Neutral Citation Number: [2009] EWHC 3148 (QB)

Case No: HQ09X

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2009

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

G and G	**Applicants**
- and -	
WIKIMEDIA FOUNDATION INC (A COMPANY ORGANISED UNDER THE LAWS OF THE STATE OF FLORIDA)	**Respondent**

- -
- -

Mr Thomas Croxford (instructed by **Pinsent Masons LLP**) for the Applicants
The Respondent did not appear and was not represented

Hearing dates: 25 November 2009

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Judgment

Mr Justice Tugendhat :

1. The Applicants have applied to the court for an order requiring the Respondent to disclose the IP address of a registered user of the website http://www.wikipedia.org/ ("Wikipedia"). The user in question had made an amendment to an article available on Wikipedia. I shall refer to the IP address requested as "the IP information" and to the amendment to the article on Wikipedia as "the amendment". The article in Wikipedia relates to the First Applicant and the amendment relates to both Applicants. The amendment is identified more particularly in the Order which I made at the end of the hearing.

2. The form of order the Applicants apply for is commonly called a *Norwich Pharmacal* Order. An example of one made in similar circumstances to the present is in *Totalise plc v Motley Fool Ltd* [2001] EMLR 29. It is an order that can be made against a person who is not alleged to be a wrongdoer, but who has become caught up in the wrongdoing of others, in circumstances where he may be compelled to identify, or assist in the identification, of the person who is the wrongdoer. See the White Book (2009 edn) notes to CPR 31.18.

3. Before the hearing commenced, I ordered that it be in private (having read the papers in advance). At the end of the hearing I made the order that the Respondent disclose the IP information. The orders that I made also contain provisions restricting what is to be accessible to the public on the court file, and other provisions preventing disclosure of the identity of the Applicants.

4. At the end of the hearing, I also stated that I would give my reasons in writing for not making parts of the order that had initially been sought. These are they.

THE FACTS OF THE CASE

5. The First Applicant is a mother ("the mother"), and the Second Applicant is her young child. It is the mother's case that the information which is contained in the amendment is private and confidential information of a sensitive nature concerning herself and her child. She seeks the IP information from the Respondent in order that she may identify the alleged wrongdoer who has disclosed this private material, and to apply for such legal remedy as she and her child may be entitled to prevent any further breach of their privacy and disclosure of their confidential information.

6. The background against which this application is made is that the mother, in her professional life, is in dispute with another person who is making claims against a company with which she is associated. The mother has very recently received two anonymous communications. One is a print out of a news article on a website about the conviction of a director of a company for theft in connection with expenses claims. This story has nothing to do with the mother or any company with which she is connected. But she understood it to be linked to threats to disclose information about her professional expenses made to her by the person who is making a claim against the company. The mother denies any wrongdoing relating to her claims for expenses. The second anonymous letter purports to be a copy of a letter to a third party disclosing the private and confidential information included in the amendment. The purported disclosure to the third party is ostensibly with a view to procuring that that information be published in a newspaper. It has not been published in a

newspaper. However, there have been recent occasions when journalists have stated that an individual was offering to sell a story about the mother and her child. The person who is making the claim against the company is an employee of the company with which she is associated, and the contract of employment includes a confidentiality clause.

7. In ordinary language, the mother believes that she is the subject of an attempt at blackmail. On the information before the court, she has reason to believe that. It is the experience of this court that applicants for injunctions to restrain publication of private information, and for related relief, such a *Norwich Pharmacal* order, are not infrequently in a similar situation in this respect to the mother. But even if there is no link between the person making the claims against the company, the two anonymous letters, and the amendment, the position of the Applicants is no weaker. If there is no such link, there remains a very strong case that private information has been disclosed by someone. The range of suspects would then include professional advisers.

8. In her witness statement the mother states that she has asked the person making the claim against the company whether (s)he is the person who sent the first anonymous letter received by the mother. That person denied having sent it, but the mother remained sceptical.

THE LAW

9. Particular provisions of the CPR are set out below. But the overriding provisions of the law relating to any application involving freedom of expression and open justice are Arts 6 and 10 of ECHR , and the Human Rights Act 1998 s.12, as follows:

> "Art 6 – Right to a Fair Trial
>
> …. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial ... where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> Art 10 – Freedom of Expression
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, … for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence,…
>
> s12 (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression….
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or

> which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
>
> (a) the extent to which— …
>
> (ii) it is, or would be, in the public interest for the material to be published; …"

ANONYMITY OF THE PARTIES

10. As the title to this judgment shows, I made orders giving anonymity to the Applicants. One provision which was sought, but which I did not grant, was an order giving anonymity to the Respondent.

11. There has been an exchange of letters and e-mails between lawyers for the Applicants and for the Respondent. The Respondent indicated that it would not disclose the IP information without a court order being made, but neither would it oppose the making of an order requiring such disclosure. It gave no indication that it required anonymity for itself, and I could see no grounds for giving anonymity to it. I set out below the gist of the correspondence between the Applicants' solicitors and lawyers for the Respondent.

12. There are some cases in which anonymity must be given to a respondent, because if it is not, then the naming of the respondent may indirectly enable readers who already know other information about the case to identify of the claimant (sometimes referred to as jigsaw identification). But the Applicants do not suggest that applies in this case.

OPEN JUSTICE – ACCESS TO THE COURT FILE

13. A second provision which was sought but which I granted only in a limited form was as follows:

> "Pursuant to CPR 5.4C(4), a non-party may not obtain a copy of any statement of case in the proposed claim between the Applicant and the Respondent until further order".

14. No reason was advanced, in evidence or argument, as to why the statement of case against the Respondent should not be obtained by a non-party in the normal way. A statement of case includes a Claim Form (CPR 2.3). The corresponding order which I made (subject to a right to apply to vary it) reads:

> "Pursuant to CPR 5.4C(4), a non-party may not until further Order obtain a copy of any statement of case in the proposed claim between the Applicant and the Respondent other than one edited to remove any reference to the names of the Claimants or the user name shown in the confidential annex."

15. CPR 5.4C provides:

> "*Supply of documents to a non-party from court records*
> 5.4C (1) The general rule is that a person who is not a party to proceedings may obtain from the court records a copy of –

> (a) a statement of case, but not any documents filed with or attached to the statement of case, or intended by the party whose statement it is to be served with it;
> (b) a judgment or order given or made in public (whether made at a hearing or without a hearing)…
> (3) A non-party may obtain a copy of a statement of case or judgment or order under paragraph (1) only if –
> ;…
> (c) the claim has been listed for a hearing; or
> (d) judgment has been entered in the claim.
> (4) The court may, on the application of a party or of any person identified in a statement of case –
> (a) order that a non-party may not obtain a copy of a statement of case under paragraph (1);
> (b) restrict the persons or classes of persons who may obtain a copy of a statement of case;
> (c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or
> (d) make such other order as it thinks fit.
> (5) A person wishing to apply for an order under paragraph (4) must file an application notice in accordance with Part 23.
> (6) Where the court makes an order under paragraph (4), a non-party who wishes to obtain a copy of the statement of case, or to obtain an unedited copy of the statement of case, may apply on notice to the party or person identified in the statement of case who requested the order, for permission."

16. Open justice has been an essential principle of English law for centuries. It is provided for today in CPR 39.2(1) which states: "The general rule is that a hearing is to be in public". There are exceptions to the principle. The relevant provisions applicable in this case are set out in CPR 39.2(3):

> "A hearing, or any part of it, may be in private if –
> (a) publicity would defeat the object of the hearing; …
> (c) it involves confidential information … and publicity would damage that confidentiality;
> (d) a private hearing is necessary to protect the interests of any child …"

17. Hearings in private under CPR 39.2(3) and orders under CPR 5.4C(4) are derogations from the principle of open justice. They must be ordered only when it is necessary and proportionate to do so, with a view to protecting the rights which claimants (and others) are entitled to have protected by such means. When such orders are made, they must be limited in scope to what is required in the particular circumstances of the case.

18. Applications to restrain publication of private or confidential information, and related applications, are usually made in circumstances of urgency. Provision is made for such applications by CPR Part 25: in particular the Practice Direction to Part 25 para 4. CPR 25(3)(2) requires that

> "An application for an interim remedy must be supported by evidence, unless the court orders otherwise".

19. In the preparation of such applications, it is not uncommon for the legal representatives of claimants to focus their attention largely on the substantive application, and to omit to give the same degree of attention to subsidiary orders, including those providing for a derogation from the principle of open justice. That is what happened in this case. There was no evidence, and nothing in the Skeleton argument, to support the width of some of the restrictions on open justice that were sought in the draft order.

20. In this case, as in most cases, this was certainly not the result of any bad faith. But it is the duty of the court to scrutinize such draft orders. However, the court is commonly asked to hear such applications in circumstances where there are other cases in the list requiring attention, or out of hours, where there may be limited access to books, and pressure of time. It is important that counsel and others who apply for such orders do not overlook the need to adapt any restriction on reporting or open justice to what is no more than is necessary and proportionate in the circumstances of the particular case.

THE REQUIREMENT OF A RETURN DATE

21. CPR Part 25 Practice Direction para 5.1 sets out the provisions which any order for an injunction must contain, unless the court orders otherwise. So:

> "5.1 Any order for an injunction, unless the court orders otherwise, *must* contain: … (3) if made without notice to any other party, a return date for a further hearing at which the other party can be present".

22. In *Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272 the Court of Appeal at para 21 emphasized the word "must" in this Practice Direction.

23. The Practice Direction at para 5.2 provides that:

> "An order for an injunction made in the presence of all parties to be bound by it or made at a hearing of which they have had notice, may state that it is effective until trial or further order".

24. By requiring that orders should be drafted so as to take effect for no longer than is necessary and proportionate, the Practice Direction gives effect to the requirements of freedom of expression and open justice.

25. Notwithstanding the clear terms of the Practice Direction, Claimants applying for injunctions without notice commonly ask for orders without a term, or return date, by including the words "until further order". That may be appropriate in the case of some injunctions to restrain publication of private information, for example where it appears that there is unlikely to be a dispute as to the sensitive private nature of the information. Including a return date has the disadvantage of putting the applicants to the cost of attending before the court a second time. But advocates applying for a departure from the requirements of the Practice Direction should draw to the attention

of the judge that that is what the draft order provides, and they should explain in the evidence or Skeleton argument (as may be appropriate) why the departure from the Practice Direction is sought. In the words of Mummery LJ in *Memory Corporation v Sidhu and another(No 2)* [2000] 1 WLR 1443, at p 1459H-1460A:

> "It cannot be emphasised too strongly that at an urgent without notice hearing for … any … form of interim injunction, there is a high duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case. It is the particular duty of the advocate to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are prepared by him personally and lodged with the court before the oral hearing; and *that at the hearing the court's attention is drawn by him to unusual features of the* evidence adduced, to the applicable law and to the formalities and *procedure to be observed.*" (emphasis added)

26. As a general rule the Practice Direction should be complied with. If it is not, orders may last longer than is required. If orders are drafted too widely, or made to apply for too long a period, the public's confidence in the administration of justice may be undermined. It is in the public interest that it should be known what orders the court makes, and why.

27. The draft order in the present case included a provision that the order under CPR 5.4C should apply "until further order", instead of including a return date. That would have been objectionable, if I had been minded to make the order in the form set out in para 13 above. But having limited the scope of the restriction on public access, I have included those words in the order I have made. I have done this in spite of the fact that the hearing was without notice. In this case the hearing was only technically without notice, in that the Respondent has not been served with the Application Notice, but the Respondent has been notified of the intention to make the application today, and has indicated that it does not wish to oppose it. This situation is sometimes said to be without notice on notice

UNDERTAKINGS BY THE APPLICANT

28. There is an undertaking that should normally be included in any order for an injunction, but which is not mentioned in the Practice Direction para 5.1, and was not included in the draft order put before me. It is an undertaking to provide full notes of the hearing with all expedition to any party that would be affected by the relief sought.

29. The following appears in the White Book (2009 edn) in note 25.3.5.

> "Applicants without notice for relief are under a duty to provide full notes of the hearing with all expedition to any party that would be affected by the relief sought; a failure to do so may result in an award of indemnity costs in favour of the party affected (*Interoute Telecommunications (UK) Ltd v Fashion*

> *Gossip Ltd*, The Times, November 10, 1999 (Lightman J.))… Counsel and solicitors have responsibility for taking full notes of what was said at the hearing and they should not expect that a transcript of the hearing would be available or would suffice if it were (*Cinpres Gas Injection Ltd v Melea Ltd*, [2005] EWHC 3180 (Pat) …. Where a freezing order is granted, the duty to provide the respondent with a full note arises whether or not the respondent asks for it (*Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272 ([approving remarks by] Neuberger J.))."

30. So too, where an order relates to freedom of expression, or may have the effect of interfering with freedom of expression, those applying for interim relief at a hearing at which the respondent or defendant is not present should generally provide the respondent with a full note, whether or not the respondent asks for it. To adapt the words of Neuberger J (as he then was) cited by the Court of Appeal at para 21 of *Thane*: Orders which may interfere with freedom of expression should only be granted in circumstances which provide maximum protection for the person against whom the order is to be made, and the least interference with the right of freedom of expression necessary to protect the claimant's rights.

31. The preparation and provision of a note of the hearing is important, not only to inform anyone notified of the order of what evidence was put before the court (in addition to that which is in the witness statements), but also to inform them of any points or queries that may have been raised by the judge. See also *Memory Corporation v Sidhu* at p 1459B. Judges rarely have the time to write judgments in such cases after the event, and even if they give ex tempore reasons, there will be no transcript available unless that is requested and paid for.

32. In the present case, I required an undertaking that a note be kept. But the undertaking permits that the note need only be provided on request, since the Respondent had made clear that it did not oppose the application.

THE CORRESPONDENCE FROM THE RESPONDENT

33. On 19 November 2009 solicitors for the Applicants wrote to the Respondent requesting the information. They stated the nature of the Applicants' complaints against the author of the amendment, and the reasons why they believe it to have been made maliciously. They asked for the text of the amendment to be removed.

34. The Respondent has a limited role in relation to material available on Wikipedia. It has a Privacy Policy (available on www.wikimediafoundation.org), in which it is referred to as "the Foundation".

> "**User accounts and authorship**
>
> The Foundation does not require editors to register with a project. Anyone can edit without logging in with a username, in which case they will be identified by network IP address. Users that do register are identified by their chosen username…

Purpose of the collection of private information

The Foundation limits the collection of personally identifiable user data to purposes which serve the well-being of its projects, including but not limited to the following:

To enhance the public accountability of the projects. The Foundation recognizes that any system that is open enough to allow the greatest possible participation of the general public will also be vulnerable to certain kinds of abuse and counterproductive behavior. The Foundation and the project communities have established a number of mechanisms to prevent or remedy abusive activities. For example, when investigating abuse on a project, including the suspected use of malicious “sockpuppets” (duplicate accounts), vandalism, harassment of other users, or disruptive behavior, the IP addresses of users (derived either from those logs or from records in the database) may be used to identify the source(s) of the abusive behavior. This information may be shared by users with administrative authority who are charged by their communities with protecting the projects….

Details of data retention

General expectations

IP and other technical information

… When a page is edited by a logged-in editor, the server confidentially stores related IP information for a limited period of time. This information is automatically deleted after a set period. For editors who do not log in, the IP address used is publicly and permanently credited as the author of the edit. It may be possible for a third party to identify the author from this IP address in conjunction with other information available. Logging in with a registered username allows for better preservation of privacy...

Editing projects

… Edits to Project pages are identified with the username or network IP address of the editor, and editing history is aggregated by author in a contribution list. Such information will be available permanently on the projects.

Logged in registered users:

Logged in users do not expose their IP address to the public except in cases of abuse, including vandalism of a wiki page by the user or by another user with the same IP address. A user's IP address is stored on the wiki servers for a period of time,

during which it can be seen by server administrators and by users who have been granted CheckUser access.

IP address information, and its connection to any usernames that share it, may be released under certain circumstances (see below).

Editors using a company mail server from home or telecommuting over a DSL or cable Internet connection, are likely to be easy to identify by their IP address; in which case it may be easy to cross-identify all contributions to various Projects made by that IP. Using a username is a better way of preserving privacy in this situation…

Release: Policy on Release of Data

It is the policy of Wikimedia that personally identifiable data collected in the server logs, or through records in the database via the CheckUser feature, or through other non-publicly-available methods, may be released by Wikimedia volunteers or staff, in any of the following situations:

1. In response to a valid subpoena or other compulsory request from law enforcement,
2. With permission of the affected user,
3. When necessary for investigation of abuse complaints,
4. Where the information pertains to page views generated by a spider or bot and its dissemination is necessary to illustrate or resolve technical issues,
5. Where the user has been vandalizing articles or persistently behaving in a disruptive way, data may be released to a service provider, carrier, or other third-party entity to assist in the targeting of IP blocks, or to assist in the formulation of a complaint to relevant Internet Service Providers,
6. Where it is reasonably necessary to protect the rights, property or safety of the Wikimedia Foundation, its users or the public.

Except as described above, Wikimedia policy does not permit distribution of personally identifiable information under any circumstances.

Third-party access and notifying registered users when receiving legal process:

As a general principle, the access to, and retention of, personally identifiable data in all projects should be minimal and should be used only internally to serve the well-being of the projects. Occasionally, however, the Foundation may receive a subpoena or other compulsory request from a law-

> enforcement agency or a court or equivalent government body that requests the disclosure of information about a registered user, and may be compelled by law to comply with the request. In the event of such a legally compulsory request, the Foundation will attempt to notify the affected user within three business days after the arrival of such subpoena by sending a notice by email to the email address (if any) that the affected user has listed in his or her user preferences."

35. The solicitors for the Applicants in their letter to the Respondent referred to the relevant provisions, and asked for disclosure of the IP information on the basis that this was a case of abuse.

36. In reply, lawyers for the Respondent made a number of preliminary observations. First they addressed the request made on behalf of the Applicants that the amendment be deleted. They stated that the Respondent is not the publisher or writer of the article relating to the mother, or of the amendment. They said they would refer the request for the deletion of the archived version of the amendment to "the community of volunteer editors, one or more of whom may attempt to address your concerns". They referred to the immunity they claim under section 230 of the US Communications Decency Act (1996) from most civil liability for content they did not originate or develop. They stated that the Respondent does not conduct operations within the jurisdiction of this court. Nevertheless, they stated that they were happy to forward the Applicants' request to their volunteer community.

37. The amendment was removed promptly following the request made on behalf of the Applicants.

38. In their letter of 19 November lawyers for the Respondent next addressed the Applicants' request for the IP information. They stated that it is the policy of the Respondent that such data be released in response to a valid sub poena or equivalent compulsory legal process. They added:

> "Without waiving our insistence that no court in the United Kingdom has proper jurisdiction over us as a foreign entity, we nevertheless are willing to comply with a properly issued court order narrowly limited to the material you ask for in your letter".

39. Solicitors for the Applicants notified the Respondent that it was their intention to apply for the order of the court on Monday or Tuesday of this week, and they did in fact apply on the Wednesday. Lawyers for the Respondent replied that it would be willing to comply with the order proposed within two or three days after receiving the order.

REPORTING THE FACT THAT THIS ORDER HAS BEEN MADE

40. There is no restriction on the reporting of the fact that the order has been made in this case. There are occasions when the court does impose a prohibition upon disclosure of the fact that an order has been made. Counsel stated that he had considered making an application for such a prohibition in this case, but had decided not to do so.

41. The reason the Applicants might have wished for there to be such a prohibition in this case was in order to prevent the wrongdoer from being tipped off about these proceedings before an injunction could be applied for or made against the alleged wrongdoer. In the interval between learning of the intention of the Applicants to bring proceedings, and the receipt by the alleged wrongdoer of an injunction binding upon him or her, the alleged wrongdoer might consider that he or she could disclose the information, and hope to avoid the risk of being in contempt of court. Alternatively, in a case such as the present, the alleged wrongdoer may destroy any further evidence (in addition to the IP information) which may be needed in order to identify him or her. Tipping off of the alleged wrongdoer can thus defeat the purpose of the order.

42. If a prohibition of the disclosure of the making of the injunction is included in an order for the purpose of preventing tipping off, and if the order provides for a return date (as the Practice Direction envisages) then the prohibition on disclosure may normally be expected to expire once the alleged wrongdoer has been served with an injunction, or at the return date. There is a standard form of prohibition on disclosure of the making of an injunction in para 20 of the Form of Search Order given in the Practice Direction to CPR Part 25. See http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part25.htm#IDAXKJ5B. It reads:

> "Except for the purpose of obtaining legal advice, the Respondent must not directly or indirectly inform anyone of these proceedings or of the contents of this order, or warn anyone that proceedings have been or may be brought against him by the Applicant until 4.30 p.m. on the return date or further order of the court."

43. In the present case the last six lines of the citation from the Privacy Policy in para 34 above make clear that the policy of the Respondent is to notify the affected user of any court order within three days of its receiving the order. In the correspondence indicating that it did not oppose the making of this order, the Respondent had not agreed to refrain from notifying the alleged wrongdoer in the present case. Since the Respondent stated that it did not accept the jurisdiction of this court, there would have been difficulties in making or enforcing an order with which it had not agreed to comply.

44. Since I was not asked to prohibit disclosure of the making of the order against the Respondent, it is not appropriate for me to make any observations as to when the court might think it necessary and proportionate to make orders prohibiting disclosure of the fact that an order has been made.

CONCLUSION

45. It is for these reasons that I made the order in the form that I did.