Neutral Citation Number: [2008] EWHC 1542 (QB)

Case No: HQ08X00820

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 July 2008

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

MINISTRY OF DEFENCE **Claimant**

- and -

BENJAMIN SIMON GLAIRE GRIFFIN **Defendant**

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- -

Robin Tam QC, Martin Chamberlain and **Oliver Sanders** (instructed by **The Treasury Solicitor**) for the **Claimant**
Keir Starmer QC and **Alex Bailin** (instructed by **Leigh Day & Co**) for the **Defendant**

Hearing dates: 19-20 June 2008

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Judgment

Mr Justice Eady :

1. The Ministry of Defence has brought a claim against Mr Ben Griffin, a former soldier, based on allegations that he has breached a confidentiality agreement and also, irrespective of contract, that he is in more limited respects in breach of an equitable duty of confidence. There is a claim for a permanent injunction, restraining any further breaches, and also for an account of profits and/or damages, for delivery up and other ancillary relief.

2. On 19 and 20 June 2008 I heard the Claimant's application (issued on 29 February 2008) to extend the terms of an interim injunction pending final determination. The injunction was first granted without notice by Openshaw J on 28 February and it has been renewed subsequently on various occasions. The order in effect at the moment

is that granted by Sullivan J on 8 April. The hearing before me represented the first opportunity for the parties to develop their respective cases.

3. Mr Griffin served in the armed forces from 28 February 1997 until 17 June 2005. He volunteered to serve in the United Kingdom Special Forces ("UKSF"). His first attempt was unsuccessful, although for the purposes of the selection course he served with UKSF for a short period between 20 January and 12 February 2001. Later, he served from 12 July 2003 to 17 June 2005.

4. It is obvious that those who apply to join and serve with UKSF do so on a voluntary basis. They fulfil particular specialised functions relating to counter-terrorism, surveillance and reconnaissance, offensive action and the provision of support and influence. The evidence before me consisted principally of a witness statement from the Director of UKSF, who was referred to as BC. It is clear that much of the work is sensitive and requires that they operate secretly.

5. Since October 1996 anyone serving with or joining the UKSF, or rejoining after a period of absence, has been required to sign a confidentiality agreement. Indeed, Mr Griffin signed one on 21 January 2001, for the purposes of his original application, and one on 12 June 2003 when he joined on a more permanent basis. The introduction of these agreements was popular with the vast majority of those serving in UKSF because there had been a number of unauthorised disclosures (notably in the memoirs of Sir Peter de la Billiere and a book called "Bravo Two Zero"). The background does not matter much for present purposes, although it has been fully explained in evidence. There is also a summary of it contained in the opinion of Lord Hoffmann in *'R' v Attorney-General* [2003] EMLR 24 at [2]-[5].

6. The Claimant's complaint is that Mr Griffin, since his discharge in 2005, has made a number of unauthorised public disclosures and statements touching to a greater or lesser extent upon matters which he experienced or which came to his knowledge through his service with UKSF – most notably in March 2006 and February 2008. The object of the present application is to prevent any further such disclosures without going through the prescribed clearance procedure (to which I shall shortly turn). Mr Griffin has made it clear in his evidence that he has acted throughout for reasons of conscience, and without any personal gain to himself. Moreover, he reserves the right to make any further disclosures or contributions to public debate in accordance with his own judgment. He has no wish to harm the interests of this country or those who serve in the armed forces. I am quite prepared to proceed on that premise, there being no evidence to the contrary.

7. I have deliberately refrained from going into detail as to the nature of the Defendant's earlier revelations, even though they have been published in the media, and from identifying the nature of the damage which the MOD witnesses say has already been caused and that which may be caused by similar future revelations. It is not necessary to go into them since the issues can be addressed in the light of established principle. Furthermore, although much of the hearing before me took place in private, and with the normal recording machine switched off, I thought it important that the terms of my judgment should be, as far as possible, open and accessible to anyone who might be interested in the subject.

8. I believe I can go so far as to say, in the most general terms, that some of the Defendant's past disclosures have related to matters of general knowledge, while others undoubtedly reflected information which has come into his possession through his experience of serving in UKSF at the times I have indicated. Some of what he has published consists in the expression of opinion about matters of public policy, but he also makes some general allegations of wrongdoing.

9. The essential issue before the court is whether Mr Griffin is permitted, as a matter of law, to exercise his own judgment in deciding what information is covered by his duty of confidence (whether contractual or otherwise) or, for that matter, in determining whether there is a wider public interest overriding his obligation. The Claimant's case is that the contractual obligations he voluntarily accepted, and signed up to, are effective to take the matter out of his hands.

10. I turn next to the material terms of the contract. It is accompanied by explanatory notes, from which I shall also need to cite certain passages. The material words in the agreement are as follows:

> "In consideration of my being given a (continued) posting in the United Kingdom Special Forces from [date] by MOD, I hereby give the following solemn undertaking binding me for the rest of my life:-
>
> (1) I will not disclose without express prior authority in writing from MOD any information, document or other article relating to the work of, or in support of, the United Kingdom Special Forces which is or has been in my possession by virtue of my position as a member of any of those Forces.
>
> (2) I will not make any statement without express prior authority in writing from MOD which purports to be a disclosure of such information as is referred to in paragraph (1) above or is intended to be taken, or might reasonably be taken, by those to whom it is addressed as being such a disclosure.
>
> (3) I will assign to MOD all rights accruing to me and arising out of, or in connection with, any disclosure or statement in breach of paragraph (1) or (2) above.
>
> (4) I will bring immediately to the notice of MOD any occasion on which a person invites me to breach this contract."

11. The explanatory notes are supplied to all those required to sign up and they explain the obligations being undertaken very fully and in clear language. For example, it is necessary to have in mind paragraphs 14 and 20:

> "14. The contract prohibits you from making, without prior MOD authority, any disclosures in any form about the

> work of the UKSF, special units, and of sensitive organisations and about those who work in support of them. The MOD will not hesitate to seek an injunction to prevent anyone publishing material in breach of contract.
>
> …
>
> 20. It is also of concern that individual members and former members of the UKSF and special units have relied upon their own judgement in making such disclosures and have not sought, or have been willing to accept, the judgement of MOD about what is and is not damaging. It is important that all present and past members of the UKSF, of special units and of units acting in their support understand and acknowledge that related information is compartmentalised and tightly controlled so that even many serving members are not in a position to understand fully the damage which even simple disclosures can cause. Former members are even less well placed and rarely in a position to understand fully how far the techniques etc, in force during their service remain relevant to current operations and capabilities … "

12. It will thus be apparent that there is provision for applying for and obtaining express prior authority in writing ("EPAW"). Accordingly, the contractual framework is not intended to represent an unqualified prohibition on disclosures in the categories contemplated in Clauses (1) and (2). The contract signer in question is simply required to go through the clearance procedure first. It is recognised, at least in general terms, that it is no part of the MOD's purpose to prevent the proper investigation of criminal activity or other wrongdoing. Moreover, I had evidence before me from Lt Col Wassell of the Royal Military Police ("RMP"), who emphasised the commitment of that body to investigating allegations of wrongdoing within its remit. What the contract provides is that the MOD shall have the right to consider any proposed disclosures and to exercise its own judgment on whether they should be permitted. Contract signers are not allowed to make their own independent judgments. The decision of the MOD, upon considering any such application, must not be reached in an arbitrary or routine manner. It is clear also that there would be the opportunity for judicial review if a contract signer remains dissatisfied with the way in which his application has been approached.

13. Mr Griffin has never approached the MOD in order to seek EPAW to make any of his statements. Nor is it the case that he has ever raised any of his concerns as to allegations of misconduct with any appropriate investigative authority.

14. It appears that Mr Griffin does not fully trust the systems in place. He suspects that the MOD would take an unduly narrow view as to the scope of his permitted disclosures and that, even if he were permitted to raise matters for the limited purpose of reporting them to the appropriate investigative authorities (e.g. the RMP), they too would not exert themselves in investigating or exposing wrongdoing. In any event,

insofar as his expressed concerns have primarily been about the conduct of the American soldiers in Iraq, there would be no authorities within the United Kingdom having jurisdiction to deal with them.

15. These problems have been the subject of relatively recent consideration by courts of high authority both here and in New Zealand. It is necessary for me to take these authorities fully into account.

16. It may be noted that the obligations imposed by the standard contractual provisions in Clauses (1) and (2) echo the wording contained in s.1 of the Official Secrets Act 1989. It is clearly intended to achieve the same public policy objectives, in the interests of national security, although to be enforced through the remedies available in civil litigation rather than by way of criminal sanctions. The parallel is of some importance, however, since any case law giving guidance on the scope of the obligations imposed under the 1989 Act, and their compatibility with the European Convention on Human Rights and Fundamental Freedoms, may be of value when addressing similar considerations raised by the contract.

17. It is not surprising that Mr Tam QC, representing the Claimant, has placed considerable reliance upon two such cases in support of his interpretation of the Defendant's obligations and their enforceability. I turn first to *'R' v Attorney-General*, cited above, concerning an appeal from New Zealand, which addressed the terms of the very contract now under consideration. There are significant differences in the underlying factual circumstances, but the discussion of the interpretation and enforceability of its provisions is nonetheless pertinent.

18. The contract signer had already been serving for some time in the UKSF when he was asked to sign the contract and left shortly afterwards. He raised a defence (of no relevance to the present case) to the effect that he had signed the agreement under duress and that there had been undue influence. It was said that the bargain was unconscionable and that there had been a lack of consideration. No such argument is raised in the present case. Nor could it be. This Defendant signed voluntarily and on the basis that it was an express condition of his being permitted to join and serve with the UKSF. As to the scope of the contractual restrictions, it was argued at trial and in the New Zealand Court of Appeal that they could not be construed as extending beyond "information" which could be characterised as confidential or sensitive. By the time the matter reached the Privy Council, this argument had been abandoned. It had been recognised by the court in New Zealand that the contract clearly covered *all* "information" and that the more restrictive interpretation contended for would involve rewriting the contract.

19. It is necessary to have in mind the clearance procedures for which the contract provides, however, since the MOD would be entitled to conclude, on an application for EPAW, that the particular information could be disclosed because it was not *in its view*, or was no longer, confidential or sensitive. In any given case, it might come to such a conclusion because, for example, the information was of a trivial nature, or because it had genuinely entered the public domain, or because there was a legitimate public interest requiring publication.

20. Considerations of this kind correspond to the "limiting factors" described by Lord Goff in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109 at

p.282. Those are criteria which the courts regularly apply when deciding whether or not an injunction should be granted to restrain the publication of information which has about it the necessary "quality of confidence". Such arguments have been addressed to me, on the present application, by Mr Starmer QC with considerable force and cogency. What is critical to the present case, on the other hand, is that under the contractual arrangements the MOD has a right, at least in the first instance, to make judgments of that kind for itself. In the background is the safeguard, where appropriate, of an application for judicial review. It is at that stage, in its supervisory jurisdiction, that the court would be able to address these criteria against the background of the individual circumstances. The underlying rationale of the contractual arrangements is that the MOD's right to exercise its own judgment should not be bypassed.

21. The second important case cited by Mr Tam is the decision of the House of Lords in *R v Shayler* [2003] 1 AC 247. That makes plain that the terms of s.1(1) and (2) of the Official Secrets Act 1989 are sufficiently clear to qualify under Article 10(2) of the European Convention as restrictions on freedom of speech that are "prescribed by law". As I have said, these restrictions correspond to those imposed under the relevant clauses of the contract now under consideration. More generally, also, the speeches explain why it is so important, because of the special nature of their work, that the security and intelligence services should be truly secure with regard to the confidential information handled. The point hardly needs to be expanded but it is perhaps appropriate to cite the words of Lord Hope at [68]:

> "Lives may be put at risk, sources of information compromised, operations undermined and vital contacts with friendly foreign intelligence agencies terminated. These points need not be elaborated. It is clear that the state is entitled to impose restrictions on the disclosure of information by members or former members of those services who have had access to information relating to national security, having regard to their specific duties and responsibilities and the obligation of discretion by which they are bound: *Leander v Sweden* 9 EHRR 433, para 59; *Hadjianastassiou v Greece* 16 EHRR 219, paras 45-47. The margin of appreciation which is available to the contracting states in assessing the pressing social need and choosing the means of achieving the legitimate aim is a wide one: *Leander v Sweden*, para 59; *Esbester v United Kingdom* 18 EHRR CD 72, 74. The special nature of terrorist crime, the threat which it presents to a democratic society and the exigencies of dealing with it must also be brought into account: *Murray v United Kingdom* 19 EHRR 193, para 47."

22. Similar reasoning can naturally be applied to the work of the UKSF. It is true that Lord Hope went on to express some doubt as to whether the mechanisms in place at that stage, within the security service, were sufficiently "sensitive" to take account of individual circumstances. Nevertheless, he concluded (at [72]-[75]) that these concerns could be met by the availability of judicial review – as now more finely tuned for the analysis of Convention rights and assessing proportionality.

23. It is against this background that I need to have in mind the requirements of s.12 of the Human Rights Act 1998. If the Defendant's right of freedom of expression (as guaranteed by Article 10 of the Convention) is engaged by the present application to restrict his right of disclosure, it behoves me to ask the question, as in the case of any other such interim application, whether the Claimant is likely to succeed at trial in obtaining the relief it now seeks: s.12(3). (Mr Tam did not accept that the Defendant's Article 10 rights are engaged. He reserved his position on the basis that those rights may well have been waived on signing the agreement. I will proceed, however, on the basis that s.12(3) applies.)

24. It is important to remember that the relief sought is not a blanket ban on the Defendant's right to publish relevant information, but only to require him to go through the clearance procedure prescribed by the contract. The court is being asked to do no more than enforce the terms of a contract which has been held, both in the New Zealand Court of Appeal and in the Privy Council, to be enforceable.

25. At this stage, therefore, I am in effect being asked to ensure that the Defendant applies for EPAW before making (in advance of trial) any disclosure contemplated by the contract. It would be inappropriate for the court now to anticipate the outcome of any judgment that might be made on an EPAW application or, for that matter, to second-guess the result of a hypothetical judicial review application (following a hypothetical EPAW decision).

26. It is also relevant to have in mind, when considering Lord Goff's "limiting factors", that there is sometimes a significant distinction to be drawn between an application based merely upon an equitable duty of confidence and an application founded upon a contract freely entered into by a consenting adult. The distinction is illustrated in such cases as *Attorney-General v Barker* [1990] 3 All ER 257, *McKennitt v Ash* [2008] QB 73 and *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57. A contract may embrace categories of information within the protection of confidentiality even if, without a contract, equity would not recognise such a duty. Moreover, in the present case, in a confidential schedule to the particulars of claim, the Claimant distinguished between classes of information covered by the contract and the more limited material to which an equitable duty of confidence would extend.

27. I was reminded in this context of the statement of principle set out by Lord Cairns in *Doherty v Allman* (1878) 3 App Cas 709, 720:

> "If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury – it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves."

28. It is right to acknowledge that the recent cases I have cited were primarily concerned with personal information such as would be protected by Article 8 of the Convention – which the present case is almost certainly not. In particular, I would accept that the subject-matter of the Defendant's earlier disclosures is, in a general sense, of public interest. At this stage, however, that is irrelevant. What matters is that the MOD has a contractual right to make a judgment about any proposed disclosure before deciding to grant or withhold EPAW.

29. The authorities have acknowledged that there is a "bright line" rule preventing the unauthorised disclosure of information by members and former members of such bodies as the security and intelligence services and the UKSF: see e.g. *Attorney-General v Guardian Newspapers Ltd (No 2)* at p.769, *per* Lord Griffiths; *Lord Advocate v The Scotsman Publications Ltd* [1990] 1 AC 812, at p.828, *per* Lord Jauncey. That too is a matter of public interest. Moreover, several of the authorities cited before me have explained the public policy considerations underlying such a rule and also how it is, in the light of those factors, compatible with the requirements of the European Convention. Similar considerations underlie the exemption of the UKSF expressly included within the terms of s.23(3)(d) of the Freedom of Information Act 2000. More to the point, they are also exempted from the "whistle blowing" provisions of the Public Interest Disclosure Act 1998. If Mr Starmer's argument were correct, it would effectively nullify that exemption.

30. It is instructive to recall the explanation given in paragraph [36] of the Board's opinion, in the context of the very same contractual regime, in *'R' v Attorney-General*:

> "It is to be noted that neither the New Zealand courts nor their Lordships were invited to consider whether the MOD had acted unlawfully in refusing to consent to publication. The whole basis of R's case has been a challenge to the validity of the contract and not to the way it has been performed. There is no contractual proviso that consent is not to be unreasonably refused; nor do their Lordships think that one could be implied. Nevertheless, an unreasonable refusal of consent by the MOD could have been challenged as a matter of public law and the appropriate tribunal for such a challenge would have been … the administrative court in England. The principles upon which that jurisdiction should be exercised were recently discussed in *R v Shayler* … Of course the considerations which the MOD are entitled to take into account in deciding whether to give consent under the confidentiality agreement are different from those which it may take into account under the Official Secrets Act 1989. As the history of this matter shows, the agreement was intended to prevent the disclosures which would not necessarily be in themselves damaging to the public interest and might even be as to matters already in the public domain. It had the broader object of preventing public controversy which might be damaging to the efficiency of the Special Forces. The United Kingdom Parliament has also taken the view that information about the Special Forces is in a special

> category: see 23(1) and (3)(d) of the Freedom of Information Act 2000, which declares information relating to the Special Forces to be 'exempt information', excluded from the general right to information under section 1(1)(b)."

31. This passage illustrates clearly why Mr Starmer's arguments based upon public interest and public domain, persuasive though they were, are in the end irrelevant (at least at this stage).

32. So too, his argument to the effect that the disclosures already made by the Defendant in 2006 and 2008 are of such a general nature, and relate to matters so widely known, that they cannot possibly have done any damage to the national interest or to the efficiency or wellbeing of the UKSF. He was unable to comment on any future disclosures which his client may make, and the argument was based entirely on what has been published hitherto. That is because no indication has been given by the Defendant as to what he wishes to publish, or may wish to publish, in the future. He merely reserves his right to publish whatever he considers appropriate – according to his own judgment.

33. There was evidence before the court from BC and another witness, described merely as Soldier A, which set out why it was, in their view, that the disclosures already made had indeed been damaging. There were a number of categories of harm or potential harm. These covered such matters as morale; risks to those currently engaged in military activity abroad; the undermining of confidence of those serving in the UKSF in their colleagues; the possibility that others might follow suit and disclose confidential information; the creation of suspicion or lack of trust on the part of United Kingdom allies.

34. As it happens, I did not find much of this very convincing. Some of what the Defendant has revealed was anodyne and most was general in nature. Also, similar allegations of wrongdoing have been canvassed publicly in the past. But it does not matter what I think. I am no more qualified than any other citizen to make a judgment on the subject. What is important is that the right to make that judgment is reserved under the contractual framework to be made by those more qualified, or at least more experienced, in the field.

35. In my judgment, the Defendant must comply with his contractual obligation in the event that he wishes to make further disclosures and make an application for EPAW. It may very well not succeed. Indeed, there is one passage in Mr Tam's submissions which gives a broad hint as to the likely outcome:

> "In this case, Mr Griffin's disclosures and/or statements to the world at large cannot be said to have been 'required' in the public interest. Further, to the extent that he made allegations of wrongdoing, these could have been disclosed (with EPAW) to an appropriate body for investigation and the public interest was not served by, and did not 'require', their unauthorised disclosure to the world at large."

Nevertheless, the plain obligation on the Defendant is to take matters stage by stage; to make an application for EPAW first and then, if he does not like the outcome, to consider with his advisers the possibility of an application by way of judicial review.

36. At one stage in his argument, Mr Starmer suggested that it was incumbent upon the Claimant to make clear what it was anticipating would be the outcome of any EPAW application and/or of any onward reference (assuming EPAW to be granted) to an investigating authority. This cannot be right. It is not appropriate to anticipate or speculate as to what the outcome might be. There is a passage in the speech of Lord Bingham in *R v Shayler*, at [36], which illustrates, by way of analogy, how important it is in this context to go through the various stages one by one, as prescribed by the contract:

> "In my opinion the procedures discussed above, properly applied, provide sufficient and effective safeguards. It is, however, necessary that a member or former member of a relevant service should avail himself of the procedures available to him under the Act. A former member of a relevant service, prosecuted for making an unauthorised disclosure, cannot defend himself by contending that if he had made disclosure under section 7(3)(a) no notice or action would have been taken or that if he had sought authorisation under section 7(3)(b) it would have been refused. If a person who has given a binding undertaking of confidentiality seeks to be relieved, even in part, from that undertaking he must seek authorisation and, if so advised, challenge any refusal of authorisation. If that refusal is upheld by the courts, it must, however reluctantly, be accepted."

Although the immediate context in that case was that of the criminal sanctions available under the Official Secrets Act, the reasoning is equally valid in the present case.

37. Suppose EPAW were given to the limited extent of enabling the Defendant to report his allegations of wrongdoing to the appropriate investigative authorities, and they were to drag their heels in pursuing the matter appropriately. In those circumstances, the Defendant's course of action would be (at least in theory) to renew his application for EPAW to disclose the material on a wider basis: see e.g. *Lion Laboratories v Evans* [1985] 1 QB 526, 538A-C, 539E-540B, 544E-H, 551G-H, 552H-553C; *R v Shayler* at [29]. It is not appropriate for the court to circumvent these prescribed steps.

38. These are the reasons why I informed the parties, at the close of argument on 20 June, that I felt bound to continue the terms of the injunction until trial or further order. Having regard to s.12(3) of the Human Rights Act, I concluded that the Claimant was likely to succeed in enforcing the contractual clearance procedure at trial.

39. I should like to conclude by expressing my thanks to Mr Tam and Mr Starmer for their full and cogent arguments both oral and in writing.