Neutral Citation Number: [2019] EWHC 1527 (QB)

Case No: QB-2019-002073

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2019

Before :

MR JUSTICE WARBY

- -

Between :

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

- -
- -

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

Hearing date: 14 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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CLIVE SHELDON QC

MR JUSTICE WARBY:

1. On Friday 31 May 2019, an investigating officer of the Advertising Standards Authority mis-sent an email. It was intended for a lawyer, from whom the ASA wanted advice on its proposed response to a complaint. The email, with several attachments, ended up in the inbox of Robert (also known as Neil) Mitchell, who was the subject of the complaint. Mr Mitchell is a critic of the Royal Bank of Scotland, and the complaint related to a billboard advertisement, for which Mr Mitchell claims responsibility, attacking the conduct of RBS. The ASA asked Mr Mitchell to delete the email and its attachments. He declined.

2. On Friday 7 June 2019, the ASA applied to me for an injunction restraining Mr Mitchell from using, disclosing, or communicating the email and its contents. The basis of the application was that this was confidential information which had been mistakenly disclosed to Mr Mitchell, who had no right to use or retain it – save for certain limited purposes to do with the ASA complaint. Mr Mitchell had been given informal notice of the application, and submitted written representations to me, but he did not attend. I granted the order. I did so for 7 days, until a hearing fixed for today. My reasons were set out in a written judgment which was sent out in draft on the afternoon of 7 June 2019, by email.

3. One of the orders I made last week was for service to be effected on Mr Mitchell by the alternative method of email, to two email addresses known to have been used by him. One was the address to which the ASA email had mistakenly been sent. My draft judgment was emailed by the Court to Mr Mitchell. Another order I made was for the disclosure of information by Mr Mitchell. He was required to provide the ASA with information about any third-party recipients of the information, and to confirm this in a witness statement. The deadline for providing the information was 4pm on Monday 10 June. The deadline for the witness statement was noon on Wednesday 12 June.

4. Today, Mr Eardley appears again for the ASA, which applies to continue the injunctions. Again, Mr Mitchell is absent. Again, however, he has submitted written representations. Just before 10am my clerk received an email with a witness statement attached, to be passed to me "prior to 10:30am on Friday 14th June 2019". I shall come back to the content of that statement.

5. The ASA has put in further evidence, dealing with events of the last week, and certain matters that were not formally in evidence at the hearing on 7 June.

6. The sequence of events since that hearing, according to the evidence, is this. The sealed order was served on Mr Mitchell by email at 15:14 on the afternoon of 7 June, followed by the documents that had been put before me (those had already been sent to Mr Mitchell, ahead of the hearing). Later that afternoon the order was sent to Banks Claims (for an explanation of this term, see my previous judgment). On Monday 10 June 2019, a Claim Form was issued and served by email on Mr Mitchell, together with a note of the hearing, followed by the Response Pack, sent at 16:05. On Tuesday 11 June 2019, my written judgment was handed down in final form [2019] EWHC 1469 (QB). On 12 June 2019, a slightly amended note of the hearing was emailed to Mr Mitchell.

7. Until today, Mr Mitchell had failed to provide the information required by paragraph 5 of the Order, or to submit any evidence, in compliance with paragraph 6 of the Order, or otherwise. He had however remained active on social media, making statements about these proceedings. He had, in that context, continued to use the term "super injunction" which, as I explained in my previous judgment, is inapt. He has also spoken of an "Orwellian Threat to stop my free speech".

8. Mr Eardley submits, and I accept, that there has been non-compliance with the Order of 7 June. Paragraph 5(a) required Mr Mitchell to identify each and every third party to whom he had disclosed any part of the information. Paragraph 5(b) required him to identify the date and nature of any such disclosure. The witness statement says that Mr Mitchell disclosed the ASA email to Banks Claims by forwarding it, at 19:32 on Friday 31 May 2019 without any additional written communication. But Mr Mitchell has not complied with paragraph 5(c), which required him to disclose "a copy of any written communication effecting such disclosure". Further, the statement of truth does not comply with the CPR, as it is not in the form prescribed by the Part 22 Practice Direction.

9. The evidence before me, including the tweets, does not show clearly or unequivocally that Mr Mitchell received the Order, and the other papers I have mentioned, when these were emailed. But I see no reason to doubt that all that material did reach him, as intended. The Twitter activity includes a number of retweets by him that show that he was aware by no later than Wednesday 12 June 2019 that the Court had granted an injunction prohibiting disclosure of the email and its attachments. His witness statement refers in its final paragraph to the use of email by the claimants for correspondence "and by their legal representatives for attempted service." I proceed on the basis that service by email gave him actual notice, and that he knows of the proceedings, the order I made, the reasons I gave for it, and this hearing. As far as the reasons for my order are concerned, the witness statement of today states in paragraph 1 that he received the Approved Judgment at 12:03 on 11 June 2019. As for knowledge of the content of the order, his statement purports to comply with the orders for disclosure and verification.

10. The issue then is whether I should continue the injunctions granted last week. I am invited to do so, for the reasons I gave in my earlier judgment, supplemented by some further points.

11. The first of these is that a standard confidentiality/privilege footer is likely to have been appended automatically to the email sent in error and to have been visible to the recipient. The ASA's standard email rubric is in evidence before me. It makes clear that the information contained in the email and any files transmitted with it "is intended for the addressee only and may contain confidential and/or privileged information". It asks anyone who was not the addressee to delete the message and notify the sender, and not to copy, distribute or disclose the content. All of this is apparent from copy documents to which my attention has been directed. The evidence before me last week did not show this (see the judgment at [2] and [31]), at least in relation to the mistakenly sent email. But that, it now appears, is because the footer only shows up at the recipient's end and not on a print-out from the sender's machine. This all strengthens the case for the imposition of a duty of confidentiality on the recipient, Mr Mitchell.

12. The second point is that it now appears that the ASA's document about how it handles complaints, a link to which was provided to Mr Mitchell at the outset of the ASA investigation itself includes a link to the ASA document "Non-Broadcast Complaint Handling Procedures", which was in evidence before me last week. So Mr Mitchell was at least on notice of those procedures, which set out the confidentiality provisions on which the ASA relies. This provides some, albeit limited, additional support for the claimant's case that Mr Mitchell came under a duty of confidence.

13. The next point relates to the Financial Conduct Authority report which Mr Mitchell seems to have boasted of "leaking" (see the previous judgment at [16]). Mr Earle's evidence includes a Guardian report referring to this as a "Confidential report". Mr Eardley fairly points out that the document was evidently "widely leaked", and that Mr Mitchell may not have been the first or only one to leak it. However, this strengthens the ASA's case that there is a real risk of wrongful disclosure.

14. Fourthly, there is Mr Mitchell's conduct since the order was granted, including his Twitter activity and his non-compliance with paragraphs 5 and 6. That also strengthens the case for injunctive restraint, submits Mr Eardley. He describes Mr Mitchell as "no respecter of confidences, when he believes the public interest is on his side."

15. Mr Eardley has drawn my attention to some concerning material in the Twitter print-outs exhibited by Mr Earle. The re-tweets by Mr Mitchell include someone saying, "Neil send it to me I will disclose it" and someone else saying they are "Happy to do it from Bulgaria or Serbia." Someone going by the handle "Logical Thinker" has made the rather obvious point that "If you publish it, that means he has disclosed it". The other point that needs to be made is that assisting someone to breach an injunction is a contempt of court. This material is somewhat equivocal, so far as the threat to disclose is concerned, as it shows Mr Mitchell re-tweeting offers to help him commit contempt of court, but also observations about the impropriety and risks of doing so; but it does nothing to assist Mr Mitchell's case.

16. I should add reference to three further matters:-

   (1) The ASA has given further consideration to a suggestion made by Mr Mitchell in earlier correspondence, that the complainant to the ASA may have been connected to or acting on behalf of RBS. There was, in an email of 13 May 2019, an assertion that the complainant was RBS "or someone put up to act on their behalf". No reasoning was put forward to support that suggestion. The ASA's response is explained in the evidence of Mr Earle, who points out that the complainant appears to be resident in the locality of the billboard, in Croydon. All the indications are that the complainant is an ordinary member of the public. Mr Eardley submits that in the circumstances there is no basis for arguing that the ASA may have acted wrongly and contrary to the public interest in adhering to its usual policy of protecting the identity of complainants, or that Mr Mitchell should now be allowed to retain and use the complaint form to conduct his own researches into the complainant. I agree.

   (2) Another suggestion previously made by Mr Mitchell is that the ASA may have been improperly influenced by RBS. The second witness statement of Mr Earle confirms that there have been no communications with RBS in connection with

the ASA's investigation. In any event, I agree with Mr Eardley that this is a separate and distinct issue, and not a point that weighs in favour of permitting Mr Mitchell to keep or use the ASA's confidential documents.

(3) In recent Tweets by Mr Mitchell he appears to be suggesting some kind of collusion or conspiracy between the ASA and the Financial Conduct Authority, against which Mr Mitchell has previously brought judicial review proceedings (see my earlier judgment at [24(2)]). The evidence is, however, that there is no basis for such suggestions. Mr Earle says there has been no contact with the FCA in connection with the ASA investigation.

17. I turn to the defendant's witness statement of today, timed at 4:42am. There are two main features of significance, besides its purported compliance with paragraphs 5 and 6 of the Order of 7 June. First, it contains further material bearing on the issue of jurisdiction, with which I dealt in the previous judgment. In paragraph 1, Mr Mitchell says that when he received the Approved Judgment he was "at my family home … thereby not in the jurisdiction of England & Wales." He goes on to say that "I returned to London arriving on a delayed flight at 12.35 am today, was collected by a driver and car …" Paragraph 4 refers to Mr Mitchell's "objections based upon jurisdictional … issues". This adds to the picture that was before me last week, though it does not provide any detail.

18. But as Mr Eardley points out, the test of residence which applies for the purposes of determining domicile for the purposes of the Civil Jurisdiction and Judgments Act 1982 is a specific one, by which a person can be resident in more than one place at a time. So, even assuming for present purposes that Mr Mitchell does have a family home in some other jurisdiction, that does not mean that he does not have a residence here. It remains my assessment that the claimant is likely to establish at a trial that Mr Mitchell is resident here, for the purposes of founding jurisdiction. The witness statement lends some support to that, as it records that all his papers relating to this matter were stored in a secure place in London.

19. The second main aspect of the statement that I should address is a suggestion that the Court has been misled by the ASA. Mr Mitchell complains that the claimant has been guilty of

> "… flagrant misrepresentation of my (assumed) position by ASA legal team in the hearing of 7th June 2019 and in correspondence /court submissions before and after that hearing …"

and that

> "The Court has been duped with excessive time, costs and efforts wasted as the Claimants have misused this Injunction application process to deflect from their serious breach of ICO GDPR and to paint a wholly inaccurate picture of my position ie my intentions and actual actions in this matter."

20. However, these points are not supported by any explanatory detail. Mr Mitchell does not set out his case as to what his position, intentions, and actual actions in the matter

are, or how they have been misrepresented by the ASA. This is therefore a broad and unspecific complaint with which it is not easy to engage. Mr Eardley submits, however, that the ASA has put before the Court everything they have had from Mr Mitchell, and I see no reason to doubt that is so. So far as any description, evaluation, or assessment of that material is concerned, I do not consider that the ASA has overstated or exaggerated the position as it emerges from the documents. Far from it. In the end, the assessment of the documents' significance is a matter for me. I see no reason to doubt that the claimant and its legal team has fulfilled the duty of full and frank disclosure which they owe to the Court when making an application on short notice, and of which, it is clear, they are conscious.

21. Returning to the substance of the matter, the relevant legal principles are clearly and sufficiently set out in my earlier judgment. Mr Eardley submits, and I accept, that there is sufficient evidence of a risk or threat of wrongful use or disclosure and that, applying the law to the facts as they appear from the evidence before me, the ASA satisfies the threshold test of showing that it is likely to succeed in showing at a trial that publication of the information at issue should not be allowed. I therefore continue the injunction until trial or further order.

22. In view of the deficiencies in Mr Mitchell's purported compliance with paragraphs 5 and 6 of the Order of 7 June 2019, I also order that he should comply fully with those paragraphs forthwith. This means he must make good the points of non-compliance which I have identified at [8] above.