Neutral Citation Number: [2020] EWHC 1011 (QB)

Case No: QB-2019-001072

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/04/2020

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

Mr Andrew Lawrence Greystoke	**Respondent**
- and -	
The Financial Conduct Authority	**Applicant**

- -
- -

Sara Mansoori (instructed by **Ronald Fletcher Baker LLP**) for the **Claimant/Respondent**
Jen Coyne (instructed by **The Financial Conduct Authority**) for the **Defendant/Applicant**

Hearing date: 23 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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THE HONOURABLE MRS JUSTICE STEYN DBE

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 28 April 2020 at 10:00.

Mrs Justice Steyn :

Introduction

1. Mr Andrew Greystoke ("the Respondent") has brought a Part 8 Claim against the Financial Conduct Authority ("the FCA"), pursuant to the General Data Protection Regulation 2018 (EU) 2016/679 ("the GDPR"). The Respondent alleges that the FCA breached Article 15 of the GDPR by its response to his subject access request for all the personal data the FCA holds on him. The trial is listed for a two day hearing on 5 and 6 May 2020.

2. The current application is for protective measures to prevent certain confidential information ("the confidential information") being made public in these proceedings. The application has arisen because the third witness statement of Ms Anila Bedi, filed on behalf of the FCA on 23 January 2020, refers to the confidential information. Consequently, on 31 January 2020, the FCA filed the application notice which is the subject of this hearing.

3. The order originally sought by the FCA put forward various alternative measures. Following exchanges between the parties, the FCA's draft order has been revised. In short, the FCA now seeks an order that:

    i) Pursuant to CPR 39.2(3)(c) and/or (g), the court shall sit in private for any part of the trial during which the confidential material is addressed;

    ii) Certain documents which contain details of the confidential information will not be provided to any non-party, or open to inspection by any third parties during the course of the trial, without further order of the court; and

    iii) Any application by a non-party for copies of any such documents shall be determined at an oral hearing on notice to the parties, and the parties shall be provided with an opportunity to be heard before the application is determined.

4. The Respondent has expressed concerns as to the limited relevance of the confidential information and the lack of proportionality of the FCA's approach in putting the confidential information before the court. Nevertheless, the Respondent has not sought a ruling that such evidence is inadmissible. Rather, the Respondent supports the FCA's application for measures to be put in place to protect the confidential information.

5. The primary issue is whether the order sought by the parties for part of the hearing to be private and for there to be restrictions on access to hearing papers is strictly necessary and should be ordered. The parties were largely in agreement as to the terms of the order sought, but they recognised that litigants cannot waive the public's right to open justice.

6. The only issues between the parties were (i) whether it should be expressly ordered that there should be no reporting of that part of the hearing which they submit should be held in private and (ii) whether costs should be in the case or reserved. I made an order for costs in the case and it is unnecessary to address that issue in this judgment.

The nature of the hearing of the application

7. In accordance with the Protocol Regarding Remote Hearings dated 26 March 2020 and Practice Direction 51Y, so as to avoid the risk of transmission of Covid-19, this hearing took place by telephone. Members of the press and the public were able to obtain access to this hearing, and so it began as a public hearing in accordance with paragraph 3 of PD51Y.

8. At the outset of the hearing, Ms Sara Mansoori, Counsel for the Respondent – supported by Ms Jen Coyne, Counsel for the Applicant - sought an order that the hearing of this application should be in private pursuant to CPR 39.2(3)(a) and/or (c) and/or (g) which provides:

> "A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice –
>
> (a) publicity would defeat the object of the hearing;
>
> …
>
> (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality;
>
> …
>
> (g) the court for any other reason considers it to be necessary to secure the proper administration of justice."

9. Having heard open argument, I gave an *ex tempore* public ruling explaining the reasons I was satisfied that it was necessary to hear this application in private to secure the administration of justice pursuant to CPR 39.2(3)(a), (c) and (g).

10. I explored with Counsel whether it would be sufficient if I were to make a restrictive reporting order in respect of this hearing, rather than order that the hearing be held in private. However, the power in s.11 of the Contempt of Court Act 1981 to prohibit the publication of a name or other matter only applies where the court (having the power to do so) allows that name or other matter to be withheld from the public in proceedings before the court. There are hearings where such withholding can be effected without any need for any part of the hearing to be private, essentially by means of the court directing that no explicit reference to the name or confidential matter should be made by the parties in oral submissions. However, the very purpose of this hearing was to consider the necessity for protective measures to be put in place for the trial. It would have been impossible for Counsel to address the reasons why they sought to have part of the trial heard in private and restrictions on disclosure of

certain documents to non-parties, without disclosing the nature of the confidential matter.

11. I concluded that the object of the hearing would have been defeated if the application were heard in public and, accordingly, the hearing continued in private pursuant to CPR 39.2(3)(a), (c) and (g).

The form of this judgment

12. Following argument, I informed the parties that I would grant the order sought, subject to certain amendments. I indicated that I would give my reasons in writing in order to ensure that, as far as possible, those reasons were given in a publicly available judgment.

13. It is not possible to explain my reasons fully in a public judgment as to do so would defeat the object of the order that I have made. Accordingly, this judgment consists of a publicly available part and a confidential annexe. The confidential annexe contains the part of my reasoning which cannot be made publicly available without disclosing the confidential information.

Factual Background

14. In short, the background to the claim is that on 28 May 2010 the FCA (through its predecessor body, the Financial Services Authority ("FSA")) imposed a Prohibition Order on the Respondent under the Financial Services and Markets Act 2000. The prohibition order and a fine of £200,000 were upheld by the Financial Services and Markets Tribunal. The Respondent was refused permission to appeal to the Court of Appeal.

15. Under the Prohibition Order, the Respondent is prohibited from performing any function in relation to any regulated activity carried on by an authorised person or exempt person or exempt professional firm. It was imposed because the Respondent had approved financial promotions on behalf of certain Spanish boiler rooms and as a result a number of UK consumers lost a significant sum of money. The FSA found that the Respondent had acted recklessly and without integrity in breach of Principle 1 of the FSA's Statements of Principles for Approved Persons and was knowingly concerned in contraventions by his law firm, Atlantic Law LLP (also regulated by the FSA), of the FSA's Conduct of Business sourcebook rules.

16. The FCA may revoke or vary a prohibition order under section 56(7) of the Financial Services and Markets Act 2000. Since December 2016, the Respondent has applied on several occasions for the Prohibition Order to be revoked, but on each occasion he has chosen (as he is entitled to do) to withdraw the application before it has been finally determined.

17. On 26 March 2019, the Respondent filed a claim seeking an order

> "that the Defendant provides him with access to his personal data pursuant to Article 15 of [the GDPR] as requested in his letters dated 6 June 2018, 17 July 2018 and 8 January 2019 and

> pays him his costs of this claim. The Defendant has confirmed that it holds the Claimant's personal data but has refused to provide the Claimant access to any of it or provide information as to the categories of personal data concerned (relying on Article 12(5)(b) GDPR)."

18. The relevance of the Prohibition Order and the Respondent's revocation applications is that a (or the FCA may say, the) reason for the Respondent's subject access request was that he wished to be provided with any personal data which will be used by the FCA to determine whether to revoke the Prohibition Order. The FCA seeks to rely in these proceedings on the extent to which it has provided personal data to the Respondent, and information regarding the categories of his personal data that it holds, in the context of his applications for revocation.

19. In the third witness statement of Ms Bedi, the FCA provided an update regarding the Respondent's most recent revocation application and gave details of the personal data provided to him in that context. This witness statement includes reference to a matter which the FCA is under a legal obligation to keep confidential.

20. The Respondent has replied to Ms Bedi's third statement in his second witness statement and so his second statement also addresses the confidential matter. In addition, both Ms Bedi and the Respondent have also submitted statements (Ms Bedi's fourth and the Respondent's third) in support of the FCA's application which address the confidential matter.

The applicable principles

21. The principles which the court should apply when deciding whether to make an order to conduct part of a hearing in private are well-settled. The power derives from the court's inherent jurisdiction: see *Khuja v Times Newspapers Ltd* [2019] AC 161 at [14].

22. As Lord Sumption JSC said in *Khuja* at [12]

> "With limited exceptions, the English courts administer judgment in public, at hearings which anyone may attend with the limits of the court's capacity and which the press may report."

23. The principle of open justice is a fundamental tenet of the justice system, the justification for which is the "*value of public scrutiny as a guarantor of the quality of justice*": *Khuja* at [13]. As Lord Sumption observed in *Khuja* at [13], the principle of open justice is a means whereby confidence in the courts can be maintained and its significance has, if anything, increased in an age which attaches growing importance to the public accountability of public officers and institutions and to the availability of information about the performance of their functions.

24. The courts have consistently recognised that the requirement that hearings be held in public has never been absolute: see *Khuja* at [14]. Nevertheless, any derogation from open justice should only be made if it is strictly necessary.

25. An order entailing one or more derogations from open justice should not be made simply because the parties consent: parties cannot waive the rights of the public. The court should closely scrutinise any application for such an order, only making the order if it is necessary, and having considered whether, even if some derogation is necessary, any less restrictive measure would suffice. See *JIH v News Group Newspapers Ltd (Practice Note)* [2011] 1 WLR 1648 at [21].

26. Two rights under the European Convention on Human Rights are likely to be engaged by, and be in conflict in relation to, an order derogating from open justice, namely articles 8 and 10. An individual's article 8 rights may be engaged where information is disclosed within proceedings which falls within the ambit of that right. The rights of the press and the public to report on and receive reporting on proceedings will be engaged by derogations from open justice.

27. Where both articles 8 and 10 are in play, the court must weigh the competing claims of the individual or individuals under article 8 and of the press and public under article 10. The weight to be attached to each will depend on the facts of the specific case. Neither article has automatic priority over the other. Nor is there a presumption in favour of one rather than the other: see *Re Guardian News and Media Ltd and others* [2010] 2 AC 697.

28. In a case where the information is the subject of a duty of confidence, a significant element to be weighed in the balance is the important public interest in the observance of duties of confidence: see *Brevan Howard Asset Management LLP v Reuters Ltd* [2017] EWCA Civ 950 at [62]-[69].

29. The Supreme Court addressed the issue of non-party access to the court file in *Cape Intermediaries Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38 ("*Dring*") and clarified that a non-party may gain access to documents used in litigation either through the CPR or under the court's inherent jurisdiction: see *Dring* at [34].

30. CPR 5.4C(1) enables a non-party to access a statement of case and judgment or order given in public. CPR 5.4C(2) provides a gateway enabling a non-party to "obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person", if the court gives permission. A party may rely on the protective provisions of CPR 5.4(4)-(6) to restrict access to such documents. An order under CPR 5.4C(4) is a derogation from the principle of open justice and must be granted only when it is necessary and proportionate to do so.

31. CPR 32.13 provides, in these terms, for witness statements to be open for inspection during the trial unless the court restricts access:

> "(1) A witness statement which stands as evidence in chief is open to inspection during the course of the trial unless the court otherwise directs.
>
> (2) Any person may ask for a direction that a witness statement is not open to inspection.

> (3) The court will not make a direction under paragraph (2) unless it is satisfied that a witness statement should not be open to inspection because of –
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> (a) the interests of justice;
>
> (b) the public interest;
>
> (c) the nature of any expert medical evidence in the statement;
>
> (d) the nature of any confidential information (including information relating to personal financial matters) in the statement; or
>
> (e) the need to protect the interests of any child or protected party.
>
> (4) The court may exclude from inspection words or passages in the statement."

32. Accordingly, I should only make an order pursuant to CPR 32.13(2) if one of the conditions in 32.13(3) applies. Any such order is a derogation from open justice and should only be made if it is necessary and proportionate. It is also clear that a restriction may apply to a part rather than the whole of a witness statement.

Analysis

33. First, the parties seek an order that "the part of the hearing dealing with the matter set out in the Confidential Schedule to this Order be heard in private". I have set out the brief contents of the Confidential Schedule in the confidential annexe to this judgment.

34. Having applied the principles to which I have referred above, I have concluded that it is strictly necessary to make such an order pursuant to CPR 39.2(c) and (g). A decisive element in the balancing exercise in this case is the public interest in upholding a legal obligation to maintain the confidentiality of the information that is the subject of the order that I shall make.

35. I note that it should only be necessary for a small part of the trial to take place in private pursuant to this order.

36. Secondly, the Respondent sought an order that there should be no reporting of the private hearing. The FCA took a neutral position on this issue. Section 12 of the Administration of Justice Act 1960 provides that the "publication of information relating to proceedings before any court sitting in private shall not itself be contempt of court" except in the cases specified in that section. I accept the Respondent's contention that the reasons which render it strictly necessary to order that part of the trial be held in private also make it strictly necessary to prohibit reporting of the private hearing.

37. Thirdly, the parties sought an order that "no copies of the following documents will be provided to a non-party without further order of the Court":

i) The third and fourth witness statements of Anila Bedi (including exhibits);

ii) The second and third witness statements of Andrew Greystoke (including exhibits);

iii) The application notice;

iv) The parties' skeleton arguments for the hearing of this application;

v) Any confidential schedules or annexes to documents used in the proceedings after the date of the hearing of this application; and

vi) Certain *inter partes* correspondence which refers to the confidential information.

38. My reasons for determining that the confidential information should be addressed in a private hearing and should not be the subject of reporting also render it necessary to prohibit the provision to non-parties, without further order of the court, of documents which refer to the confidential information.

39. However, I was not satisfied that it was necessary to make such an order in respect of the entirety of the documents specified in the proposed draft order. Accordingly, the order that I make is limited to parts of the four witness statements referred to above. I am grateful to the parties for speedily producing redacted versions of those four statements which are not subject to the prohibition on provision to non-parties and which will be open to inspection by third parties during the course of the trial. In addition, the only part of the application notice which is made subject to any restriction is the original draft order which referred to the confidential information.

40. The Applicant's proposed draft order also referred to a fifth witness statement of Ms Anila Bedi. No such statement has yet been served or filed. It appears likely that any application to rely on further evidence will be contested. No such application is before me and I should not be taken as making any comment on its merits, or the merits of any potential opposition to it. However, I made clear during the course of the hearing that in any further documents that are to be adduced at trial (such as skeleton arguments) any reference to the confidential information should be placed in a confidential schedule or annexe, so that the full extent of the information which falls to be addressed in the public part of the hearing (and which is not subject to any restrictive measures) is clear. The order that I am making would cover any confidential schedule or annexe to any further witness statement which may be sought to be adduced. Accordingly, the FCA accepted during the course of the hearing that it was unnecessary to make any express provision for the proposed fifth witness statement of Ms Bedi and the order I make does not do so.

41. Fourthly, the parties sought an order pursuant to CPR 32.13(2) that the same documents (or parts of documents) that shall not be provided to non-parties without further order "shall not be open to inspection by any third parties during the course of the trial". This order, too, is necessary in order to protect the confidential information.

42. Fifthly, the parties sought, and I make, an order to ensure that if a non-party applies for access to any of the documents which are subject to restrictions on provision and

inspection to which I have referred, the application should be on notice to the parties and the parties shall be provided with an opportunity to address the application at an oral hearing before any final determination is made. This part of the order does not constitute a derogation from open justice. It serves to ensure that any court apprised of an application by a non-party for access to the confidential information will hear from the Applicant and the Respondent, as well as the non-party applicant.