



Neutral Citation Number: [2020] EWHC 1680 (QB)

Case No. QB-2019-000569

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
Strand, London WC2A 2LL

Date: 29 June 2020

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

Between :

LONDON BOROUGH OF LAMBETH

Claimant

- and -

A.M.

Defendant

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

Hearing date: 23 June 2020

Approved judgment

I direct that pursuant to CPR PD39A 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.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. This breach of confidence claim is listed for trial before me today, Monday 29 June 2020. Last Tuesday, I heard the Defendant's application to vacate the trial and stay this matter pending the hearing of his appeal against a case management decision of Deputy Master Hill QC. There was insufficient time that day for me to give judgment. Accordingly, I indicated through my clerk later in the week that the application would be dismissed for reasons to be given at the start of the trial. This is my judgment upon the application.

BACKGROUND

2. The case concerns a young girl, LM, who was born on [a date in] 2016. In January 2018, the girl's aunt, HJ, made a confidential report to the Children's Services department at the London Borough of Lambeth purporting to report her concerns about LM's development. LM was then 18 months old and HJ reported that she was underweight, that her diet remained too dependent on breastfed milk rather than solids and that she was not being properly encouraged to walk or crawl.
3. Lambeth contacted the parents in order to discuss the reported concerns. The child's father, AM, declined to engage with the authority and the case was swiftly closed. Subsequently, AM made a subject-access request for copies of the files held by Lambeth. On 29 November 2018, Lambeth provided AM with a redacted copy of its file in respect of LM. Mindful of its duty to maintain the confidentiality of the referral, Lambeth attempted to redact any details that would reveal HJ's identity. It did so electronically without realising that someone proficient in the use of computers would be able to undo the redaction and restore the original text. AM did so and used the documents obtained from Lambeth to write a letter before action accusing HJ of malicious defamation, breach of confidence and harassment.
4. Upon discovering that AM had been able to circumvent the redaction of the file, Lambeth issued this claim seeking injunctive relief to protect the alleged confidentiality of its file and orders requiring AM to destroy all copies of the unredacted information. On 26 February 2019, Her Honour Judge Collins-Rice sitting as a High Court Judge granted an interim injunction preventing the further use or disclosure of the unredacted data pending trial.
5. AM and HJ have been estranged following a major family argument at the time of LM's first birthday. AM argues that his sister maliciously made a knowingly false referral to Lambeth. He therefore argues that even if he would otherwise owe a duty of confidentiality, such claim is defeated by reason of HJ's malice. His actions were, he contends, in the public interest.

THE DISCLOSURE APPLICATION

6. By an application dated 27 February 2020, AM sought an order that Lambeth should provide further disclosure and replies to his Part 18 requests and that, in default, its claim should be struck out. AM also sought new case management directions to accommodate any such late disclosure and clarification of the authority's case. The documents sought were divided into nine categories:
 - 6.1 Category 1: All records of direct communications between Lambeth and HJ containing the direct or transcribed statements made by HJ.
 - 6.2 Category 2: All records of direct communications between Lambeth and HJ containing any other direct or transcribed statements by HJ.
 - 6.3 Category 3: All records of internal communications between Lambeth'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.
 - 6.4 Category 4: All records of communications between Lambeth 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.
 - 6.5 Category 5: The complete and unredacted social care record held by Lambeth in databases or other filing systems in respect of LM, AM and AM's wife.
 - 6.6 Category 6: All documents relating to Lambeth's assessment, evaluation and decision-making and documents in response to the subject-access requests made by AM on 28 May and 27 October 2018.
 - 6.7 Category 7: All documents relating to Lambeth's assessment, evaluation and decision-making and documents in response to AM's 18 December 2018 complaint and in relation to the processing of his 8 February 2019 complaint to the Information Commissioner's Office ["the ICO"].
 - 6.8 Category 8: Copies of the employee records of a number of Lambeth employees, including for each his or her (a) detailed job description; (b) CV with qualifications and employment history; (c) training record; (d) disciplinary or complaint record; and (e) start and end dates of employment.
 - 6.9 Category 9: All records of communications between Lambeth and third parties (including AM's general practitioner, the NHS Trust and the ICO) in which Lambeth made representations regarding AM in relation to its investigation of HJ's allegations or of his various complaints.
7. The application came before Deputy Master Hill QC on 7 May 2020. By a judgment handed down on 28 May 2020, the deputy master dismissed the application. Her essential reasoning can be briefly summarised:
 - 7.1 She found, at [29], that documents in categories 7 and 9 relating to AM's complaint to the ICO and the ICO's criminal prosecution of AM were not relevant to the pleaded issues. In so finding, she observed that His Honour Judge Freedman QC had struck out the counterclaim.
 - 7.2 She observed, at [30], that category 8 comprised a wide range of confidential information concerning the authority's employees. Such information was in any event not relevant.

- 7.3 She remarked, at [32], that Lambeth had taken “a very generous approach to disclosure” and that much of the material was disclosed despite being “at the margins of relevance.” She accepted, at [33], Lambeth’s argument that, with the limited exceptions where Lambeth had refused disclosure on grounds of relevance, it had already disclosed all of the documents that it had within its control.
- 7.4 Further, she accepted, at [35], that Lambeth was entitled to claim privilege in respect of communications between its external solicitors and HJ.

THE APPLICATION FOR A STAY

8. AM now seeks to appeal the deputy master’s decision. By his application dated 12 June 2020, AM seeks an order vacating the trial and staying proceedings pending the hearing of his appeal.
9. In preparing for this hearing, I was struck by the fact that I did not have a copy of the Appellant’s Notice and grounds filed in this matter. I therefore asked my clerk to obtain a copy of the appeal file. In doing so, it occurred to me that one solution might be for me to treat the hearing as an oral application for permission to appeal. My clerk was, however, told that while papers have been lodged, the appeal has not been accepted as properly filed. AM disputes that he has not properly filed his appeal papers and complains that this is yet another episode of maladministration in respect of the proper processing of his applications to the court. He made a similar complaint in respect of the processing of his original disclosure application. Since I have not been able to get to the bottom of the dispute as to whether the court office was right to reject AM’s appeal – such that he would also now need the appeal court’s permission to file his appeal out of time – I do not decide this application upon the basis that he has failed to lodge his appeal in good time. It does, however, mean that there is no issued appeal that could be referred to me for a decision upon permission.
10. In the course of his oral submissions, AM focused on files held by Lambeth in his own and his wife’s names; the audit logs for these and LM’s files; documents concerning the October subject-access request and subsequent complaint to the ICO; and correspondence passing between the authority’s external solicitors and HJ.

Mosaic files for AM and his wife

11. AM sought to demonstrate that Lambeth’s claim that it only held Mosaic files in respect of children was untrue. In particular, he pointed out that he, his wife and LM each had their own unique identity reference numbers in the authority’s database and that there must, accordingly, be a file for each of them. Indeed, he argued that the unsubstantiated and unwarranted allegations recorded in Lambeth’s files that he had acted in a controlling way towards his wife would of themselves have caused Lambeth to open files in the parents’ names.

12. Julian Milford QC, counsel for Lambeth, accepted that the Mosaic platform might well be used by Adult Services. This claim, however, concerned Children's Services and, in that context, he argued that Mosaic files are only maintained in respect of children. Adults mentioned in a child's file might have a unique reference number, but that did not mean that Children's Services maintained separate files in respect of such adults. As to the possibility of a file being opened by reason of any concerns as to AM's conduct towards his wife, Mr Milford added that Lambeth did not hold any such separate files.

Audit log

13. AM argued that the documents disclosed as an audit log amounted to no more than a case history and that he was entitled to disclosure of the automatically generated audit log that would allow the court to know how, when and by whom file entries were altered. He could not, however, identify the pleaded issue to which the audit logs might be relevant. Mr Milford responded that the documents already disclosed showed the activity on LM's file. In any event, he submitted that any log was irrelevant to the pleaded issues.

Documents relating to the subject-access request and complaint to the ICO

14. AM demonstrated that there was evidence that Lambeth had identified the need to consider carefully the issues raised by his subject-access request but complained that the authority had not disclosed any documents evidencing such analysis. Mr Milford argued that such documents were simply not relevant to the pleaded case.
15. AM insisted that Lambeth had not complied with its legal obligations pursuant to the Data Protection Act 2018 and the General Data Protection Regulation 2016. Further, he asserted, the authority had not honoured its assurances to the ICO that it had complied with its statutory obligations. Mr Milford argued that there had been full disclosure for the purpose of these proceedings and that documents relating to AM's data-protection complaints were simply not relevant to the pleaded case.

Lambeth's litigation conduct

16. In addition, a constant theme underlying AM's submissions was that Lambeth has lied to the court in the course of earlier hearings. Mr Milford denied any such misconduct.

DISCUSSION

17. The essential question on any application for a stay pending appeal is whether there is a risk of injustice to one or both parties if the court grants or refuses a stay: Hammond Suddard Solicitors v. Agrichem International Holdings Ltd [2001] EWCA Civ 2065; Leicester Circuits Ltd v. Coates Brothers plc [2002] EWCA Civ 474. Here, it can properly be argued by AM that the refusal of a stay is likely to stifle his appeal. Against that, this application was heard less than seven days before trial and a stay would necessarily involve the late adjournment of a four-day trial. Trial dates should ordinarily be kept since the late adjournment of trials adds delay and

cost to proceedings, is wasteful of limited court resources and prejudices other court users. Accordingly, in my judgment, it is necessary to consider with some care the merits of AM's proposed appeal, the likely importance of the documents now sought and the possible impact upon the fairness of these proceedings should the court proceed to trial without allowing the appeal to run its course.

The issues

18. Before one can sensibly consider questions of disclosure, it is important to identify the issues in this case. AM filed an extensive Defence and Counterclaim. That pleading was considered in detail by His Honour Judge Freedman QC, sitting as a High Court Judge, at a hearing on 26 November 2019. The judge struck out large swathes of the Defence and the entirety of the Counterclaim.
19. At the hearing before the deputy master, Mr Milford identified four key issues in this case:
 - 19.1 First, was the redacted information confidential?
 - 19.2 Secondly, did AM receive the information in circumstances of confidentiality?
 - 19.3 Thirdly, did AM use the information in breach of confidence by, for example, sending a pre-action letter to HJ?
 - 19.4 Fourthly, if so, were AM's 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?
20. The deputy master accepted Mr Milford's analysis. In his written submissions, AM agreed that such issues arise on the claim, but added that the essential elements of his defence also required consideration of a number of additional issues:
 - 20.1 That Lambeth's investigation of HJ's allegations was unlawful because "it failed in numerous and significant ways to comply with the relevant Government guidance in the London Child Protection Procedure."
 - 20.2 That the authority's social workers engaged in unlawful conduct by the falsification of AM's records.
 - 20.3 That Lambeth failed to comply with its statutory duties to investigate AM's complaint in respect of the conduct of its employees.
 - 20.4 That Lambeth unlawfully withheld subject data to which AM was entitled.
 - 20.5 That Lambeth unlawfully refused to respond to or investigate AM's complaint of data breach made on 18 December 2018 and, further, that it refused to comply with the ICO's instructions and its own statutory obligations.
21. Mr Milford challenged AM's insistence that any such issues as to the authority's own conduct are before the court in the forthcoming trial. He submitted that AM's original case as to such issues had been struck out.

22. I have therefore considered the statements of case with some care. I accept Mr Milford’s argument that a number of the issues now relied upon by AM were pleaded at paragraphs 31.1(d)-(h) of the original Defence and Counterclaim but were struck out by Judge Freedman QC. Accordingly, they are no longer in issue in these proceedings.
23. There remains an allegation, at paragraph 30.4, as to AM’s belief that Lambeth was “a ‘bad actor’, and would not act in [his] best interests, nor in accordance with its statutory obligation.” He adds that such belief was justified given the unresolved grievances and “on the basis of the gross misconduct and incompetence by [Lambeth’s] social workers” as evidenced in the subject-access request disclosure. Paragraph 30.4 was not, however, some freestanding complaint against Lambeth but rather a supposed particular of AM’s denial that he was unaware of or had not obtained the confidential information in the disclosure prior to his letter of 18 December 2018. It was therefore part of his explanation for why his letter appeared to indicate that he then believed that the referral had been made by a statutory organisation. By definition, documents not previously seen by AM or postdating 18 December 2018 could not, in any event, be relevant to his claimed belief at that date.
24. Further, AM pleads, at paragraph 33.2, as a particular of his denial that Lambeth has suffered any harm:
- “The Defendant submits that any harm which may have been incurred by ‘the Council’ would be entirely due to its gross, several and manifest failures as alleged by the Defendant in this defence. The Defendant maintains that the Claimant’s conduct falls far below the acceptable standards for public bodies and these failures represent a danger to the public interest. The Defendant also submits that the Claimant has had multiple opportunities, sign-posted by the Defendant, to mitigate its liabilities, but has and continues to respond in an unethical and unlawful manner.”
25. Given that Lambeth’s claim arises out of the actual and threatened use and disclosure of allegedly confidential information, any such failure must logically relate to its part – if any – in such use or disclosure. Accordingly, its error in redacting the file may be relevant. At a stretch, the actions taken by Lambeth upon receipt of and in investigation of HJ’s referral might also be relevant. But any other default in respect of its handling of the subject-access request or the subsequent complaint, or in its alleged failure to comply with directions from the ICO cannot in my judgment be relevant.

The appeal

26. AM’s proposed appeal faces a number of hurdles:
- 26.1 First, orders for specific disclosure can never be demanded as of right. Rule 31.12 of the Civil Procedure Rules 1998 is framed in permissive terms that the court “may” make an order for specific disclosure. It is well established that in determining an application pursuant to r.31.12, the court is exercising a discretion.

- 26.2 Secondly, a court will only order disclosure where it is satisfied that the documents sought are, or have been, in the other party's control and they are relevant to the pleaded issues in the case.
- 26.3 Thirdly, the court will usually treat a party's statement that it does not have further documents to disclose as conclusive. If relevant, such assertion can be challenged through cross-examination at trial, but absent evidence that the party has conducted an inadequate search or that its disclosure statement is not honestly made, the court will not usually order further disclosure.
- 26.4 Fourthly, appellate courts should not lightly interfere with a judge's decision upon a matter of case management. Since the deputy master was here exercising a discretion, the appeal court will only entertain an appeal if she erred in law, took into account matters that she should not have taken into account, overlooked other relevant matters or reached a decision that was perverse. This is a high threshold.
- 26.5 Fifthly, paragraph 4.6 of PD52A provides:
- “Where the application is for permission to appeal from a case management decision, the court dealing with the application may take into account whether—
- (a) the issue is of sufficient importance to justify the costs of an appeal;
 - (b) the procedural consequences of an appeal (e.g. loss of trial date) outweigh the significance of the case management decision;
 - (c) it would be more convenient to determine the issue at or after trial.
- Case management decisions include ... decisions about disclosure”
27. Cumulatively, these are formidable hurdles to a successful appeal in this case.
28. The deputy master directed herself in accordance with the test for standard disclosure in r.31.6. Further, she properly focused on the essential questions of whether the documents sought were relevant to the pleaded issues and there was evidence that such documents were within Lambeth's control.
29. In my judgment, the deputy master was right to conclude that documents relating to AM's complaints about the authority's handling of his subject-access requests, the ICO prosecution and information as to the council's employees were not relevant to the pleaded issues. Further, she was entitled to find that AM had not established a failure by Lambeth to disclose all of the relevant documents that it had within its control.
30. Dealing with the specific matters relied upon before me:
- 30.1 I entirely understand why AM suspects that Lambeth might hold files in respect of him and his wife. There is, however, no basis for going behind the authority's disclosure statement that there are no such files. AM can of course

explore this issue further in cross-examination at trial but, upon the material shown to me, the deputy master was right to dismiss the application for disclosure of files that Lambeth has confirmed do not exist.

- 30.2 While AM seeks a computer-generated audit log in respect of LM's Mosaic file, the authority has disclosed a case history recording activity on the file. That is sufficient in the absence of any pleaded issue as to the falsification or manipulation of the file. In so far as AM asserts that the entries in the file are inconsistent with recordings that he has made of contact with Lambeth, then he already has the material to cross-examine the authority's social workers.
- 30.3 The fact that AM might be entitled to, or have been promised, further documents as part of his subject-access request or his complaint to the ICO is not relevant. The purpose of disclosure in these proceedings is in order to ensure the fair and efficient trial of the pleaded allegations, not to allow the court to conduct a public inquiry into Lambeth's conduct generally or its compliance with its legal obligations under the Data Protection Act 2018 and the General Data Protection Regulation 2016.
- 30.4 The deputy master was also undoubtedly right to find that Lambeth was entitled to claim privilege in respect of communications between its external solicitors and HJ. AM's submission that litigation privilege cannot be claimed in public-interest proceedings under the Children's Act 1989 is not in point. These are not care proceedings in respect of LM but ordinary Queen's Bench proceedings alleging a breach of confidence. The usual rules of privilege are not abrogated simply because this claim arises out of the authority's public-law duties in respect of children in its area.
- 30.5 I entirely agree with the deputy master's conclusions at paragraph 34 of her judgment that:
- a) AM's wider allegations of misconduct in the course of this litigation would only be relevant if they persuaded the court that Lambeth was deliberately withholding further disclosure; and
 - b) it was neither appropriate nor possible for the deputy master to try such allegations upon the papers.
- 30.6 Upon the material before her, the deputy master was entitled to conclude that she could not be satisfied that the allegations of misconduct were merited or that, in any event, they would assist her in determining the disclosure application.
31. Accordingly, I consider that the deputy master was right to dismiss the application for disclosure. Even if I were not satisfied that I should myself have dismissed the application, I am not in any event persuaded that there is any merit in the proposed appeal. This was a case management decision that was plainly open to the deputy master and with which an appellate court should not lightly interfere. I can detect no error of law in her approach and I am not persuaded that she either relied on matters that were irrelevant or overlooked material matters. There is no merit in any argument that her decision was perverse.

32. In any event, the appeal court would be entitled to consider whether the disclosure issue is of sufficient importance to justify the costs of an appeal and whether the loss of the trial date outweighs the significance of the case management decision. For my part, I am entirely satisfied that the disclosure issue was at best of marginal relevance, that the costs of an appeal are not justified and that the cost of and delay caused by the loss of this week's trial would substantially outweigh the significance of the issue.
33. I am therefore satisfied that there is no merit in the proposed appeal, at least on the grounds argued before me. I direct that this judgment be made available to the judge considering AM's appeal should it in due course be accepted as properly filed. Such judge will not of course be bound by my own views but may nevertheless find my analysis to be of some assistance.

Conclusion

34. In view of my conclusions as to the merits and value of the proposed appeal, I find that the injustice caused by the late vacation of the trial date and the stay of proceedings outweighs any injustice that might be suffered by the stifling of AM's appeal. Accordingly, I dismiss this application and the trial will now proceed.