Neutral Citation Number: [2020] EWHC 2148 (Fam)

Case No: PO16C01149

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/08/2020

Before :

THE HONOURABLE MRS JUSTICE ROBERTS

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Between :

MELANIE NEWMAN **Applicant**

- and -

SOUTHAMPTON CITY COUNCIL (1)

AB (2) **Respondents**

TR (3)

and

M (a child) (through her Children's Guardian) (4)

(No. 2: Costs and the application for Permission to Appeal)

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Anya Proops QC, Zac Sammour and **Kate Temple-Mabe** (instructed by **Howard Kennedy LLP**) for the Applicant
Heather Rogers QC and **Sarah Earley** (instructed by **Southampton City Council**) for the Local Authority
Deidre Fottrell QC (instructed by **Goodman Ray**) for the Guardian

Hearing dates: 2nd and 3rd March 2020
Judgment released to counsel on 31 May 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 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 Roberts :

1. Having handed down my substantive judgment in this matter last week, I am now asked to rule on two remaining issues : (i) costs; and (ii) the application by Ms Newman for permission to appeal my substantive decision in relation to the disclosure of documents. My judgment in relation to the latter is reported as *Melanie Newman v Southampton City Council, AB, TR and M (a child) (through her Children's Guardian)* [2020] EWHC 2103 (Fam) ("the mainframe judgment").

2. Before addressing the two outstanding issues, I should add by way of postscript to my judgment that I am aware that the case of *Dring*[1] to which I have referred following its journey up to the Supreme Court in 2019 has since been remitted to Picken J who has delivered a further judgment reported as *Graham Dring (for and on behalf of The Asbestos Victims Support Group Forum UK) v Cape Intermediate Holdings Limited* [2020] EWHC 1873 (QB) (handed down on 16 July 2020). Because his decision on the application before him turned on its particular facts, it is agreed by counsel that there is no need for me to deal with further submissions in the context of Ms Newman's case. I mention it only for the sake of completeness.

A. COSTS

3. All parties are agreed that there should be no order in relation to the costs of the substantive application for disclosure. In terms, I refused the application for disclosure of the entire court file but I did so on the basis that Ms Newman should be permitted to have access to certain documents which I identified in a schedule which I propose to attach to my order. Ms Newman was represented throughout by her legal team on a pro bono basis. The local authority, on the other hand, has incurred substantial costs in relation to the application. In

[1] *Dring (on behalf of the Asbestos Victims Support Group) v Cape Intermediate Holdings Ltd (Media Lawyers Association Intervening)* [2019] UKSC 38, [2019] 3 WLR 429

agreeing that it will not seek to recover any of its costs, the local authority has been guided by the President's Guidance on Reporting in the Family Courts (3 October 2019). In that document at paragraph 16, Sir Andrew McFarlane said this:

> "Finally, in seeking to vary/lift reporting restrictions, the standard approach as to costs in children's cases will apply and a reporter, media organisation or their lawyers should not be at risk of a costs order unless he or she has engaged in reprehensible behaviour or taken an unreasonable stance."

4. I agree entirely with the local authority's approach. Ms Newman was entitled to make her application as she did and there has been nothing in her conduct of this litigation which could be characterised as unreasonable, far less reprehensible.

5. The issue which arises for determination is who should pay for the costs of providing the documents which I have said she should be entitled to see. There are two aspects to these costs. The first is the time which it will take to ensure that they are appropriately redacted prior to disclosure. The second is the cost of producing copies of the redacted documents.

6. The local authority seeks an order that Ms Newman should meet these costs. Reliance is placed on the decision of the Supreme Court in *Dring* (above) where, in paragraph 47, the general principle was stated in these terms:

> "The non-party who seeks access will be expected to pay the reasonable costs of granting that access."

7. On behalf of the local authority, Ms Rogers QC and Ms Earley remind me that this is a restatement of the general approach adopted by the Court of Appeal in *Dring* to which I was referred during the course of argument. That said, costs are in the discretion of the court and it has power to depart from the standard order. By way of example, in *R (British American Tobacco) v Secretary of State for Health* [2018] EWHC 3586 (Admin), Green LJ expressly waived any requirement for payment in respect of documents which were released following an application for judicial review in circumstances where there had

been a significant delay on the part of the court in retrieving the same. It had been thought that the relevant documents on the court file had been destroyed before the discovery that they were available in electronic format.

(i) The redaction exercise

8. Because the documents which are to be released to Ms Newman relate to public law proceedings involving a child, I have determined that certain aspects of the documents should be redacted prior to disclosure. The reasons for that decision are set out fully in the mainframe judgment. As to what that redaction exercise will entail, I am told that the solicitor who has been dealing with the matter throughout will be best placed to undertake the task. The process will not be straightforward and she is familiar with the papers and knows what will be required. In particular, I am told that there are over 150 pages of experts' reports alone which will need to be carefully redacted to protect the private information relating to the child. The local authority has estimated that it will take the solicitor up to 10 hours to complete this task. At an hourly rate of £95.00, this element of the claim for costs would be a maximum of £950.00 plus VAT.

(ii) The copying exercise

9. In addition, the local authority seeks the costs of copying and collating the redacted material. This amounts to 283 pages in all and can be undertaken by an administrative assistant and capped at the rate of £45 per hour plus VAT.

10. I am told that the local authority would be content to cap its claim for costs at £1,200 inclusive of VAT. They will only charge on the basis of time actually spent. Ms Rogers reminds me that the local authority has already met significant costs in relation to the administrative exercise which had to be undertaken in notifying relevant third parties affected by Ms Newman's application for disclosure. It was also responsible for preparing the court bundles which were used for the purposes of the final hearing. No claim is

being made for these costs. Furthermore, I am reminded that Ms Newman has been on notice throughout the proceedings that the local authority would be seeking an order which required her to pay for the costs of providing whatever documents the court decided she should see.

11. Ms Newman objects to meeting the costs of the redaction exercise although she has offered to meet the costs of the copying exercise. On her behalf, her legal team has made a number of points to support her position. I can summarise these submissions in this way.

12. First, as a matter of principle, Ms Proops QC, with her two junior counsel, submits that it would be wrong in principle for the local authority to seek to transfer to a member of the public the burden of any costs incurred as a result of complying with an order which this court has made. Thus, where the court has made an order which permits the disclosure of selected documents to Ms Newman, it is for the local authority to meet the costs of complying with that order. In pursuing that submission, Ms Proops reminds me that the limited disclosure which I have permitted engages important Article 10 rights which Ms Newman has as a journalist engaged in "serious public interest journalism".

13. Furthermore, she seeks to argue that the imposition of a costs order on Ms Newman is likely to be disproportionate in terms of its impact on her financial situation. Whilst it is acknowledged that different considerations may apply in circumstances where an individual journalist is in the employment of a substantial media organization, Ms Newman has no such employer to whom she can look for support with costs. She has made her application for entirely legitimate reasons, as the court has acknowledged, and, whilst she has not succeeded in her application for the release of the entire court file, she has secured a limited release of information and documents from the proceedings. Were she now to be penalised in costs, it might deter other professional journalists from pursuing similar orders in future which might well be contrary to the public interest.

14. From the foot of that principled opposition to any form of costs sanction, Ms Newman does offer to meet the local authority's reasonable copying charges. Thus, there appears to be no issue in relation to the *copying* exercise; the challenge lies in relation to the costs of the *redaction* exercise which Ms Proops and her team suggest is wholly disproportionate both in relation to the work which needs to be undertaken and Ms Newman's ability to meet those costs having regard to her means. Were she to be required to meet these costs, Ms Proops submits that she is unlikely to follow through with a request that these documents are produced to her. Whilst she has made a significant professional investment in the case, she is simply not in a position to afford the sums claimed by the local authority and there is no prospect of offsetting against that liability any payments she might in future receive as a result of her journalistic endeavours. In these circumstances, it is submitted on her behalf that a costs order would "render the Court's judgment a dead letter and have a silencing effect on the exercise of the Applicant's Art.10 rights".

15. In relation to the point that Ms Newman has been put on notice in relation to the local authority's intention to apply for costs, Ms Proops submits that whilst she was alerted to a potential claim for *copying* costs, she was never warned about a potential liability for the costs of the work which would be required to redact those documents, nor the scale of those costs.

16. In terms of the principle established in *Dring*, the following additional points are advanced on Ms Newman's behalf in opposition to the principle of a costs order:-

    (i) This was a case where the court was considering the fundamental right of a journalist to access documents which went to the heart of the exercise of those rights. Whilst the court undertook the necessary balancing exercise in relation to those rights as against the child's Article 8 rights, any measure which interferes in those rights must go no further than is necessary or proportionate. Regardless of what is said in *Dring*, there must be circumstances where the burden imposed by requiring a party seeking access to court documents to pay costs could amount to a

disproportionate, and thus unlawful, interference in those Convention rights.

(ii) The judgment of the Court of Appeal in *Dring* cannot be interpreted as a settled mandate to a court dealing with similar applications in future to award costs against an applicant in relation to a particular disclosure exercise. In this context, reliance is placed on that part of the Court of Appeal's judgment where it was observed:

> *"The court may order that copies be provided of documents which there is a right to inspect, but that will ordinarily be on the non-party undertaking to pay reasonable copying costs, consistently with CPR 31.15(c). There may also be additional compliance costs which the non-party should bear, particularly if there has been intervening delay"* [emphasis added].

17. Ms Proops reminds me that, at paragraph 161 of my judgment, I acknowledged that the administrative burden on the local authority was *"necessary and proportionate given the importance which I have attached to aspects of Ms Newman's Article 10 rights"* which include *"her entitlement to receive information (rather than her ability to publish) as an aspect of the freedom of expression which is guaranteed by Article 10"*.

18. Ms Newman has set out her financial circumstances in a sworn witness statement dated 27 July 2020. She has exhibited a number of exhibits to that statement to support the narrative she provides in her statement. I do not consider it appropriate to record those details in the body of this short judgment on costs. Suffice it to say that I am satisfied that a costs burden of £1,200 would be very likely to result in her abandoning her request for the documents which I have allowed her to see. I agree that a costs order against her in terms of the redaction exercise which I have required the local authority to undertake would place a disproportionate burden on her shoulders and is likely to render the whole exercise nugatory. She has had the considerable benefit of professional support from her legal team which has acted for her on a pro bono basis throughout. They have been prepared to undertake that work without seeking payment for what has been a very significant amount of work

because they, like Ms Newman, have a professional investment in the principle of open and transparent justice in the Family Courts.

19. I accept that I might have taken a different view were Ms Newman to have behind her the financial resources of a large media organisation such as the BBC or one of the major press organisations. I have also considered carefully the extent to which this local authority has already incurred costs in relation to this application. It has incurred the costs of instructing leading and junior counsel. In addition, such was the importance which was attached to the outcome of the application that I was told that a senior team manager had attended the two day hearing. In no circumstances can it be said that the local authority has taken this application lightly and/or that it has not done what it can to assist the court in circumstances where Ms Newman's team were instructed directly with the result that there was only one administrative legal department running the case. I have taken well on board the financial impact on a local authority which currently has to juggle a significant number of calls on over-stretched resources. Weighing all these matters carefully in the balance, and in accordance with the discretion which I have in relation to costs, I propose to order Ms Newman to pay the costs of the copying exercise limited to £45 per hour plus VAT. There will be no order in relation to the costs of the redaction exercise. These must be absorbed by the local authority. I hope that it will prove to be possible to contain those costs to something less than the ten hours of professional time claimed but Ms Newman will not be liable for the costs of that exercise.

B. THE APPLICATION FOR PERMISSION TO APPEAL

20. Ms Newman relies on three separate grounds as the basis of her application for permission to appeal my judgment. These are summarised below.

Ground 1: the balancing exercise

21. First, it is maintained on behalf of Ms Newman that insufficient weight was given to the mother's consent to the release of documents and her purported

waiver of the child's Article 8 rights. Next, she contends through her counsel that I failed to give sufficient weight to the bifurcated approach she adopted to her application. The *release* of private and confidential information relating to the child to a third party unconnected to the original proceedings has to be distinguished from the *reporting* of that information to the world at large. Finally, she argues that I failed to give adequate weight to the information which was already in the public domain when assessing the weight to be afforded to the rights of this child to a private family life.

Ground 2: insufficient consideration of the interference with Ms Newman's Article 10 rights

22. Pursuant to this ground of appeal, it is submitted that the documents and material in respect of which I have permitted disclosure are insufficient for Ms Newman's objective which is to produce a detailed journalistic assessment or analysis of the decision-making processes undertaken by both the courts and the local authority in the public law proceedings concerning M.

Ground 3: flawed approach to the ultimate balancing exercise

23. This ground appears to be based upon a further submission that, in terms of the balancing exercise which I undertook, I wrongly gave precedence to the child's rights to a private family life and failed to treat Ms Newman's Article 10 rights as paramount. It is said that I failed to start from a position of parity as between these two competing rights.

24. It seems to me that all three of the grounds relied on by Ms Newman are, in effect, part of the same challenge that I reached the wrong conclusion in terms of the ultimate balancing exercise.

25. I am satisfied that, over the course of my judgment and from the foot of an holistic survey of the existing jurisprudence, I have conducted an appropriate and fact-specific balancing exercise which has informed the conclusions I have reached. As I said in paragraphs 162 of my mainframe judgment:

> "162. As I have made clear at several stages of this judgment, I am not deciding matters of general principle. This is a targeted and fact-specific exercise which has involved a careful balancing exercise of all the competing rights involved as between the individual parties to this particular case. I have rejected Ms Newman's application for wholesale disclosure of the court file but I have agreed that she should be entitled to see limited aspects of the material it contains. To the extent that I have interfered with either the mother's or M's Article 8 rights and/or Ms Newman's Article 10 rights, I have done so in what I judge to be an entirely proportionate manner. An important factor in my decision has been the mother's consent to disclosure but this does not mean that in every case where an aggrieved parent supports media access to material generated in children's proceedings, journalists should be encouraged to make applications."

26. In paragraphs 72 and 163 of my judgment, I dealt with the important national consultation process which the President, Sir Andrew McFarlane, has initiated. That formal 'Transparency Review' is currently ongoing and multiple stakeholders involved in the Family justice system are providing input. The President has assembled a multi-disciplinary professional panel which has been charged with a wide-ranging professional overview of precisely the issues which have been engaged in Ms Newman's application to this court. That process should be allowed to take its course. The report flowing from that extensive consultation will no doubt inform to a significant extent any necessary recalibration of the important balance between the interests of professional journalists to act as the "social watchdogs" (to adopt Ms Proops' description) of the quintessentially important work undertaken in the Family Courts up and down the country.

27. I have considered carefully the requirements of FPR 2010 r. 30.3(7) which provides that permission to appeal may be given only where –

    (a) the court considers that the appeal would have a real prospect of success; or
    (b) there is some other compelling reason why the appeal should be heard.

I do not consider either limb to be made out in this case.

28. In the circumstances, I reject the application for permission to appeal.

Order accordingly