NON-DISCLOSURE INJUNCTIONS: THE NEW LANDSCAPE

In 1987 the then Master of the Rolls, Sir John Donaldson, memorably described confidential information as being like an ice cube:

> "*…Give it to the party who has no refrigerator or will not agree to keep it in one, and by the time of the trial you just have a pool of water which neither party wants. It is the inherently perishable nature of confidential information which gives rise to unique problems.*".

Those problems are often brought into sharp focus when an application to court is made to restrain the disclosure of allegedly confidential (and now often allegedly private) information pending a full trial. Until recently, the relevant principles had to be garnered from a wide collection of case reports, and with reference to an injunction precedent contained in the old, pre-Woolf, Rules of the Supreme Court. Now, however, the important procedural considerations are far more transparent and accessible, thanks to guidance published by the Master of the Rolls, Lord Neuberger of Abbotsbury, in August 2011. Over the last year the guidance has been bedded in, by a number of interim application hearings.

The guidance was first provided in draft form as Annex A to the "Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice", which was published on 20th May 2011. That committee had been set up in April 2010 in response to controversy concerning super- and anonymous injunctions in the context of claims brought by the global commodities trading company Trafigura, and the England footballer John Terry. At the time the committee published its report the controversy had continued intermittently for over a year, reaching its height in May 2011 with the obtaining of an injunction by the claimant CTB, whose anonymity remained for some time protected by a court order.

Non-disclosure injunctions are often applied for to restrain the publication or broadcast in the media of private or confidential information. However, there will not always be a media respondent, for example where a company seeks to restrain a former employee against using its confidential information acquired during employment. Sometimes other causes of action may arise, such as contract, harassment, passing off, copyright or trade mark infringement, or one or more of the economic torts. It is, however, extremely difficult to obtain a prior restraint injunction in a defamation claim, to prevent damage purely to reputation: if a respondent attests to the truth of the defamatory allegation (or otherwise seeks to rely on the substantive defences of either honest opinion or qualified privilege), then the court will very likely decline to prevent publication.

The guidance is just that: it has not been incorporated into a Practice Direction. The provisions of CPR 25 (Interim Remedies) and its Practice Direction, CPR 39.2 (concerning public and private hearings, and the anonymity of a party or witness), and section 12 of the Human Rights Act 1998 all remain unaltered. However, Practice Direction 51F has been introduced, to provide for a pilot scheme by which the Ministry of Justice will compile and analyse anonymously information in respect of applications for injunctions where section 12 is engaged.

Established principles

The guidance records a number of aspects of established practice, which are to continue. The applicant must prepare in advance of the hearing an Application Notice, Draft Order, Claim Form, Witness statement(s) justifying the need for an order and Legal submissions (i.e. a skeleton argument). The applicant must ordinarily give advance notice of the application hearing to any respondent and to any non-party who it is intended to serve with or otherwise notify of the order, because they have an existing interest in the information sought to be protected by the injunction. Such a non-party will often be found in the media, because they have come into the possession of information which it may appear to be in the public interest to be published. Clear and cogent evidence of a compelling reason not to give notice will be required, for example of a fear of tipping-off or blackmail. The application hearing will be in public (see CPR 39.2(1)), unless exceptional circumstances justify a derogation from this general principle. There is no general exception to the principle of open justice in a privacy or confidence case. However, CPR 39.2(3) does provide that the court may hold a hearing or part of it in private if publicity would defeat its object, or it involves confidential information and publicity would damage that confidentiality. Anonymity will only be granted to a party or witness, under CPR 39.2(4), where that is strictly necessary, and then only to that extent. A prohibition on the reporting of the fact of proceedings (a super-injunction) must be justified on grounds of strict necessity, for example in an anti-tipping-off situation, where short-term secrecy is required to ensure the applicant can notify the respondent that an order has been made. Applicants (and their advocates) must comply with the high duty to make full, fair and accurate disclosure of all material information to the court and to draw the court's attention to significant factual, legal and procedural aspects. A full and accurate note of a without notice hearing must be taken on the applicant's behalf, recording what documents were put before the court, what legal authorities were relied on and what the court was told in the course of the hearing.

Innovations and improvements

The guidance also notably contains a number of innovations, and emphasises a firming up of the procedural process. An Explanatory Note following a prescribed form will ordinarily be required to accompany the application and any order made, explaining to the respondent or an affected third party or other recipient in brief terms the nature of the case. The production of this Note represents a fresh burden in an applicant's preparations. A media organisation should be notified of a hearing through its legal adviser. The assumption stated by the guidance is that such legal advisers are able to differentiate between information provided for legal purposes and information for editorial use. Where a non-party is to be notified of an application, or an order that has been made, the applicant needs only to provide the detail of the case to the non-party upon receiving an irrevocable written undertaking to the court from the non-party that such detail will only be used for the purpose of the proceedings. This may involve the early service of the Explanatory Note on a non-party, which may exceptionally be anonymised. If the non-party does not provide the written undertaking, then the applicant is under no further obligation so far as serving the detail of the case on the non-party is concerned. Applicants must keep any respondent or non-party who is subject to the order updated on the progress of

proceedings which affect the status of it. In particular, an applicant must inform any non-party who has been served with the order if it ceases to have effect. A return date, for a full *inter partes* hearing, will now be specified as a rule. This will be used to determine the interim application, and also for the court to review any derogations from open justice (anonymity, private hearing etc) in place. The court will usually give directions for the prosecution of the matter, to prevent any interim ruling becoming a substitute for a final adjudication.

If at some stage it becomes apparent to the court that a trial is unlikely to take place, then it may terminate the interim relief by dismissing the action. This part of the guidance is intended to address any temptation on the part of an applicant to "sit" on an interim restraining order indefinitely, instead of pursuing it to trial in order to establish that relief is actually justified on the full merits.

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