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No: QB-2019-000569

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

[2020] EWHC 1458 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28th May 2020

Before:

DEPUTY MASTER HILL QC

Between:

LONDON BOROUGH OF LAMBETH

Claimant

-and-

ANTHONY AMAEBI HARRY

Defendant

Julian Milford QC (instructed by Browne Jacobson LLP) for the **Claimant**
The Defendant (in person)

Hearing date: 7th May 2020

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.

DEPUTY MASTER HILL QC:

Introduction

1. By an application dated 27th February 2020 the Defendant seeks an order (i) striking out the Claimant's claim unless it complies with its standard disclosure obligations under CPR 31.6 and replies to CPR Part 18 requests; and (ii) new case management directions if the Claimant does comply with its obligations. The Defendant opposes the application. I received written skeleton arguments from both parties and heard oral submissions at a half-day telephone hearing on 7th May 2020. I also considered the lengthy bundle of documents provided by the parties.

The factual background

2. The Claimant's claim is for breach of confidence. It arises out of a Subject Access Request ("SAR") the Defendant made to the Claimant seeking information held about his child by the Claimant's Children's Services department. On 29th November 2018 the Claimant provided the Defendant with the data electronically. The Claimant's case is that the data was provided to the Defendant in a form which, unbeknown to the Claimant, could be electronically manipulated. The Claimant alleges that the Defendant removed the redactions from the data and thus identified the details of a person (HJ) who had made allegations to the Claimant about the care the Defendant and his wife were providing their child. The Defendant then took action in response to this knowledge, including sending a pre-action letter to HJ intimating claims for defamation and other matters.
3. The Claimant's case is that the data was provided to the Defendant in circumstances where he knew it was confidential and that he breached that confidentiality by unredacting the data, retaining an unredacted copy of the file, using the evidence to write the pre-action letter to HJ and threatening to bring court proceedings against HJ based on the information. The Claimant's stated rationale for bringing the claim is that it is integral to the work of Children's Services that people who bring to its attention instances of perceived inadequate care or neglect of children are able to do so under conditions of confidentiality and can be assured that their confidentiality will be respected. For the same reasons, on 26th February 2019 the Claimant obtained an interim injunction to restrain the Defendant from using the information he had acquired.
4. The Defendant's Defence and Counterclaim initially made allegations about other parties, provided a lengthy defence to the allegations HJ had made, complained about the Claimant's handling of his SAR and counterclaimed against the Claimant for

various breaches of data protection duties. Much of the Defence and all of the Counterclaim were struck out by HHJ Freedman QC on 26th November 2019, for reasons including that the contentions about the Claimant's data protection duties were irrelevant to the claim and that the Defendant's allegations that the Claimant had breached his data protection rights were unarguable.

5. HHJ Freedman QC did not strike out those parts of the Defence which alleged that HJ's referral was made in bad faith or maliciously. This is said to be relevant to whether the Defendant has a public interest defence to the claim for breach of confidence.
6. It is also pertinent to the application that:
 - (i) On 18th December 2018 the Defendant lodged a complaint with Claimant about its handling of his SAR. On 8th February 2019 he lodged a complaint with the Information Commissioner's Office ("ICO") about the Claimant's response to his SAR and his 18th December 2018 complaint. On 3rd September 2019 the ICO provided its decision on the complaints. The ICO concluded that (a) the Claimant had not provided all the information in response to the Defendant's SAR within the required one month timeframe; (b) it had since provided him with all the material to which he was entitled; and (c) the Claimant had complied with its data protection obligations with respect to the accuracy of the data, but had nevertheless added a note to the file to make clear that the Defendant disputed the information held; and
 - (ii) The Claimant informed the ICO that the Defendant possessed unredacted records containing exempt information which had been sent to him in an insecure electronic format. In April 2020 the ICO decided to prosecute the Defendant for the offences of (a) knowingly or recklessly re-identifying de-identified personal data, without the consent of the data controller, contrary to the Data Protection Act 2018 ("the DPA"), s.171(1); and (b) knowingly or recklessly processing re-identified personal data, without the consent of the data controller, contrary to the DPA, s.171(5).
7. HHJ Freedman QC also gave case management directions through to trial. The trial has since been listed for 29th June-2nd July 2020, a matter of weeks away.

The disclosure application

(i) The Defendant's application

8. The Defendant appended a large amount of material to his application notice namely a 20 page submission/draft order and nineteen exhibits (AH5/01-AH5/19) that ran to over 240 pages. Prior to the hearing he submitted a further bundle of exhibits (AH7/01-AH5/09) that ran to over 75 pages and a detailed skeleton argument, which he supplemented with oral submissions during the hearing. After the hearing he provided a further submission supported by nine exhibits (A-E).
9. The Defendant sought disclosure of certain categories of documents set out in Schedule 1 to the application, as follows:

- (i) Category 1: All records of direct communications between the Claimant and HJ which contain the direct or transcribed statements of HJ;
 - (ii) Category 2: All records of direct communications between the Claimant and HJ which contain any other direct or transcribed statements of HJ;
 - (iii) Category 3: All records of internal communications between the Claimant's social workers, team leads or other employees which contain or reference or render interpretations or opinions as to the meaning or any intent of any part of HJ's allegations;
 - (iv) Category 4: All records of communications between the Claimant and third parties which contain or reference or render interpretations or opinions as to the meaning or any intent of any part of HJ's allegations;
 - (v) Category 5: The complete and unredacted social care record held by the Claimant in databases or other filing systems respecting the Defendant's child, the Defendant and his wife;
 - (vi) Category 6: All documents relating to the Claimant's assessment, evaluation and decision-making and documents in response to the Defendant's 28th May 2018 and 27th October 2018 SAR;
 - (vii) Category 7: All documents relating to the Claimant's assessment, evaluation and decision-making and documents in response to the Defendant's 18th December 2018 complaint and the various correspondence in relation to the processing of his 8 February 2019 ICO complaint;
 - (viii) Category 8: Copies of the employee records of a series of the Claimant's employees as listed in the application, including for each of them their (a) detailed job description; (b) CV with qualification and employment history; (c) training record; (d) disciplinary or complaint record; and (e) start and end dates of employment; and
 - (ix) Category 9: All records of communications between the Claimant and other third parties including the Defendant's GP, the NHS trust and the ICO, in which the Claimant made representations regarding the Defendant in relation to its investigation of HJ's allegations or its investigation of his various complaints.
10. In respect of the nine categories of material the Defendant argued that the material was relevant for the following reasons:
- (i) The material in categories 1-5 would address the context of HJ's allegations and the Claimant's response to it, which was relevant to whether the allegations were made maliciously;
 - (ii) The material in category 6 should be disclosed because of the requirements of the DPA, because it would address the Claimant's allegation that he had

removed redactions from the SAR file when in fact the Claimant had failed to apply those redactions and because it would assist his defence;

- (iii) The material in category 7 should be disclosed because of the requirements of the DPA and the Defendant's rights under the European Convention of Human Rights ("ECHR"), Articles 6 and 8; and
 - (iv) The material in categories 8 and 9 should be disclosed because the material so far provided evidenced gross incompetence and/or misconduct by the Claimant's employees including the falsification of evidence, the mishandling of his personal data and various failures in their obligations to investigate allegations of neglect and abuse; and that these factors were "*the central motive for the Claimant's initiation and continued conduct of the litigation*".
11. The Defendant's position was that the Claimant was wrongly withholding the above material. He argued that the Claimant was also unlawfully asserting litigation privilege over some of the material which was not merited as care proceedings should be non-adversarial; and was unlawfully asserting legal advice privilege over further material. The Defendant argued that the Claimant had failed to comply with its CPR 31 obligations in respect of the timeframe, persons and locations in respect of which it conducted its search for disclosure.
12. The Defendant made wide-ranging and disparate further allegations about the Claimant's conduct of the litigation, set out over a series of documents as summarised at paragraph 8 above. For the reasons given at paragraph 34 below, in my judgment these allegations are of limited relevance to the issues before me. However I seek to summarised them as fairly as I can thus:
- (i) The Claimant had committed other breaches of the CPR including failing to provide a directions questionnaire within the required time, breaching the anonymity order in place to protect HJ in its communications with the ICO and losing some documents;
 - (ii) The Claimant had misled the Court on several occasions including as to whether it had "screened" HJ's referral, the date of her referral and whether it had breached the Defendant's data protection rights,
 - (iii) The Claimant had fraudulently obtained the ICO's decision and unfairly deployed it this litigation;
 - (iv) The Claimant's continued conduct of the litigation was unlawful because the Claimant knew or ought to have known that HJ's referrals were malicious; and
 - (v) The Claimant's pursuit of the litigation was therefore a breach of his rights under Articles 6, 8 and 10 of the ECHR, harassment, an abuse of public office and involved the misuse of public funds; and
 - (vi) Overall the Claimant's conduct amounted to "*an established pattern of contempt of the Court and malicious conduct*".

(ii) The Claimant's response

13. The Claimant provided a written reply to the Defendant's application and explained its position in several items of correspondence to which I was taken (notably its letters of 24th January 2020, 4th February 2020 and 7th February 2020). The Claimant's counsel also provided a detailed skeleton argument which was supplemented with oral submissions during the hearing.
14. The Claimant submitted that that it had taken a very liberal approach to relevance and provided material even where the relevance was questionable in order to try and assuage the Defendant's concerns. The Claimant's position in respect of each of the categories of document sought was that:
- (i) All the material in categories 1-4 had been provided;
 - (ii) In respect of category 5, the Claimant only holds a social care ('Mosaic') record about the Defendant's child and that had been provided in unredacted form (for the purposes of this litigation only);
 - (iii) The material in category 6 had been provided. The Claimant had provided a full explanation of the process followed for finding the SAR information and the rationale for redacting it. The Claimant's evidence included (a) a detailed document completed by the paralegal who redacted the file, explaining the basis for the redactions; (b) a report by its Business Liaison Manager dated 19th February 2019 into how the redactions were made and why they were in some cases not properly made; and (c) a short email summary of that report;
 - (iv) Some material in category 7 relating to the Claimant's assessment and evaluation of the Defendant's complaint dated 18th December 2018. However, the material relating to the ICO had not been provided because (a) it was not relevant; (b) this aspect of the disclosure application was an attempt by a "sidewind" to reinsert into the claim parts of it that were struck out by HHJ Freedman QC; and (c) the Claimant was concerned that the Defendant's concentration upon "satellite" issues of data protection had the potential to derail the hearing timetable;
 - (v) In respect of category 8 the Claimant had provided some information about its employees *de bene esse* but the application otherwise sought material that was irrelevant and intrusive; and
 - (vi) As to category 9, the Claimant had provided all communications concerning the Defendant's child between it and the Defendant's GP and hospital trust, but not the ICO as these were irrelevant.
15. There had been an issue as to whether the "start date" for the disclosure search should be 8th January 2018. This was the date on which HJ's referral was received by the Claimant. It transpired that she had made a telephone call on 5th January 2018 and sent the referral on 6th January 2018. This had been addressed by the Claimant

providing the Defendant with a further disclosure statement on 4th February 2020. However the Defendant remained very concerned about this issue.

16. The Claimant submitted that:

- (i) It had not withheld documents from disclosure other than on the basis summarised above;
- (ii) In respect of certain categories of material or specific documents referred to by the Defendant, no such material exists;
- (iii) There was no basis to set aside the Claimant's litigation privilege which covered communications between HJ and the Claimant's external solicitor about this litigation, in which she has provided a witness statement;
- (iv) The Claimant has not claimed legal advice privilege over any material at all; and
- (v) The wider allegations made by the Defendant as summarised at paragraph 12 above were not merited and/or were irrelevant to the issues on this application.

(iii) The legal framework

17. CPR 31.6 provides for standard disclosure. It requires a party to disclose (a) the documents on which he relies; and (b) the documents which (i) adversely affect his own case; (ii) adversely affect another party's case; or (iii) support another party's case; and (c) the documents which he is required to disclose by a relevant practice direction.

18. The Claimant's counsel summarised the legal framework applicable to the disclosure application as follows:

- (i) Disclosure within CPR Rule 31.6(b) is limited to documents which adversely affect or support the parties' cases. The statements of case are therefore the essential starting point (see *Harrods v Times Newspapers Ltd* [2006] EWCA Civ 294 at paragraph 12);
- (ii) Standard disclosure does not include "train of inquiry" documents. So, for instance, it would not include the identification of a party's employees, simply because their names might lead to a train of inquiry that might adversely affect the party's case (see, for example, *Shah v HSBC Private Bank* [2011] EWCA Civ 1154 at paragraph 50); and
- (iii) It is not part of the function of a Part 18 request to enable parties to ask questions so as to elicit information to give rise to other claims, or to use in other proceedings. Its purpose is to clarify any matter which is reasonably necessary for a party to prepare their own case, or to know the case they have to meet. The emphasis is strictly on what is necessary and proportionate (see *King v Telegraph Group* [2005] 1 WLR 2282, paragraph 63).

19. The Defendant broadly agreed with the above legal principles. He also argued that material fell within CPR 31.6 if it satisfied either of the criteria in CPR 31.6(b)(i) or (iii), or if it:
 - (i) Identifies or promotes the importance of the testimony of a witness;
 - (ii) Identifies or clarifies a document or evidence to that end;
 - (iii) Identifies or clarifies expressed motives or intent to that end;
 - (iv) Identifies or clarifies an event or sequence of events to that end; or
 - (v) Identifies or clarifies how any decision was reached to that end.
20. The criteria for standard disclosure are set out in CPR 31.6. These descriptions of what material may show do not amount to additional criteria in CPR 31.6. That said, some documents of this sort may well otherwise fall within the categories set out in CPR 31.6.
 - (iv) Analysis and decision**
21. The focus of this application has to remain the parameters of CPR 31.6. Pursuant to the legal framework applicable to CPR 31.6 the essential starting point in determining the application is to identify the issues in the claim from the statements of case.
22. The Claimant's counsel distilled the issues thus:
 - (i) Was the redacted information confidential?
 - (ii) Did the Defendant receive the information in circumstances of confidentiality?
 - (iii) Did he use the information in breach of confidence by, for example, sending the pre-action letter to HJ?
 - (iv) If so, were his actions in the public interest, because HJ's identity was not in fact confidential and/or because her allegations were made maliciously and in bad faith?
23. The Defendant addressed relevance in respect of the specific categories of documents of which he sought disclosure.
24. I have considered the Particulars of Claim, the parts of the Defence which survived HHJ Freedman QC's order and the Claimant's Reply carefully. I am satisfied that the Claimant's counsel's distillation of the issues as set out above is fair and accurate.
25. I also accept the Claimant's argument that whether or not the allegations HJ made, as recorded in the data, were justified is irrelevant to these proceedings. These

proceedings solely concern the Defendant's alleged breach of confidence in improperly using that data. I emphasise this because it is clear that the Defendant vehemently denies all the allegations HJ made. However it appears to me that this has impacted to some, perhaps significant, degree on his approach to the application and perhaps the litigation itself. The issue of whether the allegations were maliciously made is, however, relevant: see above.

26. The Claimant's response to this application can broadly be summarised as being (a) the material is not relevant to the issues; (b) the material is relevant to the issues but has been disclosed; and (c) privilege has been properly claimed.

(a) *The material is not relevant to the issues*

27. This argument only applies to some of categories 7-9.

28. As to categories 7 and 9 the Defendant considers that its communications with the ICO are not relevant to the issues as they remain after the strike out decision by HHJ Freedman QC. These communications relate to (i) the Defendant's complaint to the ICO about the Claimant's conduct dated 8th February 2019; and (ii) the ICO's criminal prosecution of the Defendant.

29. The Claimant has already disclosed certain material relating to its own investigations into how the material came to be disclosed in the form that it was to the Defendant. Following HHJ Freedman QC's order the Defendant no longer has a live counterclaim relating to the Claimant's data protection duties. In those circumstances I accept the Claimant's submission that the remaining material in categories (i) and (ii) above is not relevant to the issues.

30. In category 8 the Defendant seeks a wide range of confidential material about several of the Claimant's employees, namely their job descriptions, CVs, qualifications, employment history and training/disciplinary/complaint records. This material is not relevant to the issues as they remain after the strike out decision, not least because the issues do not include whether the Claimant's employees properly investigated the allegations HJ made.

(b) *The material is relevant to the issues but has been disclosed*

31. This argument applies to all the categories of documents sought by the Defendant and is the sole argument relied upon in relation to categories 1-6.

32. Having considered the issues, as identified above, I accept that the Claimant has taken a very generous approach to disclosure. I consider that much of the material in the Defendant's categories 1-9 is at the margins of relevance but has nevertheless been provided.

33. I have given the Defendant's submissions as to "withheld" material in these categories careful consideration. However, overall he has not persuaded me that there is in existence any further particular document in these categories which the Claimant has withheld. Insofar as paragraphs 65-90 of the Defendant's skeleton argument sought to do so, I accept the detailed responses provided by the Claimant's

counsel at paragraph 40 of his skeleton argument as amplified in oral submissions. In various respects the Defendant has, perhaps understandably at times, assumed the existence of material from references to it in other material and I accept the Claimant's explanations that the material does not in fact exist. In particular (i) several references in disclosed material to advice/discussions in fact referred to solely oral exchanges such that no documents exist; and (ii) notwithstanding the generic material about the Mosaic system which the Defendant supplied after the hearing I have seen nothing to gainsay the Claimant's submission that it holds no records on Mosaic for the Defendant or his wife.

34. The focus of the Defendant's submissions was in fact his wider assertions about the Claimant's general conduct of the litigation as set out at paragraph 12 above. These issues would only be relevant to this application if they helped persuade me that there was indeed further relevant material in existence which the Claimant was deliberately withholding. While it would not be appropriate or indeed possible in an application of this nature for me to conduct some form of trial of the Defendant's allegations, from what I have seen, I am not satisfied that they are merited or that they assist me in determining this application.

(c) *Privilege has been properly claimed*

35. The Claimant is *prima facie* entitled to rely on litigation privilege in respect of its external solicitor's communication with HJ about this litigation. The Defendant referred at paragraph 97 of his skeleton argument to *Shah*, paragraph 23 in support of the proposition that litigation privilege should not be an obstacle to the Court's determination of the true facts where there was a witness who had a significant vested interest in the outcome of the case. Here, he argued that applied to HJ. I heard no detailed argument on this issue at the hearing. Having reviewed the *Shah* judgment I do not see how it assists the Defendant on this issue.

36. The Claimant has indicated that it does not rely on litigation advice privilege to withhold evidence.

(v) **Conclusion**

37. For these reasons the Defendant's application in respect of disclosure is dismissed.

The Part 18 application

38. Neither party addressed this application in their skeleton arguments or at the hearing in any detail. The draft Part 18 questions are set out at Schedule 2 of the application. The questions overlap substantially with the categories of disclosure sought above. The Claimant addressed these requests in its letter dated 9th January 2020. From the material placed before me I accept the Claimant's submission that the various questions asked in the Part 18 application have already been answered and to the extent they have not been, they are irrelevant and disproportionate.

39. The Defendant's Part 18 application is therefore also dismissed.

The application with respect to future case management directions

40. Again this issue was not addressed in detail at the hearing. However my understanding is that the application was premised on the basis that the other applications succeeded, in that if I was persuaded that the Claimant should provide further disclosure or answer the Part 18 questions the Defendant's position was that more time was needed for compliance with the other directions set by HHJ Freedman QC.
41. I have now dismissed the applications and so I do not understand that any variation of the directions set by HHJ Freedman QC is now needed. If I am wrong about that, further submissions can be made to me. However any application to break the imminent trial fixture should be the subject of a separate application.