. Indeed counsel made clear it was accepted that the contractual undertaking given remained binding on the Defendant until that time. Further, the Defendant accepted that, until that time, it would maintain as confidential the identities of the journals listed in Confidential Schedule 1. However, it submitted both at the hearing on 19 December and at the further hearing on 21 December that this information was not confidential in character. For the reasons I have given, however, I am satisfied that at this stage of the proceedings the Claimant has shown an arguable case that the information which is set out in Confidential Schedule 1 is entitled to protection. Once again, there is no suggestion that preservation of the confidentiality of this information over until the hearing in February will cause the Defendant any damage.

12. I turn then to consider the request for an order pursuant to CPR 31.22. This reads:

> "31.22 (1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where –
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> a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
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> b) the court gives permission; or
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> c) the party who disclosed the document and the person to whom the document belongs agree.
>
> (2) The court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the

> document has been read to or by the court, or referred to, at a hearing which has been held in public.
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> (3) An application for such an order may be made –
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> a) by a party; or
>
> b) by any person to whom the document belongs."

13. Counsel for the Claimant requested that I make an order pursuant to CPR 31.22 over until judgment on the summary judgment application restraining (subject to certain savings) the publication or disclosure of the information contained in pages 1 and 2 of Confidential Exhibit 2 and of the identities of the journals listed in Confidential Schedule 1 notwithstanding the fact that these documents were referred to at the hearings held in public on 19 and 21 December and read by the court. Both parties accepted before me that it is at least arguable that this rule applies to documents which have been disclosed in circumstances such as the present. Consequently, if I had declined to make an order there was, in my judgment, a real risk that the documents and information contained in them would have ceased to be confidential because protection under CPR 31.22 (2) requires an order of the court.

14. The approach to be taken in considering a request for an order under CPR 31.22 was explained by the Court of Appeal in *Lilly Icos v Pfizer (No 2)* [2002] EWCA Civ 2; [2002] 1 WLR 2253. Of particular relevance to the present case is the following passage in the judgment of the court:

> " 25. It may be convenient to set out a number of considerations that have guided us.
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> i) The court should start from the principle that very good reasons are required for departing from the normal rule of publicity. That is the normal rule because, as Lord Diplock put it in *Home Office v Harman* [1983] AC 280 at p303C, citing both Jeremy Bentham and Lord Shaw of Dunfermline in *Scott v Scott*,
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> > "Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial."
>
> The already very strong English jurisprudence to this effect has only been reinforced by the addition to it of this country's obligations under articles 6 and 10 of the European Convention.
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> ii) When considering an application in respect of a particular document, the court should take into account the role that the document has played or will play in the trial, and thus its relevance to the process of scrutiny referred to by Lord Diplock. The court should start from the assumption that all documents in the case are necessary and relevant for that purpose, and should not accede to general arguments that it would be possible, or substantially possible, to understand the trial and judge the judge without access to a particular

document. However, in particular cases the centrality of the document to the trial is a factor to be placed in the balance.

iii) In dealing with issues of confidentiality between the parties, the court must have in mind any "chilling" effect of an order upon the interests of third parties: see paragraph 5 above.

iv) Simple assertions of confidentiality and of the damage that will be done by publication, even if supported by both parties, should not prevail. The court will require specific reasons why a party would be damaged by the publication of a document. Those reasons will in appropriate cases be weighed in the light of the considerations referred to in sub-paragraph (ii) above.

v) It is highly desirable, both in the general public interest and for simple convenience, to avoid the holding of trials in private, or partially in private. In the present case, the manner in which the documents were handled, together with the confidentiality agreement during trial, enabled the whole of the trial to be held in public, even though the judge regarded it as justified to retain confidentiality in respect of a significant number of those documents after the trial was over. The court should bear in mind that if too demanding a standard is imposed under CPR 31.22(2) in respect of documents that have been referred to inferentially or in short at the trial, it may be necessary, in order to protect genuine interests of the parties, for more trials or parts of trials to be held in private, or for instance for parts of witness statements or skeletons to be in closed form.

vi) Patent cases are subject to the same general rules as any other cases, but they do present some particular problems and are subject to some particular considerations. As this court pointed out in *Connaught*, patent litigation is of peculiar public importance, as the present case itself shows. That means that the public must be properly informed; but it means at the same time that the issues must be properly explored, in the sense that parties should not feel constrained to hold back from relevant or potentially relevant issues because of (legitimate) fears of the effect of publicity. We venture in that connexion to repeat some words of one of our number in *Bonzel v Intervention Ltd* [1991] RPC 231 at p234.27:

> "the duty placed upon the patentee to make full disclosure of all relevant documents (which is required in amendment proceedings) is one which should not be fettered by any action of the courts. Reluctance of this court to go into camera to hear evidence in relation to documents which are privileged which could be used in other jurisdictions, would tend to make patentees reluctant to disclose the full position. That of course would not be in the interest of the public."

In our view, the same considerations can legitimately be in the court's mind when deciding whether to withdraw confidentiality from documents that are regarded by a party as damaging to his interests if used outside the confines of the litigation in which they were disclosed."

15. It is apparent that very good reasons are required for departing from the normal rule of publicity. In the present case such good reasons have, in my view, been shown. The documents in issue are closely related to the very subject matter which the Claimant is seeking to protect by means of this action for breach of confidence. In my judgment, and for the reasons I have given, the Claimant has established at this stage at least an arguable case that they contain private confidential information of a sensitive nature.

16. I must also take into account the part that the documents have played and are to play in the proceedings. At this stage of the proceedings I have only been concerned to provide directions to allow the summary judgment application to proceed to an expeditious and just conclusion. The directions as to the serving of evidence were in fact agreed between the parties. Accordingly the documents have played a minor role in the proceedings to date. The hearing of the summary judgment application will take place in the relatively near future. At the hearing of that application I consider it likely that third parties will be able to understand the issues without access to the particular details of the documents which the Claimant is concerned to protect. In any event, however, it will be open to the judge who hears the application to make such further or other order that he may consider appropriate in all the circumstances and in the light of all the evidence and submissions advanced by the parties.

17. It is also necessary to consider the "chilling effect" of any order upon third parties. In the present circumstances the documents are limited in number and clearly identified. There is, in my judgment, little prospect of them now coming into the hands of third parties.

18. I have also been conscious that simple assertions of confidentiality should not prevail. However, for the reasons I have given, the documents in issue are in my judgment, at least arguably confidential. At this stage of the proceedings I am satisfied that the Claimant has a genuine interest in seeking to prevent the publication of sensitive private information of a confidential nature.

19. Finally, I have had regard to the fact that it is desirable to avoid holding hearings and trials in private. At the present time I see a real prospect of these proceedings being held in public provided that appropriate safeguards are put in place to protect the information contained in the documents in issue and the information which is the subject of the claim.

20. For all these reasons I came to the clear conclusion that I should make the order sought under CPR 31.22 restraining the publication or disclosure of the information contained in pages 1 and 2 of Confidential Exhibit 2 and of the identity of the journals listed in Confidential Schedule 1 over until judgment on the summary judgment application or further order in the meantime, and I made an order accordingly.