IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

[2017] EWHC 1157 (QB)

No. HQ14D05164

Royal Courts of Justice

Wednesday, 26th April 2017

Before:

MR. JUSTICE WARBY

B E T W E E N :

ISSAM SALAH HOURANI — Claimant

- and -

(1) ALISTAIR THOMSON
(2) BRYAN MCCARTHY
(3) ALLISON BLAIR
(4) PSYBERSOLUTIONS LLC
(5) JOHN MICHAEL WALLER — Defendants

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MS. H. ROGERS QC and MR. J. PRICE (instructed by Payne Hicks Beach) appeared on behalf of the Claimant.

MR. A. HUDSON QC and MR. B. SILVERSTONE (instructed by Mishcon de Reya LLP) appeared on behalf of the Defendants.

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE WARBY:

Introduction

1 This is an action in libel and harassment arising from a campaign conducted by the fifth defendant in which the first, second and fourth defendants participated. I have given two judgments in the case already. The first was handed down on 6th February 2017 following the trial of preliminary issues, which I shall call "the Preliminary Issue Judgment": [2017] EWHC 173 (QB). In that judgment, I declined to order the disclosure of documents and information that would reveal the identity of the person or persons who funded the campaign but, at para.52, I said this:

> "The question of whether disclosure of the identity of the client(s) is necessary to enable Mr. Hourani to vindicate his rights against the client(s), or to enable him to consider such steps, can properly be left open for the time being. Disclosure for that purpose is not necessary at the present stage. The issue can be revisited in the light of the court's findings on the merits of the claims that are before it now."

2 The second judgment was handed down on 10th March 2017, following the trial of the substantive claims for libel and harassment. In the "Trial Judgment", as I shall call it, I held all but the third defendant liable for damages for harassment and the first, second and fourth defendants liable to pay damages for libel: [2017] EWHC 432 (QB).

3 This hearing has been concerned with the claimant's claim for additional remedies and with matters consequential on the Preliminary Issue and Trial Judgments; the two judgments were both handed down without argument on consequential matters, which were adjourned for later consideration. I shall use abbreviations explained in the previous judgments.

Source disclosure

4 I deal first with the claimant's claim for source disclosure. I use that term because I have already held that, contrary to one of the submissions for the claimant, the funder(s) of the campaign is or are to be treated as a source or sources for the purposes of assessing whether the defendants can rely on the rights conferred by s.10 of the Contempt of Court Act 1981. I shall refer from here onwards to the "client" or "funder" in the singular, although there is the possibility that there is more than one.

Factual and procedural background

5 The factual and procedural background can be shortly stated. In the Trial Judgment, I found that the claimant was the victim of a campaign of harassment that included (a) the staging of events in which he was accused of being a murderer, and was targeted with other grave allegations, (b) the making of various online publications and (c) the posting of stickers. The claimant was successful in seeking to identify most of those responsible for the campaign. An order made by Dingemans J in December 2015 led to the identification of the first four defendants, three of whom were, in my judgment, responsible in part. An order of Master Davison in April of 2016 required those defendants to provide further information, and that led to the identification of Dr. Waller, the fifth defendant, who was joined as a party in the summer of 2016.

6 Dr Waller was asked in correspondence to identify others who were responsible for the campaign, including his client, but he declined to do so, and persisted in that after being served with a request for information in November 2016. In December 2016, there was further disclosure of documents which had been redacted so as to prevent the identification of the fifth defendant's source. The claimant then made an application by notice filed on 12th December 2016 ("the December Application") for orders including inspection of documents and the provision of further information, the aim of which was to identify the client or funder.

7 The matter came before Nicola Davis J on 13th January 2017, when she reserved judgment. By a judgment of 20th January 2017, she directed that the question of whether there should be source disclosure should be determined as a preliminary issue at the outset of the trial: [2017] EWHC 56 (QB).

The Preliminary Issue Judgment

8 The trial commenced on 1st February 2017. I heard evidence and argument over three days and gave judgment on the preliminary issue on Monday, 6th February, refusing the relief sought at that stage. Having found that the client was a "source" within the meaning of s.10 of the 1981 Act, I held that it was not necessary in the interests of justice, at that stage, to require identification of the source. I adjourned until after judgment on the merits the question of whether identification might be necessary for the purposes of enabling the claimant to vindicate his rights against the source or funder.

The Trial Judgment

9 In the Trial Judgment, I found that the campaign of which complaint was made was initiated at the behest of the client, that the client paid just short of $500,000 for the campaign, and that this was Phase I of what was intended to be a two-phase approach. The overall scheme was aimed at subjecting the claimant to extreme psychological pressure and otherwise damaging him.

10 The Trial Judgment granted the claimant permission to amend the Particulars of Claim to seek substantive relief in substantially the same terms as those of the December Application. The order sought now is an order for service of a witness statement and disclosure of certain documents by which the client(s) is or are to be identified and contact details provided. There is no objection to the terms of the relief sought; the argument has concerned whether any relief of that kind should be granted at this stage.

The Order sought

11 The application and the claim are made pursuant to the *Norwich Pharmacal* disclosure jurisdiction, under which the court has power to order someone who is not a mere witness to disclose the identity of a wrongdoer or a suspected wrongdoer. It is clear that the jurisdiction is available against those who, like Dr. Waller, are themselves wrongdoers. That is clear from the case itself (*Norwich Pharmacal Co. & Ors. v Customs and Excise Commissioners* [1974] AC 133, 174) and, most recently, from *Various Claimants v News Group Newspapers Ltd (No 2)* [2014] Ch 400 [28] (Mann J). The principles that apply to the exercise of the *Norwich Pharmacal* jurisdiction were most recently considered by the Supreme Court in *The Rugby Football Union v Consolidated Information Services Ltd.* [2012] UKSC 55 and, in particular, at para.17, where ten factors to be considered are listed.

12 Before dealing with those factors, it is necessary to recall that the central question on this claim is whether the disclosure is shown to be necessary in the interests of justice, even though it would require the disclosure of a source. Sources of information contained in publications are protected by s.10 of the 1981 Act which confers rights that I have called the "Source Protection Rights". The Preliminary Issue Judgment establishes for present purposes that the Source Protection Rights are engaged in this case. The general principles of law that are applicable to a claim or application for the disclosure of a source are set out in the Preliminary Issue Judgment at paras.25 and 26 and 35 to 37, of which I have reminded myself.

13 Mr. Hudson has submitted that it is not necessary, within the meaning of s.10, for Dr. Waller to be ordered to identify his client either (a) in order to resolve issues that concern the campaign that was the subject of the trial or (b) as a springboard for third party disclosure against the client or (c) to vindicate the claimant's rights against the client. Mr Hudson relies on the reasoning

contained in my Preliminary Issue Judgment and on his previous submissions filed in relation to these issues which continue, it is said, to justify the dismissal of the present application following the handing down of judgment on the merits.

14 I agree that the reasons given in the Preliminary Issue Judgment are relevant and sufficient as a basis for refusing the relief sought, to the extent that it is sought for the purposes of vindicating rights in respect of the campaign that has been conducted so far. Ms. Rogers has failed to persuade me that there is a real need to secure the same or similar relief against one or more additional participants in that process. The judgment of the court is, in my assessment, sufficient for that purpose. The need and justification for further relief against additional defendants is not sufficient to outweigh the importance of protecting sources.

15 However, my overall conclusion is that I should make the order for disclosure of the client, because it has been shown to be necessary in the interests of justice. To explain that conclusion, I shall address the ten factors set out in *The Rugby Football Union v Consolidated Information Services Ltd.*:

(i) The strength of the possible cause of action contemplated by the applicant.

Although it does not seem to me that it is necessary to unmask the funder in order to obtain an adequate remedy for what has already happened, there is great force in the submission made by Ms. Rogers that the claimant has a strong claim to vindicate and, more importantly, protect his legal rights in respect of the same or similar conduct in the future. That includes, in particular, seeking to secure that there is no repetition of the harassment of him that has been perpetrated so far, including by the publication of false allegations of murder and other criminal offences. The allegations are undoubtedly serious, and the impact on Mr. Hourani has been serious. The relief that has been and will be granted in this action does not bind any third party. It clear that the client has the means, and it appears to me that the client has the will, to continue or to resume the campaign.

I have been reminded of some features of the Phase II documentation that was amongst the trial papers. This contained a number of clear statements of intent to cause damage to Mr. Hourani. It made clear that the purpose was to conduct a concerted campaign directed at Mr. Hourani, amongst others. The aim included, very clearly, to keep the client insulated from exposure and potential litigation. That is all clear from a document sent to Dr. Waller, according to his evidence, in late April or early May of 2015.

I accept Ms. Rogers' submission that there is no reason to think that the client has given up. There is material that is still available online containing substantially the same text as some of that which was complained of in this action, but is being published by other means. In particular, there is a blog under the name of Rakhat Aliyev including, among other things, a picture of the claimant with the caption "Murderer" from the June Event. Dr. Waller's position is that he is not in control of this material and for present purposes at least I accept that.

I am also conscious of three factors which it seems to be legitimate to keep in mind: first, the background includes a campaign to secure the prosecution of Mr. Hourani in the Lebanon, and the possibility that that campaign is linked with the campaign which was the subject of the present action. I cannot say that that is the case – I am not in a position to determine whether it is so – but that background does support the conclusion that there is a real risk that the campaign that has been conducted in the past will be continued by other means. Secondly, I bear in mind the fact that the defence of this action has been funded by the client. Thirdly, although the client is involved in funding the defence of this action and, I infer, must know what has gone on and is going on, there has been no statement on behalf of the client that the campaign has now come to an end.

(ii) The strong public interest in allowing the applicant to vindicate his legal rights.

That is a matter that supports the application for reasons I have already given. There are grounds for seeking injunctive relief against the client or for considering whether that is appropriate.

(ii) The court should consider whether the making of the order will deter similar wrongdoing in the future.

I find that there is a real prospect that that will be the case here, given the factors I have already mentioned, including the client's access to substantial funds and its or his ability to recruit and pay those who are willing to conduct such campaigns.

(iii) Whether the information could be obtained from another source.

I accept that there is no other source that can be identified through which the claimant could hope to obtain information about the identity of the client.

(iv) The court should consider whether the respondent knew or ought to have known that he was facilitating arguable wrongdoing or was himself a joint tortfeasor.

That is a factor that counts in favour of the application for reasons given in the Trial Judgment.

(v) I must consider whether the order might reveal the names of innocent persons as well as wrongdoers and whether they would suffer any harm as a result.

I see no substantial risk of the identification of innocent people, let alone that they would suffer harm as a result.

(vi) The degree of confidentiality of the information sought.

The information that is sought has a degree of confidentiality about it. There was a confidentiality agreement of some kind with the client, though it does appear to have related principally at least to the content of the information provided. I have not seen the confidentiality agreement but even if I assume that the agreement was that the identity of the client should be kept confidential, given my conclusions on the merits and my conclusions as to the future risk, there would, in my judgment, be good reason to require disclosure of that which had been agreed to be confidential.

(vii) I am required to consider the privacy rights of the individuals whose identity is to be disclosed.

On the face of the letter of engagement that I have seen (B5, p.1015), the immediate client was a corporate entity and, as such, the privacy rights under Art.8 would be limited at best, consisting of a right to the protection of correspondence and probably not much more. If I assume that the order would result in the disclosure of the identity of individuals it seems to me that it is a proportionate intrusion into their privacy rights to require them to be identified, for the purposes I have specified.

(viii) The rights and freedoms of individuals under the data protection regime have to be considered.

My conclusions are broadly the same as those I have just indicated. There is no material distinction between the Art.8 rights and the data protection rights to be considered in this context.

(ix) Finally, the public interest in maintaining the confidentiality of journalistic sources as recognised in s.10 of the 1981 Act and Art.10 of the Convention.

This, of course, is the principal matter for consideration and I have addressed it in some detail in the Preliminary Issue Judgment. It is a very important and weighty matter for consideration, but whilst, in this case, I have concluded that the client is a source for this purpose, it is not a case of a high order source. There is a strong public interest, in my judgment, in the claimant being permitted to at least consider the possibility of taking action against the person or persons who funded what I have found to be a seriously unlawful campaign.

So those are the reasons for which I am granting the order as sought.

Time for payment of damages

16 The next issue is time for payment of the damages. I made an order of my own initiative when handing down the Trial Judgment, staying execution of the judgment for damages until after this hearing, and they have not been paid. An order is sought that the sums I ordered to be paid should be paid within seven days. Mr. Hudson seeks 28 days, and he also seeks a stay, pending appeal, to which I shall come shortly. It seems to me that, in all the circumstances, a 28-day extension is reasonable. I will come back to the question of a stay.

An injunction?

17 An injunction is sought to restrain the repetition of the conduct complained of. I said in the Trial Judgment, at para.241, that there was "a clear basis for injunctions to restrain further libel and harassment of this claimant." The unsuccessful defendants do not oppose this in principle, but they submit that one aspect of the order is unduly broad. It is submitted by Mr. Hudson that it is not appropriate for the injunction to extend to publication of any allegation that the claimant was guilty of or complicit in "any crime committed" against Anastasiya Novikova prior to her death or "any criminal offence of any kind". Mr. Hudson submits that those words do not reflect the judgment and should be omitted. It is fair to say that the form of order contains the usual sweeping-up wording prohibiting the publication of "words to the same or similar effect". Nonetheless, I have reached the conclusion that I should grant an order in the form proposed.

18 It is suitably framed, given all the circumstances of the case. I am assured that there is no intention, subject to appeal, to publish any allegations of criminality and if, by any chance, the defendants came into possession of different

evidence which they considered might justify them in taking a different stance, it would be open to them to apply to vary the order.

Payment out of security for costs

19 The next order sought is not opposed and I shall make it. It is an order for the payment out of sums paid into court by way of security for costs, together with any interest accrued on those sums while they were in court.

Costs

20 Finally, for present purposes, I have to deal with costs. I deal first with the position as between the claimant and the unsuccessful defendants. The general rule is that the unsuccessful party must pay the costs of the successful party and I see no reason to depart from that rule in this case, as regards the general costs of the claim, including the merits as dealt with in the Trial Judgment. An order to that effect will encompass costs that were ordered to be in the case and also, subject to any different order, any costs that were reserved.

21 Two particular issues arise. The first concerns the costs of the claimant's December Application and, to the extent that this differs, the costs of the Preliminary Issue trial. The December Application was heard at the adjourned pre-trial review in January 2017 and, at that stage, the costs of the application under paras.8 and 9 of the application notice were adjourned to the trial judge, which turned out to be me. On 6th February 2017, when handing down judgment on the preliminary issues, I adjourned the costs of that preliminary issue trial to today.

22 The fifth defendant is the successful party in relation to the preliminary issue of whether disclosure should be granted. The court is therefore faced with a situation where the claimant has succeeded on all the main issues against the four unsuccessful defendants, but one of those defendants has succeeded in relation to a preliminary issue against the claimant. The court can consider making an order that a party must pay the costs relating to only a distinct part of the proceedings, but before doing so, it has to consider whether it is practicable to make a different order, i.e. an order that a party pay a proportion of another party's costs or that that party pay costs incurred from or until a certain date only. Those provisions are contained in CPR 44.2(6)(f) and 44.2(7). I have been referred to the discussion in the notes on p.1329 of the current **White Book**.

23 The primary submission on behalf of Mr. Hourani is that, applying that approach, I should make an order for a proportion of costs to be paid by the defendants. It is said that the proportion should be 100 per cent. In the course of argument, an alternative approach was debated at my prompting, of

identifying a sum of money attributable to the application on each side and deducting that from the overall costs. With the encouragement of Mr. Hudson, I backed away from that. It seems to me that the costs of the December Application and the preliminary issue trial should, in principle, be paid by the claimant as the unsuccessful party, but that a percentage approach is the right approach to do justice to the degree of success achieved in that respect.

24 There is a real difficulty about identifying the costs concerned, given the overlap between the issues considered at the preliminary issue trial and issues that were relevant for the determination of the substantive merits. I accept that it would be disproportionately costly to conduct a detailed assessment in order to disentangle those matters.

25 The second issue I have to consider is the position of the third defendant, who was successful in her defence of the claim. The starting point again should be that the unsuccessful party (in this case the claimant) should pay those costs. Ms. Rogers submits, however, that, so far as the claimant's costs of his claim against the third defendant are concerned, it is hard to see that any separate costs were incurred. As to the third defendant's own costs, those, she submits, would be modest and, further, she invites me to take the view that the third defendant's conduct should deprive her of a claim to costs. She makes that submission on the basis that the third defendant could and should have disclosed earlier on that she was only a nominee as an officer and controller of the fourth defendant company which was, in reality, controlled by Dr. Waller, the fifth defendant. It seems to me there is a great deal of force in that.

26 The third defendant was first made aware of the potential claim against her in May 2015. The claim as pleaded against her was that she was of American nationality, resided in Washington DC and was "the founder and Chief Executive Officer of the fourth defendant, was a US limited liability company" filed in Wyoming with its principal office in Washington DC (2.3 and 2.4 of the Particulars of Claim). In her defence, she admitted that allegation and she continued to admit it up until the re-amendment of the defence in November 2016. It was only when witness statements were exchanged in December 2016 that she and Dr. Waller disclosed the true position with regard to the control of the fourth defendant.

27 It seems to me that that candour could and should have been exercised at an earlier stage. Once it was clear that that was the case for the third defendant, she was undoubtedly the successful party. That was my conclusion at the end of the trial.

28 My conclusion, therefore, is that the claimant should pay his own costs of the claim against the third defendant from start to finish and that the third

defendant should have her trial costs, including the preparation and conduct of the trial, from December onwards. That is the conclusion in principle.

29 I accept Mr. Hudson's invitation to reflect the conclusions I have reached on these two issues by arriving at a percentage approach, in other words awarding a percentage of the claimant's costs which reflects the success of the third defendant and the success of the fifth defendant on the disclosure application, disallowing those costs of the claimant attributable to those matters and allowing costs in favour of the defendants. I reject Mr. Hudson's argument for a 20 per cent deduction, which seems to me excessive, but bearing in mind the total costs schedules for the applications, the figures of which have been given to me, and the total figures in the approved costs budgets for, on the one hand, the first to fourth defendants and, on the other hand, the claimant, I have concluded that the right percentage would be 87.5 per cent or, putting it another way, seven-eighths of the claimant's costs.

30 In the light of that conclusion, I can easily resolve the dispute about the last matter, the payment on account of costs. It is agreed that, in principle, such a payment should be ordered. The claimant seeks a sum of £400,000. That is well below the percentage I have mentioned of the approved costs budget and, accordingly, it seems to me that, in light of the authorities, including *Thomas Pink Limited v Victoria's Secret UK Ltd.* [2014] EWHC 3258 (Ch), it is appropriate to make an order for the payment of £400,000.

LATER

Permission to appeal

31 The final matter I have to deal with is applications for permission to appeal. The first, second and fifth defendants seek permission to appeal on four grounds which can be summarised in this way: first, that I erred in concluding that the first and second defendants were responsible for the publications complained of; secondly, that I erred in concluding that those two defendants had failed to establish a defence under s.4 of the Defamation Act 2013, that is to say the public interest defence; thirdly, that I erred in concluding that the first, second and fifth defendants had failed to establish the defence under s.1(3)(a) of the Protection from Harassment Act 1997; and, finally, that I had erred in concluding that those three defendants had failed to establish the defence under s.1(3)(c) of the PHA 1997, those two defences being publication for the purposes of preventing crime or publication that is reasonable.

32 I have had the benefit of able submissions in writing from counsel for the defendants and I have given careful thought to them. For reasons that I will set out in writing, I refuse permission to appeal against the Trial Judgment.

33 Permission to appeal against my decision of today on source disclosure is also sought. The submission is similar in structure to the principal argument for permission to appeal on the merits, but it has a different focus. It is argued that I have applied too low a test when considering whether it was necessary, in the interests of justice, to order disclosure of a source. It is submitted that there is a good prospect of an appeal succeeded and/or that there is, in any event, a compelling reason for granting permission to appeal, on this topic as on the other. Ms. Rogers submits that if permission were granted for such an appeal, her client would wish to appeal himself against the order that I made on 6th February 2017, refusing source disclosure. He would wish to challenge my conclusion that the client(s) was/were a source for the purposes of s.10 of the 1981 Act.

34 I have concluded that I should grant permission to appeal against my decision today on source disclosure and that I should grant permission to appeal against the decision I made on 6th February on the earlier application for source disclosure. It seems to me that there is a prospect of an appeal succeeding on the basis that Mr. Hudson identifies and a prospect of an appeal succeeding on the basis advanced by Ms. Rogers. Additionally, this area is one of sufficient public interest to justify the Court of Appeal devoting some of its limited time to considering whether I have erred in law.

35 Therefore, I refuse permission to appeal against the Trial Judgment. I grant permission to appeal against the decisions I made on source disclosure. I will give the reasons for those decisions in writing in the usual way.
