Neutral Citation Number: [2020] EWHC 424 (QB)

Case No: QB-2020-000370

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

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 24/02/2020

Before:

MR. JUSTICE WARBY

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Between:

(1) SIR FREDERICK BARCLAY **(2) AMANDA BARCLAY**	**Applicants/ Claimants**
- and -	
(1) ALISTAIR BARCLAY **(2) AIDAN BARCLAY** **(3) HOWARD BARLCAY** **(4) ANDREW BARCLAY** **(5) PHILIP PETERS**	**Respondents/ Defendants**

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MR. DESMOND BROWNE QC, MR. HEFIN REES QC, MR. CLEON CATSAMBIS and MS. SOPHIA DZWIG (instructed by **Brown Rudnick LLP**) for the **Applicants/Claimants**

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

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Approved Judgment

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MR. JUSTICE WARBY:

1. This is an application on short notice for an interim non-disclosure order in this claim, which is based on allegations of breach of confidence, misuse of private information and breach of data protection rights.

2. The defendants' position is that the application should be dismissed for three main reasons: that the short notice that has been given is unjustified; that the application lacks any, or any sufficient, evidential foundation; and that the injunction sought is unnecessary in the light of undertakings which the defendants have offered as a result of negotiations that have taken place over the last four days.

3. The claimants also seek orders requiring them to be put on notice of any application by non-parties for access to certain documents that are or may become filed on the court file. That is an application to which I will come back separately.

4. The claim stems from a falling out between elements of the families of Sir Frederick and Sir David Barclay, the well-known businessmen. The group of businesses that they have built up over the years includes, prominently, the Telegraph Media Group, and the Ritz Hotel in London. The claimants are Sir Frederick and his only daughter Amanda. The defendants are three of his nephews, Alastair, Aidan and Howard - all sons of Sir David - Aidan's son Andrew, and Philip Peters, a Board director of the Barclay group.

5. Substantial parts of the business enterprises are now owned by trusts, the beneficiaries of which include the second claimant, Amanda, and at least the first three defendants. It is apparent that a dispute has arisen, the details of which it is unnecessary to enter into, between different elements of the family over the governance and direction of the group businesses, at least.

6. This action has its origins in the claimants' discovery, on 13 January 2020, that Alastair Barclay had been secretly recording conversations between the claimants, held at The Conservatory at the Ritz Hotel. Evidence obtained since the action began has revealed that such recording was being undertaken from about early November 2019. Transcripts of some of the conversations have been made, recordings have been kept, and there have been discussions between the defendants about the material, the transcripts, or their significance, over WhatsApp and perhaps in other ways.

7. The claimants' case is that the conversations held in The Conservatory covered a range of private and/or confidential matters and a considerable quantity of personal data, including (1) discussions about potential acquisitions and disposals of business assets, (2) the structures, financing and the management of group businesses, (3) personal financial matters, including matter relating to the family trusts, and (4) private and confidential family matters. Much further detail is given in aspects of the documents before me which are labelled "confidential".

8. The claim form against Alastair was issued on 30 January 2020, relying on the causes of action that I have mentioned. Paragraph 1 of the claim form, in its original version, read as follows:

> "In or around January 2020 (and possibly earlier) the defendant engaged in covert audio surveillance of the claimants at a hotel in London. The defendant was captured on CCTV installed and/or handling the covert recording device. Such surveillance which was calculated to capture and in all likelihood did capture highly personal confidential, sensitive and legally privileged information, of both a personal and a professional nature, and any subsequent use, therefore, constitutes (1) misuse of private information, (2) breach of confidence and/or (3) breach of the General Data Protection Regulation and the Data Protection Act 2018."

The claim form went on to claim five heads of relief, including, at paragraph (1), injunctive relief.

9. A series of interim hearings has since taken place, before Farbey J DBE, Freedman J and, more recently, before me. It is unnecessary to rehearse the history in detail, but some key steps are these.

10. First, on 5 February 2020, the claimants obtained from Freedman J a doorstep delivery order, or DDO, against Alastair Barclay, with a return date of 12 February 2020. This included provisions for the delivery up of documents, for the provision of information about what had been done with the information gained by recording the claimants' conversations and an anti-tipping-off order, prohibiting the then single defendant from informing others of the proceedings.

11. Secondly, on Wednesday, 12 February, I granted applications for permission to join the 2nd to 5th defendants to the claim. The basis for that application was the information provided by Alastair Barclay pursuant to the order of Freedman J.

12. The amended claim form, which has now been issued, contains allegations against those defendants, namely, "The 2nd to 5th defendants knowingly received and used the covert audio surveillance of the claimants, which likewise contains (1) misuse of private information, (2) breach of confidence, (3) breach of the GDPR and the Data Protection Act 2018", and against them also injunctive relief is claimed.

13. Thirdly, on the same day, 12 February 2020, I granted the claimants' application for DDOs against each of the newly added defendants, containing similar provisions to those that I have just mentioned in relation to Alastair Barclay.

14. Fourthly, on the same day, Wednesday, 12 February, I heard the return date hearing of an order of Freedman J, granting certain orders and adjourning other applications.

15. Fifthly, on Tuesday, 18 February, there was a hearing before me of the applications against Alastair Barclay which I had adjourned the previous Wednesday.

16. Next, on Wednesday, 19 February, there was the return date hearing before me in relation to the applications against the 2nd to 5th defendants. At that hearing a timetable for the future progress of the litigation was laid down, and I made orders for the inspection of the retained recordings.

17. At the early hearings, on the claimants' application, the parties were anonymised. On 12 February 2020, I discharged the anonymity orders and declined to make orders anonymising the additional defendants, whom I allowed the claimants to add. The case has, however, been conducted from the outset, until today, at hearings held in private, and I have imposed reporting restrictions in respect of all the hearings to date. Those measures were taken on the grounds that they were necessary in the interests of justice to avoid the tipping-off of third parties who might be identified as a result of the disclosure orders sought by the claimants and against whom the claimants might bring further proceedings. That, as will be evident, is what happened when the original DDO was complied with by Alastair Barclay. There has latterly, in addition, been reliance on the fact that confidential information has, to some extent, been deployed during the hearings as a justification for reporting restriction orders.

18. The need for those restrictions has in due course fallen away, and one of the orders that I made on 19 February 2020 was a direction that the reporting restrictions previously imposed would be lifted at 2 p.m. today, unless someone made an application to extend them. The application notice put before me ahead of this hearing did contain an application for continuation of these measures, but it has not been pressed, and no party has sought an order for the hearing today to be held in private. This judgment is therefore public, following a hearing which took place exclusively in public. It was not necessary to refer to the detail of any of the confidential or private information that is the subject of the claim.

19. The immediate background to today's application appears to be what happened at the end of the hearing on 19 February. Mr. Hefin Rees QC then invited the defendants to give undertakings that they would not disclose to the press anything arising out of the confidential material in this case, in terms of what had been viewed by way of transcripts, or the audio recordings. That plainly was prompted by the direction that I have just mentioned, lifting the reporting restrictions.

20. I responded by making clear that, in the absence of agreement from the defendants at that time, I did not think it appropriate or necessary to deal on very short notice with an application for restraint of that kind. I accepted the submission of Mr. Eardley that there was no evidential basis before me for such an application. I pointed out that although there had been protection for anything confidential said in the course of a hearing, there had never been any restraint in this case on disclosure of the confidential information, other than the reporting restrictions.

21. What happened next is, in summary, the following. At about 6.30pm on Wednesday, 19 February, the claimants' solicitors wrote to those acting for the defendants, proposing that they give undertakings as to confidentiality. There was a reply indicating that instructions were being taken, but reiterating that the defendants had no desire to disseminate confidential or personal information. Then, over the following days - Friday, Saturday, Sunday and into this morning - there were fairly intensive negotiations, and documents went backwards and forwards, as to the detail of what undertakings might or might not be appropriate. It is in that context that Mr. Browne, quite fairly, reminded me of an observation I made last week, that this litigation has not been easy for any of those involved, and I accept that this has been another difficult passage in this vexed litigation.

22. I start, however, with the question of whether the claimants are justified in bringing this matter before me on such short notice. This is a case that engages the provisions of section 12 of the Human Rights Act, but not those of section 12(2), which prohibit the court from granting an application without notice unless there are compelling reasons to do so. Notice has been given to the defendants and to the Press Association.

23. On the question of the notice given to the Press Association, Ms. Rogers submits that there was no need to do that. She argues that the Press Association was, on no view, a respondent to the claimants' application; nor did it stand in the shoes of a respondent. She has referred me to paragraphs 18 and 19 of the Master of the Rolls *Practice Guidance* [2012] 1 WLR, 1003, which identifies as respondents those who are non-parties but are to be served with or otherwise notified of the order that is sought "because they have an existing interest in the information which is to be protected by an injunction". I accept that submission, but Mr. Browne has explained that notice was given for a different reason, namely that the Press Association, as a representative of the media, is an organisation affected by applications for derogations from open justice. He has referred me to paragraph 16 of the Practice Guidance and paragraph 21 of *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645. I accept that that was the motivation for notifying the Press Association. In the event, as I have made clear, there has been no application for any derogation from open justice, but the application notice that is before me, apparently drafted yesterday, Sunday, did envisage the continuation of orders for private hearings and reporting restrictions.

24. I say no more about that aspect of the matter. I focus instead on the fact that, so far as the defendants are concerned, only very short notice of this application has been given. Ms. Rogers points out that the general rule is that a copy of the application notice must be served at least three days before the court is to deal with the application: see CPR 23.7 and PD23A paragraph 4.1. That certainly has not been done. The claimants' application notice was, it seems, drafted over the weekend and may have been filed today. They now seek a direction under CPR 23.7(4) that in the circumstances of the case sufficient notice has been given of the application.

25. The draft order addresses that in paragraph 3, which sets out to justify short notice on the following basis:

> "(a) that the Claimants have taken all practicable steps to notify persons affected and/or (b) that there are compelling reasons for notice not being given, namely (i) that the application was urgent because there is no interim non-disclosure order currently in place, (ii) that protection is afforded by paragraphs 1 to 3 of the (order of 19 February 2020) ceased to have effect at 14.00 on Monday, 24 February 2020, and (iii) it has not been possible to agree satisfactory undertakings with the defendants ..."

26. The most obvious response to the allegation of urgency is that any urgency would seem to be of the claimants' own making. There is ample evidence at this stage to suggest that the bugging of conversations at the Ritz yielded a wealth of confidential

business information, and personal information of a confidential and private nature which, on the face of it, the claimants are entitled to protect from unauthorised use or disclosure. Certainly, the unauthorised use or disclosure of such information would require cogent justification. At the present time, I have very little evidence or information on the topic of justification. The litigation is still at a relatively early stage, and the defendants have not been called on yet to file a defence; but it is nonetheless fair to say that it is somewhat unclear as to what the justification might be. The claimants' case is unequivocal: that there is and can be no such justification.

27. Against that background, it is a striking feature of this litigation that in the six weeks or so that have passed since the claimants discovered that their conversations had been bugged, there has never been any application to the court for an order restraining the use or disclosure of the information acquired by doing so. Applications of that kind are a commonplace, indeed standard feature of claims in confidence or privacy, where undertakings to maintain secrecy have not been forthcoming. There have been opportunities to seek such relief. The case has been before a judge on at least six occasions before today.

28. The inference that I had previously drawn was that claimants did not consider that there was a real threat of misuse or onward disclosure of their private or confidential information, or at least not a sufficient threat to call for the imposition by the court of restrictions on disclosure and use.

29. There are a number of factors that might explain the claimants' position, among them the fact that this is a family dispute, the fact that all parties have some interest in the success of the business interests that lie at the heart of the dispute and might be threatened by untoward disclosure, and the fact that the defendants' covert activities having been unmasked, it would seem that any misuse of the information obtained would be hard to conceal and any liability that might arise would be hard to evade.

30. Mr. Browne has told me today that the existence of the reporting restriction orders, albeit different from and less effective than an INDO, explains the fact that there has been no application for such an injunction.

31. Whatever the reasons may be, it seems to me that the claimants need to demonstrate a clear and compelling justification for bringing this application on so late and so soon.

32. The mere fact that the existing provisions as to reporting of hearings expired today cannot suffice, as they never afforded any protection against disclosure of anything, by any means, other than via reporting of proceedings in court which, as I have indicated, did not include any material disclosure of private or confidential information. The mere fact that there is presently no INDO in place plainly cannot suffice as a justification for putting one in place. What is required is a positive reason to justify such a step. If it is to afford a full justification for urgency, the reason must be one that has only come into existence or at least become apparent only recently, and so recently that it would not have been possible to give the notice required by the CPR.

33. I turn to the evidence. The application is supported by an affidavit of Jane Colston of the claimants' solicitors, which addresses, appropriately, the sensitive nature of the

information that is categorised as confidential and/or private. She describes the process of bugging of the claimants and observes:

> "There does not seem to be a reasonable or innocent explanation for this behaviour ... The use of a secret recording device is, itself, strong evidence of improper conduct ... It is to be inferred that the bug was designed to surreptitiously gather confidential and private information to assist the defendants in their personal and professional objectives and that such objectives remain in existence."

34. However, she goes on to observe, in paragraph 17(c), that the data has, prior to recent court orders, been stored or processed in a way that seems insecure. She concludes, in paragraph 18:

> "Against this background, now that the claimants know more about how their data was treated, they have little faith and confidence that the defendants will not, without the discipline of a court order or undertakings to the court, police what they are doing with the confidential data, who they are disclosing it to and how they are using it."

35. It is hard to identify in that evidence anything that is a novel or recent development in the case that could count as a threat, or evidence of a threat or a risk, that information would be misused or disclosed. The inference that the defendants are untrustworthy stems, ultimately, from the fact of the bugging and its apparent impropriety. What is now being said about the impropriety of the bugging could have been said at any stage since 13 January, and could have been said in the proceedings at any stage since 30 January 2020. It is not easy, therefore, to see what it is that could justify the significant change of position that has occurred over the past few days.

36. That brings me to the question of necessity, and the third justification for urgency that is put forward, namely that it has not been possible to agree satisfactory undertakings. The first thing to say about that point is that nobody is obliged to provide undertakings not to act unlawfully, so a failure to do so cannot be enough to justify an injunction. Such a failure cannot afford a standalone justification for such an order. To justify that, there must be some evidence of a threat or intention to act unlawfully, or at least of a risk that this will happen, sufficient to justify the intervention of the court. That said, a failure to provide undertakings can make an evidential contribution to the conclusion, that without an injunction there is a sufficient risk of wrongdoing to justify the court making an order.

37. The salient facts here are these. The claimant at no point prior to 19 February suggested there was a need for any injunctive relief or any undertakings to protect the information at issue. The position adopted on behalf of the defendants, when the matter was raised before me, on 19 February, was that there was no intention and no evidence of any intention to disclose. That was repeated in the initial response by letter on Friday 20 February.

38. I have been taken through the exchanges of correspondence that subsequently took place, principally over the weekend, and it is my assessment that the defendants responded to the demands of the claimants' solicitors, and to their objections to the defendants' own proposals, in a responsible and reasonable way. Having addressed the four points raised by Brown Rudnick on Friday night, the defendants' solicitors then responded on the Sunday in a way that does not strike me as manifestly unreasonable.

39. We are left, at the time of this hearing, on Monday afternoon, 24 February 2020, with just one major issue relating to the proposed Confidential Schedule 1 to the order, and a group of smaller points relating to departures from the model order. Most of the issues, as Mr. Browne candidly made clear in his submissions, have been dealt with. He described the undertakings offered by the defendants, as they stood at the opening of this hearing, as undertakings which "come close to being satisfactory".

40. The main remaining issue concerns the risk of what has been described as "reverse engineering". In other words, the possibility that the defendants might seek to exploit the confidential information acquired by surreptitious recording in such a way as to create a different, ostensibly legitimate, source for the information. Some of the wording which was thought to give rise to a concern of that kind has been agreed now, so that the operative words are "information contained in or derived from the confidential information". But a related point that remains in dispute concerns the question of what happens if and when the defendants wish to use information on the basis that it was *not* derived from the audio recordings.

41. This part of the debate has really only arisen in the course of today. It is the claimants' position that some wording that they have put forward to me this afternoon should be imposed by the court on the defendants as a means of addressing this problem. The wording is contained in subparagraphs (2) and (3) of what is now a confidential schedule to undertakings. They read as follows:-:

> "(2) For the avoidance of doubt, the Confidential Information shall not include information which (i) was known to the defendants independently of the covert recordings and prior to the covert recordings; (ii) the defendants are lawfully entitled to use; and (iii) is not confidential or private to the claimants.
>
> (3) In so far as the defendants wish to rely on the exclusion of paragraph 2 of this Confidential Schedule 1 above, the defendants shall give three clear days' notice to the claimants and, if there is any dispute about whether the information in question constitutes confidential information, the defendants shall not use it pending determination by the court."

42. I rose for some time to enable Ms. Rogers to take instructions on that wording and, to some extent, she has instructions to accept it, but she took objection to some of the words in paragraph (2)(i) and to the whole of paragraph (3). The objection to (2)(i) was that the words "and prior to the covert recordings" should not be included. The objection to paragraph (3) was that it is unworkable because of the sheer breadth of

the information defined as "Confidential Information" in the confidential schedule. It is so broad, she submits, that a great deal of information that could quite legitimately be deployed would be caught and, would thereby become the subject of an unreasonable obligation to give three clear days' notice before making use of it.

43. In the time available, it really has not been possible to make a sensible evaluation of the merits of those points and the ruling that I am making now should not be taken to be a determination of them. My conclusions are these. The evidence has failed to provide any clear basis justifying the urgency with which this application has been brought on, or the fear that the defendants will do that which they have remained free to do for the last six weeks. The evidential basis for the application is, in reality, no better, or not materially better than it has been for the last several weeks. The request for undertakings could as easily have been made two weeks ago, or three weeks ago, as on Wednesday evening. If that had happened, I do not doubt that the parties would, in relatively short order, have arrived at substantially the position they have reached today, that is, substantial agreement on the terms of the appropriate undertakings.

44. Reviewing the negotiations between last Wednesday and this morning dispassionately, I do not see anything that departs materially from the picture one would typically expect from drafting discussions in matters of this kind. The issues were not totally straightforward. They had to be dealt with from a standing start and, as one would expect from teams of experienced and skilful lawyers working hard over a period of four days, they have largely been dealt with. I see no sign of anything improper being done or of any improper position being adopted by the defendants or, for that matter the claimants. The position adopted by the defendants at the present time cannot be categorised as an unreasonable one and, given the short notice they have provided, the claimants cannot legitimately complain if they do not achieve everything that they have set out to achieve today.

45. Accordingly, I accept the undertakings offered, in the terms offered by the defendants, with the restrictions and limitations identified by Ms. Rogers. I also, for the reasons I have given, accept her submission that this hearing has been brought on too swiftly and could and should have been avoided. I make no injunction order. If the claimants wish hereafter to impose additional limitations or restrictions on the use the defendants can make of the information, and they cannot achieve those limitations or restrictions by agreement, they will have to make a fresh application. The prospect of such application is one reason why I have dealt with this matter at some length, as I may not be the Judge who hears it.

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