Neutral Citation Number: [2011] EWHC 3099 (QB)

Case No: HQ11X01432

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 November 2011

Before :

THE HONOURABLE MR JUSTICE EADY

- -

Between :

CTB	**Claimant**
- and -	
(1) NEWS GROUP NEWSPAPERS LIMITED **(2) IMOGEN THOMAS**	**Defendants**

- -
- -

Hugh Tomlinson QC (instructed by **Schillings**) for the **Claimant**
Richard Spearman QC (instructed by **Farrer & Co**) for the **First Defendant**
David Price QC (of **David Price Solicitors & Advocates**) for the **Second Defendant**

Hearing date: 11 November 2011

- -

Judgment

Mr Justice Eady :

1. There is before the court an application on behalf of Ms Imogen Thomas, the Second Defendant in this action, for permission to read a unilateral statement in open court in accordance with the provisions of CPR Part 53, PD 6.3. The relevant provisions have recently been amended by CPR TSO Update 55, with effect from 6 April 2011, and are now expressed in the following terms:

> Statements in Open Court
>
> 6.1 This paragraph only applies where a party wishes to accept a Part 36 offer or other offer of settlement in relation to a claim for –
>
> (1) libel;
>
> (2) slander;
>
> (3) malicious falsehood;

> (4) misuse of private or confidential information.
>
> 6.2 A party may apply for permission to make a statement in open court before or after he accepts the Part 36 offer in accordance with rule 36.9(1) or other offer to settle the claim.
>
> 6.3 The statement that the applicant wishes to make must be submitted for the approval of the court and must accompany the notice of application.
>
> 6.4 The court may postpone the time for making the statement if other claims relating to the subject matter of this statement are still proceeding.

The recent changes to the provisions had the purpose of extending them to claims for malicious falsehood and for the misuse of private or confidential information. This is a case which falls into the latter category.

2. The claim was commenced by the Claimant, known throughout as CTB, against News Group Newspapers Ltd as the First Defendant and, as I have said, against Ms Thomas as the Second Defendant. He was thereby seeking to prevent Ms Thomas from revealing details of a past relationship and, specifically, through the medium of the First Defendant's newspapers.

3. Mr Price QC, appearing for Ms Thomas, argues that the court has an inherent jurisdiction to permit a statement to be read and "a duty to [do] so where it facilitates a settlement or protects the parties' Article 8 rights unless (on proper analysis) it infringes any other rights or damages the administration of justice". The Claimant and the Second Defendant have reached an accommodation, whereby they propose to settle the proceedings, but this is subject at the moment to Ms Thomas being allowed to read a statement along the lines of one or other of various drafts hitherto submitted. I had earlier given directions with a view to the action being tried in the week beginning 7 November 2011, but the parties had taken no steps and were not in a position to proceed at that time. Indeed, they have no wish to proceed with a trial at all if it can be avoided. Accordingly, following a hearing before Tugendhat J, as Judge in Charge of the List, the trial date was vacated. The learned Judge had rejected earlier drafts of the proposed statement in open court for various reasons, and the current draft was submitted before me in a further attempt to implement this part of the settlement on 11 November 2011.

4. There has been much emphasis in recent years, in a number of appellate authorities, on as much openness as possible in the court process. One of the consequences is that allegations which may be inchoate or untested will appear, and may be centrally important, in a judge's publicly available reasons for granting an injunction on grounds of privacy. That may sometimes lead to unfairness, in so far as allegations may be misrepresented in the media as findings of fact, or may be capable of refutation by means of some explanation of which the court knew nothing at the time of the judgment.

5. In the present case, Ms Thomas wishes to make a unilateral statement for the purpose, as she put it, of clearing her name in respect of allegations made on the application for an injunction on 14 April last. That matter came before me in Ms Thomas' absence and then again, on 20 April, when she was legally represented (by Mr Price). The injunction which I granted originally on 14 April was continued on the return date with her consent.

6. I gave my reasons on 16 May both for granting the injunction at the *ex parte* hearing and for continuing it a week later on the return date. After giving all parties the opportunity to comment on the draft judgment, and making certain amendments accordingly, those reasons were given in public: [2011] EWHC 1232 (QB).

7. Up to that point, for whatever reason, Ms Thomas had chosen not to put in any evidence denying the Claimant's account of events contained in his witness statement of 14 April. That was a decision for her to make with, if necessary, the benefit of legal advice. The explanation given by Mr Price was simply that she was not opposing the continuation of the injunction. But, whatever reasons may have underlain her decision not to give her own account of the background events, the fact remains that the allegations contained in the Claimant's evidence remained unanswered up to (and beyond) the handing down of my public judgment. It was in the light of the evidence before me, one-sided and limited though it was, that I was obliged to make a judgment in accordance with s.12(3) of the Human Rights Act 1998 as to the "likelihood" of the Claimant's succeeding at trial in obtaining a permanent injunction to similar effect: see *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253.

8. One of the matters which I thought it necessary to explain in the body of the open judgment was why I had thought it right, on 14 April, to proceed with the hearing of the Claimant's application on an *ex parte* basis. I recorded that, in the light of the evidence before me, I was satisfied that there would otherwise have been a risk of further disclosure of private or confidential information prior to her being served with the order. The judgment then continued as follows:

> "5. The Claimant's witness statement was to the effect that Ms Thomas had made contact with him by various text messages in March, which led him to conclude that she was at that stage thinking of selling her story, such as it was. She told him by this means that she wanted, or 'needed', a payment from him of £50,000. It was against this background that he agreed (he says with some reluctance) to meet her in a hotel where he was staying in early April of this year in order to discuss her demands. Although he had no wish to meet, he eventually agreed because he was concerned that she would go to the newspapers if he refused. On that occasion, which was according to his evidence only the fourth time they had met, they were together for no more than 30 minutes. She had asked him to provide her with a signed football shirt, which he did, but he told her that he was not prepared to pay her the sum of £50,000.

> 6. The next development was that she asked to see him again, in a different hotel, a few days later (where he was also staying). He agreed with reluctance and on this occasion, as she had requested, provided her with some football tickets.
>
> 7. It now seems that the Claimant may well have been 'set up' so that photographs could be taken of Ms Thomas going to one or other, or both, of the hotels. Although the position is not yet by any means clear, the evidence before me on 14 April *appeared* to suggest that Ms Thomas had arranged the hotel rendezvous in collaboration with photographers and/or journalists. He first began to 'smell a rat' when she told him at the first April meeting, perhaps feigning innocence, that she had been followed and recognised when she visited the first hotel.
>
> 8. On 12 April, the Claimant sent Ms Thomas a message to say that he did not want any further contact with her. Then, in something of a quandary, he thought better of it and sent her a further message the following day. This was to convey to her that he might be willing to pay her some money after all. By this time, however, she made it clear that she was looking for £100,000. She later texted him to say that there was a journalist outside her house.
>
> 9. The evidence before the court at that point, therefore, appeared strongly to suggest that the Claimant was being blackmailed (although that is not how he put it himself). I hasten to add, as is obvious, that I cannot come to any final conclusion about it at this stage. I have to make an assessment of the situation on the limited (and untested) evidence as it now stands. (That is what is required by s.12(3) of the Human Rights Act, to which I shall return shortly.)"

9. Needless to say, had evidence been placed before the court on Ms Thomas' behalf, whether on the return date or later, putting a different complexion on matters, that would have been recorded and included in the judgment. What is more, depending upon the nature of the evidence, it might have made a difference as to my assessment of the "likelihood" of the Claimant succeeding at trial, as required by s.12(3) of the Act.

10. It is not uncommon in privacy cases for a judge to proceed on an *ex parte* basis, and/or to make an order that the fact of the injunction should not be revealed, where the evidence appears to disclose that the claimant in question has been the subject of blackmail threats. That is obviously a legitimate matter to take into account, as has been acknowledged by the Court of Appeal: see e.g. *ASG v GSA* [2009] EWCA Civ 1574. It is obvious from the passages I have cited above that this was a matter I had

to address on the facts before me. It hardly needs to be stated that, although the word "blackmail" was not used by the Claimant, it appeared to be the clear implication of what he was saying about Ms Thomas' demands for large sums of money. She had also made reference in her text, apparently, to the fact that there was a journalist outside her house.

11. It was necessary for me to mention these matters in my public judgment in order to explain the reason why I had proceeded *ex parte* on 14 April. Thereafter the contents of the judgment received a good deal of publicity.

12. There are two matters in respect of which Ms Thomas wishes now to "put the record straight". First, there is the background of publication of an article in *The Sun* on the morning of 14 April (i.e. the day on which I initially granted the interim injunction). This appeared on the front page of the newspaper and was accompanied by a photograph of Ms Thomas. It attributed to anonymous friends of hers the story that she had been having a relationship with a well known footballer. There was therefore no prospect of her being anonymised in any court order or judgment. There would by that time have been no point. At that stage, there were grounds for the Claimant and his advisers to suspect that Ms Thomas had actually authorised the story, and had received payment for it, since she had already acknowledged that she had instructed Mr Max Clifford, a well known publicist, to act on her behalf.

13. I was told that Ms Thomas denies that she was responsible for the publication and it is now accepted by Mr Spearman QC, appearing for News Group Newspapers, that she was not. The newspaper published the story, it is accepted, without her consent or co-operation. That is one of the matters she wishes to address in the draft statement in open court. There is no problem about that.

14. The other issue is more difficult. One of the Claimant's allegations relating to Ms Thomas, which was central to my reasoning in granting the injunction *ex parte* on 14 April, was that she had made the demands for money. Between 14 April and 16 May no witness statement was forthcoming from Ms Thomas joining issue on those allegations, although I was told by Mr Price in general terms that she denied them.

15. It is now sought to include within the statement in open court, albeit unilateral in form, a mutual recognition that the Second Defendant was not "blackmailing" the Claimant. Ms Thomas' application was presented originally in writing before Tugendhat J and his reasons for refusing permission, at that stage, were recorded in communications from court officials to Mr Price. The learned Judge was concerned that the court's process should not be used to make a statement that was "misleading or ambiguous".

16. Tugendhat J was concerned about a number of matters contained within the draft presented to him at the end of October. First, some of the passages in the statement could be understood as suggesting that the court had not given Ms Thomas an opportunity to give evidence before the judgment of 16 May was handed down, which would clearly not be correct. He drew attention to the fact that she had been represented on 20 April. Secondly, the reference to the Claimant accepting "that there is no basis to accuse Ms Thomas of blackmail" was also unclear and left certain questions unanswered. In particular, anyone interested would have difficulty in deciding whether or not the allegations made by the Claimant, and recorded in

paragraphs 5 to 8 of the 16 May judgment, were true or untrue. In other words, was it being suggested that the allegations which had led to the inference drawn in the 16 May judgment were no longer maintained? I would add that, for so long as any such ambiguity remained, it would hardly serve Ms Thomas' avowed intention of putting the record straight.

17. It is not surprising in view of the opportunity given to all the parties to comment on the draft judgment, before it was handed down on 16 May, but it is appropriate to record that no one has suggested that my rehearsal of the evidence contained in the judgment as published was mistaken or inaccurate.

18. It is necessary, therefore, to consider in a little further detail the nature and purpose of a statement in open court – especially in view of the recent amendments which contemplate such statements being made more frequently in circumstances outside the traditional context of claims for defamation.

19. Mr Spearman, on behalf of News Group Newspapers Ltd, has submitted that the application raises questions of general importance. I am not sure whether he is right about that, but he developed his submissions along these lines.

20. He argues that the purpose of such a statement is to provide a form of remedy for a claimant – additional to those which can be claimed in a pleading such as damages, an injunction and costs.

21. He suggests that an obvious reason for extending this procedure to claims for misuse of private information would be to cover cases of "false privacy". For example, if a publication related to allegations of extra-marital sexual relationships, a claimant might wish to say (if true) that the defendant had come to accept not only that the allegations related to a private area of his life but also that there had in fact been no adultery.

22. Mr Spearman, therefore, raises the question whether or not the new extensions of the procedure should be recognised as rendering it available to defendants as well as claimants. No counsel could actually offer an example of a defendant having taken advantage in the past of a statement in open court, whether in a defamation claim or otherwise. That does not obviously conclude the matter, but it is fair to say that it represents something of a departure from established practice.

23. I rather take the view that if it had been intended to confine the "remedy" of a statement in open court to claimants, then the wording would have made that clear. Although it will undoubtedly be rare, I can see no reason in principle why a defendant should not avail himself or herself, in appropriate circumstances, of this mechanism for vindication. An example cited by counsel was that of an allegation of malice against a defendant in a libel action. One could envisage circumstances in which a defendant wished to make it clear, upon the settlement of such an action, that this allegation had been withdrawn. So serious an allegation can affect a defendant's reputation adversely.

24. Another question raised was whether or not, in view of the general policy underlying the procedure, a proposed statement in open court should be concerned only with the wrongdoing which actually gave rise to one or other of the causes of action now

contemplated in the practice direction. Here, of course, the suggestion of "blackmail" does not relate to privacy; nor does it appear in any pleaded issue raised by the Claimant. It is thus, strictly speaking, extraneous to the issues which the court would be called upon to resolve if the matter went to trial, although it could be raised in the context of Ms Thomas' credit or credibility. What appears to be unique about the present application is that it seeks to vindicate a party in respect of an allegation (not a finding) recorded in a public judgment. On the other hand, although he did not use the term himself, it clearly derives from allegations that were being made by the Claimant in his evidence as at 14 April of this year.

25. I can see no reason why, as a matter of principle, a party should not seek to vindicate herself in respect of allegations made by another party, whether or not they are contained in a pleading. I can imagine circumstances in which, part way through a trial, an action might reasonably be settled on terms which included a statement in open court to deal with allegations made from the witness box. Similarly, evidence contained in a witness statement could no doubt be withdrawn in order to contribute towards a party's vindication as part of overall terms of settlement.

26. There remain, however, the concerns expressed by Tugendhat J. The reason why permission is required for the making of a statement in open court is so that a judge may ensure that the court's process, or the forum it can provide, should not be in any way abused. It would not be right for the procedure to be used to make allegations which are misleading or ambiguous. Issues are not resolved or clarified if they are "fudged".

27. At the moment, it appears that the parties concerned wish to disavow "blackmail" without making it clear whether the allegation that Ms Thomas asked for £50,000 and later £100,000 is also disavowed; or whether it is accepted, for example, that she did so but on some legitimate ground. Not only does that fudge the issue, but because the allegations were so widely published at the time, the ambiguity will be noted by any interested onlookers. The statement thus would not be effective to achieve Ms Thomas' objectives, whether of putting the record straight or of achieving vindication. It appears to disavow the concept of "blackmail", but that word did not have an independent life of its own. It only appeared in the judgment as a summary of the allegations made by the Claimant.

28. In the result, therefore, and largely for the same reasons that troubled Tugendhat J, my conclusion is that it would not be right to approve the draft statement in its present form. Accordingly, as I indicated to the parties at the conclusion of the hearing, I have refused permission.