Neutral Citation Number: [2020] EWHC 1194 (QB)

Case No: QB-2020-000179

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/05/2020

Before :

MR JUSTICE NICOL

- -

Between :

Notting Hill Genesis	**Claimant**
- and -	
Abdirahman Ali	**Defendant**

- -
- -

Caroline Addy (instructed by **DAC Beachcroft LLP**) for the **Claimant**
The Defendant in person

Hearing dates: 22nd April 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.

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MR JUSTICE NICOL

Mr Justice Nicol :

1. There are two applications by the Claimant before the Court today. The first is an application for permission to make use of documents produced by the Defendant in Employment Tribunal proceedings which he brought against the present Claimant ('the use of disclosed documents application'). The second application is the adjourned application by the Claimant for an interim injunction ('the interim injunction application').

2. The Claimant is a large housing association. It has some 64,000 properties housing about 170,000 people. The Claimant employed the Defendant as a Financial Inclusion Officer from 9th April 2018 until his resignation on 8th October 2018 with effect from 12th October 2018. On 13th February 2019 the Defendant brought proceedings against the Claimant in the London Central Employment Tribunal. He alleged (amongst other things) that he had been constructively dismissed, that he had suffered discrimination on grounds of race and disability and been subjected to detrimental treatment as a whistle-blower (*Abdirahman Ali v Notting Hill Genesis* Case Number 2200496/2019).

3. The present proceedings began with the issue of a claim form on 16th January 2020. Particulars of Claim were attached to the Claim Form. The Claimant alleges that the Defendant is in breach of the General Data Protection Regulation, has breached its confidential information and misused the private information of its tenants.

4. On 17th January 2020 the Claimant issued its application notice for an interim injunction. This first came for hearing before Soole J. on 27th January 2020 – see *Notting Hill Genesis v Abdirahaman Ali* [2020] EWHC 463 (QB). The Claimant had had difficulty in serving the Defendant and he did not attend and was not represented at the hearing before Soole J. On that day the judge queried whether it was open to the Claimant to rely on documents some of which had been produced on disclosure in the Employment Tribunal proceedings. He referred to the decision of the Court of Appeal in *IG Index Ltd v Cloete* [2014} EWCA Civ 1128. Caroline Addy, counsel, who then as now acted for the Claimant, accepted that, in view of that decision, she did need the Court's permission to rely on information about the provenance of the disclosed documents. She asked the Judge to grant retrospective permission. Soole J. declined to consider such an application, notice of which ought to be given to Mr Ali. In those circumstances, he also declined to consider the application for an interim injunction. He did make an order for substituted service (at an email address, abdi-ali@outlook.com, which at the hearing before me Mr Ali confirmed he still used). Soole J. made other procedural directions.

5. The Claimant issued the application notice seeking permission to use information from the documents disclosed in the Employment Tribunal proceedings on 6th February 2020. The Defendant served his defence on 3rd April 2020.

6. CPR r.16.5 prescribes what a defence should contain. In particular, it should state for each allegation in the Particulars of Claim whether the allegation is admitted, denied or whether the defendant is unable to admit or deny the allegation. If the allegation is denied the defence should state the grounds for the denial. Ms Addy is entitled to comment that the Defence in this case does not observe those requirements. It does not address each allegation in the Particulars of Claim: it is a more discursive document.

The timing of the present hearing

7. Paragraph 1 of Soole J's order directed that the application for an interim injunction should be made on notice to Mr Ali with the hearing to take place on the first open date after 20th April 2020.

8. Soole J. was aware that the trial of the Employment Tribunal proceedings was due to take place imminently (in March 2020). The judge was also aware from one of Mr Ali's emails that 'he needs to focus on the great amount of work which is required for the full hearing in the Employment Tribunal.' ([30] of Soole J's judgment).

9. I was told that the Employment Tribunal hearing did indeed start on 4th March 2020 with a 12-day time estimate. Judgment was reserved. At [34] of his judgment Soole J. said that the Claimant's application for an interim injunction 'should not be before the conclusion of the Employment Tribunal proceedings'. At the hearing before me, Mr Ali legitimately questioned whether the Employment Tribunal proceedings had been concluded since the reserved judgment had not yet been delivered.

10. I was however persuaded by Ms Addy's submissions that Soole J's concern was that Mr Ali should not be distracted from preparing for the substantive hearing before the Employment Tribunal by the renewed application (the interim injunction application) in the present proceedings. With the conclusion of the hearing in the Employment Tribunal, that cause of concern had come to an end, even though the reserved judgment had not been delivered. Furthermore, the formal order made by Soole J. did not provide that there should be a further delay in the event that judgment was reserved by the Employment Tribunal and not delivered. Mr Ali had said in correspondence that he intended to emigrate, and the Claimant had a legitimate interest in having its adjourned application for an interim injunction resolved before he did so. Indeed, 2 days after the hearing before me, Mr Ali announced that he had acquired a ticket to leave the country shortly. In conclusion, I agree that it was right for the hearing to continue. If on the material presently before me I agree that there should be some form of injunction (and I return to this matter below) the parties will have liberty to apply for any injunction to be discharged or varied if there is a relevant change of circumstances. That will allow them to submit that the decision of the Employment Tribunal is (or is not) such a change. I was told that at the Employment Tribunal trial, the Defendant withdrew the whistle-blowing allegation. That may affect the relevance of any decision of the Employment Tribunal. In any event, I did not understand Ms Addy to seek an injunction which would restrain in any way the publicity which could be given to any judgment of the Tribunal.

The application to rely on information derived from the documents disclosed in the Employment Tribunal proceedings

The legal background

11. The Employment Tribunal has power to make disclosure orders in the same way that a county court can – see Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 SI 2013 No.1237 regulation 31.

12. So far as proceedings in the High Court or County Court are concerned, documents disclosed may only be used in the course of the same litigation unless,

> '(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;
>
> (b) the court gives permission; or
>
> (c) the party who disclosed the document and the person to whom the document belongs agree.' - see CPR r.31.22(1).

13. An Employment Tribunal is not a 'court' for the purposes of the CPR, but in *IG Index* at [28] the Court of Appeal held that it was implicit in the Procedure Regulations that the same restrictions on collateral use applied as if disclosure had been ordered by the County Court.

14. R.31.22(1)(b) allows the Court to give permission for collateral use of disclosed documents and that, of course, is the permission which the Claimant now seeks. At [75]-[78] of *IG Index* the Court of Appeal considered whether the High Court had power to grant permission for the use of documents that had been disclosed in Employment Tribunal proceedings in subsequent High Court proceedings. The Court of Appeal concluded that the High Court did have this power.

The factual background

15. The Employment Tribunal ordered the parties to make disclosure. In consequence, the Defendant did disclose various documents in the Employment Tribunal proceedings. Ms Addy is right to say that the obligations in r.31.22 apply only to disclosed documents. They do not apply, for instance, to pleadings (or their Employment Tribunal equivalents) or inter-party correspondence. Nor do they apply to witness statements (although CPR r.32.12 imposes restrictions on the use that can be made of witness statements). It is also clear from r.31.22(1)(a) that the restrictions cease to apply to a document which 'has been read to or by the court, or referred to at a hearing which has been in held in public'. Ms Addy submitted that some of the documents on which the Claimant relied fell within one or more of these categories. However, when pressed, she conceded that the evidence to provide the necessary particulars in support of these allegations was lacking. And, indeed, had any of them been well-founded, the application by the Claimant for permission to use the disclosed documents would have been superfluous.

The parties' submissions

16. Ms Addy's submissions as to why the Court should grant the Claimant the permission which it seeks can be summarised in this way:

    i) The Claimant has good reason to wish to prevent misuse of its information. It has obligations as the data controller to take steps to protect the security of its data. Some of the information is highly sensitive such as contacts between its tenants and the police, including on occasions criminal convictions. It also includes health data.

    ii) The scale of the documentation which the Defendant has in his possession or under his control remains unclear. In his earlier correspondence he said that he had 'thousands of documents'. In his defence to the present claim he said that

was a flippant remark not meant to be taken seriously (see paragraph 14 of the Defence), but there was nothing in the original email in which this remark had been made to indicate that was the case. In any event the Defendant has also referred to another document (an email of 24th October 2018) which he apparently retains or of which he has control.

iii) The Defendant ceased to be employed by the Claimant many months ago. He has no continuing need to possess the documents.

iv) The documents in question are the property of the Claimant. In those circumstances, the limitations on the use of disclosed documents either do not apply (see *Process Development Ltd v Hogg* [1996] FSR 45 CA) or carry less weight.

v) The reason why permission of the court was not sought in advance was not deliberate or reckless. *IG Index* represented an extension of the law as it had previously been understood.

vi) The principal reason why Soole J. had not made an order in the Claimant's favour on 27th January 2020 was because the Defendant had had no notice that this issue was to be considered. For the present hearing, he has had notice and has been present and been able to make his submissions.

vii) The Claimant denies that it deliberately sought to exclude the Defendant from the hearing on 27th January 2020 or failed to take steps which it reasonably should have taken to give him notice of that hearing. It would have been of no advantage for it to have done so. Any order made without notice to the Defendant would have been subject to an early hearing of which he would have been given given notice and at which any order previously made would have been reviewed afresh and the Defendant would have been provided with a full note of the without notice hearing.

17. Mr Ali submitted that I should refuse permission to rely on the disclosed documents. He argued that:

i) The omission to seek permission in advance had been deliberate and reckless. The restriction on the use of disclosed documents was well known. Ms Sally Christopher, one of the Claimant's solicitors, had alluded to it in her email to him of 1st August 2019 when she had said, 'the general rule is that documents provided in the course of the Tribunal proceedings should not be used for any other purpose.'

ii) The Claimant had not taken all the steps it should have done to give him notice of the hearing on 27th January 2020. He had not been able to provide a postal address because he intended to leave the U.K. and had only temporary places to stay. The Claimant had had a telephone number for him, but had not called him until after the hearing.

iii) The present action was 'misguided and misconceived' and its purpose was to distract him from preparing for the hearing of his Employment tribunal claims.

As the Claimant was also aware, he had to deal with the consequences of his father's recent death.

iv) The Claimant had also delayed issuing the present proceedings until January 2020 although it had known about his possession of certain documents from his employment since April 2018.

v) It was 'ludicrous' to suggest that the Claimant was motivated by a desire to protect its tenants' privacy, when the information which the Claimant alleged was confidential showed that the Claimant had been 'stealing' from the tenants.

vi) None of what the Defendant had done had been for his own self-interest: he was concerned that the Claimant appeared to be claiming rents to which it was not entitled.

vii) Although Mr Ali is not a lawyer and was representing himself, he asked me to consider the impact of *ECU Group plc v HSBC Bank plc* [2018] EWHC 3045 (Comm) and *Grosvenor Chemicals Ltd v UPL Europe* [2017] EWHC 1893 (Ch). Among other things the Claimant had used information which Mr Ali regarded as without prejudice and privileged.

Use of disclosed documents application: discussion

18. It has often been remarked that the power to require litigants to provide disclosure is a fundamental part of the armoury available to the courts (and some tribunals) to do justice between the parties. Yet disclosure is also an intrusion into a person's ordinary right to require the privacy of his documents to be respected (and see now European Convention on Human Rights Article 8). The restrictions on the collateral use of disclosed documents are part of the careful balance of competing rights which has to be struck between the individual's right of privacy and the wider public good see e.g. *Riddick v Thames Board Mills* [1977] 1 QB 881, 896 and *Robert Tchenguiz v Serious Fraud Office* [2014] EWCA Civ 1409 at [56].

19. Ordinarily any collateral use (not permitted by the terms of r.31.22(1)(a) and (c)) must be sought in advance of the use. Nonetheless, it is plain that the Court does have power to grant retrospective permission. It has been said that retrospective permission will only rarely be granted – see *Miller v Scorey* [1996] 1 WLR 1122, 1133 C-D Rimer J. Yet all must depend on the circumstances of the particular case. I note, for instance, that in *Miller v Scorey* itself, if permission had been granted the defendant would have been deprived of a limitation defence which might otherwise have been available (and so that was a significant obstacle to the grant of permission). In *IG Index* itself, although the Court of Appeal cited *Miller v Scorey* (see *IG Index* at [49]) the Court of Appeal took the unusual course of granting retrospective permission although the Judge at first instance (Tugendhat J.) had declined in his discretion to do so. When retrospective permission is sought a very important consideration is whether the Court would have granted permission for the collateral use of the documents if it had been sought prospectively, but although very important that is not a necessary or sufficient condition - see Andrew Baker J. in *ECU Group plc v HSBC Private Bank (UK)* [2018] EWHC 3045 (Comm) at [12].

20. In this case, if the Claimant had sought permission in advance, I have no doubt that it would have been granted. My reasons are as follows:

i) The purpose of the present proceedings is to protect the confidentiality in the Claimant's own documents and to assert a duty of confidence which the Defendant owes to the Claimant. If permission was refused, the Defendant would, in effect, be uninhibited in his use of that information. In theory the individual tenants might have a right to protect information relating to them and in which they would have a reasonable expectation of privacy, but in practice enforcement of such a right would be haphazard, not to say, unlikely.

ii) The Claimant also owes public duties under the GDPR to protect the security of its data. That is particularly the case for data of special sensitivity such as health information and contact with the police.

iii) It is not entirely clear what documents the Defendant still has. As part of the disclosure exercise in the Employment Tribunal he produced about 100 documents. On 24th July 2019 he also wrote to the Claimant's solicitors to say that 'he had spent hours sifting through more than a thousand emails'. Although the Defendant has now said that was a flippant remark, not to be taken seriously, I agree with Ms Addy that it was not apparent from the email that it was anything other than a serious remark. Although the Defence says that the Defendant does not have any further documents of the Claimant, the reassurance that would otherwise provide is undermined by the reference by the Defendant to another document of the Claimant's. In all these circumstances, there is a strong case for the Defendant to state in a formal manner what documents of the Claimant's he now has and the circumstances in which he ceased to have those which are no longer in his control. But if permission is refused, it seems that the Claimant will at least be seriously hampered in that endeavour.

iv) It is relevant that the documents with which the claim is concerned are the property of the Claimant (or, see below, copies of them). In *Process Development Ltd v Hogg* [1996] FSR 45 CA Blackburne J. had granted an *Anton Piller* order (what is now called a 'civil search order'). The Plaintiff (as the Claimant was then called) sought permission to disclose to the police the fact that its property had been found in the Defendant's possession. Rattee J. granted permission and the Court of Appeal had to consider whether he was right to do so. Sir Thomas Bingham MR gave the leading judgment. As he observed at p. 52,

> 'What is in issue here is not the Defendant's own personal property but goods and information relating to goods which he [the Defendant] has allegedly stolen from the Plaintiff. As it seems to me the ordinary rule applicable to discovery has no direct application to the situation which arises here.'

It is right that *Process Development Ltd v Hogg* was considered by the Court of Appeal in *IG Index* (see [32]-[47]). *Process Development* was distinguished on the ground that the Defendant in *IG Index* did not have the originals of the Claimant's documents but only copies (Indeed, it seems that the Defendant had supplied copies to the Information Commissioner's Office ('ICO') who, in turn, had copied the documents electronically and then returned them to the

Defendant). IG Index argued that this was too fine a distinction, but the Court of Appeal disagreed (see [39]).

In the present case, it is not entirely clear whether what the Defendant retained were the originals of the Claimant's documents or copies. So far as they were originals, *Process Development* would apply and the Claimant would not need permission. If what the Defendant retained were copies, it might still be of significance that what the Defendant had are not shown to be copies of documents supplied back to him by the ICO. Yet even if the Defendant could overcome that hurdle, it is significant that the Court of Appeal was prepared in the circumstances of *IG Index* to grant retrospective permission. Of course, the exercise of discretion in an earlier case is in no way binding on me, but it is important that the Court of Appeal considered that Tugendhat J. had erred in his approach to the exercise of discretion by not adequately reflecting on the consequences of the refusal of permission. As I have already indicated, refusal of permission in this case would, in my judgment, have severe consequences for the Claimant's legitimate concerns.

v) None of the documents were written 'without prejudice'. There is no basis for the Defendant's assertion that any of them were privileged.

21. I also reject the Defendant's assertion that the failure to seek the Court's permission in advance was deliberate or reckless. I am not sure that the decision of the Court of Appeal in *IG Index* was so novel, as Ms Addy submitted. It relied, for instance on *Crest Homes v Marks* [1987] AC 829, 854 and *Sybron Corporation v Barclays Bank plc* [198?] Ch 299. Yet, I recognise that the full extent of the obligation as expressed in *IG Index* would not have been in the forefront of the Claimant's solicitors' minds, even though they would necessarily have been aware of the general principle against the collateral use of disclosed documents. In any event, it would be surprising for such a cavalier attitude to the Rules to be adopted by a reputable firm of solicitors, such as DAC Beachcroft is, and, in any case, it would be for the Defendant to make good the assertion that the omission to seek prospective permission was deliberate or reckless. He has provided no sufficient evidence in support of that assertion.

22. The explanation for the chronology has been given by Ms Sally Christopher in her witness statement of 6th February 2020. There is no, or no sufficient, evidence to contradict her explanation. In brief, although the Defendant ceased to be employed by the Claimant in October 2018, it was only in July 2019 that the Claimant realised that he might still have the Claimant's documents. That arose because he mentioned in an email of 3rd July 2019 that some of the documents he proposed to disclose in the Employment Tribunal proceedings might contain details of the Claimant's clients and employees. The correspondence continued as Ms Christopher describes. The Claimant remained concerned and issued the present proceedings in January. By then, the hearing of the Employment Tribunal hearing was imminent. With respect, I can well understand why Soole J. decided that fairness to the Defendant required the substantive hearing of the interim injunction application to be deferred until after the hearing of the hearing in the Employment Tribunal had been concluded. That has now happened. In my view there is no evidence to support the Defendant's assertion that there was something more sinister in the chronology or the timing of the present proceedings. I do not accept that they were engineered deliberately so as to distract the Defendant from preparing for the Employment Tribunal hearing.

23. Nor do I accept that the Claimant deliberately omitted to take steps that it was obliged to take so as to avoid giving the Defendant notice of the hearing on 27th January 2020. The Defendant had declined to provide an address for service. Although it was apparent that he had an active email account, he had expressly declined to accept service by email. Ms Addy was entitled to describe his attitude in the run-up to that hearing as 'uncooperative'. Even if the Claimant had a telephone number for the Defendant, there was no obligation on it to use that method of communication to give the Defendant notice of the hearing. I also agree with Ms. Addy that there would have been little advantage for the Claimant in deliberately failing to give notice of the hearing to the Defendant. As she said, any injunction granted without notice, would only have been for a very short period and the Defendant would have been given a note of what had then taken place. When proper notice was given to the Defendant, the Court would have considered afresh whether an interim injunction was justified.

24. For all of these reasons I shall grant the Claimant retrospective permission to rely in these proceedings on the documents disclosed by the Defendant in the Employment Tribunal proceedings.

The interim injunction application

25. Ms Addy accepted that the injunction which the Claimant sought included restrictions on the Defendant's freedom of expression. Accordingly, by Human Rights Act 1998 s.12(3), the injunction could only be granted if the Claimant was 'likely to be granted' injunctive relief at trial. In effect, in the present circumstances, that meant that she had to show that it was more likely than not that the Claimant would succeed at trial – see *Cream Holdings ltd. v Banerjee* [2005] 1 AC 253 (HL).

26. Mr Thacker, who is the Claimant's Group Director of Central Services, gives evidence in his witness statement of 16th January 2020 of the terms of the Defendant's contract with the Claimant. The Claimant questioned how the Defendant came to be in possession of some at least of the information in the first place. The Defendant has said in correspondence that he had the permission of his managers. That, however, is not material. It is clear that on the termination of his employment in October 2018 at least, the Defendant should have returned any of the Claimant's documents to it and deleted any electronic copies on his devices. It is clear from subsequent events that the Defendant did not do this.

27. It is also clear that the Defendant has disclosed the Claimant's confidential information to a number of recipients. These include, on his own admission: the Financial Conduct Authority; the Treasury; the Information Commissioner's Office; at least one MP; the Serious Fraud Office. The Defendant may also have been in communication with a journalist for the *Mirror* website. On the face of it, these disclosures would have been in conflict with the Defendant's obligations to preserve the Claimant's confidential information.

28. In general terms, it is apparent that the Defendant believes that these disclosures were necessary in the public interest. However, there is no witness statement from him to this effect and his defence does not explain with the necessary particularity what he alleges the Claimant has done that was wrong. Ms Addy is also entitled to observe that, despite the disclosures referred to, there has been no official criticism, or even investigation, of the Claimant.

29. In my judgment, the Claimant would be likely to succeed at trial in restraining the Defendant from making any further disclosure of the Claimant's confidential information. I should add that Ms Addy made clear that it was no part of the Claimant's application to seek an order which would inhibit the Defendant in his conduct of the Employment Tribunal proceedings, though even in that context it would not be necessary for him to refer to any of the personal information of the Claimant's clients. An appropriate qualification will need to be added to the Claimant's draft order to give effect to this.

30. The Claimant is also entitled to be provided with the information in paragraph 2 of the draft order as refined by Ms Addy in the course of the hearing. As refined, it does not require the Defendant to allow his devices to be inspected.

31. With these modifications I will allow the Claimant's application for an interim injunction until trial or further order.