Neutral Citation Number: [2019] EWHC 1469 (QB)

Case No: QB-2019-002073

IN THE MATTER OF AN INTENDED ACTION
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/06/2019

Before :

THE HONOURABLE MR JUSTICE WARBY

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Between :

Advertising Standards Authority Limited	**Intended Claimant**
- and –	
Robert Neil Whyte Mitchell	**Intended Defendant**

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- -

Aidan Eardley (instructed by **Bates, Wells & Braithwaite London LLP**) for the **Intended Claimant**
The Intended Defendant was not present or represented

Hearing date: 7 June 2019

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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 WARBY

MR JUSTICE WARBY:

1. Just about everyone who uses email will have had an experience similar to the one that has led to this application for an injunction. Email programmes commonly autofill the name of the addressee, as the sender types in the name. Sometimes, the name filled in by the programme is not the one the sender intended. Sometimes, the sender clicks on send before realising the error. The message goes to an unintended recipient. Sometimes, this is a problem. The email or its attachments may contain information that is personal, private, confidential, commercially sensitive, or just embarrassing.

2. This is a recognised risk. Emails commonly contain standard text intended to address it, making clear (for example) that the email and attachments are only intended for one or more persons, should not be used, copied or disseminated to anyone else, and if they are mis-addressed they should be destroyed, and the sender notified.

3. In this case, the sender was an investigating officer of the Advertising Standards Authority ("ASA"), Tom Norton. Mr Norton had been investigating a complaint about a billboard advert attacking the record of the Royal Bank of Scotland ("RBS"), apparently funded by Robert Mitchell. The ASA considers that a company linked to Mr Mitchell, by the name of Banks Claims Group Limited ("Banks Claims"), was also involved with the billboard.

4. Mr Norton's email, sent at or about 12:29 on Friday 31 May 2019, had six elements or attachments. They included [1] the original complaint, with [2] a photograph of the billboard, [3] an exchange of correspondence with Mr Mitchell, [4] draft recommendations in respect of an advertising complaint, [5] an email chain including legal advice from Mr Rupert Earle, a partner of Bates Wells Braithwaite, and [6] a written Opinion of Counsel from 2009. The email and attachments were meant to go to Mr Earle, for further legal advice. In fact, they went by mistake to the person whose conduct was under investigation by the ASA, Mr Mitchell.

5. Once the email was sent, the error was swiftly realised. Mr Norton very promptly sent a "message recall" email. He then emailed Mr Mitchell asserting that the email was confidential and asking for its deletion. That was at 13:16 on 31 May 2019. At 16:54, a letter was sent, reiterating these points. On Monday 3 June 2019, Mr Earle left a voicemail message. On Tuesday 4 June, a further letter was sent, with drafts of the application notice and order that are now before me, making clear that this application would be made in the absence of suitable undertakings. A further voicemail and text message were sent.

6. Mr Mitchell evidently became aware of these communications, from an early stage. That is apparent from a series of posts on his Twitter account, on which he has informed his followers that he is being threatened with a "super injunction", has posted a copy of the front page of the draft order, and criticised the ASA and its lawyers for their conduct.

7. Mr Mitchell also provided direct responses to all this communication from the ASA and its lawyers.

   (1) At 04:02 on 5 June 2019, he emailed to say that he had not been available "until late tonight" due to a child health issue, but would be "seeking specialist legal advice".

(2) At 14:52 on 5 June 2019, he sent by email an "OPEN LETTER in the PUBLIC INTEREST", of which I shall say more later. At this point it is enough to say that the letter made clear that no undertakings would be forthcoming. It pointed out that the mistake was that of the ASA, and invited the ASA to engage in calm reflection, "see the error of your hammer to crack a nut strategy", immediately withdraw "this ill-judged injunctive claim", and apologise to Mr Mitchell.

8. It is against that background that this application was issued by the ASA against Mr Mitchell on 6 June 2019. I heard the application in open Court on the morning of 7 June 2019, and decided it in favour of the ASA. This judgment, circulated in draft on the afternoon of 7 June, gives my reasons for doing so.

9. The application papers were sent to Mr Mitchell, and to Banks Claims, by emails timed between 4:30 and 5pm yesterday afternoon. At 06:19 today, he responded by an email sent, via Bates Wells Braithwaite, for my attention. This informed the Court that "for a number of reasons listed below I will not be attending the hearing in person today". He began by stating that he is not domiciled in England and Wales, and that this Court is not the appropriate locus for consideration of this application as English law does not apply. He then made a number of other points about the procedural and substantive merits of the application, to which I shall come later.

10. The case for the ASA, represented today by Mr Eardley, is that this Court has jurisdiction to grant the injunctions sought. The ASA's case is that the contents of the email and attachments were and remain confidential and, in part, legally privileged. Mr Eardley submits that, subject to certain exceptions and qualifications, Mr Mitchell should be prohibited by injunction from using, publishing, communicating or disclosing all or any part of the email and attachments [1], [2] and [4]-[6], and any information derived from them. He seeks an additional order, for disclosure of what Mr Mitchell has done with the email, attachments, and the information they contain.

11. This is not the trial of the action, but an interim application brought on short and informal notice, at which I have to decide what should happen at this early stage, when I have relatively limited evidence, and there has been relatively limited time for argument. I am asked to grant an injunction until a return date in a week's time, when there can be a hearing at which the Court can hear from both sides, if Mr Mitchell chooses to attend.

12. The application is brought without formal service on Mr Mitchell. That is because the ASA has been unable to identify a service address. He is not present, nor is he represented. But, as I have indicated, Mr Mitchell has been told about the application and the hearing, and he has been provided with the application documents, and he has responded.

13. I should deal first with some procedural issues:

(1) Open justice. I have heard this application in public, but directed that the information which the ASA seeks to protect should be withheld from the public, and granted a reporting restriction order in respect of it, pursuant to s 11 of the Contempt of Court Act 1981. The reasoning is simple: the purpose of the claim and application is to protect what is said to be confidential information. Publicity in advance of judgment would destroy the subject matter of the claim. These measures

are the minimum necessary to avoid that. They mean that it is not necessary for the hearing to be in private.

(2) Jurisdiction (A). Mr Mitchell has asserted that he is not domiciled in England and Wales, but he has not (or not clearly) asserted where he *is* domiciled. I take his latest letter to imply that his domicile is in Scotland, but he has not squarely asserted as much. If he was domiciled in Scotland and not in England and Wales, there could be a debate about whether the Courts of this jurisdiction or those of Scotland provide the appropriate forum for the claim (*Kennedy v National Trust for Scotland* [2019] EWCA Civ 648), and there might be dispute about the applicable law (*Douglas v Hello!* [2006] QB 125 [97]). But this Court would not be deprived of jurisdiction to grant interim relief: CPR 25.4 and Civil Procedure 2019 nn 25.4.1 and 25.4.2. As it is, I accept that the test for me to apply at this stage is whether the claimant is likely to establish at trial that the defendant is domiciled here, so that the English Court has jurisdiction over him. This is because of the threshold test provided for by s 12 of the Human Rights Act 1998 ("HRA"), with which I deal later. I shall deal with this issue in its proper place.

(3) Jurisdiction (B). The Court has no jurisdiction to grant an injunction which restrains freedom of expression, unless the respondents are present, or the Court is satisfied that the applicant has taken all practicable steps to notify them, or that there are compelling reasons not to do so: HRA 1998 ("HRA"), s 12(2). I am satisfied that all practicable steps have been taken, and that the respondents are in fact clearly and sufficiently on notice of the application. Mr Mitchell knew a week ago that the ASA was concerned to protect the information mistakenly sent to him. He has been provided with notice of the application, the order sought, and the evidence relied on.

(4) Adequacy of notice. The general rules are that an application notice must be served on the respondent, with the supporting evidence, at least 3 days before the Court is to deal with the application. rr 23.4(1), 23.7(1)(b), and 23.7(3). But the Court may direct that in the circumstances sufficient notice has been given, and hear the application: r 23.7(4). That has been my approach today. It has not been possible, despite diligent efforts, for the ASA's solicitors to identify a service address. The notice is sufficient, given the circumstances to which I shall come.

(5) Claim Form. Ordinarily, a claimant should issue proceedings before seeking an interim remedy. But there may be insufficient time, and the Court may grant a remedy in return for an undertaking to issue a Claim Form. That is what I have been asked to do. The draft Order offers such an undertaking. It is something that is appropriate in principle, provided the interim relief itself is justified.

14. The next, and important, question is whether there is a sufficient threat or risk that the respondent will, unless restrained, carry out the acts which the injunction would prohibit. Mr Eardley relies on what I said in *Linklaters LLP v Mellish* [2019] EWHC 177 (QB) [29]:-

> "The applicant for an interim injunction of this kind must meet some threshold conditions. First, and fundamentally, it must satisfy the Court that there is a threat or risk that, if not restrained, the respondent will publish. The Court must be persuaded that

> the threat or risk is sufficient to justify the intervention of the Court, assuming the other threshold conditions are met."

15. Mr Eardley has taken me through the correspondence, identifying grounds to fear that Mr Mitchell may publish, disclose or use at least some of the materials and information which are the subject of the claim. He has very properly drawn attention to an express denial, in one of Mr Mitchell's tweets, that he has any intent to misuse the information. But Mr Eardley has also identified a number of passages which I accept give rise to a reasonable apprehension that Mr Mitchell might make disclosure, or use, information which is the subject of the claim, unless he is ordered not to do so.

16. In a Press Release of January 2019, Mr Mitchell appears to boast of being "the individual who leaked" a Financial Conduct Authority investigation report "for all the world to see". In an email sent to the ASA before the present dispute arose Mr Mitchell made clear that he refused to consider himself bound by any confidentiality provisions of the ASA's regime, on the grounds that he had not subscribed to their regime. There are passages in his recent tweets that imply a degree of pleasure in the discomfiture he can tell the ASA feels at what has happened. His "Open Letter" contains passages that come close to disclosing some of the content of the information. There is a refrain in his correspondence, that the public interest justifies some disclosure. He does not make clear, however, what it is that he considers to be justifiable in the public interest.

17. It is also relevant to this point that Mr Mitchell's communications display a degree of confusion. He fails to distinguish clearly between the aims of this application (to restrain disclosure of confidential unpublished information about the ASA's procedures and legal advice) and "gagging" of what he wants to say about the conduct of RBS. As Mr Eardley has emphasised, this application does not impinge on Mr Mitchell's freedom to criticise RBS. If the ASA were to determine the billboard complaint against him and/or Banks Claims, that freedom would be affected. But no such adjudication has yet been made, and that is a separate matter. I should add that the order sought contains a carve-out to ensure that Mr Mitchell is not prevented from making use of the draft determination, and the correspondence about it, for the purposes of the ASA complaint and any litigation that may ensue about that.

18. I have borne these points in mind when concluding that sufficient notice has been given, in all the circumstances.

19. The threshold test on an application of this kind, which seeks pre-trial relief which, if granted, might affect the exercise of the Convention right to freedom of expression, is "that the applicant is likely to establish that publication should not be allowed". I set out what this means in *Linklaters v Mellish* (ibid.):

> "This requirement looks forward to the time of a trial, and to what would happen then. "Likely" in this context normally means "more likely than not", though a lesser prospect of success may suffice where the Court needs a short time to consider evidence/argument, or where the adverse consequences of publication might be extremely serious: *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 [16]-[23] (Lord Nicholls); *ABC v Telegraph Media Group Ltd* [2018] EWCA Civ 2329 [2019] EMLR 5 [16]. "

20. In this case, as in *Linklaters*, the cause of action relied on is breach of confidence. It is sufficient to repeat what I said at paragraph [26] of *Linklaters*:

> "The law of breach of confidence is summarised and considered in the recent judgment of the Court of Appeal in *ABC v Telegraph Media Group Ltd* [2018] EWCA Civ 2329 [2019] EMLR 5. In summary, however, the matters that have to be proved to establish a claim for an injunction in breach of confidence are: (1) That the information has the necessary quality of confidence; (2) That the information has been imparted to or acquired by the defendant in circumstances importing an obligation of confidence; and (3) That the defendant threatens or intends to misuse the information. Defences or justifications in a breach of confidence claim include loss of confidentiality due to prior disclosure in the public domain, and a compelling public interest in the disclosure of the information in question, which requires the duty of confidence to be overridden."

21. The right approach to an interim application to restrain an alleged breach of confidence is outlined in *Linklaters* [30-31]:-

> "30. …. the Court must be persuaded that the claimant is likely to establish the three elements of the cause of action, and that there is no defence or justification for breach of confidence, which would be likely to succeed at trial. The extent to which the information at issue is already in the public domain, and the extent to which its publication would be in the public interest will always need to be considered. HRA, s 12(4) requires the Court to have regard to these factors, in any case which concerns "journalistic [or] literary material". This is to be treated as such a case. All these requirements must be addressed by the Court, as best it can, on the evidence before it at the time of the application, which may be (as in this case) from one side only.
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> 31. Even if all of these requirements are met, the Court retains a discretion. An injunction may be refused if, for instance, damages would be an adequate remedy, or the defendant could not be adequately compensated if the Court eventually concluded that the injunction was wrongly granted."

22. In the present case there is the additional, jurisdictional factor to which I have referred. I can only be satisfied that the ASA is likely to obtain an injunction at trial if I am persuaded that it would probably show (a) that Mr Mitchell is domiciled here and the English Court has jurisdiction and (b) that, applying English law, the claim should be upheld.

23. I am persuaded by the submissions of Mr Eardley that both those things are likely, and that I should grant an appropriately worded injunction to preserve the position until the return date, fixed for Friday 14 June 2019.

24. I deal first with the question of domicile, residence, or location. There is certainly some evidence of Scottish connections. Besides Mr Mitchell's name, he has been referred to in media reports, to one of which he refers in today's letter, as a "Scottish businessman". His Facebook page refers to Glasgow, seemingly as his residence. But Mr Mitchell has not asserted Scottish domicile. He has, indeed, refused to provide information when asked. Against the indications pointing to Scotland, there is a body of evidence clearly suggesting he is resident in this jurisdiction.

    (1) A report of a bankruptcy order granted against Mr Mitchell in 2017 by the High Court of England and Wales states that he is of "unknown, England", and gives a c/o address in England.

    (2) Last year, Mr Mitchell brought judicial review proceedings in the High Court of England and Wales against the Financial Conduct Authority. The claim form, dated 31 October 2018, gives an address in London W1.

    (3) Companies House records for a company called Vision 1 Films Limited record him as a current director with a correspondence address in London WC2.

    (4) Companies House also lists him as a person with significant control of Banks Claims, with a correspondence address in Wales.

    (5) The Banks Claims website shows the company headquarters to be in the City of London, and identifies Mr Mitchell as Founder and Spokesman.

    (6) The ninth of Mr Mitchell's tweets of 4-5 June 2019, seemingly posted at around 3am, seems to show him opposite the billboard, in Croydon, at some point during that night. He wrote "I have been at the BILLBOARD tonight in RESISTANCE."

    (7) His Twitter profile identifies his location as London.

25. In all these circumstances, my conclusion is that the ASA would be likely to establish that Mr Mitchell is domiciled or at least present in this jurisdiction, received the email and attachments here, and can properly be served here.

26. Turning to the merits of the claims in confidence, my conclusion on the evidence before me is that the ASA would be likely to satisfy a trial Court that apart from the photograph (in which no confidentiality is alleged) the information in the email and its attachments is confidential in nature; that it came to Mr Mitchell's attention under circumstances importing a duty of confidence; and that his disclosure, publication or use of the information in the email and attachments would represent a breach of confidence.

27. The complaint itself is, so far, confidential. It is likely to become public but that has not yet happened. In any case, the complaint document contains the identity of the complainant. ASA literature, to which Mr Mitchell was referred at an early stage, makes clear that complainants are given anonymity in the absence of good reason to the contrary. No good reason is apparent as to why this complainant should be identified. At this stage of the matter, it seems to me that the complainant's identify is irrelevant to the merits of the complaint. And the merits of the complaint are not the issue on the application before me.

28. The draft recommendations of the ASA, and the correspondence that has taken place about them, are unpublished and confidential in nature. Again, their confidentiality is expressly asserted in the ASA documentation. The fact that Mr Mitchell has not signed up to the ASA rules is not an answer to this point. The imposition of a duty of confidence does not depend solely on contract or even on consent. The ASA does not seek to inhibit Mr Mitchell's use of this material for the purposes of resolving the ASA complaint, or any consequent legal proceedings. It merely seeks to protect this information from disclosure under other circumstances.

29. The legal advice given by Mr Earle and by Counsel is plainly confidential in nature, and protected by legal professional privilege.

30. Ordinarily, a person who receives confidential information when they know or ought reasonably to appreciate that it is confidential in nature, comes under a duty to respect that confidentiality, in the absence of a good and sufficient reason to override it. A good or sufficient reason may be afforded by the existence of a public interest in disclosure. The modern law was summarised in *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57, [67]-[69]. At [68], the Court identified the test to be applied when considering whether it is necessary to restrict freedom of expression in order to prevent disclosure of information received in confidence:

> "… the test … is not simply whether the information is a matter of public interest but whether, in all the circumstances, it is in the public interest that the duty of confidence should be breached. The court will need to consider whether, having regard to the nature of the information and all the relevant circumstances, it is legitimate for the owner of the information to seek to keep it confidential or whether it is in the public interest that the information should be made public."

This requires a proportionality assessment which gives consideration to the damage which would be likely to result if the duty of confidence were breached, and this requires consideration of the rights and interests of third parties: *ABC v Telegraph Media Group Ltd* [2019] EMLR 5 [48], [51], *Linklaters* [33].

31. The copy of the email that is before the Court does not contain any standard rubric of the kind I mentioned at the start of this judgment. But the confidentiality of the information provided to Mr Mitchell is clear enough on its face. A reasonable person in his position would have well understood its confidential character. It is hard to identify any public interest considerations that could weigh in the balance against the obvious public interest in upholding the confidence of the complainant, and the confidentiality of the ASA processes. Anonymity for complainants is justified by the need to encourage candour, and avoid the chilling effect which publicity could have. Confidentiality for the ASA processes is warranted in the interests of efficient administration.

32. There is a distinct strand of authority concerning legally privileged documents disclosed by mistake, sometimes called the *Ashburton v Pape* jurisdiction (after *Lord Ashburton v Pape* [1913] 2 Ch 469). In this context, the established principles are that where the disclosure is the result of an obvious mistake the Court should ordinarily intervene; there may be exceptions, where the Court could properly refuse relief on other grounds;

but the law does not require the Court to engage in a balancing of the public interest in upholding the privilege as against the public interest in allowing the documents to be used in litigation: see *Al Fayed v Commissioner of Police for the Metropolis* [2002] EWCA Civ 780, [16]-[24], *ISTIL Group v Zahoor* [2003] EWHC 165 (Lawrence Collins J) at [74], [92]-[94], and *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1327 [23]-[26].

33. When it comes to the imposition of a duty of confidence the law does not, I think, approach the recipient of a mistaken disclosure of privileged information any more favourably than one who inadvertently receives or obtains other kinds of confidential information, in other circumstances. Be that as it may, the mistake in this case is clear on the face of the email and must have been plainly apparent to Mr Mitchell when he got it. The email is addressed to "Dear Rupert" and refers to Mr Mitchell in the third person. It refers to and contains a wealth of information which is manifestly not intended to be seen, used or disclosed by anyone other than the ASA and its advisers. There is no reason that I can see at this stage to depart from the default rule that privilege material may not be used or disclosed by the accidental recipient.

34. Mr Eardley has properly identified a point of law that might be raised against the ASA, namely that it is a public authority required to demonstrate that the use or disclosure which it seeks to restrain would be harmful to the public interest (see the "*Spycatcher"* case, [1990] 1 AC 109, 258, 270 & 283). The ASA does not assert, or concede, that this principle applies. But Mr Eardley was prepared to argue his clients' case on the assumption that it does. He submits, and I accept, that the ASA would be likely to succeed at trial in persuading the Court that the identification of the complainant in this case would tend to have a chilling effect on complainants generally, and that this would be inimical to the public interest. It is easy to conclude that if Mr Mitchell were allowed to use and disclose the privileged legal advice that would cause harm to a number of public interests, not least the desirability of public authorities seeking and receiving legal guidance without inhibition. Likewise, I accept, for present purposes, that the non-privileged material already communicated to Mr Mitchell could give other advertisers an unwarranted and undesirable insight into the private thinking of their regulator.

35. Finally, I have considered, and Mr Eardley has addressed me on, a number of points that are or might be made from Mr Mitchell's perspective. These include the points raised in Mr Mitchell's email of today:

(1) "The release of the information …is 100% the fault of the ASA". This is true, but not an answer to the application. The ASA has self-reported to the Information Commissioner's Office.

(2) There is "an evident possibility that the 'leak' may have been deliberately staged". I fail to understand the basis for this assertion, or its relevance to the application. I see no evidence to support this supposition, and every reason to doubt it. I have been shown a screenshot of how the address bar fills in on Mr Norton's email programme, when he types in the letter "R" for Rupert. Mr Mitchell's address comes up as one of the first three entries. On instructions, Mr Eardley tells me his clients do not believe there is a "whistleblower".

(3) There is "the possibility that this information may already be on the internet rendering this application futile, after the event, and unnecessary". Mr Mitchell does

not assert or provide evidence that this is in fact the case. It cannot be entirely ruled out as a theoretical possibility, but it seems wholly unrealistic given the limited range of people who could achieve such a thing. The ASA's solicitors have failed to find anything, in a search carried out this morning.

(4) The relief sought is said to be overbroad, "wide and wrong" and "egregious". The point appears to be that the undertakings sought would inhibit Mr Mitchell in his dealings with the ASA, or litigation against it, over his criticisms of RBS. This is a misunderstanding on his part, as I have explained.

(5) Freedom of expression. There are references to "an attempt to abuse my rights to Free Speech", to "seeking only to tell the truth" about RBS, and to seeking to "gag my free speech rights." I have dealt with free speech and the public interest in the context of confidentiality. These passages appear to me to reflect the misunderstanding to which I have just referred.

36. Finally, I should record and emphasise that the order I have made is not a "super injunction". That term is often misused to refer to almost any kind of injunction that impinges on freedom of expression. Properly used, it refers only to a narrow and vanishingly rare category of order: the one which prohibits the respondent and others from identifying the existence of the injunction and/or the applicant's interest in it. There were never very many of these, and to the best of my knowledge none have been granted for many years.