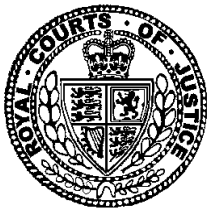

Neutral Citation Number: [2020] EWHC 1180 (QB)

Case No: QB-2020-000370

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST
(via Microsoft Teams)

Royal Courts of Justice
Strand
London, WC2A 2LL

Date: Thursday, 7th May 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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MR. HEFIN REES QC, MS. TAMARA OPPENHEIMER QC and **MR. CLEON CATSAMBIS** (instructed by **Brown Rudnick LLP**) appeared for the **Claimants.**

MS. HEATHER ROGERS QC, MR. AIDAN EARDLEY and **MR. JONATHAN PRICE** (instructed by **Signature Litigation LLP**) appeared for the **Defendants.**

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Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
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MR. JUSTICE WARBY:

1. I have been dealing with this case since February of 2020. I first became involved in it on 12th February. Before that, Freedman J had heard the first substantive application in the case. He did that on 5th February. It was an application for a doorstep delivery order (DDO). He heard the application in private, and gave a substantial reasoned judgment, a transcript of which is in the papers before me today. That hearing was held in private.

2. No reporting restrictions were sought or granted at the time, but I imposed such restrictions retrospectively when the matter came before me on 12th February 2020 for a further DDO. I also imposed reporting restrictions in relation to that hearing, and subsequent hearings.

3. The reason, or main reason, for all those reporting restrictions was to ensure that there could be no tipping-off of people other than a defendant, who might, if tipped off, take steps to undermine or defeat the rights which the claimants were asserting.

4. On 19th February 2020, that risk having expired or evaporated, I made orders lifting the reporting restrictions that had previously been in place, with effect from 2pm on 24th February 2020, unless an application was made to extend them.

5. There was no such application. On 24th February, the defendants gave undertakings not to make use of the information they had obtained from recordings made by the use of covert devices in the Conservatory at The Ritz.

6. The effect of all of that is that since 24th February 2020 there has been no reporting restriction in place and no substantive restriction on access to a transcript of the judgment of Freedman J, or the judgments that I gave in private or, indeed, on applications for access to transcripts of the hearings themselves, although (1) there is no automatic right to access to transcripts of private hearings and (2) my order of 24 February 2020 included a procedural requirement, that any non-party seeking a transcript of any part of the proceedings in question should make a written application on three clear days' notice to the parties.

7. I say all of that by way of background to the application that is now before me.

8. I am now in the final throes of hearing interim applications in this case, to do with the inspection of items which were the subject of the DDOs made by Freedman J and by me on 5th and 12th February. The principal issue, in the end, for resolution, has been one of costs, but there has been a great deal of technical discussion about the working out of the complex interim orders.

9. The hearing, nonetheless, has been attended by a number of media reporters, and shortly before 2pm yesterday one of them, Sam Tobin of PA Media, made a written application by e-mail, seeking access to the video recording made by the claimants of the first defendant engaged in placing or removing the audio recording device that led to the recordings that are the subject of the action. That application was put over to today, because I prioritised the resolution of the applications made by the parties. However, it was supported at the time by a two-page cogent written submission, and

its renewal today is supported by a very helpful six-page written submission from Mr Tobin, on behalf of the Press Association.

10. The application is said, in paragraph 1, to be for non-party access, under the court's inherent jurisdiction, to the CCTV footage of the first defendant "installing and/or handling the covert recording device on 13th January 2020, the discovery of which prompted the present proceedings." This is a quote from my judgment of 24 February 2020, [2020] EWHC 424 (QB) [8]. The application is supported by reporters from the BBC, the Financial Times, Private Eye and Sky News, a factor which is relied on in support of the application. The application is further described in paragraph 53 of the written submissions as an application for the Court "to direct release of the Footage to the media".

11. That wording prompted me to ask Mr. Tobin, at the start of the hearing today, what it was in precise terms that he was asking me to do, that is to say: who he was asking me to order to do what. I made that enquiry because, as far as I was aware, and as far as I am aware, the court does not have a copy of this video.

12. That, in turn, prompted a helpful intervention from Mr. Rees, who gave a thorough account of the extent to which the video had been deployed and referred to in the course of the hearings in this case, going beyond the oblique and passing reference in my judgment of 24th February 2020.

13. The recording was Exhibit AB3 to the first affidavit of Amanda Barclay, the second claimant. It was relied on by the claimants in support of their application for an injunction against all the defendants. It was played to Freedman J on 5th February 2020, at the hearing in private. It was put in the bundle for that hearing, referred to it in the judgment of Freedman J. Extracts from it, including the exhibit to Ms. Barclay's affidavit, are in the bundle before me today, although there has been absolutely no reference to them until the hearing of this application.

14. I asked Mr. Rees whether he was indicating that the claimants were ready and willing to release the document. In response, he made clear that his clients had always been alive to the principle of open justice, and pointed out that this was an exhibit within the proceedings, which the claimants can provide. However, in his further submissions, later on, he indicated that it was for me to decide whether the court would make an order, and that the claimants would be guided by that.

15. Ms. Rogers has submitted that the document was deployed at a private hearing. The principle of open justice does not mean that any document that is before the court has to be given to third parties. The court has to be alive to the risk of harm that may be caused, either to the judicial process itself, or the legitimate interests of others. I should look to what the reason for access is, and to the purpose of the open justice principle which is, essentially, to enable the public to understand the hearing. That is not a purpose which would be served, she submits, by ordering the claimants to provide this document. It would represent an interference with the first defendant's privacy rights, because this is a secret recording, containing the first defendant's personal data, in relation to which he may be thought to have a reasonable expectation of privacy, protected by Article 8.

16. The legal principles are not really in dispute at all, and they can be taken as read from the very helpful written submissions of Mr. Tobin. The principal submissions relied upon today really are based upon a small number of cases of high authority. The principal authorities are cited in paragraphs 16 and 18 of the written submissions: *R(Guardian News and Media) v City of Westminster Magistrates' Court* [2012] EWCA Civ 420, and the more recent case in the Supreme Court of *Cape Intermediate Holdings v Dring* [2019] UKSC 38. I do not propose to cite extensively from those authorities, but I shall mention paragraphs [44-47] in the judgment of Baroness Hale, to which I have been taken, and which are very clear.

17. My decision is that I will not make any order that the claimants should provide the media with this document.

18. The application has been made on very short notice, and just as I did when dealing with the application made by the defendants in private yesterday I approach it as if it were an urgent interim application, in this case for the production of information, which is resisted by the person to whom that information relates. The application does not comply with the Order of 24 February 2020. I do not think it is right to make a conclusive decision on such short notice, with the limited argument that I have had.

19. The reasons why I do not make the order for disclosure at the moment also include the following:-

    (1) First, as I have said, I do not believe this is material that is in the court's records, or ever was in the court's records.

    (2) Secondly, I do not believe this is material that is in the court's possession. I have been given no reason to suppose that the court retains a copy. If it did, that would be contrary to the normal practice in relation to documents produced to and viewed by the court as long ago as 5th February 2020, which have been barely referred to, and certainly not viewed by me, in the course of all the proceedings since then.

    (3) Thirdly, the only order the court could make, therefore, is an order requiring a third party, namely the claimants, to make the material available. I have not been taken to any authority that decides that that is an order that the court can make. I am not deciding that the court cannot make such an order, but it would be a step beyond anything that has been done so far, and I would not consider it appropriate to take that step on a short-notice application of this kind.

    (4) Fourthly, although reference has been made by Mr Tobin to the Protocol that governs the disclosure of material in criminal proceedings, I am not persuaded that that is an apt analogy. Criminal proceedings are brought by the state against citizens. They represent an exercise of state power. The Protocol concerns the functions of a number of different agencies, all of which are public authorities. The Protocol goes well beyond the principle of open justice as it relates to proceedings in court.

    (5) Fifthly, I am not persuaded, indeed it has not been submitted, that this document is required in any way for the purposes of reporting this hearing. There has been no reference at all to the footage until this application came on for hearing.

(6) Sixthly, the degree to which this material that is required for the purposes of reporting the February hearings before me is seriously questionable. There was no dispute at those hearings about what had happened.

(7) Seventhly, the relevance of this material to the reporting of the hearing before Freedman J is a lot more obvious: he plainly relied on that material to make the orders that he did, and referred to it in his judgment. But it is a matter that goes to discretion that nobody seems to have applied for a transcript of Freedman J's judgment in order to make the point that I have just made. The first mention of that was in Mr. Rees's helpful intervention.

(8) Finally, the material is in the hands of the claimants, and available to them to provide to the media, if they so choose. If they were to provide it to the media for the purposes of facilitating the reporting of proceedings which - albeit they were in private at the time - are now publicly accessible, that would be one thing. For my part, I could not see any objection to that, whatever might be the interference with the privacy rights of the first defendant that that involved. However, the fact that they can do that is a good reason for the court not to exercise whatever discretion it might have to require them to do that.

20. One has to approach an application of this kind with a degree of caution. It is, of course, no part of the function of the court to attempt to regulate or control the way in which the media report on proceedings that take place in open court, or those which take place in private and are then opened up to scrutiny, as is the position here. The authorities make perfectly clear that the court should lean in favour of facilitating or ensuring media access to documents and materials that were put before the court, and, emphatically, those that were relied on by the court as part of its reasoning process.

21. On the other hand, the court's machinery can sometimes be used as a mechanism for the "laundering" into the public domain, with the protection of the privileges that attend fair and accurate reporting, of material that it suits one party to deploy in a public arena, as part of a litigation strategy. I emphasise that I am not, by saying that, indicating that that is what I consider to be going on here. However, it is a factor that has to be considered as part of the court's decision-making in any individual case, because every individual decision may be relied on as some sort of precedent in future cases.

22. For those reasons, it seems to me the court should be especially cautious in a high profile, highly publicised case before it makes a mandatory order against an apparently willing party to provide documents which are in its possession to a third party, for the purposes of reporting.

23. I would add just this in relation to the Article 8 arguments advanced by Ms. Rogers. There is considerable of force in the submission of Mr. Tobin, that the Article 8 rights of someone caught out interfering with someone else's privacy by surreptitious recording may be considered to be at the lower end of the scale, when one comes to consider whether the court should prevent, or refrain from facilitating, an interference with those rights. However, for the reasons I have given I do not have to adjudicate on that question.

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