

Legal Professional Privilege—the need for confidentiality and avoiding delay (*Winstone and Others v MGN*)

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Dispute Resolution analysis: Whether confidentiality in material which is subject to legal professional privilege (LPP) is lost by the pleading, in a statement or statements of case which is or are accessible by non-parties, of allegations which cover the same or similar ground to that material is a matter of fact and degree. The present case concerned two classes of material. With regard to the first, the fact that allegations had been pleaded for a number of months was not sufficient to defeat LPP, in particular because confidentiality is only lost when information is in fact known to a substantial number of people, and because although someone knowing the privileged material would deduce that the pleaded case was based on it, that case did not in terms plead it. As to the second, where the chairman of a parent company made reference to material which was assumed to be subject to the LPP of a subsidiary company in a conversation which was not held in private and in respect of which no condition of secrecy was stated in advance, confidentiality in it was lost then; alternatively, protection could not be maintained in light of the pleading of allegations which here replicated that very material. Written by Richard Spearman QC, of 39 Essex Chambers, who was leading counsel for the defendant, MGN Limited, in this case.

Winstone and others v MGN Ltd [\[2019\] EWHC 265 \(Ch\)](#)

What are the practical implications of this case?

It was not in issue that LPP only protects information which is confidential (see, for example, *Three Rivers DC v Bank of England* [\[2005\] 1 AC 610](#), Lord Scott at [24]; *Serdar Mohammed v MoD* [2013] EWHC 447 (QB), Leggatt J at [40(iv)]). Further, such points of law as were in issue were decided in favour of MGN. Norris J held:

- at [34], that information only ceases to be capable of protection as confidential when it is in fact known to a substantial number of people (*Stephens v Avery* [1988] 1 Ch 449 at 454)
- at [35], that the mere fact that the claimants intended to rely on it was no answer to a claim by MGN for an order restraining them from making use of the contents of the note (*Goddard v Nationwide* [1987] 1 QB 670 at 683d-e)
- at [35], that such an order could be made against the claimants notwithstanding that they had come innocently into possession of the confidential information in the note (*Goddard* at 685d-e), and
- at [36], that although an injunction could properly be refused on equitable grounds, if delay was relied upon it had to be ‘inordinate’ (*Goddard* at 685f). The outcome thus turned on applying these established propositions to the facts

Where material is subject to LPP, it is important to ensure that the confidentiality of that material is not lost. Loss of confidentiality can occur as a result of the material being voluntarily made public. It can also occur as a result of delay in taking steps to restrain it from being used by a third party, after it has become apparent that a third party has learned of it and/or intends to rely upon it. In cases involving companies, it is necessary to ensure that these matters are appreciated and are acted on not only by lawyers, but also by all those who have access to such materials and who may otherwise make statements or carry out actions which, perhaps unwittingly, could have the effect of undermining LPP.

What was the background?

In October 2017, the last two claimants in the second wave of the Mirror Newspapers Hacking Litigation (MNHL) amended their claims for aggravated damages to plead—(a) that the MGN board and legal department were aware of the habitual or widespread use of unlawful information gathering activities by 2002 and certainly by 2007, and (b) that they deliberately took steps to conceal those activities and to provide false statements to the public rather than prevent or reduce such activities and thereby spare the claimants the harm which they suffered. Starting in June 2018, claimants in the third wave of the MNHL included expanded particulars of aggravated damages relating to these issues of knowledge and concealment.

MGN contended that two of these expanded particulars relied upon material protected LPP comprising:

- a note made by one of MGN's in-house lawyers on one copy of the witness statement dated May 2007 of a journalist who was bringing proceedings for unfair dismissal, and which related to the views of MGN's external lawyers or possibly of that in-house lawyer concerning the merits of those proceedings (the Note), and
- statements made by the then Chairman (Mr Grigson) of MGN's parent company at a reception following the annual general meeting (AGM) of that parent company in May 2015 (the Comments)

MGN applied for:

- an injunction to restrain claimants who had expressly or implicitly referred to the Note or the Comments in their Particulars of Claim from relying on the Note or the transcript of the Comments, and
- an order striking out the words in the material particulars of aggravated damages which effectively pleaded the Note or the Comments

What did the court decide?

Norris J recorded that, in resisting this relief, the claimants' sole contentions could be summarised as follows:

- that the foundation for a claim to LPP was not laid because the material for which LPP was sought could not sensibly be regarded as either initially or still confidential, and
- that as a matter of discretion an injunction should be withheld

With regard to the Note, Norris J said: 'The issue is whether [it] has lost the character of confidence which underpins the assertion of legal professional privilege.' He held that:

- the Note had not lost that character
- injunctive relief was available against those claimants who had pleaded reliance upon it, restraining its use in their claims, and
- MGN had not lost the right to seek such an injunction

However, he also held that no part of any pleaded case should be struck out, because the words in the Particulars of Claim to which MGN objected on the basis that they were reliant on the Note—(a) did not plead the Note, and (b) 'are capable of being proved by other evidence.'

With regard to the comments, Norris J held that they 'lack the requisite quality of confidentiality,' and 'it is in any event inappropriate to grant injunctive relief.' Norris J said: 'The 2015 AGM and the reception which followed it were public occasions.... In truth Mr Grigson spoke on a public occasion—what he said was not said on a confidential basis.' He continued: 'It is in any event too late to claim that the communication was confidential and to assert privilege.' Among other things—the Comments had been pleaded in about 40 Particulars of Claim which 'lay on the Court file and were open to inspection by third parties until 5 December 2018 (when a temporary "sealing up" order was made);' and they 'set out a

discrete event' in respect of which 'Claimants were entitled to know quickly whether it could form part of their several cases when assessing the strength of their damages claims.'

Case details

- Court: High Court, Business and Property Courts
- Judge: Mr Justice Norris
- Date of judgment: 18 February 2019

Richard Spearman QC practises from 39 Essex Chambers. He has appeared in many reported and high profile cases, including several cases in the House of Lords/Supreme Court and numerous cases in the Court of Appeal and all divisions of the High Court, as well as advising on and appearing in litigation overseas (Bahamas, Cayman Islands, Hong Kong, Malaysia) and appearing and sitting as an arbitrator in commercial, media and sport arbitrations. He is a Recorder of the Crown Court and the County Court and a Deputy High Court Judge. He was leading counsel for MGN in *Winstone and Others v MGN Ltd* [2019] EWHC (Ch) 265.

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