NCN: [2024] EWHC 500 (KB)

Case No: U20210959

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07 March 24

Before :

MRS JUSTICE MAY

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Between :

Director of the Serious Fraud Office	**Applicant**
- and -	
(1) BLUU SOLUTIONS LIMITED **(2) TETRIS-PROJECTS LIMITED**	**Respondent**
- and -	
Director 1	**Interested party**

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Robert O'Sullivan KC, Dominic Lewis (instructed by the Serious Fraud Office) for the **Applicant**
Adrian Darbishire KC, Tom Doble (instructed by Mishcon de Reya) for the **Interested Party**
The Respondent did not appear and was not represented.

Hearing dates: 27 November 2023
Judgment Date: 7 March 2023

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JUDGMENT

Mrs Justice May:

Introduction

1. On 19 July 2021, at a public hearing following the requisite preliminary private hearing, I approved Deferred Prosecution Agreements ("DPAs") between the Serious Fraud Office ("SFO") and each of the Respondent companies ("BSL" and "TPL"). The judgment notified to the parties on that occasion was anonymised, bearing in mind the existence of criminal proceedings which had then been commenced against former individual directors and agents of the companies ("the Individuals"). The order also postponed the publication of any judgment until after those proceedings had concluded.

2. The criminal proceedings concluded in March 2023, with all bar one of the Individuals being acquitted of any wrongdoing. My clerk thereafter received a request from a member of the press asking whether they could now receive a copy of a de-anonymised judgment approving the DPA. Having reflected on the principles of open justice discussed and applied by the Divisional Court in *R (Marandi) v Westminster Magistrates' Court* [2023] EWHC 587 I invited the parties affected by my judgment on the DPA to make representations as to why, the criminal proceedings having now concluded, my judgment should not be de-anonymised in its entirety. The post-judgment note appearing at the foot of my judgment [2023] EWHC 1976, recorded that "..having had no objection from the parties, anonymisation is now lifted and this judgment may be published".

3. After initial publication of the de-anonymised judgment on 28 July 2023 it appeared that, through no one's fault, the representatives of one of the Individuals (now) named in the judgment had not in fact received notification of my intention to de-anonymise in full prior to publication, and consequently were not able to make the submissions on their client's behalf which they would otherwise have wished to make. Any further publication of my judgment has been suspended pending a hearing of those objections. The first occasion on which such a hearing could be listed and heard was Monday 27 November 2023.

History of events subsequent to the DPAs being approved

4. When the DPAs were concluded on 19 July 2021 criminal proceedings against the Individuals were ongoing. The Order which I made on that occasion, having had oral and written representations on behalf of the Individuals, postponed publication of specified matters until the conclusion of criminal proceedings *"or further order of the Court or the judge with conduct of the criminal proceedings"*. The matters in respect of which publication was postponed included the DPAs themselves, the Statement of Facts in support of the DPAs, the identity of the companies and *"any report of the oral hearing conducted in open court on 19 July 2021…including a report of the anonymised judgment handed down by Mrs Justice May."*

5. The principal justification advanced on behalf of the Individuals at the time for such a broad postponement of publication, even publication with anonymisation of the companies' and Individuals' identities, was that the industry was so small that the

companies would be easily identifiable, and consequently also the Individuals concerned with the companies, and that this identification would risk prejudicing the criminal proceedings.

6. At the end of the criminal trial all bar one of the defendants were acquitted on all charges. On 2 March 2023, the trial judge, His Honour Judge Grieve KC made an order ("the March Order"), the material terms of which for present purposes were as follows:

"UPON considering the Order of Mrs Justice May DBE dated 19 July 2021…

AND UPON the Serious Fraud Office confirming that it will:

(i) Maintain the anonymised references to Director 1, Director 2 and Agent 2 contained within the Statement of Facts in support of the [DPAs] to be released for publication

…

IT IS ORDERED that:

The postponement of the publication of the matters set out below, is hereby lifted:

(a) The [DPAs]

(b) The naming of the identity of Bluu Solutions Limited and Tetris Projects Limited as being parties to DPAs;

(c) The Statement of Facts in support of the DPAs;

(d) The Indictment;

(e) Any report of the oral hearing conducted in open court on 19 July 2021 pursuant to paragraph 8(1) of Schedule 17 to the 20131 Act including a report of the anonymised judgment handed down by Mrs Justice May…"

7. At the time of making this order, there was no de-anonymised version of my judgment in existence; although some de-anonymisation at least was going to be required in order to name the companies in accordance with the intention of para (b) of the March Order lifting restrictions regarding the identity of the companies involved. Although it had been notified to the parties at the time of approving the DPAs the judgment itself had not been assigned a neutral citation number or been published by being uploaded to the National Archive, consistent with the order for full postponement which I made at the request of counsel for the Individuals, for the reasons indicated above.

8. Following the conclusion of criminal proceedings my clerk contacted counsel for the parties on 23 March 2023 with the following request:

> "As the case is no longer subject to anonymisation, and I have received a query from a reporter who would like to publish an un-anonymised version of the judgment, Mrs Justice May is seeking to confirm counsel do not have

> any issues with publication. Her Ladyship also invites amendments to include the correct names of all the parties…[she] will then update and finalise the judgment for publication."

9. Leading Counsel for the SFO responded pointing out that naming the companies but retaining anonymity in respect of the Individuals would be consistent with the March Order; also suggesting that the acquitted defendants should be invited to make representations. Thereafter, on 11 July 2023, my clerk wrote to all parties, including to representatives of the acquitted defendants using contact details provided by the SFO, as follows:

> "Mrs Justice May is finalising her judgment for publication following the conclusion of criminal proceedings earlier this year. Given the starting point of open justice… she would like your submissions on the extent to which there is any proper reason for continuing to anonymise the persons involved in the activities forming the background to the DPA in her judgment."

10. No contrary submissions being received from any side, and in the light of the principles discussed in *Marandi,* I proceeded to finalise for publication a de-anonymised version of my judgment. On 28 July 2023 my clerk notified all parties that the final de-anonymised judgment would be published that day at 2pm, which is what happened.

11. On 31 July 2023, solicitors for one of the Individuals contacted the SFO to express concern about publication of the de-anonymised judgment identifying their client in connection with the activities said to form the background to the DPAs. It transpired that the contact details for the solicitor concerned, though still active, were no longer in regular use so that the messages from my clerk in connection with de-anonymisation had not been picked up.

12. Following receipt of a Note from counsel representing the individual concerned, I asked for a hearing to be listed. In the meantime, the SFO removed the de-anonymised judgment from its website and any further publication was suspended.

Open Justice

Legal principles

13. There is no automatic statutory reporting restriction which applies to DPAs, or to judgments approving DPAs. It follows that the court is being invited to exercise a discretionary remedy conferring anonymity in order to prevent an unjustified breach of Article 8 rights. The provisions of section 4(2) of the Contempt of Court Act 1981 and paragraph 12 to Schedule 17 of the Crime and Courts Act 2013, under which reporting restrictions were imposed at the time of approving the DPAs no longer apply as there are no more legal proceedings which might be prejudiced.

14. The applicable legal principles have recently been re-stated by the Divisional Court in the case of *Marandi* at [43] and are, in summary, as follows:

i) The starting point is the common law principle of open justice, as identified in the "foundational" decision of *Scott v Scott* [1913] AC 417.

ii) The common law principle encompasses mentioning names: *R(C) v Secretary of State for Justice* [2016] UKSC 2, at [36]; In *Re Guardian News and Media Ltd* [2010] UKSC 1 at [63] and *Khuja v Times Newspapers Ltd* [2017] UKSC 49, at [14].

iii) Any derogation from the principle of open justice is required to be justified by the party seeking the derogation on the ground of necessity "in the interests of justice": *Khuja.*

iv) This exception is of narrow scope.

v) The "threshold question" is whether allowing disclosure of the person's name and any consequent publicity would amount to an interference with that person's Article 8 rights.

vi) If so, then the court is required to conduct a balancing exercise:

"The question implicit in the judge's reasoning process is whether the consequences of disclosure would be so serious an interference with the claimant's rights that it was necessary and proportionate to interfere with the ordinary rule of open justice", per Warby LJ in *Marandi* at [34(5)]

vii) Clear and cogent evidence is needed to make good a claim to anonymity.

15. These principles are reflected in the Judicial College publication "Reporting Restrictions in the Criminal Courts" (July 2023). As a member of the press present in court at this hearing pointed out, that publication emphasises that

"…unless there are exceptional circumstances laid down by statute and/or common law the court must not:

…

• Allow evidence to be withheld from the open court proceedings.

• Impose permanent or temporary bans on reporting of the proceedings or any part of them including anything that prevents the proper identification, by name and address, of those appearing or mentioned in the course of proceedings."

The Judicial College publication goes on to explain the importance of open justice to the rule of law as follows:

"The open justice principle is central to the rule of law. Open justice helps to ensure that trials are properly conducted. It puts pressure on witnesses to tell the truth. It can result in new witnesses coming forward. It provides public scrutiny of the trial process, maintains the public's confidence in the administration of justice and makes inaccurate and uninformed comment about proceedings less likely. Open court proceedings and the publicity given to criminal trials are vital to the deterrent

purpose behind criminal justice. Any departure from the open justice principle must be necessary in order to be justified."

The Arguments

16. Adrian Darbishire KC, for the individual concerned, submitted that his client's anonymity should be preserved for two reasons: first, he suggested that in the absence of any change of circumstances I had no jurisdiction to re-visit a decision already arrived at after argument by HHJ Grieve KC in his March Order. Second, as a matter of principle individuals such as his client who had had no connection with the negotiations between SFO and the company, and no opportunity to correct background facts agreed between the SFO and the company during those negotiations, should not have their identities revealed after an acquittal has necessarily called those facts into question.

17. On the first point, Mr Darbishire stressed that the SFO had explicitly suggested maintaining anonymity following the trial. This was reflected in the March Order, which had directed publication of the anonymised judgment only. De-anonymising the judgment before publication was to make a material revision to the terms of the March Order, when there had been no material change since that order had been made.

18. Moving to his second point Mr Darbishire pointed out that the identities of the Individuals had only been mentioned at the private hearing, not in open court at the public hearing when the DPAs were approved. His client, along with the other Individuals, was subsequently acquitted at trial, in circumstances where the judge (in finding no case on certain of the charges) and jury (in acquitting on the remainder) plainly had not accepted some of the facts which had been agreed between the SFO and the companies as background to the DPAs. He suggested that there is a "settled practice" in recent DPA cases of conferring anonymity on acquitted persons, reflecting the fact that the court approving a DPA makes no finding about any implicated individuals, none of whom have played any part in the negotiated agreement between the SFO and the company involved. He submitted that maintaining the confidentiality of material which was not disclosed in open court, which is irrelevant to the public scrutiny of the court's approval of a DPA, could not offend the open justice principle.

19. Mr Darbishire referred me to my own reasoning in a previous DPA case, *Airline Services Ltd* [2020] 10 WLUJ 606, at [13]:

> "In the Statement of Facts and in this judgment certain names have been anonymised. There are two reasons for this: first, in order to safeguard the fairness of any future prosecution(s); second, because factual assertions have been included about the conduct of persons who have not been parties to negotiations with the SFO, who have not been represented at either hearing and who have not had any opportunity to comment on how their roles may have been characterised and described…" (emphasis added)

20. He pointed out that in no previous DPA case has it been suggested that retaining anonymity after the relevant investigations/proceedings have concluded infringes the open justice principle, nor could it. That is because the DPA process concerns an

agreement reached through private negotiations between the SFO and the company concerned. The role of the court is simply to approve (or not) that agreement, in doing so it exercises no judgment regarding the underlying background or (alleged) facts of the company offending. Individuals said to have been responsible for, or to have participated in, the alleged offending by the company are not involved or consulted at any stage of the DPA negotiation; in most if not all cases the company will be under entirely new management. Given the extremely limited role of the court in relation to the underlying facts – themselves part of the negotiated agreement – the names of individuals can add nothing to the approval process. If the guilt or innocence of the implicated individuals is irrelevant to the DPA process, it is difficult to see how naming those individuals could be necessary for public scrutiny of that process.

21. Mr Darbishire went on to submit that there is an essential unfairness in publishing a judgment which appears on its face to make a definitive statement about the conduct of an implicated individual. Had his client been found guilty then he could not have complained, but he was acquitted. Mr Darbishire referred to the points of principle made in relation to Article 6 rights by the European Court of Human Rights in Allen v United Kingdom (2016) 63 EHRR 10 at 94

> "However, in keeping with the need to ensure that the right guaranteed by art 6(2) is practical and effective, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged. In those cases, the presumption of innocence has already operated, through the application at trial of the various requirements inherent in the procedural guarantee it affords, to prevent an unfair criminal conviction being imposed. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the fair trial guarantees of art 6(2) could risk becoming theoretical and illusory. <u>What is also at stake once the criminal proceedings have concluded is the person's reputation and the way in which that person is perceived by the public.</u> To a certain extent, the protection afforded under art 6(2) in this respect may overlap with the protection afforded by art 8." (emphasis added)

22. Mr Darbishire submitted that, balancing the seriousness of the infringement of his client's rights against the slender justification for publication, the court should find it necessary to continue to anonymise references to his client in the DPA judgment.

23. Dominic Lewis, appearing for the SFO, quite properly stressed that his client was neutral on the matter of anonymity. He was there, he said, to assist the court with points of principle only. He pointed out that revisiting the terms of my judgment, following the lifting of restrictions following the conclusion of trial was a matter for me alone. The March Order required the judgment to be amended, at least to remove anonymity so far as the companies were concerned. As there were no longer any statutory reporting restrictions in play, Mr Lewis pointed out, the sole consideration for the court in relation to the de-anonymisation of individuals was the balancing exercise referred to in *Marandi*. Whilst the nature of the DPA approval process might

affect the weight to be given to naming individuals for the purposes of open justice, as against the possible prejudice to those individuals by being named, the touchstone remained one of necessity.

Decision

24. I agree with Mr Lewis that I alone have jurisdiction over the final form of my published judgment. The approval, and the substantive reasons for approval, were notified to the parties in July 2021, but the publication of my judgment was postponed until the criminal proceedings had concluded. As far as I understand it, this is the first time when there has been a total postponement of the publication of the court's judgment approving a DPA. What I have to decide is whether, before publication of that judgment finally occurs, anonymity given to individuals at the time my judgment was first notified to the parties should now be removed. The terms of the March Order made by HHJ Grieve KC cannot restrict what the final form of my judgment for publication should be.

25. Moving from jurisdiction to the question of whether anonymity should be lifted, I do not accept, if that is what Mr Darbishire was suggesting, that any special principle of confidentiality applies to the background facts which underpin a court's approval of a DPA. Open justice is not to be qualified by reference to any particular decision which a court takes. A derogation can only occur as provided for under common law or by statutory provisions which restrict publication of certain facts under certain circumstances. *Marandi* and previous decisions referred to by the Divisional Court in that case make it clear that the identity of individuals is encompassed by the principle of open justice.

26. It follows that in my view the only exercise for this court to undertake is the balancing exercise between, on the one hand, the requirement of open justice in enabling a full understanding of how and why a DPA agreement has been approved by the court and, on the other, the article 8 right to private life of the acquitted individual.

27. The key is necessity. In relation to this the question is not, as Mr Darbishire sought to argue, whether it is necessary to publish the identity of individuals in order for there to be proper public scrutiny of the approval process; rather it is the extent to which his client has established that it is necessary for the proper protection of his art 8 rights that his identity continues to be withheld following his acquittal. The starting point must be publication; the question for me is whether Mr Darbishire's client has established sufficiently that his interests require publication to be restricted.

28. I stress that each case has to be decided on its own particular facts. Included in Mr Lewis's written submissions was a table setting out details of the 10 DPA approvals decided prior to this, of which the judgment in four (*Standard Bank (2015), Sarclad (2016), Tesco (2017) and Gurlap (2019))* did not include any anonymisation of individuals. Whilst it is right that the more recent DPA approvals have extended anonymity they disclose no general principle that implicated individuals' identities will never be disclosed. It will vary from case to case. My remarks in the *Airline Services* case were made under different circumstances, including where publication was happening before any prosecutions. Here, publication was specifically postponed until after the criminal proceedings brought against the Individuals, then underway with a trial in prospect, had been concluded.

29. In this case, the Individuals, including in particular Mr Darbishire's client, were all named in the criminal proceedings. I was told that a report of those proceedings is on the SFO website next to a report of the present DPA, making the connection obvious. Moreover, one of the reasons in July 2021 for postponing any publication, even with company names and individuals all anonymised, was that the small size of the industry meant that both companies and individuals would be readily ascertainable. That being so, there seems to me little point here in retaining any anonymity, still less so as the companies are going to be named in any event.

30. Mr Darbishire relied on the parts of my judgment which emphasised the limits of my function and which stressed that I was making no findings of fact about any individual – see [15] and [16]. Given that I was making no findings of fact, he suggested, the open justice principle did not require identification of individuals in order properly to be able to scrutinise and understand why the DPA had been approved. The alternative view is that having made it plain in my judgment that my role in approving the DPA involved making no findings of fact, the harm to the reputation of any individual named must be negligible. Any fair reporting of proceedings could not imply any guilt on the part of acquitted individuals.

31. The proper reporting of proceedings is another consideration. Counsel made it plain at the hearing that retaining anonymity did not mean that reporting restrictions applied, on the contrary, they do not. Any journalist who researched and made the link between acquitted defendants and the court's decision to approve the DPA would be free to name those individuals in connection with the circumstances of the court's approval of the DPA. That being so then retaining anonymity is simply confusing, and pointless given the ease with which that link can be made, see [29] above.

32. Even accepting Mr Darbishire's point that the public interest in identifying the names of individuals implicated by the statement of facts agreed between the SFO and the companies is low, I cannot see that the interest of his client in retaining his anonymity in the judgment is of such weight as to shift the balance away from publication. No evidence has been advanced of any specific disadvantage which will result from his client being identified in the judgment approving the DPA. None of the other acquitted individuals have suggested that they should remain anonymous; if their names are published then Mr Darbishire's client's position becomes even less tenable.

33. In any event I am not persuaded that the public interest is as low as Mr Darbishire suggested: proper scrutiny of the SFO and of the companies in reaching agreement may very well involve a comparison of the facts upon which the agreement was advanced to the court from whom approval was sought with the facts as found (or in this case as rejected) by the court and jury in criminal proceedings. Such a comparison must necessarily involve identifying the individuals.

34. Whether the hearing is treated as an application by Mr Darbishire's client for a reporting restriction order, or for the withdrawal and re-issue of the published (de-anonymised) judgment, the principles of open justice to be applied are the same. For the reasons given above I conclude that in this case the balance falls in favour of de-anonymising the judgment; accordingly, it will be published in that form.