Neutral Citation Number: [2021] EWHC 2999 (Ch)

Case No: BL-2020-000115

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building
Fetter Lane
London, EC4A 1NL

10 November 2021

Before :

MRS JUSTICE BACON

- -

Between :

NEIL CHARLES MONEY
(as Liquidator of (1) CSL Global Solutions Limited (in Creditors Voluntary Liquidation) and (2) David Dyett Limited (in Creditors Voluntary Liquidation))

Claimant

- and -

AB
(by his Litigation Friend, the Official Solicitor)

Defendant

- -
- -

Kenneth Hamer (instructed by **Freeths LLP**) for the **Claimant**
Shazia Akhtar (instructed by **Hodge Jones & Allen Solicitors**) for the **Defendant**

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

- -

Mrs Justice Bacon:

Introduction

1. This is my ruling on an application by the Defendant for anonymity pursuant to CPR 39.2(4), in the context of contempt of court proceedings brought by the Claimant, Mr Money, following breaches by the Defendant of court orders made in April and October 2020. Irrespective of my decision on this application, I have followed the course taken by the court in *XXX v Camden London Borough Council* [2020] EWCA Civ 1468 of anonymising the Defendant in this judgment in order to facilitate its handing down and any subsequent applications that may be made.

2. The contempt proceedings that have given rise to this application have been ongoing since October 2020, and I gave judgment on liability at a hearing on 26 January 2021. Following various adjournments of the proceedings thereafter in order to enable the Defendant to obtain legal representation and medical evidence, the sentencing hearing finally took place on 5 October 2021 and I circulated my draft judgment to the parties on 22 October 2021. Upon receipt of that draft judgment the Defendant's solicitors indicated that they would be seeking the anonymisation of the judgment when it was handed down, and a formal application for anonymity was made on 27 October 2021.

3. The application is supported by a witness statement from Ms Susan Hardie of the Official Solicitor. The Official Solicitor has been acting as the Defendant's litigation friend since early September 2021, following a report provided on 1 September 2021 by Professor Sensky, a consultant psychiatrist, which considered the Defendant's capacity to conduct the present proceedings as well as his mental capacity at the time of the acts that gave rise to the finding of contempt. The basis of the present application is that the Defendant is a protected party under CPR 21.1(2)(c) and (d), and there is a concern that the judgment that I am due to hand down will have a serious impact on his mental health and relationships with his children, engaging his rights under Article 8 ECHR.

4. In addition to the application notice and witness statement, I have received written submissions from Ms Akhtar for the Defendant and Mr Hamer for Mr Money. Both parties were content for the application to be dealt with on the papers on the basis of those submissions, without a further hearing.

5. Mr Money's position is that he does not formally object to the making of an anonymity order. However he does not consider that there is anything in the draft judgment that justifies anonymisation, and notes that the hearing on 5 October 2021 was a public hearing (albeit conducted remotely via Microsoft Teams) and that no request for anonymisation was made at any stage until the draft judgment was circulated.

The law

6. CPR 39.2(4) provides that "The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness."

7. In *XXX v Camden London* the Court of Appeal considered the principles applicable to an application for anonymity, which may be summarised as follows (with references to the paragraphs of the Court of Appeal's judgment):

   i) The test has a single stage: the Court must decide whether non-disclosure is necessary to secure the proper administration of justice and in order to protect the interests of that party or witness: §24.

   ii) In determining that issue, the starting point is that it is a fundamental rule of the common law that, subject to limited exceptions, proceedings must be heard in public and justice done openly, even if that entails discomfort or distress to the parties: §17.

   iii) Given the fact that there are statutory reporting restrictions in particular circumstances, as well as exceptions set out in CPR 39.2(3), further exceptions to the general principle of open justice are likely to require compelling circumstances §18.

   iv) The common law has, however, long recognised a duty of fairness towards parties and witnesses called to give evidence, and their fears about the publication of their identities and the impact of that on their health are relevant factors to take into account. Articles 2 and 3 of the ECHR may also be engaged where parties or witnesses are at risk if their identity is disclosed, and court proceedings may affect a person's right to private and family life, protected by Article 8 ECHR. On the other hand, the rights of the public and the press to know about the content and result of proceedings is protected by Article 10 of the ECHR, and the press has an important and legitimate interest in knowing the identities of the parties to litigation: §§19–20.

   v) The approach to balancing competing human rights is as set out by Lord Steyn at §17 of *In re S (A child)* [2005] 1 AC 593:

      > "First, neither article has as such precedence over the other. Second, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

   vi) It is also necessary to have particular regard to the extent to which material has already become, or is about to become, public: §21.

8. As to the last of those points, an order under CPR 39.2(4) may be made at any stage of proceedings, including at the end when hearings have already been conducted in open court and where the parties were identified. That is apparent from *XXX v Camden* itself, where the application for anonymity was made after the trial had taken place and after two judgments had been given in open court. That did not *a priori* preclude the making of an anonymity order (although the application for such an order was ultimately rejected, having carried out the balancing exercise described above). But the stage that proceedings have reached is clearly a factor relevant to the balancing exercise, because

the extent to which the identity of the parties has already been revealed goes to the questions of what rights to privacy they still have and how effective the order is likely to be in preserving them: see *R (Imam) v Croydon LBC* [2021] EWHC 736 (Admin) at §25 and *Revenue and Customs Commissioners v Banerjee* (No. 2) [2009] 3 All ER 930, §39.

Discussion

9. In this case, Ms Akhtar places particular reliance on the point that the Defendant is a protected party in light of the conclusions of Prof Sensky that he lacks capacity to conduct these proceedings. As to that, I note that in the context of approval hearings, where the Court is asked to sanction a settlement of a personal injury claim brought on behalf of a child or a protected party, anonymity orders may be granted more readily than in other contexts (although even then there is no general rule that such hearings should be held in private): *JX MX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96, §§29–30.

10. But it is important to note that such cases involve a context that is quite different to the present case. In cases of that kind the court is discussing a claim which will inevitably involve detailed examination of the medical condition of the claimant, as well as highly personal details of the claimant's future care needs; and the claimant is unable to settle the claim without the court's approval. In this case the Defendant is a contemnor, and the comments in my draft judgment on the Defendant's mental capacity are confined to setting out and analysing the conclusions of Prof Sensky's report. While I have noted that the report gives a full history of the Defendant's mental and physical health problems, and family and personal background, I have not found it necessary to make reference to any of those details in my draft judgment.

11. In *XXX v Camden* the Court of Appeal upheld a refusal of anonymity in respect of the substantive judgment in the proceedings, notwithstanding the contention that publication of the judgment would damage the applicant's mental health. The court commented, in particular, that there is no general rule that the courts will refrain from publishing details of mental health illnesses, citing *Zeromska-Smith v United Lincolnshire Hospitals NHS Trust* [2019] EWHC 552 (QB). In *Zeromska-Smith* the claimant had sued the hospital trust seeking damages for psychiatric harm following on the basis of alleged negligence in the delivery of her stillborn daughter, and contended that if distressing details about the stillbirth and her subsequent mental illness were publicly reported, then that would further damage her mental health and her relationships with her family. While the judgment recorded that the case would involve "exploration of intimate details of the Claimant's private and family life, her psychiatric condition and her relationship with her two young children", an anonymity order was nevertheless refused on the basis that those considerations did not outweigh the open justice principle and the interests of the press in reporting the proceedings.

12. The rulings in *XXX v Camden* and *Zeromska-Smith* demonstrate that references to the mental health of one of the parties to proceedings do not necessarily justify the grant of an anonymity order, even in very distressing circumstances. Moreover, while the courts will consider the impact of publicity on family relationships, the circumstances in which such considerations are likely to override the interest in open justice are likely to be exceptional.

13. The mental health condition of the Defendant and the impact of the judgment on his family relationships are, therefore, relevant factors to take into account, but they do not

of themselves mean that anonymity should be granted. Rather, it is necessary to consider all of the circumstances of the case, and balance the competing interests of the Defendant, on the one hand, and the public interest in open justice, on the other.

14. As to that balancing exercise, the first point to note is that beyond the usual public interest in open justice, there is a particularly strong public interest in contempt proceedings being freely reported, with the parties identified. The public is entitled to know, and indeed must know, the consequences of a breach of orders of the court. Moreover, identification of the contemnor is part of the sanction that the Court imposes. It is in recognition of these principles that CPR 81.8 provides (among other things) that all hearings of contempt proceedings shall be listed and heard in public unless the court otherwise directs, and also provides that at the conclusion of the hearing, whether or not held in private, the court shall sit in public to give a reasoned public judgment stating its findings and any punishment.

15. On the other side of the balance, the references to the Defendant's mental health in my draft judgment are (as explained above) limited to an analysis of Prof Sensky's conclusions on his capacity at the relevant times, without setting out the background or wider medical discussion that preceded those conclusions. The medical details given in my draft judgment are therefore neither extensive nor particularly intrusive.

16. I accept that the Defendant may well be distressed to be identified in my judgment, and I cannot rule out that it will have a negative impact on his relationships with his family. It appears from the witness statement of Ms Hardie that the Defendant's (adult) children may not know about these proceedings or at least the full extent of these proceedings; and that the Defendant's family relationships are already somewhat strained. But the fact that publication of a judgment in contempt of court proceedings may involve considerable distress to the contemnor, and may have detrimental consequences on their family relationships, is not exceptional and certainly does not take this case so far out of the norm as to outweigh the public interest in open reporting.

17. Ms Hardie also raises a concern that a deterioration in the Defendant's mental state may cause him to disengage with the proceedings. That is, however, is in my judgment not sufficient to tip the scales in favour of anonymisation. Indeed the Official Solicitor accepted appointment as the Defendant's litigation friend precisely because, in the opinion of Prof Sensky, the applicant already lacked sufficient capacity to conduct these proceedings without assistance.

18. Finally, I note that this application is made at a very late stage of the proceedings, after a number of hearings have been held in open court, including the most recent hearing of 5 October 2021. It is right to say that the Defendant was not legally represented until that most recent hearing, for reasons which are set out in my draft judgment on sentence. By early September 2021, however, the Defendant had the assistance of the Official Solicitor and was represented by his current solicitors, who in turn instructed counsel on or around 23 September 2021. Despite having a full legal team in place by that point, no application for anonymity was made prior to the 5 October hearing, at which extensive references were made to the content of Prof Sensky's report. The result is that references to the Defendant's mental health condition have already been made in public, at that hearing and indeed at previous hearings, and my decision must take account of that.

19. Having careful regard to all of the matters set out above, in this case I consider that the balance comes down firmly in favour of the public interest in open justice, and against the making of an order for anonymity.

Conclusion

20. I therefore refuse the application for an anonymity order. I will, however, delay handing down my substantive judgment until 14 days after this judgment is handed down, to enable the Defendant to take any further steps if so advised in the interim period.