Neutral Citation Number: [2020] EWHC 1154 (QB)

Case No: QB-2020-00370

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6/05/2020

Before:

Mr JUSTICE WARBY

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Between:

(1) Sir Frederick Barclay **(2) Amanda Barclay**	**Claimants**
- and -	
(1) Alistair Barclay **(2) Aidan Barclay** **(3) Howard Barclay** **(4) Andrew Barclay** **(5) Philip Peters**	**Defendants**

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Hefin Rees QC, Tamara Oppenheimer QC, and Cleon Catsambis (instructed by **Brown Rudnick LLP**) for the **Claimants**
Heather Rogers QC, Aidan Eardley, and Jonathan Price (instructed by **Signature Litigation LLP**) for the **Defendants**

Hearing dates: 6-7 May 2020

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Approved Judgment

This is a public version of a judgment originally given extempore at a hearing in private on Wednesday 6 May 2020. Redactions have been made to ensure that the remainder can be made public.

Mr Justice Warby:

1. I am dealing now, in private, with an application by the defendants for the continuation, until further order, of two orders that I made earlier today in the public part of this hearing. I directed that the whole of paragraph 3.2 of the claimants' skeleton argument should be withheld from the public, and that there should be no reporting of that paragraph, the second order having been made under section 11 of the Contempt of Court Act 1981.

2. The application now has been made more specific, and that is no criticism at all. The paragraph reads as follows:

> "The Recordings contain extensive discussions with a Russian businessman relating to an acquisition [A] [redacted]. These discussions reveal the strategy that was to be adopted, the commercial tactics on timings, and highly confidential and valuable information. The contemporaneous WhatsApp messages the Ds delivered up on 9 April show D1 saying to D2 [B] [redacted] to which D2 responds: 'Good. Now I've got something to shoot at and an opportunity'. In the event, including following an intervention by lawyers instructed by the Ds, the deal did not proceed."

3. The deletions proposed are in two parts. The first is to delete the words at [A] above. The second is to delete either the whole of the description of the contemporaneous WhatsApp messages, or the passage at [B] above.

4. This application has been made on very short notice to the claimants, and short notice to the court. Mr. Rees tells me that he first became aware that there was such an application in prospect two minutes before this hearing began, that is to say at 10.28 this morning. He did not see the proposals as to the redaction of the text until about 10.40, while the hearing was already underway. The skeleton argument was served and exchanged yesterday at 10.00 a.m.

5. The application is unusual, but, in substance, it resembles an application for an urgent interim injunction on short notice, but with notice to the respondent. , It seems to me that the right approach is to adopt the test that I would apply if that was the nature of the application; that is to say section 12(3) of the Human Rights Act, as interpreted in *Cream Holdings v Banerjee* [2005] 1 AC 253, and by the Court of Appeal in *ASG v GSA* [2009] EWCA Civ 1579. In substance, I have to ask myself whether the claim would be likely to succeed at a trial. However, I may grant interim relief if I am satisfied there is a sufficient prospect of success to justify that short-term relief.

6. I am persuaded that there is a sufficient prospect, and that I should make the order, but that I should limit it in time, to allow for the applicants/defendants to vouch for the

application with evidence, and for the claimants/respondents to reply, so that a fuller argument can be had if so desired on a further occasion in the future.

7. I have asked myself, first of all, whether the information is confidential in nature. It seems to me that there is a strong case that it is. The wording of the skeleton, itself, talks of "highly confidential and valuable information". The nature of the information is in the realms of that which is self-evidently confidential.

8. The second issue is not so obvious, and that is whether it is the defendants' confidential information. The case for the claimants, as presented by Mr. Rees, is that this is information that belongs, in the abstract sense, to Sir Frederick, the first claimant. [redacted]

9. That, however, does not seem to me to be a guaranteed winning argument, because it is well established that confidential information can be the subject of shared rights and obligations. In this case, it is not clear enough to me that the submission, made by Ms. Rogers, that there is a right of confidence in the defendants, or at least some of them, in relation to [redacted] is unsustainable, or indeed unlikely to succeed, if it was tested more fully.

10. The third issue, which was touched on by Mr. Rees, is really one of public domain. He submitted that the information is "on the transcripts". This has been a very short hearing, and it is no criticism of him that he did not go further than that. I am not quite sure what he means. However, of course, even if the information is on the transcript of a public hearing, it does not follow, by any means, that the world knows it. It is trite to say that confidence in a piece of information is not lost, merely by the fact that some people know it. There is an interesting legal issue as to whether the mere fact that information has been once disclosed in a public hearing deprives it of any right of confidentiality. But I would be loath to decide this issue on that basis today.

11. For those reasons, I will grant the applications. I will grant a reporting restriction in relation to those parts of the paragraph that have been struck out, that is to say the more limited version of the order, but there will have to be a timetable for this issue to be resolved after a more complete review of the evidence and arguments, if the parties so wish.