Neutral Citation Number: [2017] EWCA Civ 1327

Appeal Court Ref A2/2016/1450 and A2/2016/1451

Claim No HQ14D05024 & HQ15D00344

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
(SIR MICHAEL TUGENDHAT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 September 2017

Before:
LORD JUSTICE McFARLANE
LORD JUSTICE DAVIS
and
LADY JUSTICE SHARP

- -

Between:

BRUNO LACHAUX	**Claimant/ Respondent**
- and -	
INDEPENDENT PRINT LIMITED	**Defendant/ Appellant**

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION **Claim No. HQ14D05025**
BETWEEN:

BRUNO LACHAUX

Claimant/Respondent

- and -

EVENING STANDARD LIMITED

Defendant/Appellant

Adrienne Page QC and Godwin Busuttil (instructed by **Taylor Hampton Solicitors**) for the **Claimant**
David Price QC (instructed by **David Price Solicitors and Advocates**) for the **Defendants**

Hearing date: 1 December 2016

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Approved Judgment

Lord Justice Davis:

Introduction

1. The essential issue on this appeal, brought by leave granted by Laws LJ, is whether the defendants and their solicitors may retain and make use of information contained in documents which are said by the claimant to be confidential and the subject of legal professional privilege ("LPP").

2. On 18 December 2015 Sir Michael Tugendhat, sitting as a Judge of the High Court, ruled in favour of the claimant. He ordered that the documents be returned, that all copies be destroyed and that the defendants be restrained from disclosing or using any of the privileged information contained in them (subject to certain limited and specified exceptions). After a further hearing, various other provisions were included in the detailed order sealed on 15 March 2016.

3. Before us (as below) the defendants, who are the appellants, were represented by Mr David Price QC and the claimant by Miss Adrienne Page QC and Mr Godwin Busuttil.

4. The hearing before this court was held in public. However, because of the nature of the dispute it was (as below) necessary to ensure that the contents of the documents the subject of the dispute were not publicly revealed. An order in agreed terms, pursuant to s.11 of the Contempt of Court Act 1981, was made by this court at the outset of the appeal hearing on 1 December 2016. That order continues to apply. In this judgment I propose to adopt the approach of the judge in referring to the documents in question in only very general terms. This court has, however, very carefully considered for itself the contents of those documents.

Background facts

5. The background facts can, for present purposes, be but shortly recounted. Much fuller versions appear variously in other judgments of the courts relating to the libel proceedings brought by the claimant in the High Court against these defendants (and others) and to the matrimonial proceedings in the High Court between the claimant and his former wife ("Afsana").

6. The claimant is a French citizen, born in 1974. He is very highly qualified in the field of aeronautical and aerospace engineering. In 2004 he moved to Dubai, working for Panasonics Aviation Corporation. That employment ceased in 2011; latterly he has been an instructor and teacher at the Military College in Abu Dhabi.

7. The claimant met Afsana in 2008. She is a British citizen. They married in London on 26 February 2010. They lived together in Dubai. Their son, Louis, was born there on 4 April 2010.

8. The marriage very quickly fractured. On 2 May 2011 the claimant presented a divorce petition in Dubai. The relations between the parties became quite exceptionally acrimonious.

9. At all events, various articles thereafter appeared in various publications (both in print and online) in the United Kingdom. It is to be gathered that to a considerable extent these articles were based on information and allegations supplied to the media by Afsana - assisted, as is the claimant's belief, at least by her eldest son from a previous marriage. For present purposes, the relevant articles are those appearing online in the Independent newspaper on 24 January 2014 and in print in the Independent on 25 January 2014 and in print in its then sister paper "i" also on 25 January 2014. An article appeared (in print and online) in the Evening Standard newspaper on 10 February 2014.

10. On 2 December 2014 the claimant commenced libel proceedings in the High Court, founded on those articles, against the defendants. He claimed that the articles were very seriously defamatory of him.

11. A meaning hearing was held before Sir David Eady, sitting as a Judge of the High Court. On 11 March 2015 he issued his ruling as to each of these articles: [2015] EWHC 6230(QB). It is not necessary to set out his conclusions in full. But they included, with regard to the Independent and i articles, the following:

    i) the claimant had become violent towards Afsana, causing her to fear for her safety and go on the run with her child;

    ii) without justification the claimant had snatched the child back from his mother's arms and never returned him;

    iii) the claimant had falsely accused Afsana of kidnapping their son, a false charge which could result in her, unfairly and wrongly, spending time in a Dubai jail;

    iv) the claimant had been content to use Emirati law and its law enforcement system, which discriminates against women, in order to deprive Afsana of custody of and access to their son Louis;

    v) the claimant had been violent, abusive and controlling and caused Afsana to fear for her own safety;

    vi) the claimant had obtained custody of Louis on a false basis and had initiated a prosecution of Afsana in the UAE founded upon a false allegation of abduction.

    That sufficiently gives the flavour. Similar (albeit not identical) conclusions as to meaning were recorded with regard to the Evening Standard article.

12. Certain preliminary issues thereafter were directed to be heard. They came before Warby J, at a hearing at which the claimant gave oral evidence. The claimant was not cross-examined by these defendants. The decision of Warby J was given on 30 July 2015: [2015] EWHC 2242 (QB). There has since been an appeal by the defendants from that decision: which by decision of this court (handed down at the same time as this judgment) has been dismissed.

13. Various outstanding matters (including the question of costs) were adjourned by Warby J for further hearing. That hearing, and the judge's ruling thereon, took place on 21 October 2015: [2015] EWHC 3120 (QB).

The present dispute

14. On 17 July 2015 Afsana had herself issued proceedings in the High Court against the claimant and his solicitors in England, seeking return of confidential documents, primarily emails, which she alleged that the claimant had wrongfully and covertly taken from her (the claim has since been discontinued against the solicitors). The claimant put in a Defence in those proceedings dated 12 August 2015. Criticisms were made in that Defence of the formulation of the claim; and a lack of particularisation was also asserted.

15. Amongst other things, however, it was alleged in the Defence that each of the emails contained in what was called the Accessed Information (the information which was the subject of Afsana's claim) was accessible to the claimant on a computer in use by both him and Afsana in their marital home in Dubai. At paragraph 12 of the Defence this was further said:

> "Under the laws of the UAE, in which the First Defendant was and still is resident and acting when he accessed the Accessed information, the First Defendant was entitled to access the Accessed Information, in particular because the law of the UAE does not recognise the possibility of secrets between a husband and wife; because the law of the UAE entitles any spouse to investigate physical and/or emotional infidelity of the other; and/or because the First Defendant was entitled to access all the Accessed Information and to present the same during litigation in Dubai to evidence the conduct of the Claimant during their marriage and to evidence her lack of competence as a child carer."

16. For the purpose of the preliminary issue hearing in the libel proceedings before Warby J, the claimant had put in a number of witness statements. One was made on 7 July 2015. In the course of it the claimant, in one of the paragraphs, made certain observations as to why he had commenced his divorce proceedings in Dubai.

17. On 7 October 2015, shortly before the renewed hearing before Warby J, the defendants' solicitors wrote to the claimant's solicitors. They annexed a document (one of those which are the subject of the present appeal), saying about it that "our clients have been provided with the attached document from Afsana. She states that it was retrieved from the hard drive of her computer in around the end of March 2011 by a computer technician in Dubai in the course of it being repaired ….". It was asserted that the contents of that document were irreconcilable with the identified passage of the witness statement of 7 July 2015.

18. Vigorous correspondence then ensued. Amongst other things, the defendants' solicitors refused to say when the relevant documentation first came into the defendants' possession. (It has since been accepted, however, that they had in fact received it around a year before referring to it in the letter of 7 October 2015.) The applications on behalf of the claimant seeking injunctive relief against the defendants in respect of this disputed documentation, including but not limited to the document attached to the letter of 7 October 2015, were issued on 6 November 2015. They were

supported by a witness statement of the claimant of the same date (as to which there was to be no cross -examination).

19. The documentation in question essentially involved communications in January 2011 between the claimant and a French avocat based in Paris. It is sufficient for present purposes to say, as the judge said, that the documentation included a copy or draft of a letter sent by the claimant to the French avocat, which also recorded some remarks of that avocat previously made to him in a telephone conversation. It is further sufficient for present purposes to say that it related to legal advice being sought by the claimant in respect of the breakdown of the marriage and the arrangements to be made for Louis. For the purpose of the hearing before Sir Michael Tugendhat it was accepted:

    i) that the documentation had been supplied to the defendants by Afsana;

    ii) that the documentation derived from a computer in Dubai to which she had obtained access;

    iii) that LPP originally attached to the documentation.

The judgment below

20. The judge set out the background. He cited at some length from relevant authorities. He dealt in detail with the defendants' various substantive arguments. He rejected all of them. On the question of discretion, he rejected the submission that the claimant had been caught in a "blatant lie" in his witness statement. The judge said that he was not satisfied that the claimant had lied or was threatening to advance in these proceedings a factual case which he knew to be false. The judge also acknowledged the potential importance of the proposition that there is a public interest in the emergence of the truth. But, as he put it: "where LPP applies that is not of itself a sufficient public interest". He considered various other factors advanced by the defendants as to why he should not exercise his discretion to grant injunctive relief. Having done so, he concluded that none of those factors justified withholding the exercise of discretion to grant relief on equitable grounds. He made the order sought accordingly. We were told that his order as drawn up has been served on Afsana also.

Disposition

21. I am of the very clear opinion that the judge was justified in the conclusions which he reached and that there is no proper basis for this court interfering with the exercise of his discretion to grant relief as he did.

22. There can be no doubt at all that the documentation not only, on the face of it, was the confidential property of the claimant but also was the subject of LPP. As such, it ostensibly was entirely privileged. The rationale for such an outcome is explained in many cases, including the well known statements of principle in *Anderson v Bank of British Columbia* (1876) 2 Ch.D 644. In the instant case, I should add, it has not been said that there was a waiver (the subject of many of the reported cases in this field). Nor has any fraud exception, as such, been argued for.

23. In my view, the relevant law for these present purposes can sufficiently be taken from just two of the many cases placed before us.

24. In *R v Derby Magistrates Court, ex. p B* [1996] 1AC 487 an individual had been charged with (but in the event was acquitted of) murder of a girl. He had initially admitted killing her in a statement to the police. However he then retracted that admission; and stated that it was in fact his step-father who killed her. The step-father was in due course himself charged with the murder. At the committal hearing counsel for the step-father asked the original defendant about his instructions to his solicitors when initially admitting the murder.

25. The House of Lords held that the instructions were subject to LPP and, as such, were not admissible. The House of Lords rejected the suggestion that an exercise balancing the competing public interests was required. Rather, LPP was to be upheld in all cases as representing the predominant public interest and that had long been established. Thus Lord Taylor (with whom Lord Mustill, Lord Keith and Lord Lloyd on this agreed) said this at page 507 D –H:

> "The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

To like effect is the speech of Lord Lloyd, in particular at page 510 G-H. It thus was ruled that "no exception should be allowed to the absolute nature of legal professional privilege, once established" (page 508H).

26. In *Istil Group Inc v Zahoor* [2003] EWHC 165(Ch), [2003] 2 All ER 252 Lawrence Collins J carefully reviewed the authorities. He set out, at paragraphs 88 to 94 of his judgment, relevant considerations. As he said in the course of that summation, at paragraph 93:

> "In this context, the emergence of the truth is not of itself a sufficient public interest. The reason why the balancing exercise is not appropriate is because the balance between privilege and truth has already been struck in favour of the former…."

However, in the particular circumstances of that particular case the documents in question had (as was found) come into existence in furtherance of fraudulent conduct. As the judge found, "on any view" there had been a forgery and the forgery had been produced for the purposes of the litigation so as to defeat the ends of justice. Thus he declined to restrain use of the documents in question: see in particular paragraphs 112 and 115 of the judgment.

27. On the face of it, the approach adopted in those authorities, when applied to the facts of the present case, would seem to lend conclusive support for the judge's decision. But Mr Price QC for the defendants, the appellants on this appeal, sought to argue otherwise, essentially on the grounds unsuccessfully argued below. In addition, at one

stage he perhaps seemed to hint that defamation and confidence cases may somehow be special for this purpose. At all events, he emphasised the term of Article 10 (he was virtually silent about Article 8) of the Convention. No doubt such litigation has over the years acquired its own particular practices and procedures. But I reject any notion that such cases are, on points of wider principle, somehow automatically to be treated differently. They are not. At all events, in this particular context, there is in my view no basis for ascribing any different general approach to the deployment of material which is the subject of LPP than would be deployed in any other kind of case.

28. The points of Mr Price were principally these. First, he sought to say that the documentation in question showed that the cited paragraph from the claimant's witness statement of 7 July 2015 was wholly false. He said that the documentation thus was permissibly to be retained and advanced by the defendants, as going primarily to the credibility of the claimant. There are, however, in my opinion, a number of answers to that:

    i) first, the documentation antedated the witness statement by over four years. It could not possibly, in contrast with the position in *Istil*, be said to have been created in furtherance of fraudulent conduct or deception of the court. That being so, it is then not enough (as the authorities make clear) simply to assert that the information contained in those documents would be important in helping to reveal what is asserted to be the truth;

    ii) second, and in any event, my own reading of the documentation in fact leads me to precisely the same conclusion as that of the judge: it simply does not demonstrate that the claimant has been caught out in a lie. Indeed, if it were to be said to be so then it is also a point of comment that the defendants never themselves disclosed the documentation before the hearing before Warby J and never even attempted to deploy this documentation (which they by now had) in cross-examination at the hearing before Warby J;

    iii) third, I would just observe that documents going solely to credit are not ordinarily disclosable in any event.

29. Then Mr Price sought to rely on the contents of paragraph 12 of the Defence dated 12 August 2015. That was a remarkable submission. For one thing, what a party asserts foreign law to be does not make it evidence of foreign law. If the defendants wished to advance such matters by way of UAE law before Sir Michael Tugendhat it behoved them to do so in proper form, by way of evidence of an appropriately qualified expert. They did not do so. In any event, the propositions advanced in that paragraph of the Defence are not even directed at the issue of LPP: for the alleged confidential Accessed Information which was the subject of Afsana's claim against the claimant was not stated to include documentation which was the subject of LPP.

30. These points thus also of themselves dispose of Mr Price's argument that, as he sought to style it, the claimant had sought simultaneously both to approbate and to reprobate. It may be that there is evidence that the claimant himself had accessed confidential information belonging to Afsana: but there is no true equivalence, once it is appreciated that in the present case the documentation is not just confidential but also the subject of LPP.

31. There is a further, and rather obvious, point. Let it be supposed that, as his then wife, Afsana was, under UAE law, entitled to access in Dubai the claimant's confidential and privileged documents. Even if that be so - and that is wholly unestablished - on what legal basis could Afsana then be entitled unilaterally to pass such documents on to third parties such as the defendants? Mr Price could provide no convincing answer.

32. Overall, Sir Michael Tugendhat further had found (at paragraph 45 of his judgment) that he was not satisfied on the information before him that the claimant had not been frank with the court. There is no proper basis for this court rejecting that finding.

Conclusion

33. I have to say that I was not impressed by the belligerent stance and aggressive tone adopted on behalf of the defendants in the correspondence on this issue. In truth, the defendants and their solicitors had been placed in a highly sensitive position by being provided by Afsana with documentation which on its face was not just obviously confidential but also was obviously the subject of LPP. It is most regrettable that on a seeming "as of right" basis they aimed both to retain and then positively to deploy that documentation in an attempt to further, to their own perceived advantage, their position on costs and otherwise in the ongoing proceedings before Warby J. They should have been more alive to the sensitivities highlighted in this kind of case by, for example, the Court of Appeal in *Imerman v Tchenguiz* [2010] EWCA Civ 908, [2011] Fam 116.

34. The judge's reasoning thus was correct. There is also no basis for attacking the exercise of his discretion. I would uphold his judgment in all respects and dismiss this appeal.

35. I should mention that, after the hearing before us, our attention was drawn to the judgment of Mostyn J handed down on 2 March 2017 in the Family Division in proceedings between Afsana and the claimant: [2017] EWHC 385 (Fam). Both had given oral evidence before Mostyn J. In the course of his conspicuously lucid judgment Mostyn J made a number of findings very critical of Afsana. He did, however, also make findings critical of the claimant. In the course of those findings the judge found that the claimant had covertly accessed some of Afsana's emails and texts, violating her privacy in a way which was "completely unacceptable". But the judge also found that Afsana had herself done the same thing, in particular with regard to the documentation the subject of the present appeal. Mostyn J pithily concluded: "…. there is a moral equivalence between the parties' conduct concerning the violation of their personal privacy". It is, at all events, sufficient to say that, as I see it, there is nothing at all in the judgment of Mostyn J which legitimately could, or indeed in any event does, impact on my conclusion as set out above. It is also to be added that leave to appeal from that decision has since been granted by Moylan LJ.

Lady Justice Sharp:

36. I agree.

Lord Justice McFarlane:

37. I also agree.