Neutral Citation Number: [2018] EWHC 261 (QB)

Case No: HQ15X04127-28

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15/02/2018

Before :
MR JUSTICE WARBY

- -

Between :

(1) NT 1 **(2) NT 2**	**Claimants**
- and -	
GOOGLE LLC	**Defendant**
- and -	
THE INFORMATION COMMISSIONER	**Intervenor**
-and-	
GUARDIAN NEWS AND MEDIA LTD, TIMES NEWSPAPERS LTD, TELEGRAPH MEDIA GROUP LTD, ASSOCIATED NEWSPAPERS LTD, NEWS GROUP NEWSPAPERS LTD, BRITISH BROADCASTING CORPORATION & THE PRESS ASSOCIATION	**Third Parties**

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Hugh Tomlinson QC (instructed by **Carter-Ruck**) for the **Claimants**
Antony White QC & Catrin Evans QC (instructed by **Pinsent Masons LLP**) for the **Defendant**
Rupert Paines (instructed by **in-house lawyers for The Information Commissioner**) for **the Intervenor**
David Glen (instructed by **in-house lawyers**) for the **Third Parties**

Hearing date: 14 February 2018

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Judgment Approved by the court for handing down (subject to editorial corrections)

Mr Justice Warby :

1. In these two actions each of the claimants seeks orders prohibiting the defendant (Google) from continuing to return internet search reports which include information about the claimant which he claims is inaccurate, stale, irrelevant, and thereby infringe his data protection and privacy rights. The cases are about what is called the "right to be forgotten" which, in this context, is also referred to as "de-listing". The

two cases are due to be tried by me sequentially, starting on 27 February 2018. They came before Nicklin J for a Pre-Trial Review on 18 January 2018, at the end of which the Judge gave a public judgment: [2018] EWHC 67 (QB).

2. The issues in the case are outlined in that judgment at [3]-[11]. As there explained, the information at the heart of each claim concerns an old criminal conviction. It is not necessary to set out the issues in detail in this judgment. But it is worth adding this much. The claimants say that in some respects the information returned by Google is inaccurate, and in any event "way out of date and … being maintained for far longer than is necessary for any conceivable legitimate purpose …" The defences relied on by Google include an assertion that the information is substantially accurate, and the propositions that if its search results involved the processing or disclosure of personal data or private information about the claimants this was necessary for the exercise of freedom of expression by internet users and/or necessary for the purposes of its own legitimate interests and/or (in at least some respects) was otherwise in the substantial public interest. Google's defences involve reliance on a deal of background information about the claimants, and the convictions which they seek to have de-listed.

3. These are the first cases of their kind to come before the High Court in this jurisdiction. The issues raised are fairly described in submissions on behalf of the media as having "potentially profound and far-reaching ramifications on both a legal and general public interest level." Accordingly, although as Nicklin J said at [12] "The very important principle of open justice applies to all cases that come before the courts ..." it is fair to say, as he did, that "there is likely to be a substantial and obviously legitimate interest in these two cases because they are novel and because of the issues that are raised."

4. Open justice is important for a number of reasons, but this case provides an illustration of one aspect of its value in the public interest. The Information Commissioner, who bears statutory responsibility for the data protection regime in this jurisdiction, has recently applied to intervene and make submissions in the proceedings, and is represented at this hearing on that application. The application has only recently been made because the Commissioner only came to know of the proceedings through reporting of the public judgment given by Nicklin J.

5. On the other hand, these proceedings would be self-defeating if the claimants were obliged, as the price of bringing their claims before the court, to submit every detail of the information they seek to protect to public scrutiny. That is why the principal issue before Nicklin J at the PTR was whether (and if so what) reporting restrictions should be imposed. The media had not been given advance warning of the application for reporting restrictions. This, though not mandatory in advance of a reporting restriction order of this kind, is clearly desirable: see Nicklin J's judgment at [22]. The Judge made limited interim orders restricting the reporting of the case, but adjourned the PTR for a short period, requiring the media to be notified and given an opportunity to attend and make representations on the issue at the adjourned PTR: see [25]-[27]. (I should add that since the hearing before Nicklin J it has been established that the service which he referred to in paragraphs [23] and [24] is available for serving applications for reporting restrictions on the national media. It is no longer called CopyDirect. Details are to be found at http:/www.medialawyer.press.net/courtapplications/practicedirection.jsp

6. Nicklin J also considered that an adjournment was necessary to give the parties time to formulate more precise, and workable proposals and submissions as to how the balance should be struck between the need to protect the rights asserted by the claimants, and the imperatives of open justice. He did not consider the order proposed at that stage represented a workable regime, for the purposes of a trial: see [28]-[31].

7. This is the adjourned Pre-Trial Review, attended by Leading Counsel for the claimants, Leading Counsel for Google, Junior Counsel on behalf of a number of third party media organisations (the Media Parties) and Junior Counsel for the Information Commissioner.

8. I have had to address a variety of timetabling and minor case management questions, which it is unnecessary to deal with in this judgment. The hearing has concerned two main issues, which I should address:

   (1) What modifications should be made to the interim reporting restriction order, to achieve the fair and workable balance that all now agree is necessary.

   (2) Whether the Information Commissioner should be permitted to intervene and make submissions on the legal issues.

Intervention

9. It is convenient to deal first with the application to intervene, and I can do so shortly. The application is for permission to intervene by way of written submissions, and oral submissions presently estimated to take 1 hour, on six specified issues. These concern the impact of the E-Commerce Directive, Freedom of Expression under the European Convention on Human Rights and the EU Charter of Fundamental Rights and Freedoms, the processing of "sensitive personal data", the impact of the right to be forgotten regime on spent convictions, a limitation issue, and an issue about rights under s 10 of the DPA. It is not necessary to set out the details of the issues here. All are agreed that they are relevant to the determination of the claims advanced in these proceedings.

10. The grounds for intervention include the following:

> "4. The Commissioner is the statutory regulator under the DPA [Data Protection Act 1998]. She has a statutory duty to promote the following of good practice by data controllers and, in particular, to perform her functions to promote the observance of the requirements of the DPA by data controllers (s.51 DPA). Following the judgment in *Google Spain*, she is also responsible for determining complaints made by data subjects in respect of refusals by internet search engines ("ISE") to de-index websites in response to right to be forgotten requests (see further the Commissioner's powers of assessment under s. 42 DPA). The Commissioner has powers under s. 40 DPA to take action against an ISE in the event that she takes the view that it has breached the data subject's rights in connection with a right to be forgotten request, or otherwise (for example non-

> compliance with a valid cease processing notification given under s. 10 DPA). "
>
> 5. The Commissioner does not usually involve herself in private party litigation. However, she has decided to apply to intervene in the instant cases because: (a) they raise general points of principle of acute relevance to all data subjects, and accordingly to the entire data subject cohort whose rights the Commissioner is duty bound to uphold; (b) the issues raised across these cases have a direct bearing on the way in which the Commissioner discharges her regulatory functions in connection with the right to be forgotten regime and (c) she considers that her submissions will be likely to assist the Court in resolving the issues before it."

11. By the time the matter came before me the claimants and Google were agreed that these considerations were persuasive enough to justify intervention in writing and orally. I also agree. I approved a form of order in each case to give effect to that agreement.

Reporting restrictions

12. I turn to the issue of reporting restrictions.

13. Between the hearing on 18 January 2018 and today the claimants, Google and the Media Parties have worked on the creation of an appropriate draft order. Certain guiding principles have emerged as common ground between them, and I agree that any order should seek to achieve the following.

    (1) First, the claimants should not be named but should be given pseudonyms, until judgment in the claims or further order in the meantime. This is necessary for the reason given by Nicklin J at [13]: "if they were named ..., reports of this case would lead to the publication again of the very information which they argue should be allowed to be 'forgotten'. In other words, without reporting restrictions, the Claimants would destroy by the legal proceedings that which they are seeking by those proceedings to protect."

    (2) Secondly, there are details about the claimants and their convictions which would tend to identify them, if they were made public, and at least some of these details should not be published before the Court has resolved the issues.

    (3) Thirdly, however, it would be going further than necessary were the Court to withhold all these other identifying details from the public, which could only be done by sitting in private. That would be too great an incursion on open justice. The only information that it is intended should be withheld from the public attending at the trial is the claimants' names.

    (4) Fourth, it is desirable for any order to specify not only what cannot lawfully be reported about the case but also to assist on what can lawfully be reported.

(5) Finally, it is necessary for any order to provide clarity, to enable the media and any others affected to know with certainty what they may and may not report. This is a general principle that applies to all orders restricting a person's freedom of speech or action. It is reflected in one of the passages cited by Mr Glen on behalf of the media: Any order must be explicit and precise. "'The need for an explicit and precise order is self-evident. Apart from the fact that any inhibition on the right of free expression should be well-defined, the order is binding on the media, and the media is entitled to know exactly what it can and cannot publish.": *Police v O'Connor* [1992] NZLR 87, 105 (Thomas J).

The form of order

14. The draft order in each case proposed recites, uncontroversially, that the Court has permitted the claimant to issue these proceedings anonymously, and to withhold the name and identifying details of the claimant from the public. The further order which at the start of this hearing was proposed by NT1 was as follows:

> "Pursuant to section 11 of the Contempt of Court Act 1981, until further order, the publication of the name of the Claimant or any particulars or details calculated to lead to the identification of the Claimant in connection with these proceedings is prohibited for the purpose of maintaining the Claimant's anonymity. Without prejudice to the generality of that prohibition, such matters include the following, further details of which are given in the Confidential Schedule to this order along with information and 'ciphers' by which these matters may be referred to in reports of these proceedings:
>
> (a) The Claimant's name;
>
> (b) The Claimant's current address or any former address;
>
> (c) The precise date of the Claimant's conviction, the Court concerned and the sentencing of the Claimant and other information relating to the charges against him;
>
> (d) The third-party publications linked by the defendant's search engine in respect of which its liability is in issue in this action;
>
> (e) Any website allegedly of or associated with the Claimant;
>
> (f) The overseas property business and the nature of its business;
>
> (g) The creditor to the business concerning overseas property;
>
> (h) The Claimant's co-defendant;
>
> (i) The offshore companies;

> (j) The business to which the Claimant provided consultancy services;
>
> (k) The Claimant's former trading vehicle;
>
> (l) Businesses to which the Claimant provided loans;
>
> (m) The bankrupted property developer, his associates and related entities;"

15. The Confidential Schedule lists each of these categories of "identifying matters" and adds, in column 3, the specific information reporting of which is prohibited and, in column 4, "Publishable information/cipher for reporting purposes". An edited section of the Confidential Schedule is attached to this judgment by way of illustration.

16. The form of order sought by NT2 was in a similar format, but the categories of information and the details in the Confidential Schedule were tailored to the facts and circumstances of that case.

17. Mr Tomlinson QC has explained on behalf of the claimants that the intention behind this form of order is to ensure that the claimant's name is not only withheld from the public, but also cannot be published in connection with the proceedings. In addition, the order is designed to prohibit the publication of other identifying information which will <u>not</u> be withheld from the public at the trial. Some such information is specified, but the form of order also prohibits the publication of any other, unspecified, information which is calculated (that is, likely) to lead to the identification of the Claimant in connection with these proceedings. The order prohibits reporting of such information if it is referred to in open court, as some of it undoubtedly will be. But it is wider than that, as it prohibits the publication of identifying information in connection with the proceedings, whether or not that information emerges in the proceedings themselves. A modest change of wording has been made to the order on my initiative: it now prohibits "the publication in connection with these proceedings of the name of the Claimant or any particulars or details calculated to lead to the identification of the Claimant …".

18. The "ciphers" are not designed for use by the parties at the trial or otherwise in the proceedings. That would be impracticable. They are aimed at those who may wish to report on or in connection with the proceedings. They are intended to help but emphatically not intended to be prescriptive. The Schedule does not seek to dictate to the media how it should report. Neither the media nor anyone else is obliged to adopt any of the ciphers. That is made clear by the use of the word "may" in the body of the order.

19. Finally, it is clear that the form of order – including any ciphers that are incorporated in the Schedule – can be revised in the course of the proceedings including at the trial, to accommodate any issues that arise along the way.

Jurisdiction

20. There is no dispute on this application that the Court has power to grant orders of this kind, but I should say a word or two about the question of jurisdiction. In form, the

order sought relies on s 11 of the Contempt of Court Act 1981, as was the case before Nicklin J. That section provides that:

> "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it is withheld."

21. The nature and effect of s 11 were explained by Lord Reed JSC in *A v BBC* [2014] UKSC 25 [2015] 2 AC 588 [59]:

> "… section 11 does not itself confer any power on courts to allow a name or other matter to be withheld from the public in proceedings before the court, but it applies in circumstances where such a power has been exercised. The purpose of section 11 is to support the exercise of such a power by giving the court a statutory power to give ancillary directions prohibiting the publication, in connection with the proceedings, of the name or matter which has been withheld from the public in the proceedings themselves. … The directions which the court is permitted to give are such as appear to it to be necessary for the purpose for which the name or matter was withheld."

22. On the face of it, s 11 is only engaged where the Court both has and exercises a power to withhold a name or other matter from the public, and in such a case it only permits restrictions on the publication of the name or other matter which has been withheld. It does not appear to confer any power to prohibit the reporting of matter which the Court has no power to withhold, or which it has permitted to be made public in the proceedings before it. Mr Tomlinson submits, by reference to the order made and approved in *A v BBC*, that the section nonetheless empowers the Court to make an order that restrains the publication of identifying information which the court has not withheld from the public at the trial. There has been no detailed exploration of the issue at this hearing. Mr Tomlinson may be right (though see *In re Trinity Mirror* [2008] EWCA Crim 50 [2008] QB 770). If he is not, then the source of a power to do that must be found elsewhere. There is no difficulty about this, and hence no need to rule on the scope of s 11.

23. At common law open justice is a strong principle, with only limited exceptions. But the Court has always had and exercised an inherent jurisdiction to control its own procedures, and to make such orders as are necessary to ensure that justice is done. This includes granting interim protection against the disclosure of information which it is the very purpose of the proceedings to protect against such disclosure. Measures of that kind fulfil the Court's duty to further the overriding objective of "dealing with cases justly" which is set out in Part 1 of the Civil Procedure Rules. Power to make orders of this kind can be seen as a case management power, derived from CPR Part 3.

24. Moreover, under s 6 of the Human Rights Act 1998 the court has a statutory duty not to act incompatibly with the Convention Rights. The statute implicitly confers a

power to do what is necessary to comply with that duty, if and to the extent that such power is not otherwise available. Where s 11 cannot assist, and there is no other power available, the Court can impose reporting restrictions if and to the extent (but only if and to the extent) that this is necessary to comply with its statutory duty under the HRA. The methodology is by now very familiar. It is set out in *Re S (A Child)*, a case where the Court had to strike the familiar balance between the open justice principle and the rights under Articles 6, 8 and 10 of the Convention.

25. There is also a specific procedural power to which the Court can resort in this case. The individuals whose identity it is required to protect from disclosure are the claimants. CPR 39.2(4) provides that "The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness." The provision is broader in scope than s 11. In this context it is tolerably clear that "non-disclosure" means, or at least includes, a prohibition on reporting that which is revealed in court. Put another way, unlike s 11 this rule allows the Court to permit the identity of a party or witness to be made public in Court but nevertheless to prohibit its disclosure to the wider public.

26. The rule is wider than s 11 in another respect: it speaks of the "identity" of a party or witness, not just their name. In summary, r 39.2(4) is a mechanism by which the Court can strike the necessary balance between the various demands of the common law open justice principle, and Articles 6, 8 and 10 of the Convention. The rule speaks of the "interests" of the party. In practice, in a case such as the present, we are concerned only with the party's rights. The test of necessity is built into the rule and falls to be applied in accordance with the principles identified in *In re S.*

27. In these circumstances, I conclude that the jurisdiction for the Order I make derives from s 11 of the Contempt of Court Act and/or the Court's inherent jurisdiction, CPR 1, 3 and 39.2(4), and s 6 of the Human Rights Act.

Principles

28. I have already identified in broad terms the nature of the competing considerations. There is no real disagreement about the legal principles that apply to the resolution of the conflict they present. The approach the Court should take is set out in the Master of the Rolls' *Practice Guidance: Interim Non-Disclosure Orders* [2012] 1 WLR 1003, which applies to the making of reporting restrictions and anonymity orders alike. Such orders must be strictly necessary and clearly justified.

29. In his helpful submissions on behalf of the media Mr Glen has pointed out that in a context such as the present it is helpful and appropriate to test the measures proposed by adopting the staggered test identified by the Court of Appeal in *Ex p The Telegraph Group plc* [2001] 1 WLR 1983. For my purposes this can fairly be summarised in this way:

    (1) Would reporting of any specific matter risk undermining the purpose of the proceedings? If not, that should be the end of the matter.

(2) If such a risk is perceived to exist in respect of any specific matter, would the proposed order eliminate that risk? Again, if not, there can be no need for such a ban and again that should be the end of the matter.

(3) Even if the proposed order would achieve the objective, it remains essential to consider whether the relevant risk could satisfactorily be overcome by some less restrictive means, (since otherwise it cannot be said to be 'necessary' to take the more drastic approach).

(4) Where no other less restrictive means of eliminating the perceived risk is available, the Court should still ask whether the degree of risk envisaged is tolerable in the sense of being the lesser of two evils.

Issues

30. The parties' contentions give rise to three main issues:

(1) Whether the list of identifying factors in the order should be exhaustive or remain as it stands, as a non-exhaustive but illustrative list.

(2) Whether the list of identifying factors is excessive.

(3) The adequacy of the ciphers currently proposed. Of these, Mr Glen said that "whilst helpful as a starting point and notionally permissive, [they] are sometimes so abstract as to prevent meaningful reporting of important issues which are likely to be ventilated at trial."

Assessment

31. I have not been persuaded by the submissions of Mr Glen, that the order should contain an exhaustive list of items of identifying information, the publication of which is prohibited. Mr Tomlinson is right, I think, when he submits that there is no previous example of an anonymity order containing an exhaustive list of identifying features. That is not of itself a reason why such an order should not be made. It is however an indication that non-exhaustive orders are not objectionable in principle. In my judgment, the need to ensure that the claimants' identities as a result of these mandates the wider form of protection. It is a necessary measure for that purpose, which is proportionate as it does not intrude unduly into the media's freedom to report or the freedom of the public to learn about these proceedings. I do not believe the form of order that is now proposed is apt to create any real or substantial difficulties for the media. Orders in this general form are frequently made, in the criminal and in the civil Courts. The standard form of anonymity provision in an Interim Non-Disclosure Order envisages less detail: see the Model Order attached the Practice Guidance, at paragraph 6(b).

32. In the event, Mr Glen did not press his written submission that "the terms of some of the prohibited matters are excessive having regard to the incidental risk of identification which they would seem to present." Mr Tomlinson had apparently responded with some illustrations of the practical risks, which Mr Glen (at least for present purposes) acknowledged.

33. On the information presently available I am satisfied that the order as proposed meets each stage of the "staggered" test identified above.

34. As for the proposed ciphers, there are really two sub-issues. The first concerns the descriptions of people, places and events. Many of these are in rather general terms. By the time the hearing began the parties had begun to engage in detailed debate over this issue. That had already resulted in some progress. The revised form of order with which I was presented during the hearing included a little more information about the convictions than had been revealed in the original draft. I left the parties to engage in further debate about the issue overnight, with permission to lodge further written representations before I settled the form of order that will regulate matters for the time being.

35. The other sub-issue concerns the anonymization or, more properly, pseudonymisation of individuals and companies. The proposal as it stands is that in the NT1 case a co-defendant of the claimant at his criminal trial in the late 1990s should be referred to as "Mr A", and that certain offshore companies used by NT1 should be referred to as "Companies A and B". There are also references to "Businesses A, B, C, D, E, F, G and H". In the NT2 case, the claimant also had a co-defendant, and the proposal is to call him "Mr A". This is not the same person as the "Mr A" in the NT1 case. "Company A" in the NT2 case is a cipher for "The business in which the claimant [NT2] previously had an interest." It is not the same as Company A in the NT1 case. The Confidential schedule in the NT2 case also features "Companies F, G, H, I, J, K and H" which are all different from any of those that feature in the NT1 claim.

36. I do not relish the prospect of preparing a judgment, or two judgments, using these ciphers. The process would be cumbersome and the output is likely to be arid and, as Mr Glen submits, "abstract" and lacking in the colour that will engage the reader. There is a risk that references to "Mr A" may give an inappropriate air of mystery to the issues. References to "Company B" may be more likely to bring to mind the music of the 1940s than real events. With two actions, each containing pseudonymous third parties called "A", "B" and "C" there is a real risk of confusion. More importantly perhaps, media reporting would suffer from the same drawbacks. Of course, both I and any reporter would be free to use different ciphers or descriptions to those listed in the Order. But the proliferation of different ways of referring to the same people or companies is a recipe for confusion and could not serve the public interest. Ideally, we would all adopt the same language, and it would have more life and be less confusing.

37. I therefore suggested that companies might be referred to by some other more user-friendly alphabetical method, such as the international phonetic alphabet (Alfa, Bravo, Charlie, Delta, Echo, Foxtrot, etc). Individuals might be given explicitly false names, as is often done in journalism involving the disclosure of sensitive personal information (eg Mr Andrews, Mr Brown, Mr Carter, etc.). I dare say more imaginative suggestions will be forthcoming from the parties or the media. It may be that the nomenclature could be descriptive. There is force in the argument of Mr Glen, with reference to the activities of two companies with which NT2 has been involved, that "The bare acronyms currently used to describe these (and other) companies give no context to that issue." Indeed, his reference to "acronyms" is too generous. They are merely letters. Mr Glen had no specific proposals of his own, however. I left this aspect of the matter for the parties and the third parties to consider over a longer time-

scale, with provision for any proposals to be notified by 10am on the day before the NT1 trial begins.

38. The order I am making today is for the most part the one proposed by the claimants, with some changes of wording to reflect the points made above, and incorporating the overnight modifications to the Confidential Schedule. I have however required two provisos to be added to the order, making clear that it does not inhibit reporting of anything said in any public judgment of the Court, or the contents of any document which is on the Court file and accessible to the public as of right, without the Court's permission.

39. As with every order of this kind, this one needs to be kept under review and the parties and/or the media may wish to propose modifications later. As is well known, matters tend to clarify as cases are prepared for and presented at trial.

Edited extract from Confidential Schedule in NT1

Order sub-para	Description of Identifying Matters	Identifying Matters of which Reporting is prohibited	Publishable Information/Cipher for Reporting Purposes
a.	The Claimant's Name	****	Claimant is a businessman, referred to as "NT1"
b.	The Claimant's current address or any former address	[to include present and all former residential and business addresses]	-
c.	Details of the precise date of the Claimant's conviction, the Court concerned and the sentencing of the Claimant Other Information relating to the charges against him	****** ******	Conviction for conspiracy to account falsely in the late 1990s. The claimant was charged with another offence but the prosecution did not proceed