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Case No: HQ08X05124
HQ08X05061

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2011

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

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Between :

ZAC GOLDSMITH and SHEHERAZADE GOLDSMITH	**Claimants**
- and -	
BCD	**Defendant**

And between :

JEMIMA KHAN	**Claimant**
- and -	
BCD	**Defendant**

- -
- -

Andrew Caldecott QC (instructed by **Carter-Ruck**) for the **Claimants**
Miss Alexandra Marzec for Associated Newspapers Ltd
The Defendant did not appear and was not represented

Hearing dates: 17 March 2011

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Judgment

Mr Justice Tugendhat:

An outline of events

1. In December 2008 Zac and Sheherazade Goldsmith and Jemima Khan were the victims of a crime. An unidentified person hacked into the e-mail accounts of Mrs Goldsmith and Mrs Khan and sent e-mails to a journalist at a national newspaper, purportedly from Mrs Goldsmith herself, containing personal information about Mrs Goldsmith and her family. The journalist's suspicions were aroused and she alerted the Goldsmiths. This crime was also a flagrant breach of the civil law of breach of

confidence. Since the nineteenth century this court has restrained such breaches of confidence by injunctions (eg *Argyll v Argyll* [1967] Ch 302). So the Claimants made an urgent application to this court before even issuing the claim forms, as the Civil Procedure Rules permit them to do.

2. Mrs Jemima Khan is Mr Goldsmith's sister. Each Claimant is, of course, well known to the public. They were all greatly distressed by what had occurred.

3. On 15 and 18 December 2008 I granted the interim injunctions the Claimants applied for ("the 2008 Orders"). At that time the Claimants were anonymised and there were three defendants, identified only by description, because the true identity of the defendants was unknown. On 23 December 2008 the Claimants obtained from the courts in Northern Ireland and in the Republic of Ireland orders in terms similar to the ones I had granted.

4. In January the Claimant also obtained a third party disclosure order against Microsoft, the operator of their Hotmail accounts. Microsoft was, of course, entirely innocent, but needed the protection of a court order before it could disclose the data from which the identity of the hacker might be discovered. The Claimants instructed an expert, a Mr Hall, to investigate. By the end of January there were grounds to suspect that the hacker was the person now identified as BCD. The Claimants reported the matter to the police, who arrested BCD in May 2009. In August 2009 the police decided not to prosecute. BCD expressed remorse and accepted a caution.

5. After reporting the matter to the police the Claimants did nothing further to progress their claims in these actions. The decisions of the police not to prosecute, or the Claimants not to progress their claims, may well have been motivated by considerations of mercy. But the Claimants overlooked that they had given undertakings to the court to serve the claim forms, which they did not do. So they were in breach of undertakings to the court. That is a very serious matter. It could easily have been avoided by effecting service, or, alternatively, by an application to the court to vary the terms of the undertakings. But that was not done.

6. Meanwhile, the Claimants' solicitors had notified a number of national newspapers of the 2008 Orders. At least two national newspapers knew what this action was about, because a second journalist had also contacted Mrs Goldsmith. But no newspaper raised any objection to the terms of the orders I had made.

7. However, after hearing nothing further for two years, Farrer & Co for News Group Newspapers Ltd ("NGN") wrote to the Claimants' solicitors in December 2010. They made the very strong point that by this time the anonymity provisions in the 2008 Orders were no longer necessary, and that the Claimants should agree to a variation of those orders accordingly. The Claimants did not dispute that. But the letter from Farrer & Co prompted the re-opening of the file, which led to the discovery that the Claimants were in breach of their undertakings given to the court in December 2008, namely to serve the claim forms.

8. But for the breaches of the undertakings, the request by NGN would have been resolved by agreement, and it may well not have been necessary to have held an oral hearing in court. The orders could probably have been varied on paper. The reason why there had to be a hearing in this case was because a breach of an undertaking is

very serious, and must be fully explained to the court, and the court must consider what to do in response to it.

9. The re-opening of the file also led to discussions between the Claimants' solicitors and BCD. BCD had no defence to the Claimants' claims and wished to submit to judgment by consent with as little trouble and cost as possible. That was agreed by her and by the Claimants. That would not have required a further oral hearing in court. That too could have been dealt with on paper, but for the breaches of the undertakings.

10. On 17 March 2011 I discharged the 2008 Orders and made new orders. I stated that I would give my reasons later in an open judgment, which I now do.

11. The substantive provisions of each of the two 2008 Orders and each of the two orders I made on 17 March 2011 were prohibitions on the disclosure of:

> "any personal private information contained in or derived from personal and private e-mails received at or sent from [the Claimants'] personal email addresses set out in the Confidential Schedule 3" [to each of the orders].

12. On 7 February 2011 the Claimants in each action had given notice of applications to vary the orders made in 2008 and for other relief. The orders made after the hearing on 17 March were finalised late on that day, and the draft of this judgment was circulated the following morning. Some delay is necessary in the preparation of this public judgment. The reason is that, in cases such as this, it is necessary, in order to protect the interests of all parties, to circulate the judgment in draft so as to ensure that nothing confidential is inadvertently included in the public judgment which should not be included, and equally that nothing is omitted which should be included.

13. In the claim forms and the 2008 Orders three Defendants are listed as "persons unknown" followed by words of description. Although the hacker has now been identified, it is necessary in the interests of justice that the identity of that person not be disclosed. The reasons for this are explained below. The other two descriptions of unknown defendants included in the claim forms and the 2008 Orders are now otiose.

The applications in December 2008

14. The evidence in support of the applications made to me in 2008 was so strong that I was easily satisfied (in accordance with the Human Rights Act 1998 s.12(3)) that the Claimants were likely to establish that publication of the contents of their e-mails should not be allowed.

15. But the form of the 2008 Orders did include a departure from CPR Part 25 PD para 5.1, in that they did not include a return date, that is a date at which the injunction would cease to apply, unless it was renewed or extended. The reasons for this are explained below. A return date would be included in any interim order that were made today.

16. The 2008 Orders did include a number of standard undertakings given to the court by the Claimants in each action, in particular:

> "4. as soon as practicable the Claimant will issue and serve a claim form claiming the appropriate relief".

Breaches of the undertakings of the court and of the rules

17. Each of the Claimants did issue a claim form in accordance with that undertaking, but each omitted to serve the claim forms as soon as practicable once the identity of the Defendant became known. As stated above, this was a serious breach, even if committed with good intentions. Each of the Claimants has apologised to the court. One of the matters which I address in this judgment is what I should do about these breaches.

18. Not only was there a breach of that undertaking by each of the Claimants, but the four month time limit for service of claim forms prescribed by CPR Part 7.5(1) expired on 15 and 18 April 2009 respectively. The Claimants made no application to extend the period, as they might have done, in accordance with CPR 7.6(1). It is now too late for them to do so.

19. The Claimants therefore each asked the court for an order under CPR Part 6.16(1) dispensing with service of the claim form. That rule provides that the court may make such an order "in exceptional circumstances" and that such an order may be made at any time.

Service on the newspapers

20. As soon as the 2008 Orders had been made they were served on NGN, the publishers of The Sun, on MGN Ltd, the publishers of the Mirror and Sunday Mirror, and on Associated Newspapers Limited, the publishers of the Daily and Sunday Mail.

21. In the letter of December 2010 referred to above, Farrer and Co referred to a number of recent authorities including my judgments in *Gray v UVW* [2010] EWHC 2367 which had been handed down on 21 October 2010, *JIH v NGN* [2010] EWHC 3174 (QB), and the judgment of the Court of Appeal handed down on 16 November 2010 in *Donald v Ntuli* [2010] EWCA Civ 1276 [2011] 3 WLR 294. These judgments all gave effect to the principles to be applied by the court when making anonymity orders as explained by the Supreme Court on 27 January 2010 in *In re Guardian News Media Ltd* [2010] UKSC 1 [2010] 2 AC 697. NGN invited the Claimants to consent to the removal of the anonymity orders which I had made.

22. When the solicitors for the Claimants came to realise that their clients were in breach of the undertaking to serve the claim forms, the Claimants sought to remedy this situation. They issued the application notices of 11 February and they purported to serve BCD, albeit it long out of time. Her identity had been known to them no later than August 2009. The result was the agreement between the Claimants and BCD recounted above.

The hearing on 17 March

23. Accordingly, the order I made on 17 March included a final judgment by consent against BCD. BCD did not appear on 17 March, but submitted letters, including

letters from medical advisors in support of her application for an order that her identity not be revealed.

24. Although the substantive hearing on 17 March was in private, I sat in open court at the beginning of the hearing and again at the end of the hearing. I did so in each case to hear submissions from Ms Marzec on behalf of Associated Newspapers Limited, and, at the end, to explain in open court that I would make a new injunction and later deliver this public judgment. By that time Ms Marzec had had time to consider the draft of the orders that Mr Caldecott was asking me to make, and her submissions were confined to the form of those orders. She made no objection to the substance of the orders. Her submissions as to their form were of assistance to the court.

25. In addition I had the benefit of the written arguments on behalf of NGN in the correspondence addressed to the Claimants by Farrer & Co and on behalf of MGN Limited in their correspondence with the Claimants' solicitors. I also had the benefit of written submissions in a letter from Mr Marcus Partington of MGN Ltd addressed to me for the purposes of the hearing.

Derogations from open justice in the 2008 Orders

26. The evidence in support of the application for the substantive relief also justified the hearing of the application in December 2008 without notice, in accordance with Human Rights Act Section 12(2)(a). There were at that time no practicable steps that the Claimants could have taken to notify the respondents whose identity they knew nothing about.

27. This evidence also justified two further provisions derogating from open justice that I made in December 2008. The first of these was the order that "the publication of all of the information relating to these proceedings or information describing them is expressly prohibited" (this is a provision added to an ordinary form of injunction which is sometimes referred to as a "super injunction").

28. The second such provision of the order was that the proceedings be anonymised so that the Claimants each be referred to only by letters of the alphabet in all court documents and notices.

29. The reasons for including these two provisions are the following. If the unknown Defendants (whoever they might be) came to know that the Claimants had commenced these proceedings and had obtained an order of the court before the Claimants could effect service of the claim forms on them, there appeared to me to be a real danger that the Defendants might either defeat the purpose of the proceedings by publishing the contents of the confidential e-mails, for example on the internet, or that they might destroy evidence which might lead to the identification of the Defendants. See *Terry v. Persons Unknown* [2010] EWCH 119 (QB) [2010] EMLR 16 at page 400 at para 138.

30. However, as already noted, if a similar application were to be made today, the orders would include a return date which limited the time during which these two provisions of the order should run. I shall explain below why there was not a return date.

The evidence

31. In so far as not already set out above, the evidence included the following. Mrs Goldsmith and Mrs Khan each gave evidence that they had encountered difficulties in logging onto their e-mail accounts. When they attempted to do so they received messages that they had incorrectly entered their password. In the case of Ms Khan this evidence related to her attempts made on 18 December 2008, and that was evidence in support of her application for the order I granted that day.

32. In the case of Mrs Goldsmith the evidence in support of her application to the court in December 2008 was that of Mr Monk, herself and Mr Goldsmith, recounting the tip off they had received from the journalist.

33. In her second witness statement dated 1 January 2009 (in support of the application against Microsoft) Mrs Goldsmith gave evidence that she had experienced difficulties accessing her e-mail account on 26 December 2008. When she was able to reset the access details and log in she discovered that e-mails that had been left in the "sent items" box had been deleted and that the emails had also been deleted from the "deleted items" box. This was not something that she had done herself.

34. In the period since 14 December she had been approached by a reporter from another newspaper with questions which she believed could only have been prompted by his having information derived from her personal e-mails.

35. On 26 January 2009 Mr Hall reported his findings to the police. There is before me now a copy of a report dated 30 January 2009 setting out what he had reported to the police. The report refers to an earlier relevant incident in which the person who is now referred to as BCD so conducted herself that she had to be given a formal warning by the police.

36. At or about the time of BCD's arrest the police and the Claimants were aware that she was suffering from a number of illnesses.

What to do about the breach of the undertakings to the court

37. The facts of the ongoing police investigation and of the knowledge of BCD's ill-health together provide some explanation for the failure of the Claimants to fulfil their undertaking to serve the Claim Forms as soon as practicable. But these facts do not amount to an excuse for that failure. The Claim Forms could, and probably should, have been served in late January 2009. If they were not served at that time, then they should, without doubt, have been served no later than about 12th August 2009 (subject to the Claimants having applied for the necessary extension of time).

38. In any event the court ought to have been kept informed of the non-compliance with the undertaking and any reason for that. However, it was not until after receipt of letters from the newspapers who had been served with the order, that is the letters of December 2010, that the Claimants and their advisors properly addressed this matter.

39. The first question therefore is: what should the Court do faced with this breach of the undertaking for which there is no good excuse? I accepted the apologies of the Claimants. While the breaches of the undertakings are culpable, they were not intended to achieve an improper purpose.

40. Such is not always the case with failure by a claimant to fulfil such undertakings. The Court must be vigilant to ensure that where such failures occur, they are dealt with in a way that is, so far as possible, consistent with justice and with the need to mark the seriousness of such breaches of an undertaking.

41. One possible course for the Court to take would have been to discharge the 2008 Orders and strike out the actions. I gave consideration as to whether or not I should do that. I was persuaded by Mr.Caldecott that I should not do that. Rather, I should grant the application for an order dispensing with service of the Claim Forms. The exceptional circumstances that make that course possible are as follows.

42. The medical evidence made available to the Court by BCD, together with her own letter, make clear that BCD's mental health remains fragile. And BCD wishes to put this matter behind her.

43. If I were to discharge the 2008 Orders without making a fresh order, there would be nothing to stop the Claimants issuing new claim forms and applying for fresh injunctions on the same day. While BCD has consented to judgment, and claims to have no intention of publishing e-mails or the contents of emails in the future, the evidence as to the past behaviour of BCD is such that I find that there remains a risk to the Claimants from BCD from which the Claimants are entitled to be protected by an injunction restraining publication of the confidential material in question. The failure of BCD to refrain from the conduct which has led to these proceedings, notwithstanding the police warning on the earlier occasion, provides sufficient material upon which to found a need for a fresh injunction.

44. It follows that to discharge the 2008 Orders without replacing them would be inconsistent with the overriding objective. The overriding objective is to deal with cases justly (CPR Pt 1.1). Where it is possible for the Court to impose some penalty for breach of an undertaking to the Court which is consistent with dealing with the case justly, that is what the Court will do. In the present case such an option is not available. In practice, however, the Claimants have suffered for their failures. They have had to incur the not insubstantial costs of the oral hearing on 17 March (which would probably not otherwise have been necessary), and they have quite properly not asked for any order for costs in their favour against BCD.

45. The fact that BCD wishes to consent to judgment to put this matter behind her, and not to undergo further legal procedures detrimental to her mental health, are, in my judgment, exceptional circumstances within the meaning CPR Part 6.16(1) which justify my dispensing with service of the Claim Forms in the present case, notwithstanding that the time for service of them has so long expired.

Why there was no return date in the 2008 Orders

46. The costs of access to justice in England and Wales are one of the biggest problems in the administration of justice today. Newspapers have much cause to complain about

this, and have successfully invoked the European Convention on Human Rights to address the problem. As recently as January 2011 MGN Ltd won their case in Strasbourg, *MGN v UK* Application No 39401/01, on the costs involved in another breach of confidence case *Campbell v MGN Ltd* [2004] UKHL 22.

47. The reason why in this case (and in other cases heard in and about 2008) the court did not include a return date was in an attempt to keep down the costs of access to justice. The saving of expense is a part of the overriding objective set out in CPR Part 1.2(b). A return date puts claimants to the burden of incurring costs in coming back to the Court for a hearing which may be no more than a formality. In cases where, as here, there is evidence of a serious breach of confidence by an unknown person, it is not uncommon for claimants to need a considerable time to identify and serve the defendant, if they ever succeed in doing so at all. And when such defendants are identified, it is not uncommon, as happened in this case, for the matter to be resolved by consent. So a return date can give rise to costs which are unnecessary.

48. In 2008 it was thought that the absence of a return date would be unlikely to cause any prejudice to newspapers served with the order. The 2008 Orders included, as such orders invariably do, a provision that:

> "Anyone notified of this order may apply to the Court at any time to vary or discharge this order (or so much of it as affects that person), but anyone wishing to do so must first inform the claimant's solicitors in writing".

49. It follows that any of the newspaper publishers served with the order in December 2008 could have applied to the Court then and there to vary or discharge the orders.

50. However, it is the experience of the court that newspapers and other third parties rarely avail themselves of the right to apply to discharge or vary an injunction. The reasons for this may be various. One reason may be that the journalists know from their own sources (as in this case) what the action is about. They may have no wish to publish anything about it. Another reason may be the risk of incurring costs if the third party makes an application to the court.

51. Regrettably, the well intentioned attempt by the court to save costs has given rise to serious unintended consequences. One problem is that the absence of a return date gives rise to a risk that claimants will fail (inadvertently or deliberately) to fulfil their undertakings to the court. If there had been a return date in the 2008 Orders, I think it unlikely that the Claimants would have allowed the time for service of the claim forms to expire without returning to the Court to seek any necessary extension of time.

52. Another problem is that in this case the derogations from open justice which were fully justified when ordered in December 2008 have lasted longer than was necessary. There is also concern that this may have happened in other cases, and Mr Caldecott informed me that newspaper publishers have written to claimants in other cases in terms similar to those of Farrer & Co's letter of December 2010. The perception that this is a problem in other cases has given rise to public concerns which led to the setting up of a committee chaired by the Master of Rolls.

53. By late 2009 it was apparent that the attempt to save costs by not including a return date in interim orders in cases of breach of confidence and privacy was giving rise to these problems. Therefore, on 2 December 2009, when I handed down a judgment in *G and G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB), at paras 21 to 25 I stated that there should be a return date in accordance with Part 25 Practice Direction para 5.2, and that orders should be drafted so as to have effect for no longer than is necessary and proportionate.

54. Under English law civil proceedings are adversarial, and the court expects parties to an action, or non-parties affected by an action, to apply to the court if they claim that their rights have been unjustifiably interfered with. The court endeavours to frame its orders so as to respect the rights of non-parties, but where it does not succeed, there should be no lasting damage if the non-parties make known their concerns by applying to the court. They may do this as soon as they are served with the order, or, if thought fit, at a later time. In order to assist media third parties in this regard, and for the benefit of those members of the public who are concerned about anonymised injunctions, there have been changes in practice. During the last year judges have generally adopted the practice of recording their reasons for granting an injunction that might affect the media in the form of written reserved judgments (like this one) which are made available on the internet at websites including www.bailii.org. In the past that information was not always provided to third parties unless they requested it.

55. NGN, Associated Newspapers Ltd and MGN have made such an application in this case. In raising the matter when they did in December 2010, NGN has caused there to be revealed an important breach of an undertaking of the court.

56. In some cases newspaper publishers served with such an order may be put in a difficult position, because they may not know what the subject matter of the action is. In the present actions that is not so, at least in the case of some newspaper publishers. It was in fact, as stated above, a journalist who brought to the attention of the Claimants the serious breach of confidence of which Mr. and Mrs. Goldsmith were the victims. Mrs Goldsmith also gave evidence of an approach from a journalist on the other newspaper.

57. Responsible journalists would have had no difficulty in recognising that disclosure of the contents of personal e-mails exchanged between members of a family would be a breach of confidence. If any newspaper had thought that this material could lawfully be published, and was newsworthy, there was an opportunity to do so before the applications were made to the Court. The fact that they did not do so demonstrates that journalists and newspapers did act responsibly in relation to this case.

58. In reality the substantive injunction prohibiting publication of the contents of the e-mails involved no interference with the freedom of expression of anyone. Even in December 2010, what the newspaper publishers sought was the removal of the anonymity and restriction on reporting the fact of the injunction. No-one has suggested that the personal emails exchanged within a family which are disclosed by a hacker should not be the subject of an injunction to restrain a breach of confidence in ordinary form.

59. However the order for anonymity and the order restraining "the publication of all of the information relating to these proceedings or information describing them" were

interferences with freedom of expression and derogations from open justice. They were justified at the time they were made, for the reasons given above, but they should not have lasted longer than the period of time necessary to effect service of the Claim Forms.

An alternative way to avoid unnecessary costs

60. The inclusion of a return date in such orders need not always involve claimants in substantial unnecessary legal costs. Of course, in the normal way a return date is an oral hearing attended by Counsel, which is a costly matter. But where at the return date the only relief that the claimant seeks is agreed with all parties concerned, or where it is an extension of time for service of the claim form, or an extension of an anonymity order, or some other ancillary provision, this can generally be done on paper.

61. Solicitors acting for claimants can write to the Court setting out what has happened since the grant of the original injunction and why it is that an extension of the injunction to a new return date is required. If the explanation is, for example, that it has not yet been possible to serve the defendant, or that the defendant who has been served requires further time to consider the matter, or that the matter is subject to a police investigation during which it might be inappropriate for the Court to make a different order, then having seen the explanation, the Court can communicate with the claimant's solicitors to the effect that no oral hearing is required and the matter can be dealt with on paper, or, if such be the case, that an oral hearing is required.

62. When I refer to a case being dealt with on paper, I refer to provisions of the CPR including the following:

    i) Part 1.4 (2)*:*

    > "Active case management includes…(j) dealing with the case without the parties needing to attend Court."

    ii) Part.3.1(2):

    > "Except where these Rules provide otherwise, the Court may…(d) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication".

63. It is pursuant to CPR Part 1.4(2)(j) that in this case I have taken into consideration the written representations of BCD and of Mr Partington for MGN Ltd. Where a third party considers that an order may have been made in terms which are inconsistent with the CPR, including its Practice Directions, or with the principles laid down in *In re Guardian News and Media Ltd* or any other applicable case law, then the third party should raise that with the claimant, as NGN did in this case. If there is then an agreed variation, and in some cases even where the matter cannot be resolved by agreement, then CPR Part 1.4(2)(j) may provide an inexpensive way for the matter to be put before the court.

Anonymity for the defendant

64. BCD has by letter asked for anonymity, and the Claimants support that application. It is, as already indicated, also supported by medical evidence. Notwithstanding the agreement between the parties, it is for the court to decide whether such a derogation from open justice is necessary.

65. The proper approach to applications for anonymity in cases involving confidentiality has recently been set out by the Court of Appeal in *JIH v. News Group Newspapers Ltd.* [2011] EWCA Civ 42 at para. 21. As stated at sub-paragraph (5):

> "Where the Court is asked to restrain the publication of the names of the parties and/or the subject matter of the claim on the ground that such restraint is necessary under Article 8, the question is whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life."

66. In the present case, so far as the anonymity of BCD is concerned, the Article 8 rights in question are not those of the Claimants. It is the Art 8 rights of BCD with which I am concerned on this point. Because of the fame of the Claimants there is a real fear that, if the identity of BCD is disclosed, BCD will be the subject of intrusive attention from journalists and others who are not as responsible as those who decided not to publish the confidential information in December 2008, even before an injunction was granted. There are real fears for the effect on BCD's health and well being.

67. The necessity of protecting the confidentiality of BCD's medical condition was one of the reasons why the hearing on 17 March had to be in private.

68. As I have already indicated, there is in the present case no interference with the freedom of expression of anyone arising from the substantive provisions restraining disclosure of confidential information. No responsible journalist would expect to publish the confidential information. Certainly none of the newspapers who have made representations to the Claimants or the Court in this case have indicated any wish to publish the confidential material in question. The only interference with freedom of expression, and the only derogation from open justice, in the orders I made on 17 March were those necessary to preserve the confidentiality of the information question and the anonymity of BCD.

69. Having regard to the medical evidence, I have no hesitation in concluding that there is no sufficient general public interest in publishing a report of these proceedings which identifies BCD to justify the resulting curtailment of her right to respect for private life, which includes her health and well being.

70. It is for these reasons that I discharged the orders that I had made in December 2008, and made the new orders that I made on 17 March 2011.