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Neutral citation number: [2023] EWFC 28

IN THE FAMILY COURT AT OXFORD

Date: 17 February 2023

Before: HHJ Vincent

Between:

THAMES VALLEY POLICE

Applicant

AND

(1) MS F

(2) MR G

Respondents

Miss Tracey Tinsley, in-house solicitor for Thames Valley Police
Miss Cleo Perry KC, instructed by Abrahams Law Ltd, solicitors for the respondent mother
The second respondent father represented himself

Hearing date: 24 January 2023

APPROVED JUDGMENT

Introduction

1. This is an application made by Thames Valley Police for disclosure to them and to the Crown Prosecution Service, of documents from private law proceedings between the respondents, Ms F (the mother) and Mr G (the father).
2. The mother and father were married in 2011. They separated in June 2021 following an incident, captured on CCTV within the family home, when the father assaulted the mother by strangulation. He subsequently pleaded guilty to an offence of assault. He was made subject to a restraining order against the mother, to last indefinitely, and providing that he was not to go within 100 metres of her home address.
3. The family proceedings commenced in September 2021. The Court was concerned with cross-applications from each of the respondents. The proceedings came to an end on 20 September 2022. The local authority had prepared a section 7 report for the Court. The author of the report concluded that the children had witnessed serious domestic abuse perpetrated by the father towards the mother over a period of time, and had also experienced abuse directly from him. The author of the report recommended that the father should not have any caring responsibilities for the children, and that the children should not have any contact with their father at all, not even supervised contact.
4. The father did not attend the Court hearing on 20 September 2022, but wrote an email to the Court in which he criticised social services for what he said was an unfair and biased investigation, said that the CCTV footage viewed had been ‘misconstrued’, and doubted that the views expressed by the children were truly their own. He said that the mother had illegally obtained recordings of his private conversations, and that it was this evidence that was the foundation of the social services’ recommendations. Stating that he had lost faith in the system, he said that he wished to withdraw his application, and would consent to an order reflecting social services’ recommendations.
5. I gave a short judgment, having reviewed the evidence in the case, including CCTV footage of the assault, the section 7 report and the parties’ statements. I found the social services’ report to be thorough, balanced and based on a detailed review of all the evidence. I made orders in line with their recommendations, providing that the father should not have any contact with his children, due to the risks he posed to both them and their mother, and consistent with the girls’ own wishes and feelings, based on their own experiences of him. I made a prohibited steps order to prevent the father from removing the children from their mother’s care.
6. In addition I made a non-molestation order against the father. Recordings obtained by the mother and handed to the police and social services included material in which it is said he is heard to make threats to kill the mother. It is alleged that he discusses making plans to buy a car to run her over, or to ‘*kill that cunt*’, and that on another occasion he is heard to say once the proceedings are over, he is ‘*going to fucking stab her ... I want to see the fear in her eyes*’. It is alleged that members of his family discuss killing her. Elsewhere

in the recordings, he is said to discuss making plans to relocate to [*country anonymised*], taking the children with him.

7. I listed a return date on 29 September 2022 to give the father an opportunity to set aside or vary this order, but he did not attend that hearing. The non-molestation order remains in force.

The application

8. On 29 November 2022 Thames Valley police applied to the Court for '*disclosure of statements, documents and as appropriate, testimony that make reference to any covert recordings obtained by Mrs F, and to any threat of harm towards Mrs F by Mr G. TVP also request under practice direction 12G a copy of the final judgement made in the family proceedings.*'
9. There is no witness statement in support of the application.
10. Miss Perry KC, representing the mother, submits that both the mother and her solicitors had attempted to contact the police a number of times to discover what the police said they required, and on what legal basis. Her instructions are that the police refused to discuss the ambit of the application in correspondence with either the mother or her solicitor.
11. I was told that the Officer in Charge of the investigation, DC D, who did attend the application hearing before me, had been on rest days in advance of the hearing and this is why there was neither a statement in support, nor any meaningful dialogue between the police and the mother or her solicitors in advance of the hearing. It seems that it had been anticipated that the application would be agreed.
12. Ms Tinsley appeared for the police at the hearing. She had prepared a skeleton argument. She told me that the application was made at the direction of the Crown Prosecution Service to assist with the decision-making process in respect of whether to bring charges (i) against Mr G for threats to kill Ms F; and (ii) Mrs F for stalking and computer misuse in respect of Mr G. In her skeleton argument she said, '*the material that TVP specifically seek relates to mitigation provided by Mrs F and the level of risk presented by Mr G towards Mrs F and the children.*'
13. The application notice refers to Practice Direction 12G of the Family Procedure Rules. This contains a table setting out who may communicate what kind of information relating to the proceedings, to whom, and for what purpose.
14. Within that table it is set out that 'a party', may communicate to 'a police officer', '*the text or summary of the whole or part of a judgment given in the proceedings*', '*for the purpose of a criminal investigation.*'
15. Practice Direction 12G permits a party to provide the police with a copy of a judgment,

but it does not create an entitlement for the police to receive it. Practice direction 12G does not provide for disclosure of other documents from Family Court proceedings to the police.

16. Ms Tinsley did not press the application under practice direction 12G. She submitted that the application was made under rule 12.73 of the Family Procedure Rules 2010. The rule 12.73(a) provides that information relating to proceedings held in private may be communicated to various classes of individual, including at sub-paragraph (viii), '*a professional acting in furtherance of the protection of children*'.
17. Ms Tinsley asserted that in this case the police should be regarded as having standing to make the application, as '*a professional acting in furtherance of the protection of children*'. The police can and do act in furtherance of the protection of children, but it could not realistically be said that this application is made 'in furtherance of the protection of children'. It is made in furtherance of criminal investigations. The application cannot succeed under 12.73(a)(viii)).
18. Alternatively, Ms Tinsley said that rule 12.73(b) provides that information relating to proceedings held in private may be communicated, '*where the court gives permission*'.
19. The Court has a discretion as to whether or not to give permission. Ms Tinsley refers me to the leading case of Re C (a Minor)(Care proceedings: disclosure) [1997] 2 WLR 322 sub nom Re EC (disclosure of material) [1996] 2 FLR 275. The '*Re EC checklist*' of factors to consider on applications for disclosure to the police of material from public law children proceedings is well-established. It was considered and approved by the Court of Appeal in Re M (children) [2019] EWCA Civ 1364. The factors are as follows:
 - "1. *The welfare and interests of the child or children concerned in the care proceedings. If the child is likely to be adversely affected by the order in any serious way, this will be a very important factor;*
 2. *The welfare and interests of other children generally;*
 3. *The maintenance of confidentiality in children cases;*
 4. *The importance of encouraging frankness in children's cases. All parties to this appeal agree that this is a very important factor and is likely to be of particular importance in a case to which section 98(2) applies. The underlying purpose of Section 98 is to encourage people to tell the truth in cases concerning children and the incentive is that any admission will not be admissible in evidence in a criminal trial. Consequently, it is important in this case. however, the added incentive of guaranteed confidentiality is not given by the words of the section and cannot be given;*
 5. *The public interest in the administration of justice. Barriers should not be erected between one branch of the judiciary and another because this may be inimical to the overall interests of justice;*
 6. *The public interest in the prosecution of serious crime and punishment of offenders, including the public interest in convicting those who have been guilty of violent or sexual offences against children. There is a strong public interest in making*

available material to the police which is relevant to a criminal trial. In many cases, this is likely to be a very important factor.

7. The gravity of the alleged offence and the relevance of the evidence to it. If the evidence has little or no bearing on the investigation or the trial, this will militate against a disclosure order;

8. The desirability of cooperation between various agencies concerned with the welfare of children, including the social services departments, the police service, medical practitioners, health visitors, schools, etc. This is particularly important in cases concerning children;

9. In the case to which Section 98(2) applies, the terms of the section itself, namely that the witness was not excused from answering incriminating questions, and that any statement of admission would not be admissible against him in criminal proceedings. Fairness to the person who has incriminated himself and any others affected by the incriminating statement and any danger of oppression would also be relevant considerations;

10. Any other material disclosure which has already taken place."

20. Ms Tinsley set out the Re EC checklist factors in her skeleton argument, but did not say in either her written or oral submissions how they applied to this application. Those checklist factors are said to apply in public law proceedings relating to children. I do not know whether it is safe to assume that the checklist applies equally to private law proceedings, in which section 98 does not operate in the same way.
21. Assuming for now, that it is appropriate to apply the Re EC checklist to this case, Ms Tinsley did not make any written or oral submissions considering the individual factors as they applied to this case. She could not do so, because there is no written evidence from the police in support of the application. Such evidence would have informed an analysis or evaluation of the checklist factors.
22. Ms Tinsley says that the police have not got a copy of any index from the Family Court file, so do not know what documents are there or not. She asks for the Court to review what is there, and order disclosure of documents that are relevant to the criminal investigations.
23. Although the application is brought with two separate investigations in mind, the focus does seem to be very much on the potential charges against Ms F. Ms Tinsley says, *'the disclosure application is made at the request of the CPS to assist in understanding the mitigation provided by Mrs F and the level of risk Mr G may have presented to her and the children. The disclosure from the family proceedings is therefore sought to corroborate information given in defence of the allegations being investigated.'*
24. The use of the word 'mitigation' is unfortunate, implying as it does that a conviction has already been obtained. Because I have not received a witness statement in support of the application, I do not know what the *'information given in defence of the allegations being investigated'* is, and therefore I do not know whether or not the information contained within the family court files would tend to corroborate it or not.

25. Ms Tinsley submits that the court must undertake a balancing act, *'between the need for frankness and confidentiality in family proceedings versus the administration of justice and co-operation between the different agencies involved in these matters.'* She submits that the balance falls in favour of disclosing 'relevant' evidence, *'to allow the justice process to consider all relevant material when making decisions on how to proceed following an investigation.'*
26. Again, because I have no evidence in support of the application telling me what the investigations are really about and what information has already been obtained, I cannot realistically conduct the exercise Ms Tinsley invites me to carry out.
27. From Miss Perry KC on behalf of the respondent mother, I understand that the police attended various multi-agency risk assessment meetings (MARAC) and should as a result have the minutes of those meetings in their possession, thus giving some insight into the level of concern from the local authority about the risk it regarded Mr G posed to Ms F. In addition, the police have the following documents:
- Lifetime restraining order,;
 - Prohibited steps order;
 - Final order;
 - Non-molestation order;
 - CCTV footage that was reviewed by local authority, leading to the conclusion that there was sustained domestic abuse perpetrated by the father against the mother and the children;
 - Audio recordings obtained by the mother and provided to the police leading to the investigation of the offences of threats to kill and also of stalking and misuse of computers;
 - Section 7 report;
 - Police interview of mother under caution, in which she admits using spyware to obtain recordings from the father's phone;
 - The witness statement from father taken by the police (he is the complainant re the stalking and computer misuse allegation)
28. All these documents are on the Court file, together with further documents from social services' child and family assessments and in respect of its involvement with the family more generally. It can be assumed that the police would be given access to the social services documents by the local authority. At the conclusion of proceedings, I gave permission for the section 7 report to be shared with the police.
29. The additional documents on the Court file are Court orders, and a number of witness statements filed by each of the Respondents to the application at different times throughout the proceedings. There never was a contested hearing, so the contents of these statements have not been tested in Court by cross-examination.
30. Mr G attended the application hearing. He sought to deny and to minimise his actions in

strangling his wife, notwithstanding this was clearly visible on the CCTV footage in June 2021, and for which he was convicted in the criminal courts. He told me he did not strangle her, but *'held her'*, and this was, *'a moment of madness for which he has remorse'*. As at a previous hearing before me, he sought to deflect blame away from himself by blaming the mother for her behaviour, which he implies provoked him. He told me the family court had taken away his children from him, based on the information he says was manipulated, taken out of context, and provided to social services from the 'illegal' recordings made by the mother.

31. He did not expressly deny the allegations of having made threats against the mother (this hearing was not about investigating the truth or otherwise of those allegations). He emphasised the impact upon him of having listening software installed on his phone, recording every conversation he had over a ten-month period. He said the software recorded conversations that took place in private, with people he trusted, and where he was 'venting' because he had not seen his children for a year. He said he has been told by the police that they investigated him and 'found nothing', and 'did not regard him as a risk or a threat'.
32. He fully supports the police in its application for further disclosure of information in respect of its investigation into phone hacking. As he did not consider he himself was in danger of being charged in respect of the threats to kill, he did not put forward a position about the disclosure of statements that he has provided to the Family Court. Ms F and her solicitors have also been given to understand that the investigation against Mr G was not being pursued further by the police.

Conclusion

33. I am not persuaded that I should sanction disclosure of documents to the police in this case.
34. It would be improper for the Court to exercise its discretion in the absence of any evidence from the Applicant supporting its application. Supporting evidence is not merely a technical requirement, it is necessary in order for the Court to undertake the balancing exercise required, and it is necessary for the respondents to know the nature of the applications they are facing and make informed submissions in response.
35. The applicant requests that I go through each of the documents in the file and make a decision about whether or not they are relevant to the investigation. I cannot realistically or fairly carry out that exercise because I have not been given evidence about the nature of the investigations (other than the headline), the status of the investigations, the information that the police hold already, the gaps in its knowledge, and why there is a need to fill those gaps by applying to the family court.
36. Without a clear understanding of the investigations, I am not in a position to make an assessment of any particular document's relevance to the investigation.

37. The mother has admitted taking the covert recordings. She was the one who provided them to social services and to the police, and she admitted what she had done when interviewed by the police. The reasons given for wanting further information, as either ‘mitigation’ or ‘corroboration of defence’, are not explained and cannot on their own justify disclosure of material from the Family Court.
38. In any event, there would appear to be sufficient information in the police’s possession to enable it to carry out an analysis of whether there is sufficient ‘mitigation’ in terms of the risk posed by the father to the mother to enable it to carry out an assessment of whether or not charges against her should be proceeded with. The father has been convicted of assault against the mother, is the subject of a lifetime restraining order, and protective orders in the Family Court. The police have attended MARAC meetings and have all the CCTV and audio material.
39. In deciding whether or not to order disclosure under rule 12.73(b) the Court is asked to exercise its discretion. The applicant has not set out in submissions that the Re EC checklist approach should be applied to private law as well as public law proceedings. But assuming the checklist does apply, the Court would need to carry out a balancing exercise, with reference to each of the Re EC checklist factors. It is not enough to have cut and paste the factors into a skeleton argument. I have not been provided with evidence or analysis to enable me to carry out that process.
40. A key part of the balancing exercise would be to consider the impact upon the welfare of the children of disclosing material that was regarded within the Family Court as confidential. The documents would be disclosed to the police, to the Crown Prosecution Service, and the application is for the material to be used within any subsequent criminal proceedings, so they are likely to end up in the public domain. Any impact upon the mother is likely to have a significant impact on the welfare of the children. The application has no regard to this at all, and invites me to disclose documents merely on the basis that they may be relevant to their investigation.
41. For all these reasons, the application for disclosure is refused.

Costs

42. Miss Perry KC submitted that if the application were refused, then the police should pay the mother’s costs.
43. The mother had admitted taking the recordings, disclosed them to the police in order to seek protection for herself and her children but found herself the subject of police interview, investigation and many months awaiting a decision on charging (she says before the application was made she had not heard from the police about its investigation for six months). She thought the family proceedings had come to an end.
44. Miss Perry tells me that the mother, her solicitors and Miss Perry herself all tried in vain to contact the police to discover what the police said they required, and on what legal

basis, but the police refused to enter into any meaningful discussion with them, and told them that any arguments they had in opposition to the application should be made at Court.

45. Miss Tinsley submitted that the police should not be liable for costs when the application was made in furtherance of the police discharging its duties to investigate crime, and had acted in good faith.
46. Despite being repeatedly asked, the police failed to provide the Respondent with the information required about the investigation and the legal basis for the application that was to be made. It was reasonable for Ms F to seek advice from her legal representatives to try and make headway.
47. The application notice gives only a thumbnail sketch of the basis for the application. The police did not provide a witness statement in support, and the officer in charge was on leave in the days leading up to the hearing, so that no discussion could take place or instructions be given. This meant that the hearing became inevitable, and this indeed was the position taken by the police in response to requests for dialogue.
48. The police did not make any attempts to discover if Mr G was attending the hearing, meaning that no application for special measures was made. In the circumstances of both having no real idea on what basis the application was made, fearful of encountering Mr G directly, and understanding the focus of the police's attention to be on seeking information in support of its criminal investigation into her alleged stalking of Mr G and computer misuse, it was reasonable for Ms F to be represented at the hearing by counsel.
49. The police have not succeeded in their application. Ms F has been put to expense unnecessarily. Her opposition to the application was reasonable in all the circumstances and she should not suffer financially as a consequence.
50. I am satisfied that the Applicant should pay the respondent mother's costs.
51. Miss Tinsley argues that the costs are ten times what the police would incur for an application of this nature, and disproportionate.
52. I have had regard to the schedule of costs, which seeks only the costs of advice and representation from Miss Perry KC. Miss Perry has represented the Respondent mother at the most recent hearings before me. It is reasonable to have continuity of counsel.
53. Applications for police disclosure are often determined on the papers, and by consent, and this was apparently the police's expectation in this case. However, this is not a straightforward case with regard to facts, law, nor the need to safeguard the welfare of a victim of domestic abuse. The police overlooked these elements of its application and as a result were not properly prepared for it. The application raised issues of the utmost gravity for the respondent mother, and she should not be penalised for taking steps to ensure that she was properly prepared to defend it.

54. In all the circumstances I am satisfied that the amounts sought for counsel both for advice/conference/documents and for attendance at the hearing should be awarded in full (£6,600 inclusive of VAT).
55. I have not been given an explanation of the £167 Court fee so would take that out of the assessment at this time.

HHJ Joanna Vincent

Family Court, Oxford

Draft judgment sent: 8 February 2023

Judgment handed down: 17 February 2023