SHERIFFDOM OF GLASGOW AND STRATHKELVIN

[2020] SC GLA 40

GLW-SW7-2019
GLW-SW8-2019

JUDGMENT OF SHERIFF A CUBIE

in the decision in relation to possible contempt of court by XY Council in social work referral proceedings concerning the S children

Glasgow, 15 November 2019

Introduction

[1] This note relates to actions of a local authority (XY) which were potentially in contempt of court. These actions arose because of the manner in which the recovery of documents had been sought in the age of the General Data Protection Regulation and raised the issue of whether recovery by means of a Subject Access Request is a substitute for recovery by way of specification procedure.

Background

[2] On the eve of the proof in social work referral proceedings, the solicitors for the mother sought recovery of the social work records, relating to two children, from the local authority XY, one of three which operates within the jurisdiction of Glasgow Sheriff Court. This was done by way of expedited motion for specification of documents which was not opposed.

[3] The motion was granted and no commissioner appointed. In apparent compliance with the order made, XY produced documents to the court. The recovered records were lodged as an Inventory of Productions by the mother on the second day of the proof.

[4] It was immediately clear that the documents produced had been subject to substantial redaction, by the covering of text being copied, and by the use of correction fluid and black marker pen to delete text. Even a cursory examination disclosed 39 separate instances of such redaction. There were varying degrees of sophistication in the redaction and the text obscured went from a few words to whole pages. Counsel for the mother confirmed that the documents had been lodged in the form in which they had been recovered from XY.

[5] The unilateral interference with the documents produced might amount to a form of contempt of court. In *Martin & Co Ltd* v *Stenhouse* 2016 SLT 45 at paragraph 45, the Inner House held that contempt of court can be constituted by a failure to produce a document which has been ordered to be produced, endorsing a passage from Maxwell *Court of Session Practice*. By extension the adulteration or redaction of a document ordered to be produced could constitute contempt of court. I also had in mind the decision of the Inner House in *Sovereign Dimensional Survey Ltd* v *Cooper Ltd* 2009 SC 382, to the effect that it is for the court to determine the circumstances in which the court's inherent jurisdiction will be invoked (Lord Reed paras [31] and [32]).

[6] Before taking any formal steps, I instructed the sheriff clerk (with the knowledge of all parties) to fix a hearing and to invite a senior officer from the relevant department as well as a member of the legal services department to attend to allow enquiry to be made about the circumstances giving rise to the extensive redaction of the documents produced.

[7] XY responded accepting the invitation to attend. At the hearing the council were represented by their head of litigation and a senior officer in the relevant department. I explained the concerns and the nature and extent of the redactions to the records, which the representatives were able to view.

[8] Their representative apologised unreservedly to all concerned recognising that it should not have happened. The letter from the sheriff clerk had prompted an internal investigation.

Background to production of documents

[9] Before narrating the result of the investigation and the background to and consequence of XY's actions, it useful to set out (according to those appearing in the case before me) what are being perceived, by some parties at least, as alternative means of recovering documents in the context of court proceedings. Without attempting a comprehensive analysis of the two regimes, certain features can be identified. I am grateful to XY for the detailed written submission made and also to the Sheriff Court librarians who provided very helpful background material. The two approaches are by way of specification procedure or by way of using the Data Protection legislation.

Specification of documents and commission and diligence

[10] The procedure in the Scottish courts for recovery of documents said to be relevant to a party's case is by way of a specification of documents, as ultimately happened in this case. Although proceedings before the sheriff for determination of whether grounds are established are governed by the *Act of Sederunt (Child Care and Maintenance Rules) 1997*, these rules make no provision for recovery of documentation and customarily parties proceed by motion with one eye on the recovery provisions of the *Sheriff Court Ordinary Cause Rules 1993 chapter 28* (see *Kearney Children's Hearings 2nd edition* at paragraph 30.43)

[11] The machinery for recovery of documents by motion is addressed in *Macphail: Sheriff Court Practice (3rd Edition)*. A party seeking recovery of documents may enrol a motion

seeking recovery of these documents, justifying their recovery and seeking the appropriate measure including if necessary the appointment of a commissioner.

[12] It is open to a party from whom documents are sought (the haver) to claim confidentiality for all or parts of documents. The position in relation to documents in respect of which confidentiality is claimed is dealt with specifically in paragraph 15.75 of *Macphail:*

> "When confidentiality is claimed for any of the documents produced, they must be enclosed in a separate sealed packet, as described above in connection with the optional procedure, and then dealt with in terms of rule 28.8(2) to (4).409 The rules give no further guidance on the procedure to be followed when a haver objects to the production of documents. It is thought that where objection is taken on any ground other than confidentiality, it is the commissioner's duty to rule on it. If, however, the matter is one of any complexity or delicacy, it may be preferable for the commissioner to repel the objection under reservation of all questions of competency and relevancy. If the haver then produces the document, it should be sealed up to await the decision of the sheriff, who before ruling on the objection will give the haver an opportunity to be heard on a motion to open the sealed packet lodged by the party who has obtained the diligence and intimated by him to the other parties and to the haver."

[13] The matter is further addressed at paragraph 15.105:

> "The Ordinary Cause Rules provide for the protection of any evidence in respect of which confidentiality is claimed in the proceedings for recovery which have been discussed above, namely the optional procedure: (a) execution of a commission and diligence for the recovery of documents; (b) execution of an order for production or recovery of documents or other property under section 1(1) of the 1972 Act; and (c) execution of an order for the preservation, etc. of documents or other property under section 1(1) of the 1972 Act. The rule provides that where confidentiality is claimed for any evidence sought to be recovered, such evidence must, where practicable, be enclosed in a sealed packet. If sealing up the evidence is not practicable it is not to be recovered without the authority of the court. The party who has obtained the commission and diligence may lodge a motion to have a sealed package of evidence opened up or, where sealing has not been practicable, to have the evidence recovered. Such a motion may be lodged by any other party to the cause after the date of intimation by the sheriff clerk (in terms of either rule 28.3(5) or rule 28.4(10)) that the party obtaining the commission has failed to uplift documents. Any party lodging such a motion must as well as intimating the motion to all other parties in the usual way, intimate the motion to the haver by first class recorded delivery post. The person claiming confidentiality is entitled to oppose the motion."

[14] The court approves the motion or otherwise, influenced, but not bound by, a lack of opposition; the rules and practices of the court provide a mechanism for the disclosure or otherwise of documents sought.

[15] The court will not, in normal course, order the recovery of documents which are afforded particular protection; they may have no use at proof; they may be privileged; the request for disclosure may be a fishing diligence or there may be claims of confidentiality, or public interest immunity. It is, for example, well settled that neither documents prepared in contemplation of litigation nor precognitions are recoverable (see *Any Whitehead's Legal Representative* v *Douglas* [2006] CSOH 178). Issues of privilege and waiver can be complex and involve the interests of parties and havers (see *Scottish Lion Insurance company Ltd* v *Goodrich Corporation* 2011 SC 534).

[16] Fundamentally the specification procedure exists so that the court can monitor and if necessary, decide upon the relevance or admissibility or confidentiality of material which is subject to the motion for recovery, either refusing the motion or allowing excerpts to be taken from material, or allowing the material to be redacted. The court maintains control of the procedure and is the final arbiter when issues of relevance, admissibility or confidentiality arise.

[17] In order to properly carry out its function when a party or haver raises the issue of confidentiality, the court requires that the whole document be produced so that the presiding judge can determine whether the basis for the redaction is made out. It is not for the party or haver to determine unilaterally what can and cannot be produced.

[18] This matter was addressed, albeit obiter, in *Cherry and others, Petitioners* 2020 SC 37. The petitioners moved for the production of unredacted versions of documents produced by the respondent. The redactions purportedly were made on the basis of irrelevance, legal

privilege and the Law Officers' advice convention. The petitioners submitted that they did not know whether these redactions had been properly made. The court looked at specification procedure and observed that:

> "[26] …It would normally require a formal application for a commission and diligence and then scrutiny of the documents by the Lord Ordinary to determine whether the redactions are justified on the bases proffered (*Somerville v Scottish Ministers* [2008 SC (HL) 45], Lord Rodger at para [155]). In that context, the court can, of course, override any objections from the Government based upon public interest considerations. It could reject the assurance by counsel that the material had been properly excluded for the reasons stated. The test is whether "production of the full version of the document to the petitioners is necessary for disposing fairly of the proceedings" (ibid para [156])."

[19] In Somerville, Lord Rodger said the following:

> "155. … The correct starting point, as I have said, is that the redacted passages are indeed relevant to one or more issues in the petitioners' cases, since otherwise there could be no question of them being produced under the specification. In these circumstances…The decision on whether they should do so was one for the Lord Ordinary after balancing the competing interests of the petitioners in having relevant material and of the public in maintaining the confidentiality of that material. I can see no way in which the Lord Ordinary could carry out that vital balancing exercise in this case without actually looking at the documents in question. …
> 156. The procedure which should be followed was outlined recently by Lord Brown of Eaton-under-Heywood in *Tweed v Parades Commission for Northern Ireland* [[2006] UKHL 53], a judicial review case where issues of proportionality were in play. He said (p 674, para 58):
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> > '[T]he judge should receive from the respondent and inspect the full text of the disputed documents (consistently with the practice laid down by the House of Lords in Science Research Council v Nassé [[1980] AC 1028]); if he concludes that realistically their disclosure could not affect the outcome of the proportionality challenge he will dismiss the appellant's application for inspection; if, however, he reaches the contrary conclusion he will need to consider (with counsel's assistance) the question of redaction; only then may he still need to determine the respondent's public interest immunity claim.'"

[20] The issue here was not one of Public Interest Immunity or national security, but the same principles must apply; if the documents have been produced as relevant then the court must be the arbiter of what, if anything, is to be excluded from disclosure by way of redaction or other limitation; it is not for the parties to unilaterally reach their own

conclusion. (See for example *Shah* v *HSBC* [2011] EWCA Civ 1154 where the Court of Appeal dealt with the disclosure of documents which had been redacted to avoid naming bank employees; all parties agreed that the court was the final arbiter. These were not matters of national security. Reference was there made to the decision *In GE Capital Corporate Finance Group Ltd* v *Bankers Trust Co* [1995] 1 WLR 172, where the Court of Appeal had considered the correct approach to a case in which part of the document had been redacted, pointing out that it had long been the practice that a party is entitled to seal up or cover up parts of a document which he claims to be irrelevant, there being a well-established procedure for the court to be the arbiter of what is or is not confidential.)

[21] For completeness I did consider the decision in *Strathclyde Regional Council* v *B* (reported 1997 Fam LB 142, although decided in 1984). Sheriff Principal Dick determined that confidential documents may be disclosed if required for the "ascertainment of truth, the ends of justice and the proper and fair determination of the dispute between the parties". This case was reportedly the first when social work records were disclosed, a matter now much more routine. But it proceeded on the basis that the court was and should be the arbiter of the nature and extent of the disclosable material when confidentiality was claimed.

[22] In this case, without reference to any issues of confidentiality, XY simply produced documents which had been significantly redacted, in purported compliance with the unopposed specification. That is what led to the concern about possible contempt.

Data protection legislation

[23] I now turn to the question of recovery through the Data Protection legislation. In this case it emerged that there had been an earlier application by the mother for recovery of the same social work records under the GDPR, a widely used abbreviation of Data Protection

Legislation which includes the General Data Protection Regulation (EU) 2016/679, the Data Protection Act 2018 Act (the Act) and regulations made thereunder. The law in this field has rightly been described as complex and the statute labyrinthine (*R* v *The Chief Constable of Sussex Police and another* [2019] EWHC 975 (Admin) at paragraph 53). This analysis is a necessarily superficial and selective distillation of those aspects which touch upon the matters arising in this case.

[24] The GDPR applies to all organisations that process personal information. Under GDPR anyone holding another's data is known as a data controller. Local authorities such as XY are data controllers for the purposes of the GDPR.

[25] Individuals retain certain rights in respect of their personal information, one of which is the right to request a copy of the personal data held about them by the data controller by way of what is commonly known as a Subject Access Request (although the term does not appear in the relevant legislation) usually abbreviated to SAR (s 45(1)(a) of the Act).

[26] Any SAR can be made in writing, by electronic means or verbally to the data controller. The data controller has an obligation to fulfil the SAR as soon as it can, and in most circumstances within one month of the date of the request being made (the period can be extended in certain limited circumstances (s 45(3)(a) and (b) of the Act). In order to comply with a SAR, the data controller will require the requester to provide information to confirm their identity. The period for responding to a SAR only begins upon receipt of such confirmation and any additional information required.

[27] GDPR does not prevent an individual making a SAR through a third party. Routinely the request will be from a solicitor acting on behalf of a client whose authority is established by a signed mandate from the client.

[28] But, as the legislation makes clear, in most circumstances an individual is only entitled to his or her own personal data, and not to information relating to other people. The Act says that the controller does not have to comply with the request if it would mean disclosing information (with limited exceptions) about another individual who can be identified from that information (s 45 (4)(e)). There are also limitations arising from the potential obstruction of official or legal enquiries, or the prejudicing of certain criminal investigations (s 45(4) (a) and (b)).

[29] Due to these statutory limitations, a local authority is under no obligation to provide an unlimited response in these circumstances where it would mean disclosing information about another individual who can be identified from that information. It is self-evident that in almost all cases where a SAR is made to recover Social Work or Education records, those records will contain third party data.

[30] The practical consequence of this restriction is that before releasing the appropriate information, a local authority will undertake detailed review of the material sought redacting or removing any data which identifies third parties. This can be time consuming and will result in the production of the material in an incomplete and/or redacted form.

The circumstances in this case

[31] As I have indicated, the mother's solicitors made a SAR; this was done around one month before the proof diet. XY was dealing with the request with a view to meeting the statutory timescale. Any material recoverable under the SAR had to be redacted to remove reference to third parties not covered by the request (to give one example, invitees to a birthday celebration for one of the children).

[32] Without the court being aware of the SAR, a motion for specification was lodged, was unopposed, and on that basis was granted waiving the period of notice. The specification was served on the Social Work Department of XY who passed it to the authority's Data Protection Officer (DPO) who in turn sought advice from the Legal Department; the advice given was that the material provided under the specification should be redacted as if it had been material recovered by way of a SAR. That advice was wrong.

[33] XY accepted before me without qualification that the legal advice given to the DPO was wrong. The solicitor involved realised his mistake on being asked about it.

[34] Once the designated Social Worker was contacted about the errors in redaction, she immediately provided unredacted copies of the relevant pages.

The question of contempt

[35] It is axiomatic that contempt of court is an offence *sui generis* but with quasi-criminal characteristics. Contempt of court may arise directly, in the face of the Court, or indirectly, by conduct which impedes the course of justice. However it is characterised, a contempt of court must be proved to the criminal standard, namely beyond reasonable doubt: *Gribben* v *Gribben* 1976 SLT 266 at page 269.

[36] In *Beggs* v *Scottish Ministers* 2005 1SC 342, the Lord President said:

> "[30] It is clear that, in order to constitute contempt of court, conduct requires to be wilful and to show lack of respect or disregard for the court. It would not qualify as contempt if the conduct complained of was unintentional or accidental. What should be held to establish contempt plainly depends upon the nature of the case. Thus, for example, in the case of a person in court — where there is no question of any court order or undertaking — it would require to be held, if necessary by inference, that his conduct was not merely inappropriate but displayed an attitude which was intended to be offensive to the dignity and authority of the court. ..."

[37] On receipt of the letter from the court, the matter was escalated to senior management, recognising the import of any complaint about potential contempt. There was no discernible reason for the advice tendered; the failure to respond to the SAR was slow; XY has identified measures to make sure that it does not happen again, including refresher training re specifications, GDPR and orders of court, extended beyond litigation and licensing solicitors. Both the chief solicitor and deputy chief executive were to be involved in impressing upon staff the need to deal with any specification received as a priority.

[38] In the circumstances, although the advice provided and the treatment of the documents produced by XY in response to the specification were wrong, I reached the conclusion that the efforts to comply with the specification were plainly conflated with and confused by the simultaneous compliance with the SAR for broadly the same material. I was satisfied that the conduct of XY in providing the heavily redacted material when faced with both an SAR and a motion for specification could not be regarded as conduct which was intended to be offensive to the dignity and authority of the court. I made no further order.

Conclusions

[39] This case arose from a conflation of the two regimes. As I indicated, according to all parties to the referral and to the local authority, parties are increasingly choosing to seek to recover documents by making a SAR under the GDPR. But such procedure is not a substitute for use of specification procedure; some observations can be made about the drawbacks of using a SAR as a substitute for recovery by specification.

- The data holder can legitimately redact records in a way which renders them much less useful in proceedings; for the reasons explained briefly it is almost

inevitable that records of the sort customarily sought in these proceedings will contain information which does not relate to the subject. The recovering party will be inhibited in the use of the material recovered in that way. But if documents are recovered by specification then there is an exemption available to local authorities under GDPR. Article 6(1)(c) provides a lawful basis for processing where:

> "Processing is necessary for compliance with a legal obligation to which the controller is subject."

That exemption is available if a local authority is required to release information in compliance with a lawful court order. This exemption allows data controllers to release information in a full and unredacted form, including information from which third parties can be identified, and avoids the complications and delays inherent in making a SAR.

- The timescales are fixed for the SAR by sections 45 and 54 of the Act. By contrast the timeframe for responding to a specification of documents is normally set at seven days from date of service on the haver, which is substantially shorter than that allowed to local authorities when responding to a SAR.
- And the court has no role in securing compliance with any SAR. As Lord Justice Munby, when head of the Family Division in England and Wales, said in *Re Venables* [2018] EWHC 1037 (Fam) at para [28]

> "… [I]t is no proper part of the judicial function … to police, let alone enforce compliance by it with, the Ministry of Justice's obligations arising in relation to Mr Ralph Bulger's subject access request under the Data Protection Act 1998. That is a matter for others in other places."

[40] Thus a party to an action seeking to recover a full social work file should obtain an interlocutor of the court authorising specification and production of documents and serve

this on the local authority. An interlocutor ordaining the authority to comply with a call in a specification of documents will compel the authority to release a full unredacted set of records which fall within that call. In complying with the court order, the local authority will not fall foul of GDPR by virtue of the exemption. Any questions of relevance, admissibility privilege and confidentiality can be canvassed before the court.

[41] The same observations arise in relation to any application under the Administration of Justice (Scotland) Act 1972; any recovery in terms of that statue would in my view attract the same protection for the data processors as material recovered under specification in terms of regulation 6(1)(c). The provision of the material is necessary for compliance with a legal obligation to which the controller is subject.

[42] This note does not deal with the prospective right of a third party affected by recovery, but it is not difficult to imagine circumstances in which a parent subject to proceedings before the children's panel may seek to recover information in relation to the health (for example drug dependency or mental health of a neighbour or a relative who is not a relevant person) and might seek to recover third party records. In such case the considerations in *WF* v *Scottish Ministers* [2016] SLT 359 should be in the mind of the parties and the court.