Neutral Citation Number: [2019] EWHC 2227 (QB)

Case No: QB/2019/2549

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 August 2019

Before:

MR JUSTICE MORRIS

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Between :

JKL	**Claimant**
- and -	
VBN	**Defendant**

- -
- -

Anthony Hudson QC and **Aidan Wills** (instructed by **Richard Slade & Co**) for the **Claimant**
Daniel Khoo (instructed by **BlackLion Law LLP**) for the **Defendant**

Hearing dates: 7 and 8 August 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Mr Justice Morris:

1. On 8 August 2019 I made an order ("the Order") providing for the continuation of an injunction to restrain publication of private information, subject to certain modifications, and made other related orders. I indicated that I would provide a short judgment in open court to provide a public account of my conclusions in relation to the central contested issues. This is that judgment.

2. The case concerns a short sexual relationship between the Claimant and the Defendant. The Claimant alleges that the Defendant has sought to blackmail him about that relationship. The Defendant has alleged that, as a result of that sexual relationship, she has contracted chlamydia and has become pregnant. She has also alleged that she did not consent to the sexual relationship.

Background

3. On 15 July 2019, on the Claimant's without notice application, Mr Justice Garnham granted an interim injunction ("the Original Order") restraining the Defendant from publishing or communicating to any other person information contained in a confidential schedule to the order (defined as "the Information"). At the same time Mr Justice Garnham made an order for anonymity in relation the parties' names. That injunction was continued by order of Mr Justice Nicklin on 18 July 2019 with a further return date of 7 August 2019.

4. The Original Order, as continued by Mr Justice Nicklin, contained a blanket prohibition upon the Defendant disclosing the information to anyone (apart from the police). Moreover that injunction, by its definition of the confidential information, appeared to prevent disclosure of the sexual relationship per se. In the course of the hearing before me, the Claimant clarified that what is to be prohibited is disclosure of the identity of the Claimant (or anything which might lead to his identification) as the person with whom the Defendant had a sexual relationship, and not the simple fact that the Defendant had had a sexual relationship with another person. Accordingly it was agreed that the definition of the Information would be modified to make this point clear.

5. As matters were presented to me, the Claimant's application was supported by two witness statements from Mr Richard Slade, the Claimant's solicitor, to each of which is attached confidential schedules. The first of those witness statements was filed and served on the day after the grant of the Original Order. His second witness statement was dated 5 August 2019 and served on 6 August 2019 and contains greater detail of the alleged blackmail on the part of the Defendant. The relevant threat is said to have been communicated by the Defendant to a third party – friend of the Claimant - on the telephone, who then relayed the threat to the Claimant. There was no witness statement from the Claimant himself.

6. Apart from one short witness statement, in compliance with paragraph 8 of the Original Order, confirming that she had not contacted the media, the Defendant put no witness statement evidence before the Court at all, either from her personally or from her legal representatives. Her position was set out in correspondence from her solicitors to the Claimant's solicitors, said to have been written on her instructions, and by way of her counsel's skeleton argument and oral submissions.

Restrictions on open justice

7. The Claimant alleges that he is the victim of blackmail. He alleges that the Defendant has demanded that the Claimant pay her a large sum of money, failing which the Defendant has threatened to go to the press or the police and publish the Information. It is well established that anonymity is generally granted in cases involving blackmail and extortion. This is because this Court does not wish to provide encouragement or assistance to blackmailers by "outing" their victims nor does it wish to deter victims of blackmail from seeking justice through the courts. It would frustrate the purpose of the injunction sought if the Claimant's application had the effect of making public the very allegations in respect of which he is seeking relief by way of injunction. The protection of blackmail victims is an important legal policy: see *ZAM v CFW* and *TFW* [2011] EWHC 476 at §27; *ZAM v CFW* and *TFW* [2013] EWHC 662 (QB) at §44 and *LJY v Persons Unknown* [2017] EWHC 3230 (QB) at §2.

8. The evidence in support of the application could not properly be considered in open court without giving rise to a significant risk of identifying the Claimant and/or the Defendant in connection with the private (purported) information whose publication the Claimant is seeking to restrain and in respect of which the Defendant has lifelong anonymity pursuant to section 1 of the Sexual Offences (Amendment) Act 1992. For these reasons at the outset of the hearing, I was satisfied that it was appropriate to make an order for the hearing to be conducted in private pursuant to CPR 39.2 (a), (c) and (g) and for reporting restrictions in relation to the hearing, and an order preventing non-parties from accessing further confidential exhibits and schedules without further order pursuant to CPR 5.4C(4).

The substantive issues

9. The Claimant sought the continuation of the interim injunction in its full form until trial. The Defendant did not object at this stage to its continuation until trial, subject to certain particular points which were disputed. The three principal disputed issues were as follows:

    (1) Whether the Defendant should be permitted, by way of exception to or limitation upon, the scope of the restraint upon disclosure of the Information, to disclose it to identified persons, namely medical professionals, her mother and cousin and five named close friends. (I refer to these persons as "medicals, family and friends").

    (2) The terms upon which the Defendant is to be permitted to disclose the Information for the purpose of the present proceedings.

    (3) Whether the Claimant should be required now to provide disclosure and/or information relevant to the presentation of its case on the without notice application.

10. At the same time I decided certain other matters – case management directions for an expedited trial, drafting points on the order and costs. I do not address these in this judgment.

Relevant legal principles

11. As regards the legal principles relevant both to the grant of an interim non-disclosure order in general, and to the particular issue of disclosure to medicals, family and friends, I have been referred to a substantial number of authorities, and in particular to *Cream Holdings v Banerjee* [2005] 1 AC 253; *Re S* [2005] 1 AC 595 at §17; *CC v AB* [2006] EWHC 3083 at §§5, 8, 10, 34-36 and 58; *ZAM v CFW* and *TFW* [2013] EWHC 662 (QB) at §102-103; *YXB v TNO* [2015] EWHC 825 (QB) at §§4, 9, 11-13, 17, 18, 60-61, 63 and 65; *LJY v Persons Unknown* supra, at §28; *AXB v BXA* [2018] EWHC 588 (QB) at §52, 55 and 56 and to the *Practice Guidance (Interim Non-Disclosure Orders)* [2012] 1 WLR 1003 in particular at §4. From these authorities the following principles are derived:

    (1) Section 12(3) Human Rights Act 1998 provides that an applicant for an interim injunction of this kind must satisfy the court that he or she is likely to succeed at trial in establishing that the publication should not be allowed. Likely means "more likely than not". Ordinarily the applicant must show that he will *probably* succeed at trial. In particular, the court must be satisfied that the applicant is likely to obtain an order "in similar terms" following a trial i.e. similar to the terms of the interim order sought.

    (2) In a case (as the present case) of misuse of private information, the claimant must establish that he has a reasonable expectation of privacy in respect of the information at issue. Sexual activity is a classic instance of information in respect of which there is a reasonable expectation of privacy.

    (3) If a reasonable expectation of privacy is established, the court must then consider how the balance between privacy under Article 8 ECHR and freedom of expression under Article 10 ECHR should be struck; neither Article has precedence over the other; there must be an intense focus on the comparative importance of the rights in the individual case; the justifications for interfering with each right must be taken into account;' and the proportionality test must be applied to each right. In this "ultimate balancing test" other rights fall to be considered including "the right of the defendant to speak to others about their own life" arising under Article 8. The Court must consider whether it is likely that at trial the court would find an injunction to be necessary and proportionate to protect the claimant's reasonable expectation of privacy.

    (4) Despite the requirement to balance each party's competing rights, ultimately the burden rests on the applicant to satisfy the requirements of s.12(3).

Generally: Continuation of the injunction

12. As regards the state of the evidence before the Court, criticism can be made of both parties. I note first that the Claimant himself has not given direct evidence of the alleged blackmail threat; the evidence is hearsay evidence from the Claimant's solicitor: see *YXB* at §18. On the other hand, the Defendant has not put forward any evidence at all, denying the allegation of blackmail. Nevertheless I am satisfied, on the evidence before me, that at trial the Claimant is more likely than not to establish an entitlement to an injunction prohibiting disclosure of the Information in general, and to the press, and the media in particular. The Defendant, whilst not conceding that the blackmail

case is strong, has not before me, made a positive case that, as regards publication to the press and media, the *Cream Holdings* threshold is not passed in this regard.

Issue (1): Medicals, family and friends

13. The Defendant does contend however that the threshold is not passed in so far as the Claimant seeks to prevent disclosure to medicals, family and friends.

14. I accept that the starting point is that the Claimant has a reasonable expectation of privacy in relation to the Information. Moreover an allegation of blackmail represents a particularly strong case for maintaining privacy and is particularly deserving of the protection of the Court: *LJY*, supra at §§29-30. I also accept that the Defendant has not put forward, by way of evidence, any specific reasons why she wishes to disclose the Information to medical professionals, to her family and to her five friends.

15. However, in my judgment, in the circumstances of this case, disclosure to, first, medical professionals (in the context of the Defendant's allegations of chlamydia, pregnancy and rape) and, further, to her family and close friends is in a different category to disclosure to the world at large, and in particular the media: see, in particular *CC v AB supra*, §§35-36.

    (1) Mr Hudson QC submitted that blackmail is in a special category; the cases where disclosure to family and friends have been allowed have not extended to blackmail. I accept that *CC v AB* did not involve blackmail specifically (i.e. extortion from the claimant), but rather involved seeking payment by the media (§5). However the case law does not support such a distinction. In *YXB*¸ a blackmail case, Warby J, at §65, indicated, citing §35 of *CC v AB*, that he would have allowed such limited disclosure, had he granted the injunction. See also *LJY* at §30.

    (2) I accept Mr Khoo's submission that, in these circumstances, it is natural that the Defendant would wish to confide in these people. The Claimant has now made clear that he does not seek to prevent the Defendant from confiding about the fact and consequences of her sexual relationship with a man on a particular occasion, but only about the identity of that man as being the Claimant or matters which might lead to his identification. That might make compliance with a such a prohibition difficult and give rise to a risk of inadvertent disclosure, and thus breach of a court order.

    (3) The mischief to which the injunction (interim and final) was and is directed is publication to the media, both to safeguard the Claimant's privacy rights and, in particular here, to neutralise the threat of blackmail. First, paragraphs 7 and 8 of the Original Order requiring identification of the persons to whom the Information had already been disclosed was directed in terms only to publication to the press or media. The Defendant subsequently gave the confirmation sought. There was no requirement to identify private conversations about the Information. Secondly, the Claimant's cause of action is misuse of private information and the threatened breach of his rights which is pleaded is publication "to media organisations with the clear intention that the information be disseminated nationally and internationally": see Particulars of Claim, §§9 and 17.

(4) I do not accept Mr Hudson QC's submission that disclosure to medicals, friends and family will or may promote, or be intended to promote, the Defendant's objective of blackmailing the Claimant. The central element of the allegation of blackmail is the threat of disclosure to the press. First, I cannot see how disclosure within the limited class of persons can operate as an incentive to the Claimant to meet a blackmail demand for money. Nor am I prepared to assume, without more, that disclosure to medicals, family and friends would be done to enable those persons then to disseminate the Information more widely, either on social media or to the press or more generally, as part of the attempt to blackmail the Claimant.

(5) In any event, the risk of onward disclosure by medicals, family and friends is met by the undertakings offered by the Defendant to notify the person of the terms of the continuing injunction, to do so prior to the Defendant disclosing and to confirm to the Claimant that she has done this. This is paragraph 3 of the Order. This provides protection against future further dissemination.

(6) The Defendant's solicitor, in a letter to the Claimant's solicitor dated 5 August 2019, stated that, prior to the order of Garnham J, the Defendant had in fact disclosed the Claimant's identity to the five friends and went on to point out that, since then, there had been no disclosure to the press and no suggestion of breach of the Original Order. Whilst this provides some further support for allowing further disclosure to those friends, there was no direct evidence to support the statement and so I do not attach significant weight to it in the balance.

16. For these reasons, applying the *Cream Holdings* test as explained in *CC v AB*, I am not satisfied that it is probable that at final trial the Claimant will obtain a permanent injunction precluding the Defendant from ever discussing with medicals, family and friends the relevant events in such a way as might identify the Claimant. Such a restraint would not be proportionate to the Claimant's reasonable expectation of privacy.

17. In relation to the point in sub-paragraph (6) above, in the Order, I required the Defendant to file and serve a verified witness statement confirming that information and providing further details of the disclosures made before 15 July 2019. This will enable notice to be given of the terms of the Order to any other person to whom the Information might have been disseminated. I considered making any further future disclosure to medicals, family and friends conditional upon the satisfactory provision of that witness statement. However I concluded that, as regards the future, the position would be covered adequately by paragraph 3 of the Order.

Issue (2) Disclosure for the purpose of the Proceedings

18. The Original Order contained provision, in standard form, that the Defendant be permitted to use "the Hearing Papers" for the purpose of the proceedings, provided that those to whom the Papers are disclosed were informed of the terms of the Order. In the light of correspondence between the parties on the issues, the Defendant wished it to be clear that this permitted her solicitors to disclose "the Information" to witnesses that she might wish to call in the proceedings. Whilst it might be that this was sufficiently covered by the provision in the Original Order, in the event Mr Hudson QC did not

object to this being spelled out in the Order. Accordingly I accepted the Defendant's proposed wording, now to be found in paragraph 9 of the Order.

Issue (3) Disclosure by the Claimant

19. At the hearing, the Defendant sought disclosure from the Claimant of five categories of documents and information, most of which related to the information presented to Mr Justice Garnham at the without notice hearing. She did so, first, out of a concern that the Claimant might not have made full and frank disclosure at that hearing, and secondly, in order to ascertain more detail of the alleged case of blackmail made against her. In that regard, Mr Khoo suggested that such disclosure might show that the blackmail case is weaker than asserted. Following argument, I made an order for limited disclosure, confined to two of the categories (see paragraphs 15 to 17 of the Order); these categories were not substantially opposed by the Claimant.

20. As for the remaining categories, I declined to make an order at this stage. Even if there might be material which ought to have been disclosed at the without notice hearing, and which might justify discharge of the Original Order, that would still leave the issue of "re-grant" (i.e. whether the interim injunction should continue for the future). I did not consider it appropriate to order disclosure now of material which went generally to the strength of the blackmail case, where what transpired between the Defendant and the third party is something within the knowledge of the Defendant herself and which, at this stage, the Defendant has not chosen to address through her own evidence. Thus, the further information sought from the Claimant is not needed by the Defendant to put forward a case challenging the strength of the blackmail claim for the purposes of "inter partes" consideration of a continuing interim injunction.

21. The Defendant is able to seek the further categories of disclosure and information as the proceedings progress, either through standard disclosure or application for specific disclosure or further information under CPR Pt 18.