Neutral Citation Number: [2010] EWHC 2457 (QB)

Case No: HQ10X03597

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/10/2010

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

AMM	**Claimant**
- and -	
HXW	**Defendant**

- -
- -

Mr Mark Warby QC and Miss Victoria Jolliffe (instructed by **Olswang**) for the Claimant
Mr Hugh Tomlinson QC (instructed by **JMW Solicitors LLP**) for the Defendant

Hearing dates: 4 October 2010

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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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THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. 4 October 2010 was the return date fixed on 21 September for the hearing of the Claimant's application for an injunction to restrain the publication of information which he claims to be private. On 21 September Edwards-Stuart J granted an injunction which had effect up to and including 4 October. On 4 October I continued the injunction subject to some variations to its provisions. By that time the Defendant was represented by Mr Tomlinson, and the revised wording of the order was the result of arguments advanced by Mr Tomlinson, which were largely accepted by Mr Warby.

2. Both Edwards-Stuart J and I also made an order under CPR 39.2(3)(a), (c) and (g) that the applications be heard in private. We both also made orders that the identity of the two parties must not be disclosed. For reasons set out more fully below, these two provisions of the orders were necessary in the interests of justice, since without them the publicity about each hearing would have defeated the object of the application. At the close of the hearing on 4 October I stated that I would give reasons why I made the order, and these are they. Although the hearing was in private, this judgment is public.

3. The application for the order of 21 September was not served on any media or other third party. One provision of the order made that day required the Defendant to name any journalist to whom she had already disclosed all or any of the information the publication of which was prohibited by the order. As a result, by a statement dated 24 September, the Defendant named certain journalists. Following that, the Order of 21 September was served on Associated Newspapers Ltd ("ANL"), the publishers of the Daily Mail. Journalists from ANL approached the Claimant's solicitors for comments about the injunction. In response to this approach for comment, the Claimant's solicitors served ANL with a copy of the Order of 21 September.

4. But although 4 October is the return date (that is the opportunity for the Defendant to contest the making of a further order by evidence and argument), she has not availed herself of that opportunity. She has not put before the court any evidence to contradict the evidence of the Claimant. Nor has Mr Tomlinson advanced submissions as to why a further injunction should not be made. He confined himself to submissions on the wording of the order.

5. Nor has ANL contested the making of the order, although it was served with the order of 21 September. As appears from an article in the Daily Mail dated Thursday September 30 ("the Daily Mail article"), ANL was in any event aware of the 4 October date. ANL has made no communication with the court in any form. If ANL had made any representations to the court, whether orally or in writing, then they would have been considered, just as the court would consider the representations of any third party affected by the order.

6. On 27 September, in the interval between the two hearings, Sharp J handed down her judgment in *DFT v TFD* [2010] EWHC 2335 (QB). Also in that interval the Daily Mail article was published. The article was not only about the first hearing of this case on 21 September, but also about another injunction, apparently the *DFT* case. The Daily Mail article included the following:

> "**TV celebrity wins court order gagging his ex-wife**.

> A married TV star has won a court gagging order to prevent details of his private life being published.
>
> The celebrity, who has a huge public profile has obtained an injunction stopping his ex-wife writing about their relationship and claiming that they had a sexual affair after he remarried.
>
> Neither the married man nor his ex-wife can be identified, but he becomes the latest figure to use the courts to protect his privacy.
>
> Yesterday, it emerged that another married public figure had won a footballer-style gagging order to hush up his infidelity.
>
> He had claimed it would be 'very distressing' if his sexual encounters with a woman, which took place in his home, were revealed. A High Court judge agreed that it would breach his human rights and granted him an injunction after hearing that the woman was trying to blackmail him by threatening to expose their relationship unless he paid a 'very substantial sum' of hush money.
>
> The latest injunction contains the same anonymity provisions which protect the identity of the TV star, raising questions over whether blackmail is involved.
>
> The injunction, granted by Mr Justice Edwards-Stuart and effective until October 4 prevents the ex-wife disclosing her claims that they had a sexual affair since he remarried.
>
> Details of the other case, involving the married public figure, were initially secret because he obtained a 'super-injunction' similar to the one footballer John Terry used to prevent the public learning he had cheated on his wife.
>
> Super-injunctions mean the media cannot even report that a gagging order has been granted.
>
> Limited details of the cheating public figure's case can be disclosed because the High Court agreed that the risk of them leaking on to the internet could never be eliminated.
>
> The order obtained by the TV star is not a super-injunction. But it prevents his ex-wife from publishing any details of their life together…"

7. The Order that I made includes a provision similar to that made by Sharp J and noted at para 41 of her judgment. It is that the Defendant must not disclose (or cause anyone else to disclose) any information concerning the identity of the parties or information liable to lead to the identification of the parties, save for that contained in any public judgment of the court. My Order is subject to a number of exceptions. One exception

is to permit republication of any material which was already in the public domain, or that thereafter came into the public domain as the result of national media publication (other than as a result of breach of the Order).

8. It is not suggested by anyone that the information in the Daily Mail article was published as a result of a breach of the order of 21 September. But as discussed below, the fact that that information has been published in the interval limited the options available to the court as to the form of the order that was to be made on 4 October.

9. It is correct that the Claimant is a married TV star and that the Defendant is his ex-wife. It is also correct that the Defendant has claimed that she and he had a sexual affair after the Claimant remarried. But the Claimant in his witness statement denies that allegation. And the Defendant has not gone so far as to put her claim that there was such a relationship into an affidavit or witness statement submitted to the court. She has only made that claim by other means which are less formal.

10. The Defendant does not, at this stage of the proceedings, raise any defence to the claim. She does not consent to the injunction, but neither does she put forward arguments as to why it should not be granted.

11. In the present case there is an allegation that blackmail is involved. The Claimant alleges, and has adduced evidence to support his allegation, that the Defendant has demanded money from him. He alleges that she had done so with threats that if he did not pay then she would publish the claims she had already made, and other detailed information about their relationship. The Defendant has not denied that she has demanded money from him in this way.

12. Whether or not the court prohibits the Claimant from disclosing information about herself and the Defendant is largely a matter between the parties to the action, the Claimant and the Defendant. Whether or not the court makes an order prohibiting the disclosure of the identity of the Claimant ("anonymity order") raises wider issues: it is a derogation from the principle of open justice.

13. Even though the Defendant does not oppose the injunction, the Claimant must persuade the court that an injunction ought properly to be granted. My reasons for prohibiting the Defendant from disclosing information about herself and the Defendant are as follows.

14. There is credible and uncontradicted evidence from the Claimant that the Defendant has threatened to disclose information about his private life, in particular about his sexual life, which the public has no right to know, and which the Defendant has no right to publish or disclose. Injunctions prohibiting the disclosure of information about a marriage and about sexual relationships have been granted by the courts since at least 1967: see *Argyll v Argyll* [1967] Ch 302; *Stephens v Avery* [1988] 1 Ch 449. They have become more frequent in recent years. Such injunctions may be granted whether the information threatened with publication is true or false: *McKennit v Ash* [2007] EWCA Civ 1714; [2007] EMLR 113 (CA) [78]-[80].

15. There is credible and uncontradicted evidence before this court that publication of such information by the Defendant would be highly damaging to the private life of the

Claimant and to that of other persons whose private lives would be interfered with. Damages would not be an adequate remedy.

16. Neither the Defendant nor ANL has advanced any argument that it would be in any way in the public interest that such information should be disclosed.

17. I have had regard to the Convention right of freedom of expression and to the other matters set out in the Human Rights Act 1998 s 12(4). In accordance with s.12(3), I am satisfied that the Claimant is likely to establish that publication should not be allowed.

18. I have considered Mr Tomlinson's submissions as to the form of the order. The only one of his submissions for the Defendant which was not accepted and addressed by Mr Warby was his submission that one sub-paragraph of the order lacked the precision which is necessary in any injunction. I am satisfied that that sub-paragraph is sufficiently precise.

19. There is one further aspect of the matter upon which both counsel addressed me, and that is the relevance of blackmail. In *DFT* Sharp J addressed this point with the assistance of Mr Tomlinson, who, on that occasion, appeared for the claimant. Sharp J also had the benefit of written representations by Ms Gill Phillips, the Director of Editorial Legal Services of Guardian News Media.

20. Sharp J made an anonymity order. She did not prohibit publication of the fact of the injunction. She said this:

> "22. … [Counsel for the Claimant] submits that looking at the matter from the perspective of Article 8, there is a plain interference with the applicant's right to respect for privacy and family life which cannot be justified under Article 8(2).
>
> 23. As to the Article 10 rights of the respondent, the evidence before me currently suggests the applicant is likely to establish at trial that disclosure of the information (whether to the media or generally) would be the fulfilment of a blackmailing threat. I accept [Counsel for the Claimant]'s submission that the expression rights of blackmailers are extremely weak (if they are engaged at all)….
>
> 26 Any provisions derogating from the principles of open justice and the provisions of the CPR must be necessary on the facts of the case…
>
> 27 [Counsel for the Claimant] submits [that the anonymity order] should remain in place until trial or further order. Anonymity orders have been considered twice by the Supreme Court in 2010; and he has referred me to the judgment given by Lord Rodger in *Secretary of State for the Home Department v AP (No. 2)* [2010] UKSC 26 where he summarises the test to be applied as follows:

> "the Court must ask itself "whether there is sufficient general, public interest in publishing a report of the proceedings which identifies [AP] to justify any resulting curtailment of his right and his family's right to respect for their private and family life. "" [7]
>
> 28 He submits the answer to this question in the present case is plainly "no". In particular, he says the publication of the applicant's name would lead to large scale media intrusion which would, in itself, constitute a very substantial intrusion into his private and family life and would be very distressing for him and his family. There is in addition a very strong public interest in the prevention of blackmail and in encouraging victims of blackmail not to give in. It would be contrary to that public interest to publish the fact that the applicant was being blackmailed. As a result, all that any report of the proceedings could do would be to identify the applicant as the person who has obtained an injunction… 35 … I also consider [Counsel for the Claimant] is right when he says the blackmail element of this case brings extremely strong public interest considerations into play. The fact that the applicant has been blackmailed should not be published…."

21. As appears from this passage, where a claimant alleges he is being blackmailed, the court may be faced with limited choices. One choice is to refuse an anonymity order. But in that case, if the blackmailer's threat is to be thwarted, the court will restrict publication of the information which is the subject matter of the action. The alternative is for the court to grant the anonymity order. The court can then permit publication of some of the facts about the action, including the allegation of blackmail. If the court adopts that course, then the anonymity order should suffice to prevent publication of the fact that it is the applicant who has been blackmailed.

22. In the present case, the article published in the issue of the Daily Mail dated 30 September discloses some of the important items of information which are the subject of the action. It follows that if the court is to prevent publication of the identity of the complainant (that is the Claimant), then the only one of the above two alternatives now open to the court is the anonymity order.

23. The offence of blackmail is now set out in Theft Act 1968 s.21, which includes the following:

> "21. (1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief -
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> (a) that he has reasonable grounds for making the demand; and
>
> (b) that the use of the menaces is a proper means of reinforcing the demand."

24. In *Thorne v Motor Trade Association* [1937] AC 797 at 817 (a case under the Larceny Act 1916 s.29(1)) Lord Atkin said:

> "The ordinary blackmailer normally threatens to do what he has a perfect right to do namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened. Often indeed he has not only the right but also the duty to make the disclosure, as of a felony, to the competent authorities. What he has to justify is not the threat, but the demand of money. The gravamen of the charge is the demand without reasonable or probable cause: and I cannot think that the mere fact that the threat is to do something a person is entitled to do either causes the threat not to be a 'menace' ... or in itself provides a reasonable or probable cause for the demand" (at pp. 806-807)".

25. In the present action it is the Claimant's case that the Defendant has no right to communicate to the public the information she threatens to publish. So on his case the Defendant's menaces are all the more unwarranted for that reason.

26. It is to be noted that in *DFT* the injunction was (as here) first granted without notice and at a time when the court had no information as to whether or not the defendant claimed to have a defence to the action. And in *DFT* when the return date came round the defendant consented to the continuation of the injunction: see para [11].

27. So I am not concerned at this stage of the action with what the position would be if the Defendant claimed to be entitled to disclose the information. Sharp J was in the same position in this respect.

28. The relevance of blackmail in the present action is to the issue of whether the court should grant the anonymity order. Mr Warby refers to Archbold (2010) para 8-68a in which the editors write:

> "… a judge has a discretion at common law to permit a witness, whose identity will be known to the court and to the parties, to refrain from identifying himself openly… this discretion has typically been exercised in certain types of blackmail".

29. The citation is to *R v Socialist Worker, ex pa A-G* [1975] 1 QB 637 (DC). In that case the publishers and Mr Michael Foot were held to be in contempt of court in disclosing the names of the complainants in a blackmail trial in defiance of the trial judge's direction. Lord Widgery CJ set out the reasons for giving anonymity to blackmail complainants as follows:

> "(644)…all of us concerned in the law know that for more years than any of us can remember it has been a commonplace in blackmail charges for the complainant to be allowed to give his evidence without disclosing his name. That is not out of any feelings of tenderness towards the victim of the blackmail, a man or woman very often who deserves no such consideration at all. The reason why the courts in the past have so often used

> this device in this type of blackmail case where the complainant has something to hide, is because there is a keen public interest in getting blackmailers convicted and sentenced, and experience shows that grave difficulty may be suffered in getting complainants to come forward unless they are given this kind of protection….
> (p650) the Crown at this stage had presented a prima facie case of contempt … because to my mind it is quite evident that if witnesses in blackmail actions are not adequately protected, this could affect the readiness of others to come forward in other cases".

30. Mr Warby relied on this citation for what it says about public policy, but submitted that the question whether or not a judge should grant an order under CPR 39.2(4), or any other anonymity order, is not a matter of the judge's discretion: it is a matter of obligation under Art 8 and HRA s.6. The court must weigh up the competing Convention rights, in accordance with the guidance given by the Supreme Court in *Guardian News & Media Ltd & Ors. Re HM Treasury v Ahmed & Ors* [2010] UKSC 1 and *Secretary of State for the Home Department v AP (No 2)* [2010] UKSC 26 (in which there is no mention of the word discretion).

31. As Sedley LJ said in *Interbrew SA v Financial Times Ltd* [2002] EWCA Civ 274, [2002] 2 Lloyd's Rep 229 [58]:

> "As Lord Griffiths said in *In re an Inquiry* [1988] AC 660 at p 704, "whether a particular measure is necessary, although described as a question of fact for the purpose of s 10 [of the Contempt of Court Act 1981] involves the exercise of a judgment upon the established facts". His next remark, that "[i]n the exercise of that judgment different people may come to different conclusions on the same facts", <u>does not reduce the exercise to one of discretion</u>. As Lord Bridge was later to explain in *X v Morgan-Grampian* (above, at p 44):
>
> > "Whether the necessity of disclosure in this sense is established is certainly <u>a question of fact rather than an issue calling for the exercise of the judge's discretion</u>, but, like many other questions of fact, such as the question whether somebody has acted reasonably in given circumstances, it will call for the exercise of a discriminating and sometimes difficult value judgement. In estimating the weight to be attached to the importance of disclosure in the interests of justice on the one hand and that of protection from disclosure in pursuance of the policy which underlies section 10 on the other hand, many factors will be relevant on both sides of the scale."
>
> I have given earlier my reasons for thinking that the effect of ss 2 and 3 of the Human Rights Act 1998 has been to move the evaluation of necessity further towards the status of a question

> of law, albeit one which is still heavily fact-dependent and value-laden." (emphasis added)

32. This passage was cited with approval in *Mersey Care NHS Trust v Ackroyd* [2007] EWCA Civ 101; [2008] EMLR 1 [34].

33. In *Socialist Worker* the trial judge had referred to himself as exercising a discretion (p644). Mr Stephen Sedley appeared for the publishers. He argued (p642) that "*Scott v Scott* [1913] AC 417 lays down clearly that the power to hear in camera is not discretionary but only to be exercised on grounds of overriding necessity". Widgery LCJ did not specifically address this argument, but neither did he use the word "discretion".

34. I invited Mr Tomlinson to assist the court on the issue of the anonymity of the order, albeit that he had advanced no submission upon it on behalf of the Defendant. He too submitted that the court's decision whether or not grant anonymity to a party or witness to proceedings could not be the exercise of a discretion, but must be a matter of obligation. Having carried out the exercise prescribed by the Supreme Court in the two recent cases, the judge will either have a duty to make an anonymity order, or a duty not to make one.

35. In my judgment both counsel are correct on this point. It is not a matter of the court's discretion. But the words of Widgery LCJ remain a guide to the public policy which is engaged.

36. The test to be applied, as prescribed by the Supreme Court, was set out by Sharp J in *DFT* at para [27] cited above.

37. Mr Warby submitted that in a case of alleged blackmail the public interest in getting blackmailers convicted and sentenced was as strong a point in favour of making anonymity orders in civil injunction proceedings such as the present action as it is in criminal proceedings such as were under consideration in the *Socialist Worker* case. If a blackmail complainant can obtain an injunction to prevent the blackmailer carrying out her threat, then there is greater incentive and opportunity for the complainant to go to the police. Further, if, by applying for an injunction to restrain the alleged blackmailer from carrying out her threat, a complainant must reveal his identity, the application for an injunction will defeat the purpose which it is intended to achieve.

38. The fact that a person is making unwarranted demands with threats to disclose information does not of itself mean that that person has no right to freedom of expression. As Lord Atkin pointed out in *Thorne*, the blackmailer may even be under a duty to disclose the information. But if a person is making unwarranted demands with threats to publish, that is a factor in deciding whether that person has any Art 10 rights, and, if so, then the weight to be accorded to them in balancing them with the applicant's Art 8 rights.

39. In my judgment, the need to have regard to the Art 8 rights of the Claimant, and to promote the public interest in preventing and punishing blackmail are both factors which weigh strongly in favour of the grant of an anonymity order. There is a strong case that Defendant has no right to publish the information which she seeks to publish about her relationship with her former husband. On this view her Art 10 rights are not

strong. And as an alleged blackmailer, her Art 10 rights are much weaker. If the Claimant fails at trial to establish any part of his case, then position of the Defendant and her rights will fall to be considered afresh.

40. The Daily Mail article also provides a further illustration of what Sharp J described in para 29 of her judgment (where she was considering the application for a so-called super injunction, which she did not in fact make):

> "29 As for the prohibition of publication of the fact of the order, he submits if no such provision is made then experience suggests that the press will publicise the fact of the order adding "snippets" of identifying information with a substantial risk of a "jigsaw identification" of the applicant, thus defeating the purpose of the action. Such "jigsaw identification" has taken place in the recent past when other injunctions have been granted, as explained in the evidence. In addition, if the fact that the injunction has been granted is publicised this will, inevitably, lead to press and internet speculation as to the identity of the applicant. Such speculation will itself cause the applicant distress and will interfere with his Article 8 rights. Such speculation risks breaches of the injunction taking place in forums on the internet. There is a temptation for journalists who become aware of the identity of the applicant to release this anonymously. This has happened in previous cases. There is no substantial public interest served by the public availability of the fact of an order - without any background information…"

41. The Daily Mail article gives "snippets" of identifying information which contribute to an increased risk of "jigsaw identification" of the applicant. Such identification would defeat the purpose of this action and, in the process, achieve the purpose of the alleged blackmailer. In order to address this risk I have followed the course adopted by Sharp J in *DFT*. I have included in the order the provision set out in para 7 above.

42. In the *Socialist Worker* case the court found that there was a contempt of court for reasons explained by Widgery LCJ at p652. One of these was that:

> "… by destroying the confidence of witnesses in potential future blackmail proceedings in the protection which they would get, there was an act calculated to interfere with the course of justice".

43. It is also to be recalled that in the *Socialist Worker* case Widgery LCJ drew a distinction between an order for anonymity and an order that the proceedings be heard in private. Blackmail trials are not normally held in private because the anonymity order is a sufficient measure to protect the interests of the complainant and the public. In applications for interim injunctions the arguments and evidence in support of the order for anonymity are often mixed with the arguments and evidence in support of the order for the hearing to be in private. That was the case in the hearing before me on 4 October. In some cases it may be possible to separate out the two applications, and if that were done, and an anonymity order granted, it may be possible for the

hearing of the substantive application for an injunction to take place in public. This would be desirable in the interests of open justice, although it is likely to lead to duplication of argument and prolongation of hearings.

44. It is for these reasons that I granted the injunction and continued the anonymity order in this case.