

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**SITTING IN PRIVATE**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22 April 2010

**Before :**

**THE HONOURABLE MR JUSTICE EADY**

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**Between :**

**TUV**

**Applicant**

**- and -**

**PERSON OR PERSONS UNKNOWN**

**Respondent(s)**

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**Richard Spearman QC (instructed by Schillings) for the Applicant**

Hearing date: 14 April 2010  
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**Judgment**

**Mr Justice Eady :**

1. On 14 April 2010, I heard further submissions in this case on the return date set following the grant of an interim injunction on an *ex parte* basis, on 30 March, against “persons unknown”.
2. The original order was based primarily upon claims to be brought to restrain infringement of privacy and possible breaches of copyright. The circumstances were stark and simple, in that during a burglary the previous night various pieces of equipment had been stolen. In particular, a laptop belonging to the Applicant was taken on which information was stored electronically, including by way of visual images. Some of these were of the Applicant and some of other persons. A friend has made an assignment of copyright to her in anticipation of this litigation (in so far as the copyright may have been vested in the friend).
3. It is plain that neither the persons who stole the equipment, who are still unidentified, nor any third parties to whom they may choose to pass it on would have any rights to view, use or exploit the stored material. In the absence of any evidence to the contrary, I should certainly proceed for present purposes on that assumption.

4. It is difficult to imagine what countervailing public interest or competing Convention right could possibly outweigh the Applicant's reasonable expectation of privacy in respect of the stored information.
5. Likewise, in so far as copyright is involved, it is difficult to conceive what ground for resisting injunctive relief there could be by way, for example, of fair dealing or any other defence specific to copyright.
6. As to the physical objects stolen, the Applicant would plainly have a right to the return of the items, since they are her property. This is a separate issue, of course, from those arising in connection with the stored information.
7. The order granted on 30 March contained provisions relating to anonymity (see paragraph 3) and restricting access to the documents on the court file (see paragraph 4). There were also imposed obligations on the Respondents, once served, to provide information and deliver up the property and/or copies of anything that may have been extracted or derived from the stored material (see paragraphs 7 and 8). These provisions are continuing and would not expire on the return date.
8. The relief sought on the return date was concerned with the following matters:
  - i) The continuation until trial or further order of what Mr Spearman QC, for the Applicant, refers to as the "principal protection"; that is to say, restrictions imposed upon the Respondents preventing their dealing with, or parting with possession of, the goods identified as having been stolen in the burglary on the night of 29-30 March 2010; restrictions upon infringement of copyright; restrictions upon the use or communication of any information derived from the stolen goods and also upon revealing the fact that the Applicant had an interest in these proceedings (i.e. restraining any reference to her identity as the Applicant); and a prohibition against causing or authorising any other person to do any of those acts.
  - ii) An extension was sought until 21 days after the identification of the Respondents of the time within which the claim form is to be served upon them.
  - iii) A restriction in the following terms:

"Pursuant to CPR 25 APD 9.2, ... , the Applicant shall be required to provide the legal advisers of any third party served with a copy of this Order promptly on request with (a) a copy of any materials read by the Judge, including material prepared after the hearing at the direction of the Judge or in compliance with the Order and/or (b) a note of the hearing on their written undertaking to use those documents and the information contained in those documents only for the purposes of these proceedings AND PROVIDED ALWAYS that before complying with any such request the Applicant shall be permitted to redact the name of the individual who assigned copyright to the Applicant."

9. Mr Spearman made a number of submissions on points raised in correspondence with one of the legal advisers to MGN Ltd, who had been notified of the terms of the order of 30 March. It will be noted that the terms of the order set out above contain a modification to the wording of CPR 25 APD 9.2, in the sense that it was provided that the Applicant's advisers need only serve documents upon the legal advisers of a third party on the provision of a written undertaking to use the documents and information contained therein only for the purposes of these proceedings. The point raised in correspondence on behalf of MGN Ltd was that this was superfluous because, it was submitted, the Applicant's interests would be sufficiently protected by the provisions of CPR 31.22 and CPR 32.12.

10. First, I turn to the provisions of CPR 25 APD 9:

“Injunctions against third parties

9.1 The following provisions apply to orders which will affect a person other than the applicant or respondent, who:

- (1) did not attend the hearing at which the order was made; and
- (2) is served with the order.

9.2 Where such a person served with the order requests—

- (1) a copy of any materials read by the judge, including material prepared after the hearing at the direction of the judge or in compliance with the order; or
- (2) a note of the hearing,

the applicant, or his legal representative, must comply promptly with the request, unless the court orders otherwise.”

11. I next need to consider the terms of CPR 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—

- (a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
- (b) the court gives permission; or
- (c) the party who disclosed the document and the person to whom the document belongs agree.”

It was submitted by Mr Spearman that these provisions would offer his client, or any applicant in her position, no protection in respect of documents passed to a third party in accordance with CPR 25 APD 9.2 or as to the information contained in such

documents. He submits, therefore, that the interpretation by the legal adviser to MGN is wrong.

12. The first reason prayed in aid by Mr Spearman is that it is clear that the wording of CPR 31.22(1) applies only to parties. In the present case, MGN Ltd is a third party (as contemplated under the practice direction) and not, therefore, a “party” to these proceedings. That is plainly correct.
13. Secondly, Mr Spearman points out that the whole context of CPR 31.22 is the “use of disclosed documents”. That is a term of art in the context of the CPR and plainly refers back to the notion of “disclosure”, as defined in CPR 31.2 (“A party discloses a document by stating that the document exists or has existed”). That has no application to the present circumstances. We are not concerned with a document “disclosed” to MGN Ltd in accordance with the provisions of CPR Part 31. I agree with this submission also.
14. The other provision cited by the MGN lawyer was CPR 32.12(1):

“Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.”

(None of the exceptions is relevant for present purposes.)
15. I do not see that this would address Mr Spearman’s legitimate concerns either. The wording would appear to contemplate witness statements served on parties. It is doubtful whether materials supplied pursuant to CPR 25 APD 9.2 would properly be described as “served” in any event. But, assuming that the term would be apt, such protection would only apply to witness statements. It would not cover other “materials” or a note of the hearing. Moreover, it is important to be alive to the distinction between a document that may be supplied under the provision and, on the other hand, the information contained within it. Mr Spearman’s client would have a reasonable expectation of confidentiality in respect of both.
16. Accordingly, I would accept that it is appropriate in this case to include the provision for an undertaking to protect the use to which documents are put, once provided under the terms of CPR 25 APD 9.2, and as to the information contained within them. It will often be reasonable to include it as a protection for the relevant claimant’s Article 8 rights. It is difficult to imagine circumstances (and certainly there are none in the present case) where such a restriction upon the relevant third party would constitute a disproportionate interference with his or her rights.
17. I turn to the next point raised by MGN Ltd on which Mr Spearman sought the guidance of the court. It is one that arises with some regularity nowadays. It concerns the extent to which it is, or may be, appropriate to give prior notification of an application for an injunction to restrict a defendant or defendants (sometimes as yet unidentified) from communicating information alleged to be private or confidential to any media third party upon whom it is intended to serve any order obtained. The question has been considered in a number of cases, including *X & Y v Persons Unknown* [2007] EMLR 290 at [18]-[19], *WER v REW* [2009] EMLR 304 at [18]-[19] and *Terry v Persons Unknown* [2010] EWHC 119 (QB) at [118]-[119].

18. The contention of the MGN lawyer is that it is, or should be, an obligation upon any applicant who intends to serve media third parties quite simply to give advance notification of the *ex parte* hearing to each and every one of them. This is based in part, I believe, on remarks I made in *X & Y v Persons Unknown*, cited above, at [18]:

“It is not for me to lay down practice directions, but what I can say is that a proper consideration for the Art.10 rights of media publishers, and indeed their rights under Art.6 as well, would require that where a litigant intends to serve a prohibitory injunction upon one or more of them, in reliance on the *Spycatcher* principle, those individual publishers should be given a realistic opportunity to be heard on the appropriateness or otherwise of granting the injunction, and upon the scope of its terms. As is well known, it is relatively easy for the media in such circumstances to instruct their lawyers to come to court at short notice and, if they are content to do so and no conflict arises, to arrange for common representation (just as, here, Mr Spearman represents the interests both of MGN and NGN).”

19. Taken at face value, it is hardly surprising that a reader would infer from this passage that there is indeed an obligation to give prior notice to all relevant third parties. The matter was later considered, however, by Sir Charles Gray in *WER v REW*, also cited above, at [19], who observed:

“ ... Eady J cannot have been contemplating an obligation being imposed on individual claimants, who may be of limited means, to arrange through their legal advisers to serve what might be a substantial body of evidence on a large number of media non-parties. It seems to me that the obligation to serve them must, as a matter of common sense and economy, be confined to those media organisations whom the claimant has reason to believe have displayed an interest in publishing the story which the claimant is seeking to injunct.”

20. As Mr Spearman points out, if notified, the non-parties may instruct lawyers (separately or jointly) and prolong the hearing. Moreover, if the applicant fails to obtain an injunction, they may then seek to recover their costs. All this, *ex hypothesi*, in circumstances in which they may not have been interested in the story in the first place. He suggests that this would be disproportionate and discourage quite legitimate attempts to protect Article 8 rights. He submits, therefore, that the law should not impose a simple blanket obligation to give prior notification to all non-parties whom the applicant would, if successful, intend to serve with the court's order.
21. This is a point of some potential importance. Hitherto, as I understand it, applicants' advisers have exercised their discretion and concentrated on serving those who are believed to have some interest in publishing the information in respect of which protection is to be sought.
22. Although he addressed these matters to an extent in *Terry*, cited above, Tugendhat J did not come to a conclusion on this particular point.

23. It is probably appropriate to have in mind the court's objective in these cases; namely, to provide a fair and practical balance between the potentially competing Convention rights of the relevant protagonists. As I pointed out in *X & Y*, it is necessary to take account of "a proper consideration for the Art.10 rights of media publishers" as well as paying due regard to the rights of an applicant under Article 6 and Article 8. That is what arises in all of these cases. When the court is confronted with a need to balance competing Convention rights, it will rarely be appropriate to adopt a blanket approach or apply a rule of thumb. Usually, it will be right to arrive at a conclusion in the light of an "intense focus" upon the particular facts: see e.g. *Re S (A Child)* [2005] 1 AC 593.
24. The question, therefore, has to be asked whether it is proportionate to require an applicant for injunctive relief to undertake, always and as a matter of course, the expense, delay and inconvenience of serving all the media organisations who may, theoretically, be affected by the grant of an injunction. As Sir Charles Gray suggested, a sensible balance of competing rights would generally be achieved by requiring them only to serve those whom they have reason to believe will have an interest in the story. They should not be required to speculate or guess, but if there are solid grounds in the light of the available evidence to think that a particular media group has shown an interest in the material, it is right that they should be notified.
25. In judging whether it is proportionate to impose an even heavier and more expensive burden upon applicants and their lawyers, it is necessary to have in mind the other protections that are available to the media. They are to an extent protected by the obligation of free and frank disclosure that rests upon an applicant's lawyers, as is illustrated in the *X & Y* case itself. Equally, they are protected by the standard provision included in such injunctions to the effect that an application can be made on very short notice to vary or discharge the order. They are also protected, of course, by the terms of CPR 25 APD 9, which I have already considered.
26. Against that background, it seems to me that the need for prior notification should be addressed according to the facts of each case. I do not think it right that an applicant's lawyers should have to give prior notification to each and every media group – simply on the basis that they *might* be interested in the story, or in the private information sought to be protected, if they hear about it. Accordingly, the law should only impose an obligation to notify those who are already believed to have shown some interest in publishing.