

I J Hudson
Claimants
1st
"IJH1" to "IJH5"
Sworn 29.11.11

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Claim no: HQ09D05196

BETWEEN :-

(1) GERRY MCCANN
(2) KATE MCCANN

Claimants

and

TONY BENNETT

Defendant

AFFIDAVIT OF ISABEL JENNIFER HUDSON

I, Isabel Jennifer Hudson of Carter-Ruck, 6 St Andrew Street, London EC4A 3AE, state on oath:

1. I am a solicitor of the Senior Courts and a Partner at Carter-Ruck, and have conducted this matter for the Claimants.
2. I make this affidavit in support of the Claimants' application to commit the Defendant for contempt of Court. The facts stated in this affidavit are true to the best of my knowledge and belief.
3. There are now shown to me the following marked exhibits:
 - "IJH1" ~ Consent Order enshrining the undertakings given by the Defendant, and Claim Form, both dated 25 November 2009;

- "IJH2" – selection of the Defendant's most serious breaches of the undertaking given at Schedule A of the Consent Order of 25 November 2009;
- "IJH3" – Schedule and (as appropriate) copies of all breaches of the undertaking relied upon by the Claimants in this application;
- "IJH4" – interpartes (and related) correspondence; and
- "IJH5" – miscellaneous documents.

Summary of application

4. In 2009 the Claimants brought a complaint in libel against the Defendant in relation to numerous allegations which he published that the Claimants were guilty of, or are to be suspected of, causing the death of their daughter Madeleine McCann; and/or of disposing of her body; and/or lying about what had happened and/or of seeking to cover up what they had done.
5. As the Claimants have always maintained, these allegations are utterly false. In July 2008 the Portuguese Prosecutor confirmed there was no credible evidence to suggest that they were in any way implicated in the disappearance of their daughter or even that Madeleine McCann had come to serious harm. The Claimants wish to make clear that it is their position also that there is no credible evidence to suggest that their daughter is dead or that she has come to any physical harm, and the search for Madeleine McCann is very much ongoing.
6. In response to the Claimants' libel complaint, the Defendant agreed to provide undertakings to the Court (inter alia) not to repeat the allegations complained of, which were enshrined in a consent Order dated 25 November 2009.

7. However, since giving the undertakings, the Defendant has clearly and flagrantly breached them on well over 100 occasions.
8. Accordingly, the Claimants make this application to commit the Defendant for contempt of Court.

Background

9. The Claimants found themselves thrust into the public eye as a result of the abduction of their three-year-old daughter Madeleine from their holiday apartment in Portugal in May 2007.
10. My firm first came to represent the Claimants in relation to defamatory coverage published about them in the national press which falsely alleged that they were to be suspected of causing and/or conspiring to cover up their daughter's alleged death. In the Spring of 2008 the Claimants received prominent front-page apologies from a number of national newspapers which acknowledged that the Claimants were completely innocent of any involvement in their daughter's disappearance. As noted above, these apologies were followed that summer by the confirmation of the Portuguese Prosecutor that police had found no evidence linking the Claimants to their daughter's abduction.
11. Since this time we have been consulted by the Claimants to advise and represent them where others have libeled them. Madeleine McCann continues to be missing, and given the very high profile of the case it is unsurprising that it continues to attract much speculation, particularly on internet discussion forums..

12. As I will explain below, the Claimants have sought, as far as possible, to 'turn the other cheek' in relation to commentators who continue falsely to allege that the Claimants caused and then concealed the alleged death of Madeleine McCann, mainly because their overriding priority continues to be the search for their daughter. However, when there have been instances where the Claimants have feared that the publication of defamatory allegations about them may threaten to hamper the search for their daughter (because if the public are led to believe that Madeleine is dead, they are unlikely to report any potential slights or other leads to the authorities), they have taken action.

13. I should make clear, however, that the Claimants have brought only a handful of libel complaints against the national press, in addition to a small number of requests to media outlets and Internet Service Providers to remove defamatory postings from internet discussion forums or "readers' comments" websites. Given the need to continue to publicise the ongoing search for Madeleine McCann, the Claimants have tried to maintain good relations with the media and to take action only where absolutely necessary.

14. I should also mention that where the Claimants have brought libel complaints against the press – most notably against newspapers published by the Express Group – any damages recovered have been used to further the search for Madeleine.

The targeting of the Claimants by the Defendant

15. As far as I am aware, the Defendant in this action first began to target the Claimants in around November 2007 when he attempted to bring a private prosecution against them for alleged child neglect. I understand from press reports that the case was

dismissed at an early stage on the grounds that it was a matter for the Portuguese authorities, and therefore outside the jurisdiction of the English courts. For the avoidance of doubt, I am instructed that no proceedings for alleged child neglect were ever pursued against the Claimants by the Portuguese authorities, or by any party other than the Defendant.

16. Subsequently, in July 2008 it was reported that the Defendant had set up a fund/campaign group called "The Madeleine Foundation" in order to raise money to try again to pursue a private prosecution against the Claimants. I refer to an article published on the website of the Telegraph on 8 July 2008 at **page 1 of "IJH5"** which reports on the Defendant's efforts in this regard.
17. It was around this time that my firm began to receive information about defamatory allegations which the Defendant was publishing about the Claimants. In particular, we received emails from what I would call "well-wishers" (members of the public who support the McCanns) alerting us to the fact that the Defendant was publishing allegations in emails and on Internet discussion forums. I exhibit an example at **page 3 of "IJH5"**.
18. It was clear from these emails that the Defendant and the "Madeleine Foundation" intended not only to campaign on issues of alleged child neglect, but also to promulgate the theory that Madeleine McCann had died in the family's holiday apartment and that the Claimants had perverted the course of justice by concealing her death and lying to the authorities about what had happened.
19. I refer to an example of an email of 20 August 2008 from the Defendant addressed "*Dear members and supporters,*" which I exhibit at **page 5 of "IJH5"**.

20. In October 2008, the Defendant began to publish a website for "The Madeleine Foundation"— <http://madeleinefoundation.org> – which was apparently intended as a means of further promulgating the Defendant's "theories" about Madeleine McCann.
21. Also in October 2008, my firm received a letter from "The Madeleine Foundation" (albeit written by a Debbie Butler) which misguidedly asserted the rights of "The Madeleine Foundation" to publish a leaflet on their website entitled "*What Really Happened to Madeleine McCann? – 30 Reasons which suggest that Madeleine was not abducted*" (see page 1 of "IJH4" for the letter).
22. The Claimants were reluctant to leave the Defendant's activities unchallenged, but at the same time were concerned that he may relish the prospect of a complaint or a claim for libel against him, and that such action might have the effect of dignifying his campaign which at that stage had received very little mainstream publicity. We therefore decided to maintain a 'watching brief' for the time being.
23. Regrettably, the Defendant continued and escalated his campaign against the Claimants. In the interests of proportionality, I do not seek in this Affidavit to set out each and every incident in this campaign, but by way merely of example:
- 23.1 In December 2008 the Defendant produced a booklet entitled "*What Really Happened to Madeleine McCann? – 60 reasons which suggest she was not abducted*" (pages 1 to 33 of "IJH3"). The booklet is replete with defamatory allegations about the Claimants. In addition to sending a copy to various newsdesks, to all MPs and to posting a copy to the Claimants themselves the Defendant claimed, in March 2009, that more than 2,000 copies of the booklet had been sold (see "Press Release" of 18 March 2009 at page 7 of "IJH5")

23.5 Throughout this period, the Defendant had published numerous postings defamatory of the Claimants on various internet discussion forums including www.the3arguidos.net, www.democracyforum.co.uk and www.truthformadeleine.com. I exhibit at page 9 of "IJH5" an example of such a posting on the "3arguidos" website, about which a "well-wisher" emailed us.

The Claimants' complaint in libel to the Defendant – August 2009

24. It was when the "10 Reasons" leaflet was distributed around the Claimants' home and workplace – on any analysis an extremely intrusive and distressing act - that the Claimants concluded that they could ignore the Defendant's vendetta against them no longer. Accordingly, in August 2009, they instructed us to send letters of complaint to the Defendant and to Debbie Butler, who described herself as the "Chairman" of "The Madeleine Foundation," and who had also been responsible for publishing a number of defamatory allegations about them (see letter of 27 August 2009 to the Defendant, page 8 of "IJH4").

25. The letter contained a number of demands, namely that the Defendant agree:

- permanently to suspend the website <http://madeleinefoundation.org>;
- to undertake to deliver up all copies of the "60 Reasons" book and "10 Reasons" leaflet and any similar hard copy publications, to destroy any electronic versions of these or any similar publications, and to confirm his actions in this regard by way of a signed witness statement;
- to use his best endeavours to delete or otherwise prevent access to defamatory postings about the Claimants published by the Defendant on other websites including (but not limited to) postings on www.democracyforum.co.uk, www.truthformadeleine.com and the "3 Arguidos" discussion forum; and

"not to repeat the same or any similar allegations about the Claimants...[that they] are guilty of, or are to be suspected of, causing the death of their daughter Madeleine McCann; and/or of disposing of her body; and/or of lying about what had happened and/or of seeking to cover up what they had done."

33. The Claimants hoped and expected that the giving of these undertakings would be an end to the matter and that the Defendant would indeed cease publicly to make the allegations complained of. That said, even before the undertakings had been enshrined in the consent Order, it became clear that the Defendant was already planning a new website concerning Madeleine McCann, albeit one which he claimed would not repeat the libels complained of (see the 'NEWSLETTER TO MEMBERS' of 15 November 2009, **page 22 of "IJH5."**)

The Defendant's conduct after he provided undertakings to the Court

34. Even after the undertakings were given, there were indications that the Defendant may breach them in continuing his campaign against the Claimants. For example, on 6 January 2010 he published a message on the "jillhavern" Internet discussion forum which arguably breached the undertakings (**page 666 of "IJH3"**). The posting reported on an upcoming hearing in the libel proceedings which the Claimants had brought against Goncalo Amaral, a discredited Portuguese police officer who had written a book which alleged that the Claimants' daughter had died in their apartment and that they had disposed of her body. I should mention that the 'jillhavern' forum is apparently largely dedicated to the discussion of various conspiracy theories concerning the disappearance of Madeleine McCann, and as I make clear below, it is a site upon which the Defendant has posted prolifically.

exhibit a copy of the email thread between this well-wisher and the Defendant (which should be read from top to bottom) at page 26 of "IJH5."

38. We also discovered that the Defendant was publishing statements on a relaunched website for the "Madeleine Foundation" which also arguably breached the undertakings he had given. For example, the Defendant reproduced on this website an article written by a Barbara Nottage which made clear that in her view it was not credible to suggest that Madeleine McCann had been abducted (as opposed to having died in the apartment and the Claimants having concealed her death). The article (now appending a 'notice' written by the Defendant in response to the Claimants' complaint about the article) can be found at page 474 of "IJH3".

39. Accordingly, it was clear that notwithstanding the undertakings he had given, the Defendant remained intent on casting doubt on the Claimants' account of what had happened to their daughter, and on suggesting instead that Madeleine McCann had died and that the Claimants had conspired to conceal her alleged death.

40. We therefore wrote to the Defendant on 5 February 2010 (page 97 of "IJH4") to complain about these breaches / arguable breaches and to require the Defendant to remove the offending publications from his website.

41. The Defendant responded on 8 February 2010 (page 99 of "IJH4") by admitting that he had sold a copy of the "60 Reasons" booklet (albeit that he tried to put forward a spurious justification for having done so). He also stated that he did not believe it was a breach of the undertakings to direct enquirers to websites where they might find the "60 Reasons" booklet, but that he was willing to refrain from doing so further.

42. The Defendant attempted to defend his publication of the Barbara Nottage article on the basis that it was not libelous of the Claimants, an assertion which I respectfully

to comply with the demands contained in our letter of 15 July 2010 by removing and/or amending the online publications in question and undertaking not to publish further the hard copy publications complained of.

46. We responded to the Defendant's letter on 3 August 2010 (**page 122 of "IJH4"**) to address a number of the points he had raised, and also to complain about the fact that the Defendant had been actively encouraging others to circulate a video recording of the Defendant reading the "48 questions" (which had been published on "YouTube" and had been one of the publications complained of in our letter of 15 July 2010).

47. The Defendant replied on 16 August 2010 with a further lengthy (and again misconceived) justification of his actions, and in particular he sought further to question the Claimants' position that they had had no involvement in the disappearance of their daughter (**page 125 of "IJH4"**). The Defendant wrote again in similar terms on 20 August 2010 (**pages 151 to 160 of "IJH4"**). Needless to say, the Claimants had no wish to encourage the Defendant by engaging with him in responding to the wild conspiracy theories contained in the Defendant's communications.

48. In a letter of 1 October 2010, the Defendant indicated that he intended to recommence the publication of a leaflet entitled "Your Questions Answered About Goncalo Amaral," about which the Claimants had previously complained (in their letter of 15 July 2010 (**page 107 of "IJH4"**) as constituting a breach of the undertakings given).

49. However, at this time, the Claimants once again hoped that they may not need to escalate matters against the Defendant by bringing contempt of Court proceedings, a

step which they (understandably) did not wish to take unless it appeared absolutely necessary.

50. For a time, the Claimants' decision appeared to be justified, as it seemed that the Defendant was not continuing to breach the undertakings which he had given.

51. However, the Defendant started to escalate his conduct against them again in early 2011. This began with the Defendant contacting us by email on 2 February 2011 (page 174 of "IJH4") in which he stated that he planned "to restore in full the article by Barbara Nottage" on the "Madeleine Foundation" website. This article had been the subject of complaint in our letter of 5 February 2010. The Defendant purported to be entitled to republish this article on the basis that Clarence Mitchell (the Claimants' PR representative) had stated in an interview that it was only an "assumption" that Madeleine McCann had been abducted.

52. Then, in April and May 2011 we received emails from well-wishers indicating that the Defendant had published further emails and press releases which appeared to constitute a possible breach of the undertakings (I attach an example dated 16 April 2011 at page 486 of "IJH3"). The flurry of further activity on the Defendant's part appeared to be prompted by the fact that the First Claimant was due imminently to publish a book recording her own account of her daughter's disappearance, the royalties from which are being donated to the fund to find Madeleine.

53. In addition, at around this time the Defendant began to publish serious (and wholly unfounded) allegations about not only the Claimants but also about Brian Kennedy. These allegations were published primarily on an internet discussion forum at www.mccannexposure.wordpress.com, where other forum users commented upon them or made similar allegations of their own.

54. The Claimants and Mr Kennedy instructed us that they felt action must be taken in relation to these defamatory and (in the case of the Defendant's postings about the Claimants) contemptuous publications.

55. In the first instance, we decided to tackle the allegations by way of letters of complaint on behalf of the Claimants (see letter of 3 June 2011, **page 176 of "IJH4"**), and Brian Kennedy, which were sent to the ISP of the "mccannexposure" website.

56. On 8 June 2011 we received a lengthy letter from the Defendant, responding to our letter to the ISP of 'mccannexposure', which had apparently been passed to him. I refer to the copy of the letter exhibited at **page 185 of "IJH4"** for its full contents, but in summary it contains a number of purported justifications of the Defendant's publications on the "mccannexposure" website. The letter also contained the (again misconceived) suggestion that the Defendant had not published anything which breached the undertakings which he gave to the Court in November 2009, while going on to make a number of statements which clearly did suggest that there were grounds to suspect the Claimants of having conspired to conceal their daughter's alleged death.

57. While the Claimants remained loath to dignify the Defendant's activities, the Defendant's response made clear that unless further action was taken against him, he was likely to libel the Claimants further and to continue to breach the undertakings he had given. As I explain above, the Claimants were especially concerned about the effect that this conduct may have on the ongoing search for their daughter.

The decision to apply to commit the Defendant for contempt of Court

58. The Claimants felt that the time had come to say "enough is enough"; having previously written to the Defendant no fewer than three times to warn him that he was publishing material which breached the undertakings, they concluded that the only prospect of ensuring that the Defendant permanently desisted from libeling them was if he were committed for contempt of Court.

59. Accordingly we commenced the task of collating from our files copies of the publications by the Defendant which appeared to breach the undertakings in order to formulate (in the first instance) a letter of complaint to the Defendant putting him on notice that the Claimants intended to apply to have him committed for contempt.

60. Having taken Counsel's advice, we sent the letter of complaint to the Defendant on 12 August 2011 which cited (and included copies of) some 54 publications by the Defendant which breached the undertakings he had given, and explaining that by doing so the Defendant had placed himself in contempt of Court (page 208 of "IJH4").

61. The letter made clear that while the Claimants rejected the Defendant's absurd "theories" about Madeleine McCann's disappearance, they did not seek (and had never sought) to prevent the Defendant from raising those "concerns" with the appropriate authorities – whether it be law enforcement agencies or elected representatives. I should make clear that this remains the case, and that the Claimants make no attempt to fetter the Defendant's rights in this regard. What they do object to, as they are clearly entitled to do, is the Defendant repeatedly defaming them in public in breach of the undertakings he had given. The Defendant's practice of doing so by publishing those allegations in letters purportedly addressed to public officials makes his conduct all the more damaging to the Claimants.

62. The letter of complaint also made clear that while the Defendant was required to remove (or use his best endeavours to remove) publications complained of insofar as they continued to appear on the internet, the Claimants had resolved that it would in any event be necessary to bring contempt of Court proceedings against him. This was because they had made a number of previous complaints to the Defendant, who had always followed a pattern of initially purporting to comply by removing the publications complained of, before going on to publish further allegations which breached the undertakings he had given. As such, the Claimants did not feel they could take it at face value if the Defendant once again purported to comply, and instead felt compelled to seek the protection of the Court.

63. We received a response from the Defendant five days later, on 17 August 2011 (page 215 of "IJH4"). The Defendant stated that he would remove the publications complained of, without any admission of liability, and went on to reserve his right to challenge whether they were indeed in contempt of court, and to assert his right to freedom of speech. As I set out below the Defendant has continued to commit further breaches of the undertaking, even after the detailed complaint contained in our letter to him of 12 August 2011.

64. In the time since we had sent the complaint to the Defendant, we had (through various internet searches) discovered a large volume of further, potentially contemptuous allegations which had been published by the Defendant, both on his own website and elsewhere. We wrote to the Defendant on 18 August 2011 to explain that our clients intended to proceed with the contempt application, but were in the process of collating and reviewing this further material which may take some time to do (page 216 of "IJH4").

65. I should mention that this material runs to many thousands of pages; given the potentially draconian sanctions which are available to the Court to impose where a contempt of Court has been committed, it has clearly been incumbent upon us to review all such allegations carefully, and to complain about only those publications which do appear clearly to constitute a breach of the undertakings given by the Defendant. For this reason, it has been a painstaking and time-consuming process to analyse the material in preparation for this application.

66. The Defendant emailed us on 18 August 2011 (page 217 of "IJH4"); once again his email contained a number of purported (but misconceived) justifications of his actions. The Defendant went on to indicate that he intended to defend any application for contempt of Court.

67. The Defendant sent a further letter to us on 24 August 2011, albeit that this letter chiefly concerned the separate libel proceedings which by that time had been brought against the Defendant by Edward Smethurst (page 220 of "IJH4").

Publications relied upon as constituting a contempt of court – Exhibit "IJH3"

68. On behalf of the Claimants, we have, as far as possible and as far as is proportionate, sought to compile a comprehensive set of all the publications by the Defendant which we submit are in breach of the undertakings he gave to the Court on 25 November 2009. In this regard I refer to exhibit "IJH3", attached, which also contains a schedule of all the publications upon which we rely in this application as being a breach of the undertakings (and therefore a contempt of Court).

69. However, it would be wrong to suggest that "IJH3" is necessarily comprehensive, as in some instances it has not been logistically possible and/or proportionate to try to

search for and identify every single potentially contemptuous publication by the Defendant.

70. For example, in relation to the "jillhavern" forum, I am aware that as at the date of this affidavit the Defendant has apparently published over 3,700 postings on this site since he first joined it (ironically, on 25 November 2009, the day the Defendant gave the undertakings to the Court). While it is possible in theory to search this site for all postings by the Defendant, in practice the search returns only the 300 most recent results. A search was conducted on 8 August 2011 which at that time returned the 300 most recent postings by the Defendant; we reviewed these postings and have included in "IJH3" all those which we consider breach the undertakings. Since 8 August 2011 we have continued to monitor further publications by the Defendant on the 'jillhavern' site, and have included them in "IJH3" as appropriate.

71. In addition to those publications which we were able to locate on the 'jillhavern' forum by conducting such a search, a number of earlier postings have been drawn to our attention, either by 'well-wishers', or because the Defendant has published a link to them from 'tweets' published on his 'Twitter' online social media account. Where these postings appear to breach the undertakings given by the Defendant, they have been included in "IJH3".

72. I should also mention that in relation to the Defendant's own website, www.madeleinefoundation.org.uk, the content of this site has been regularly changed and updated since the website's inception. While many of the articles on there are dated, not all are. Where it is not clear whether a particular article was published before or after the Defendant gave his undertakings to the Court, we have generally not included it in the compilation of publications complained of at "IJH3" (albeit that while acts pre-dating the undertakings cannot by definition constitute a breach of the

McCann's clothes, on one of the children's T-shirts, on Cuddle Cat, and on the key and on the floor of the Renault Scenic the McCanns hired. Unless you start by doing all of that, debating with you is useless." (typographical errors as per the original posting of 8:42am on 16.09.11 on www.jillhavern.forumotion.net, page 925 of "IJH3.")

80. As such, it appears that even the clear threat of contempt proceedings has not been sufficient for the Defendant to desist from breaching the undertakings which he gave to the Court.

Remedies

81. The Claimants are aware that if the Defendant is indeed found in contempt of Court, the remedies open to the Court include a sentence of imprisonment (which may be suspended, possibly subject to certain conditions being imposed) as well as being fined. The Claimants are also aware that it is open to the Court to grant an injunction against the Defendant, ordering him now to abide by the terms of the undertakings he gave.

82. It is of course ultimately for the Court to decide first, whether any contempt has been committed and (if so) what the appropriate sanction is, having heard submissions from both parties. The Claimants' purpose in bringing these contempt proceedings is in the hope that the Court will be able to intervene to stop the Defendant's contemptuous conduct once and for all. Accordingly, the Claimants respectfully request the Court take this consideration into account, together with the obsessive and persistent nature of the Defendant's conduct against them to date, when deciding what sanction (if any) to apply.

83. Although it goes without saying that the Court should and will take the Defendant's Convention rights into account when considering this application I respectfully draw the attention of the Court (and the Defendant) to paragraph 1.4 of the Practice Direction to RSC 52 which states expressly that "[i]n all case the, Convention rights of those involved should particularly be borne in mind. It should be noted that the burden of proof, having regard to the possibility that a person may be sent to prison, is that the allegation be proved beyond reasonable doubt."

84. For the reasons given above and to be given in argument I respectfully submit that the Defendant's contempt of court is established beyond reasonable doubt. A finding that the Defendant is in contempt, and any sanction imposed consequent on that finding, would plainly constitute an interference with the Defendant's right to freedom of expression guaranteed by Article 10 of the Convention. However, in circumstances where the Defendant has freely given an undertaking to the Court not to act as complained of in this application, and in doing so settled libel proceedings against him brought in order to protect the reputations (and thus the Article 8 rights) of the Claimants, I respectfully invite the Court to find that any such interference is both necessary and proportionate.

Statement of Truth

I believe that the contents of this affidavit are true.

Isabel Jennifer Hudson

Isabel Jennifer Hudson

29/11/11

Dated

SWORN BEFORE

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29/11/11

Dated