



Neutral Citation Number: [2022] EWCA Civ 465

Case No: CA-2021-000713
(formerly B4/2021/1432)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Mrs Justice Lieven
Case No. DE19P00318

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/04/2022

Before :

LADY JUSTICE KING
and
LORD JUSTICE WARBY

Between :

ANDREW JAMES GRIFFITHS	<u>Appellant</u>
-and-	
(1) LOUISE TICKLE	
(2) BRIAN FARMER	
(3) KATE ELIZABETH GRIFFITHS	
(4) 'G' (A CHILD) THROUGH THEIR GUARDIAN	<u>Respondents</u>
-and-	
(1) RIGHTS OF WOMEN	
(2) ASSOCIATION OF LAWYERS FOR CHILDREN	<u>Interveners</u>

**IN THE MATTER OF A DISCLOSURE BY COUNSEL FOR THE APPELLANT
AND AN APPLICATION BY THE FIRST RESPONDENT**

BETWEEN:-

LOUISE TICKLE	<u>Applicant</u>
-and-	
(1) RICHARD CLAYTON QC	
(2) ANDREW JAMES GRIFFITHS	<u>Respondents</u>

Lucy Reed (instructed by **direct access**) for the **Applicant**
Gavin Millar QC (instructed by **Plexus Law**) for the **First Respondent**
No other party appeared or was represented

Hearing date: 5 April 2022

Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 4pm on 5 April 2022.

LORD JUSTICE WARBY:

1. This case was about a fact-finding judgment in Children Act proceedings held in private in the Family Court at Derby. The issue was whether it was appropriate in all the circumstances for that judgment to be published without anonymising the mother and father concerned. On 30 July 2021, after a further hearing in private, Lieven J, DBE held that it was. On 10 December 2021, after a hearing in public in November, we gave judgment upholding that decision and dismissing an appeal by the father: [2021] EWCA Civ 1882 (“the Main Judgment”).
2. We left over for separate consideration ancillary questions arising from the fact that in September 2021 Leading Counsel for the father, Mr Clayton QC, had disclosed some of the appeal papers to non-parties without the permission of the court (“the Disclosure”). The ancillary questions concerned the propriety of the Disclosure and an application (“the Application”) by the first respondent to the appeal (“Ms Tickle”) for permission to report aspects of a Note about the Disclosure which Mr Clayton had provided to the court on 21 October 2021 (“the Note”). The Application has since been extended to cover a witness statement filed later by Mr Clayton.
3. Having now had the benefit of argument on these questions we have reached the following conclusions.
4. First, the Application should be granted. Mr Clayton no longer opposes this, and he is right not to do so. It would have been premature to allow reporting of the Note before the court had dealt with the issue to which it was addressed. But that has now been done. The relevant proceedings have now taken place in public. The Note and witness statement have been deployed in the course of those proceedings. Both contain some private and personal information relating to Mr Clayton and his family but Ms Tickle has made clear that she does not wish to report those matters. She has also excluded from the scope of her application the identity of a solicitor who acted as an intermediary in the Disclosure. There is no reason why the remainder of these documents should not be subject to the ordinary principle of open justice. As Mr Clayton has recognised, the same applies to the skeleton argument for this hearing.
5. Secondly, our conclusions in respect of the Disclosure itself are these. This was a significant breach of the confidentiality regime that exists to safeguard the rights and interests of children in proceedings of this kind. There should have been no such disclosure without the court’s permission. Mr Clayton should have realised this. A

detailed investigation of the circumstances was necessary. That investigation has led us to the conclusion that there may have been a contempt of court. But in the event the harm was limited; this was a careless breach and not a deliberate one; Mr Clayton made a prompt apology; he will have to bear his own costs of the Application and these proceedings, which have been protracted; in all the circumstances these proceedings and this public judgment represent a proportionate and sufficient response. We do not consider it necessary or appropriate to take any further action.

The essential legal framework

6. The key statutory provisions are contained in s 12 of the Administration of Justice Act 1960 (“AJA”) and the Family Procedure Rules (“FPR”). We summarised the overall structure of the regime in the Main Judgment at [42]-[43]:

“42. Children Act proceedings are generally conducted in private, on the basis that this is necessary to protect the welfare of the child.

43. Section 12(1) AJA makes provision about the publication of information about such proceedings. This covers the publication of accounts of what has gone on in front of the judge, and the publication of documents such as transcripts of judgments, witness statements, reports, position statements, skeleton arguments or other documents filed in the proceedings. Publication of such information may be a contempt of court. But by virtue of s 12(4) AJA, it will not be punishable as contempt if it is authorised by rules of court. Rule 12.75 of the Family Procedure Rules provides for some kinds of communication to be authorised by default. And the Court can authorise a disclosure that would otherwise be at risk of amounting to a contempt of court.”

7. Most forms of dissemination whether oral or written amount to “publication” for this purpose: *Re B (A Child) (Disclosure)* [2004] EWHC 411 (Fam), [2004] 2 FLR 12 [72]-[73] (Munby J). So a disclosure of information that falls within s 12(1) AJA which is not authorised by the FPR or by an order of the court may be a contempt of court. The circumstances in which that will be so are discussed in Arlidge, Eady & Smith on Contempt (5th ed) at paras 8-179 and following. I shall return to that topic.

The facts

8. The procedural history of the case is set out fully in the Main Judgment and needs no repetition. What follows may be read in the context of that account.
9. From 28 June 2021 Mr Clayton represented the father, Mr Griffiths, on the instructions of Geldards LLP. He appeared for Mr Griffiths at the hearing before Lieven J on 15 and 16 July 2021. Lieven J allowed an intervention at that hearing by a civil society organisation called Rights of Women (“RoW”).
10. On 26 July 2021, Lieven J circulated a draft of her judgment allowing publication of the fact-finding judgment. In doing so she was following the standard practice of

circulating draft judgments in confidence under embargo to enable the parties to learn the outcome, prepare a draft order, and notify the court of any typographical errors so that the judgment can be perfected before formal hand-down. It is also an opportunity to embark on preparation of appeal papers. Mr Clayton was instructed to do this, with junior counsel.

11. On 27 July 2021, before hand-down and accordingly at a time when the draft judgment was confidential and subject to an embargo, Leading Counsel discussed the case over dinner with a senior solicitor with expertise in child care law who was known to him as a friend of his wife. Mr Clayton says the discussion was in very general terms. He outlined that an application had been made to publish a fact-finding judgment in a matter involving a child. He did not reveal the identities of the parties or any information relating to the private proceedings in the Family Court or the High Court. He asked the solicitor

“whether there were any organisations which focused on representing the interests of children and might be interested in intervening on the issue of publication of the judgment from the perspective of the child’s right to privacy”.

She told him of the existence of Association of Lawyers for Children (“ALC”), a national association of lawyers working in the field of children law. Mr Clayton says the conversation went no further, and no documents were sent to the solicitor at that time.

12. On 30 July 2021, Lieven J’s judgment was handed down. Publication of the fact-finding judgment was ordered but a stay was granted pending an application for permission to appeal. The appeal papers were filed on 20 August 2021. On 25 August 2021, Geldards ceased to act for Mr Griffiths. From then until 6 October 2021 he was acting as a litigant in person with Mr Clayton and junior Counsel providing him with advice and representation on a public access basis and, as we are told, *pro bono*.
13. On 8 September 2021, permission to appeal was granted by Baker LJ. Mr Clayton thereafter set about trying to find new solicitors for his client and, at the same time, exploring whether there might be a third-party intervention in support of the rights and interests of the child. Mr Clayton approached three firms, each of which declined to act for Mr Griffiths.
14. On or around 13 September 2021, Mr Clayton telephoned the solicitor/intermediary. He reminded her of their earlier conversation, told her that permission to appeal had been granted, and asked if she might consider assisting by forwarding an email to the ALC to see if it might wish to intervene. She agreed to do so.
15. On 14 September 2021, Mr Clayton sent her two documents. These were the Appellant’s skeleton argument seeking permission to appeal, in unredacted form, and the order of Baker LJ granting permission to appeal. He did this by forwarding an email and attachments which he had previously sent to solicitors whom he had tried to interest in representing Mr Griffiths.
16. On 5 October 2021, solicitors for the ALC alerted the parties to the appeal to the fact that it had received this documentation from a member of the ALC who considered that

they may wish to intervene in the case given the issues involved. The solicitors reported that they had discovered that the member was not a representative of a party in the case and did not have permission to share the documentation with the ALC. The pleadings had been deleted and not retained in any form. The ALC did not know how the disclosure had come to pass. The solicitor said that the ALC had been informed about the issues separately, and had considered whether to apply to intervene.

17. Mrs Griffiths' solicitors wanted information about the source of the documents and the chain of custody. The matter was drawn to the attention of the court which raised enquiries. On 20 October 2021 the intermediary, who was an ALC member, identified herself as the person who provided the documents to the ALC. We shall refer to her as "the intermediary". She said that having received the documents from Mr Clayton she had forwarded them to the ALC unread. She offered her unreserved apology for breach of confidence which she said was unintentional and done with the best of motives. Later on 20 October 2021, Mr Griffiths' solicitors informed the court that Mr Clayton intended to provide a note in relation to the disclosure. The following day he did so.
18. The Note provided a chronology, an explanation, and an apology. Mr Clayton fully accepted his responsibility for the difficulties that had occurred and expressed his embarrassment at the time and trouble that this had caused. He said, "At all times he genuinely believed that he was able to consult a professional legal adviser about these matters" but offered an unreserved apology.
19. In response, Mrs Griffiths' solicitors wrote to the court drawing attention to the restrictions imposed by FPR 12.73 and expressing concern about their client's case being discussed over dinner, and about Mr Clayton's approach to the ALC.
20. When we heard Mr Griffiths' appeal we put this matter to one side. The proceedings that have culminated in this hearing were dealt with separately. In the course of those proceedings Mr Clayton filed a witness statement which, among other things, provided a fuller account of the Disclosure and the background to it. This differed in some of its detail from the account provided in the Note. In the account we have given we have relied on the witness statement.

This hearing

21. The main purpose of this hearing was to determine what if any action should be taken in respect of the Disclosure. The issue at this stage is whether the court should embark on the procedure provided for by CPR 81.6. CPR 81.6(1) deals with contempt applications where there is no application by a party. It provides that

"If the court considers that a contempt of court (including a contempt in the face of the court) may have been committed, the court on its own initiative shall consider whether to proceed against the defendant in contempt proceedings."

Counsel's position

22. In the Note, Mr Clayton said that his sole purpose in sending the documents to the intermediary was to allow her and the ALC to consider from an expert professional standpoint whether the case might be suitable for an intervention by the ALC to assist

the court on the issue of children's rights and the impact of identification on the internet. He anticipated an application from RoW to intervene in the proposed appeal and had in mind that Mr Griffiths might remain a litigant in person. His concern was "to secure a balanced presentation of the issues" on an appeal in which, as he puts it, "all other parties in the case align". The documents were sent with an express request for confidentiality.

23. In his witness statement, Mr Clayton adds that the disclosure was made in good faith, in the belief that this limited disclosure of information from within the proceedings for this purpose was, and would be permitted, in the interests of justice. He did not at the time apply his mind to s 12 AJA or the relevant provisions of the FPR. With hindsight he accepts that he should have done so. He apologises unreservedly for that omission, but stresses that it was unintended, due to a lack of familiarity with the applicable provisions. He understands that the court may now consider that he should have sought its permission. If it concludes that the disclosure was improper he fully accepts this and apologises. Mr Clayton also points to his good character, including 44 years of unblemished practice at the Bar, 20 of these as Leading Counsel.
24. In his submissions on behalf of Mr Clayton, Mr Millar QC observes that it is for the Court to consider whether Mr Clayton was at fault in these respects. He does not seek to persuade the Court that this was not the case. Mr Millar highlights four points to be taken into account when considering the Disclosure. First, he points to its nature and extent. It was not to the public at large or to any section of the public. It was a disclosure in confidence made by a lawyer in the case to family lawyers, of whom only a limited number within the ALC actually read the documents, which were deleted once read. Secondly, Mr Millar submits that the disclosure was for a legitimate litigation-related purpose. Thirdly, Mr Clayton did not intend to interfere with the administration of justice. Fourth, the Disclosure did not interfere with the administration of justice or threaten to do so.

Assessment

25. We remind ourselves that we are considering whether a contempt of court "may have been" committed in this case. The first step is to determine whether the evidence reveals a publication which falls or may be held to fall within the scope of s 12(1) of the AJA. This provides so far as relevant that:-

"The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except

(a) where the proceedings ...

(ii) are brought under the Children Act 1989 ...".

26. We accept the revised and more detailed account of events which Mr Clayton has now given in his witness statement. There is room for argument about whether all the disclosures made fell within the ambit of s 12(1). There is nothing objectionable about disclosure of the mere existence of such proceedings: see *P v Liverpool Post and Echo Newspapers plc* [1991] 2 AC 370, 423 (Lord Bridge), *X v Dempster* [1999] 1 FLR 194 (Wilson J). We doubt that the disclosure of the order granting permission to appeal contained information within s 12(1). But the skeleton argument plainly did contain

“information relating to proceedings before a court sitting in private”. It gave considerable detail about the factual background, the hearing in the Family Court, the adverse findings in that case, the hearing before Lieven J in the High Court, and the judgment of Lieven J following that hearing. On the evidence before us, that information was not disclosed to the intermediary for the simple reason that, whatever Mr Clayton may have intended, she did not read the attachments to the email. But the information was, as Mr Clayton plainly did intend, disclosed to more than one individual at the ALC.

27. The language of s 12(1) might be read as suggesting that the disclosure of information relating to proceedings under the Children Act held in private *shall* of itself be a contempt of court. The decision of the House of Lords in the *Liverpool Post and Echo* case establishes that this is not the correct reading of the sub-section; what it means is that in such a case “there is a contempt in the absence of a defence recognised by law”: [1991] 2 AC 370, 421 (Lord Bridge).
28. It has not been argued that the disclosure in this case is or might be saved by s 12(4) of the AJA, nor can we identify any reasonable basis for reaching such a conclusion. Section 12(4) provides as follows:

“Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section (and in particular where the publication is not so punishable by reason of being authorised by rules of court).”
29. We do not believe the disclosure of the skeleton argument to the ALC can be said to have been “authorised by rules of court”. The only relevant provisions seem to be those of FPR 12.73 and 12.75, and the related Practice Direction PD12G. These are detailed provisions which we have considered with some care. We do not see how this disclosure could be said to fall within any of the specified categories.
30. FPR 12.73(1)(iii) allows disclosure to a “professional legal adviser”, but it seems clear from the context and the language that this only extends to someone representing an existing party: see *Re B (A Child) (Disclosure of Evidence in Care Proceedings)* [2012] 1 FLR 142. The closest the rules come to addressing a disclosure of this nature is in FPR 12.75(1)(a). This authorises the legal representative of a party to communicate information relating to the proceedings “to any person where necessary to enable that party ... by confidential discussion, to obtain support, advice or assistance in the conduct of the proceedings.” Nobody has suggested that this language can be stretched to cover a disclosure made in an attempt to procure a supportive intervention from a third party.
31. Nor can we identify any other basis on which it might be said that the publication in this case “would not be ... punishable apart from this section”. The function which those words perform is to preserve any defence which would have been available at common law. The nature and scope of the common law defences is discussed by Arlidge Eady & Smith (op. cit.) at 8-186 to 8-190. They summarise the effect of the authorities in this way:

“... [A]n applicant would need to show that the alleged contemnor knew that the information published was within one of the categories in fact protected by the subsection. It would not be necessary to show an awareness of the legal restrictions themselves.”

Applied to this case, it would be enough to prove that Mr Clayton knew, as clearly he did, that the information related to proceedings held in private under the Children Act. It would not be necessary to show that he was aware of the provisions of s 12 AJA or their effect.

32. It is for these reasons that we consider that a contempt of court “may have been committed” by Mr Clayton when he disclosed the information in the skeleton argument to the ALC. But CPR 81.6(1) requires us to consider whether to initiate proceedings for contempt. As we have indicated, our decision is that contempt proceedings are not necessary and would be disproportionate. That is because of the limited disclosure, the limited harm, the mitigating factors identified by Mr Clayton and his Counsel which serve to reduce his culpability, and the delay that has occurred, which is no fault of Mr Clayton.
33. We emphasise however that we do not consider this to be a trivial or technical matter by any means. It is necessary to have clear rules about what disclosures may and may not be made by legal professionals involved in Children Act proceedings. In our judgment the FPR meet that need. Lawyers involved in cases of this kind have a professional responsibility to inform themselves about the rules and to abide by them. In case of doubt an application should be made to the court. That is what should have happened here. We do not consider it helpful to speculate about what might have happened if that had been done.
34. We add this. In the course of the hearing there was discussion of Mr Clayton’s conduct in discussing this case over dinner with the intermediary after he had received and read the draft judgment and been instructed to settle grounds of appeal but before the judgment had been formally handed down. We are not in a position to make any finding about this, except to say that it is unwise for a person in Mr Clayton’s position to have any discussion about a case with any third party at a time when a judgment is subject to embargo. As the Master of the Rolls reiterated only a few weeks ago, strict adherence to the terms of the embargo on draft judgments is of great importance: *R (Counsel General for Wales) v The Secretary of State for Business, Energy and Industrial Strategy* [2022] EWCA Civ 181.

LADY JUSTICE KING:-

35. I agree.