Case No: HQ10X02201

Neutral Citation Number: [2013] EWHC 58 (QB)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2013

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

Elena Ambrosiadou	**Claimant**
- and -	
Martin Coward	**Defendant**

- -
- -

Mr Richard Spearman QC (instructed by **Carter-Ruck**) for the **Claimant**
Mr Jacob Dean (instructed by **Lewis Silkin LLP**) for the **Defendant**
Maples Teesdale LLP on behalf of the Allbourne Partners Ltd

There was no oral hearing.

- -

Judgment

Mr Justice Tugendhat :

1. This judgment is given on an application which has been made without an oral hearing, on the basis of written submissions alone. This is at the request of the Claimant applicant.

2. The application is for an order that the court approve the terms of an order which is in terms largely agreed between the parties, and by which they have settled the litigation between them. There is included an application for the court's permission for the making of a statement in open court (CPR Practice Direction para 6.2). None of the substantive terms which relate to the parties themselves is controversial. Save for two points, I would give my approval without further explanation.

3. There is one respect in which this application differs from other applications where the court's approval is required before the terms of a settlement can become binding. This is a claim for an injunction to restrain the publication of private information, and the terms of the draft order are said by the Claimant to have the effect of binding persons other than the Defendant who are not parties to this action ("third parties"). The Defendant does not agree to those parts of the order which are said by the Claimant to have that effect, and he does not agree to pay the costs of this application.

4. The dispute between the parties and the background to this application were explained by the Court of Appeal in its judgment of 12 April 2011([2011] EWCA Civ 409, [2011] Fam Law 690). The Master of the Rolls said at paras 4 to 15:

> "*The factual background*
>
> 4) The claimant and the defendant ("the parties") got married in England in 1983, and they have one son ("the boy"), who was born in October 1996. In 1992, the parties founded a company called IKOS CIF Limited ("IKOS"), which has grown into a very successful hedge fund management services operation, which currently has assets under management worth around US$1,200m. IKOS has been registered in, and has operated from, Cyprus, since 2005, which was around the time the parties went to live there. It appears that the claimant claims to have been was responsible for IKOS's management and marketing, and the defendant says that he developed and managed the software for research and its trading operations.
>
> 5) In April 2009, the claimant started divorce proceedings ("the Greek proceedings") by issuing a petition in Thessaloniki, Greece – the proceedings referred to in para (1) of the order made by Maddison J. After the defendant issued a counter-petition in those proceedings in January 2010, the claimant filed a further claim for divorce in Monaco (and she withdrew her petition in August 2010, and two months after that, the defendant withdrew his counter-petition). It appears to be the claimant's case that the marriage had fallen apart in 2004, whereas the defendant says that it was the claimant's summary dismissal of his research and development team at IKOS in December 2008 which effectively caused the marriage to founder.

6) In December 2009, the defendant resigned from the board of IKOS. Shortly thereafter, IKOS brought proceedings in Cyprus, which resulted in an injunction being granted against the defendant on 23 December 2009 to protect its rights of confidentiality. That injunction was subsequently registered here, so that, as the Judge pointed out, it would be enforceable pursuant to the Judgments Regulation and the Civil Jurisdiction and Judgments Order (SI 2001 No. 3929), at the suit of IKOS.

7) On 19 May 2010, the defendant issued an application ("the May application") in the Greek proceedings for provisional measures, relating to the boy. In summary, he sought orders concerning his contact with the boy, and the boy's schooling and assets. The notice in support of the May application ("the May application notice") contained a number of allegations relating to the disputes which had arisen between the parties both domestically and in relation to IKOS. At least to an English lawyer, many of these allegations seem to have had little to do with the provisional measures which the defendant was seeking.

8) On 27 May 2010, at a hearing in the Thessaloniki court ("the May hearing"), after rejecting the claimant's application for an adjournment, a Judge made orders regarding the defendant's contact with the boy and the boy's education. (The May application notice has now been withdrawn by the defendant: this occurred around the time that he withdrew his counter-petition following the withdrawal of the claimant's petition, so it appears that the Greek proceedings are now discontinued).

9) On 29 May 2010, the defendant's solicitors, Hogan Lovells International LLP ("Lovells") sent Louise Armitstead, a Daily Telegraph journalist, a copy of the May application notice, together with a copy of a written proposal he had made to the board of IKOS on 9 December 2009 and his letter of resignation from the board of IKOS (the "resignation letter"), written two days thereafter. Lovells made it clear to Ms Armitstead that they did not wish her to reveal that they were her source.

10) On 1 June 2010, Ms Armitstead contacted the claimant's public relations representatives about this, and the claimant's solicitors, Schillings, immediately sought an undertaking from the publishers of the Daily Telegraph not to use the information contained in those documents. The publishers of the Daily Telegraph promised to give notice to Schillings before publishing any such information. This promise was breached when an article appeared in the 3 June edition of the Daily Telegraph without any such prior notice, but, fortunately, its contents were not objectionable.

11) Just after 10.00 am on 4 June 2010, Schillings contacted Lovells, as they rightly suspected that the defendant was Ms Armitstead's source, and threatened to apply for injunctive relief unless the

defendant gave appropriate undertakings. This prompted the defendant to issue, through his litigation public relations company, a statement ("the June statement") just before midday. In that statement, he said that he had so far "refrained from commenting in detail either to my former clients or to the media", but, following "an open court hearing in Greece", he had decided to release a copy of the May application notice, which, as he explained, set out his resignation letter in full. As he also explained in the June statement, the copy of the May application notice he was releasing had been redacted "to protect the privacy both of IKOS clients and Dr Coward's son."

12) It appears that the June statement and the redacted May application notice were sent to rather over fifty organisations, most of them media organisations. Unsurprisingly, Schillings learnt of the June statement within a couple of hours of its release, and, equally unsurprisingly, they immediately wrote complaining about it in very strong terms to Lovells.

13) The June statement and redacted May application notice resulted in an article in the 5 June 2010 edition (both hard copy and electronic version) of the Daily Mail, which referred to the "bitter divorce" between the parties, the defendant's allegations of the claimant's high-handed behaviour, and a custody battle.

14) Unfortunately, the redacted version of the May application notice could, with the use of a piece of non-standard, but fairly easily available, software costing around £300, be unredacted. In other words, the parts of the May application notice which the defendant had blanked out could be restored, and therefore read, by someone who had access to the necessary technical knowledge and the software.

15) The defendant refused to admit that he had done anything wrong, so the claimant immediately applied to Maddison J for ex parte relief, which was granted during the evening of 4 June. The application then came on inter partes before Eady J on 21 and 22 June, and, having heard argument as to what could be included in his open judgment on 8 July, he handed down a reserved judgment on 15 July 2010 dismissing the application."

5. The Court agreed that (as stated by the Master of the Rolls) at para 34:

> "The redacted material … does contain information in respect of which the claimant and the boy had a reasonable expectation of privacy, and Article 8 of the Convention is accordingly engaged. Further, there is (realistically) no challenge to the Judge's finding that, despite (a) the (apparently unintentional) release of the redacted material from the May application notice accompanying the June statement, (b) the release of a wholly unredacted May application notice to the Daily

> Telegraph, and (c) the publication of the Daily Mail article, "the information in question [was not] so generally accessible", so that it "cannot be regarded as confidential", quoting from Lord Goff in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 282C."

6. The Court agreed that (as stated by the Master of the Rolls) at para 38:

> "In the absence of an injunction, it would seem that there would be nothing to prevent a person, to whom an ineptly redacted copy of the May application notice was sent, actually reading the redacted material, and then publishing any information contained therein. An interlocutory injunction restraining the defendant from publishing such information would prevent such a person from doing so, provided that person had notice of the injunction, pursuant to the so-called *Spycatcher* principle – see *Attorney-General v Newspaper Publishing Plc* [1988] Ch 333, 375, 380."

7. The Court of Appeal granted an interim injunction as explained in paras 42-43 of the judgment of the Master of the Rolls. In substance this was to restrain:

> "the defendant (i) from publishing the material redacted from the May application notice, or any information contained therein or derived therefrom, and (ii) from publishing the May application notice, in the light of the unfortunate history. However, reflecting the approach of the Judge, I do not consider that the injunction should go any further than this: there is no history or threat of the defendant publishing any other document in the Greek proceedings, or any information derived therefrom to which the claimant could object."

The form of the order sought

8. The order to which the Defendant consents includes injunctions restraining him from disclosing or publishing information defined in para 2 of the order, subject to various exceptions and provisos. The substance of the injunction is to restrain the disclosure of the material redacted from the copies of the documents submitted as part of the May Application (as defined in the Court of Appeal judgment): (para 2(a) and (b)). The injunction (para 2(d) and (e)) also restrains the publication of private information concerning the son and the marriage and personal relationship between the Claimant and the Defendant. The exceptions and provisos are for the purpose of enabling the Defendant to discuss the case with legal advisers and family members and the like, and there are provisos that the restraint should not extend to matters already set out in judgments of the court, or otherwise in the public domain. There is provision for orders under CPR r5.4C(4) and other matters.

9. There is no part of the order which is expressly framed as a restraint imposed on third parties. However, there is para (4), which reads:

> "For the avoidance of doubt, this Order does not impose any restriction on any third party in relation to information which is specified in paragraphs 2(d) and 2(e) above but which is not also specified in paras 2(a), 2(b) or 2(c) above."

10. The draft order is also headed with a Penal Notice which, so far as material, reads:

> "Any person who knows of this order and disobeys this order or does anything which helps or permits any person to whom this order applies to breach the terms of this order may be held to be in contempt of court…."

Submissions for the Claimant

11. The reason why the Claimant makes this application is that there is a difference between interim injunctions, where the *Spycatcher* principle definitely applies, and final injunctions, where the position is less clear. The Order that I am asked to make would not be an interim injunction: it would be a final or permanent injunction. In *Hutcheson v Popdog Ltd* [2012] 1 WLR 782; [2011] EWCA Civ 1580 the Master of the Rolls said:

> "5. … a party who has notice of an interim injunction is at risk of being in contempt of court if he does something which effectively flouts or undermines the injunction – see, for instance, *Attorney-General v Times Newspapers Limited* [1992] 1 AC 191, 223-224 and see also *Attorney-General v Punch Ltd* [2003] 1 AC 1046, 1066. This principle, sometimes known as 'the *Spycatcher* principle' (see *Attorney-General v Newspaper Publishing plc* [1988] Ch 333, 375 and 380), is well-established. However, Gray J decided in *Jockey Club v. Buffham* [2003] QB 462, paras 23-27, that, if and when a final injunction is granted in favour of a claimant, any interim injunction is discharged and replaced by the final injunction, and that a third party, even one who has notice of the final injunction, is not at risk of being in contempt of court if he acts inconsistently with the injunction….
>
> 26. … It would be wrong to end this judgment without making the following points:
>
> … b) … it cannot be safely assumed that the conclusion in *Jockey Club* [2003] QB 462, that the the *Spycatcher* principle does not apply to final injunctions but only applies to interim injunctions, would be approved by this court;… "

12. So, submits Mr Spearman, the Claimant cannot safely proceed on the basis that third parties who had been notified of the Order (when I have made it), would be in contempt of court if they disclosed information of the kind specified in paras 2(a) or (b) of the order. But, he submits, the Court of Appeal has held that the parties and their son are entitled to the protection by injunction of their private information and the court is obliged to give it, pursuant to its obligation as a public authority under the

Human Rights Act 1998 s.6 not to act incompatibly with their rights to respect for their private life under Art 8.

13. Mr Spearman submits that the court has jurisdiction under the Senior Courts Act 1981 s.37(1) to make an order binding on third parties. This submission is not in dispute.

14. Mr Spearman submits that an order binding upon third parties would be achieved by the inclusion in the Penal Notice of the words set out in para 10 above. This is in dispute.

15. As noted above in the judgment in this case in the Court of Appeal, it appeared then that the June statement and the redacted May application notice were sent to rather over fifty organisations, most of them media organisations. According to the evidence now before this court, it was over 100 individuals working for 53 organisations, most of them media organisations. The order of the Court of Appeal was sent by the Claimant's solicitors on 6 May 2011 to all these organisations. It was with a document headed Legal Notice and said to be "enclosed by way of service".

16. In her first witness statement made on 20 November 2012 in support of the present application Ms Martorell states:

> "… there is … a very real risk that this information may be published by the Media Recipients once a final injunction has been granted and the protection afforded by the Court of Appeal interim Order has fallen away [and she refers to the *Jockey Club* case]…"

17. The Defendant informed the Claimant that he was prepared to notify the individuals who had copies of the May Application Notice ("the Media Recipients") that he withdrew his permission to publish any material based on the May Application Notice and to require them to return copies of these documents to the Claimant. His solicitors did this on his behalf.

18. Ms Martorell states that the response has been unsatisfactory. A small number of recipients of this message confirmed that they would destroy electronic copies and return hard copies of the documents, as requested. But the overwhelming majority have sent either no reply at all or have sent a response which the Claimant regards as inadequate or even hostile (although none included a threat to publish the information).

19. In a second witness statement dated 28 November 2012 she states that on 21 November 2011, in accordance with the Practice Guidance on Interim non-disclosure orders, the Claimant provided copies of their Application Notice, draft Order, Skeleton Argument and a Legal Notice to the Media Recipients. Two of these, Bloomberg News and Guardian News and Media Ltd, have provided responses which the Claimant regards as satisfactory. She therefore states that if the order is made in the form the Claimant seeks, she does not propose to serve it upon these two organisations.

Submissions against the making of the order sought by the Claimant

20. By letter dated 29 November 2012 Maples Teesdale LLP responded on behalf of the Allbourne Partners Ltd. The letter describes that firm as an independent advisor in the alternative investment markets, regulated by the FSA. The letter argues (amongst other things) that: (1) no order should be made which is expressly binding upon that firm because there is no reason to suppose that it will publish or disseminate the May Application Notice; (2) it is unreasonable to expect it to spend time and effort investigating whether complying with the terms of a final injunction could put it at the risk of breach of its regulatory obligations and (3) it should not be put at risk of the consequences of breaching a final injunction in circumstances where it was an involuntary recipient of the May Application Notice.

21. In a document submitted for the Defendant Mr Dean also argues that no order should be made expressly binding on third parties and that the Defendant should not be liable to pay for an application to that effect. He submits that there is no evidence of a threat by any third party to publish the information in question. He refers to specific responses which demonstrate that even those who reacted with hostility to the Claimant's notice did not threaten to publish the information.

22. Mr Dean submits that the Claimant has failed to satisfy the test laid down in the speech of Lord Dunedin in *Attorney-General for Canada v Ritchie Contracting and Supply Co Ltd* [1919] AC 888, 1005:

> "no one can obtain a quia timet order merely by saying "Timeo"; he must aver and prove that what is going on is calculated to infringe his rights".

23. Mr Dean submits that such a test is now necessary to comply with ECHR Art 10.

24. Mr Dean submits that even if the Claimant's fears that *Jockey Club v Buffham* is good law will be proved correct in the future, that does not assist her. The publication of the information in question would (as matters stand) be unlawful, and the Court of Appeal made that clear in para 34 of its judgment in this case (to which the Statement in Open Court also refers) when they said that: "The redacted material … does contain information in respect of which the claimant and the boy had a reasonable expectation of privacy, and Article 8 of the Convention is accordingly engaged".

25. He submits that where there is no threat that a person will perform an unlawful act, the fact that the act would be unlawful is all the protection that a claimant needs: there is no need for the added protection of a penal sanction which is imposed for the breach of a court order. In any event, there is no justification for requiring the Defendant to pay the costs of an application for such an order.

26. Further, Mr Dean submits that even if he were wrong about the foregoing, the form of order by which the Claimant seeks to achieve her objective is inappropriate. It is well established that the court can make orders *contra mundum* (against all the world) wherever necessary and proportionate, for the protection of Convention rights whether of children or adults. See *OPQ v BJM* [2011] EMLR 23, [2011] EWHC 1059 (QB) at para 18. But the form of the proposed consent order is not an injunction *contra mundum*.

Discussion

27. In my judgment the submissions of Mr Dean and of Maples Teesdale are to be preferred. An order addressed to third parties has not been shown to be necessary or proportionate. No third party has disputed, nor is there any evidence that any third party is likely to dispute, that the parties and their son have a reasonable expectation of privacy in respect of the information referred to in para 38 of the judgment of the Court of Appeal in this case. There is no evidence of a threat from any third party to publish, nor of a real risk that any third party may publish, information in respect of which the parties or their son have a reasonable expectation of privacy. This is what I understand to be what the Court of Appeal had in mind in the last sentence of the passage cited in para 7 above.

28. Further I share the doubts expressed by Mr Dean as to whether the result sought to be achieved by the Claimant would in fact be achieved simply by the inclusion in the Penal Notice of the words (set out above in para 10 above) referring to third parties, rather than by the making of an express order *contra mundum* in the body of the order. But I do not need to make a decision on this point.

29. Further, if any third party might otherwise have been in doubt as to whether they could lawfully publish the information which the Claimant seeks to protect, they will now have to consider the contents of the judgment of the Court of Appeal, and now of this judgment.

SUMMARY

30. For the reasons set out above, and subject to any further submissions as to the form of the order, I shall give permission for the reading of the Statement in Open Court in the form annexed to the draft order and I shall make the Order in the form sought, save that the there shall be omitted from the order the words set out in para 10 above.