Neutral Citation Number: [2015] EWHC 826 (QB)

Case No: HQ15X00823

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/03/2015

Before :

MR JUSTICE WARBY

- -

Between :

YXB	**Claimant**
- and -	
TNO	**Defendant**

- -
- -

William Bennett (instructed by **Manleys**) for the **Claimant**
Jacob Dean (instructed by **Cassell Moore**) for the **Defendant**

Hearing date: 16 March 2015

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Judgment

Mr Justice Warby :

Introduction

1. The claimant and the defendant first met on the evening of 15 December 2014, at a Christmas Party at a city centre club. In the early hours of 16 December 2014, during a party at the home of a friend of the claimant known in this case as "Mr X", the defendant performed oral sex on the claimant. They have never met again, but a month later the claimant initiated an exchange of messages between the two, via their mobile phones, in the course of which he wrote to her, and she to him, about having sex together. The claimant sent the defendant explicit images, including photographs of his erect penis, and video of himself masturbating. She also sent him images, but nothing so intimate.

2. Because the claimant is a Premier League footballer, his sex life is of interest to newspaper readers, and on 13 February 2015 the defendant signed a contract to sell the publishers of The Sun "her full detailed and true story with particular reference to her knowledge and experiences of [the claimant] and all related matters". The agreement provided that she would make available "all photographs, film, documents, names and addresses and other items of evidence which are relevant to his/her account." The newspaper approached the claimant's club ("the Club") and his representatives came to know that publication was intended.

3. On 19 February 2015, an application was made to Walker J on behalf of the claimant, without notice to the defendant, for an interim order restraining the defendant from

disclosing information to the effect that a sex act took place between the two, photographs sent by the claimant, any information to the effect that he sent her naked photographs of himself, and text messages sent by him or any summary of the information contained in such messages. The claimant's case was that disclosure of such information would represent a misuse of private information and, so far as the photos were concerned, infringement of copyright.

4. The evidence and submissions for the claimant also alleged that in dealings with Mr X, acting on behalf of the claimant, the defendant had sought to blackmail the claimant, demanding £100,000 as the price of her silence. This was the factor said to justify an application without notice, and was also relied on in support of the injunction, and the anonymity order. Walker J granted the interim non-disclosure order, an order anonymising both parties, and a reporting restriction order prohibiting the identification of either party or Mr X.

5. On 22 February 2015 an article was published on the front page of The Sun on Sunday, under the headline "Prem star's £100k sex blackmail". The story related to the claimant and the defendant. It described them as having had a sexual encounter, quoting a source as saying (inaccurately, by all accounts) that "the pair did everything that a man & woman can do together." It reported that the defendant had attempted to blackmail the claimant. But neither the identities of the parties, nor the images, nor the content of the messages between the claimant and defendant, were made public in that article. It is not suggested that the appearance of this story represented or flowed from a breach of the injunction. Its publication is accepted to have been consistent with the Judge's order.

6. The claimant's application to continue until trial the orders made by Walker J came before me on 26 February 2015. On the application of the claimant, unopposed by the defendant, I adjourned the application until this hearing, and continued the orders meanwhile. This is therefore the return date of the claimant's application for orders maintaining anonymity and restraining disclosure and until after judgment in the action. The order sought is in a slightly expanded form, to cover the video material. Between 26 February and this hearing the claimant has served Particulars of Claim, the defendant has filed evidence, and the claimant has filed evidence in reply.

The issues

7. Four issues now arise:-

   i) Should the orders of 19 and 26 February 2015 be discharged for material non-disclosure on the part of the claimant? The defendant asserts that the factual picture was not fairly presented. In particular, she says that the sex act between them was not as private as made out, that the accusation of blackmail was false to the knowledge of Mr X, and that Mr X failed, deliberately it is alleged, to disclose a key message sent to him by the defendant, which is inconsistent with the charge of blackmail.

   ii) Should there be any privacy injunction for the future? The defendant does not oppose the continuation of an injunction to restrain publication of the photos, or its extension to protect the video material, but she maintains that the court should refuse any injunction for the future. She relies on the claimant's

material non-disclosure and what she submits is the weakness of his claim generally. In relation to this last point she highlights the dearth of evidence that the claimant would be distressed by any disclosure.

iii) If the information remains subject to an injunction and anonymity for the claimant, the defendant nevertheless seeks to lift the anonymity order so far as she is concerned, to "out" herself as TNO in order to tell her side of the story. She maintains that there neither was nor is any justification for anonymising her.

iv) The defendant also seeks, if restrained from disclosing information to the public, to be free nonetheless to disclose it to friends and family. A restraint on communication to that extent is unreasonable and unwarranted, she submits.

8. The hearing was conducted in public without identifying either party by name or otherwise. The orders, including the reporting restriction, granted by Walker J have remained in place pending this judgment, with an unopposed extension to prohibit publication of the video material.

The legal context

The threshold requirement of likely success

9. The test that has to be satisfied by the claimant on any application for an injunction to restrain the exercise of free speech before a trial is that he is "likely to establish that publication should not be allowed": Human Rights Act 1998 (HRA), s 12(3). This normally means that success at trial must be shown to be more likely than not: *Cream Holdings v Banerjee* [2004] UKHL 44, [2005] AC 253. In some cases it may be just to grant an injunction where the prospects of success fall short of this standard; for instance, if the damage that might be caused is particularly severe, the court will be justified in granting an injunction if the prospects are sufficiently favourable to justify an order in the particular circumstances of the case: see *Cream* at [19], [22]. But ordinarily a claimant must show that he will probably succeed at trial, and the court will have to form a provisional view of the merits on the evidence available to it at the time of the interim application.

Misuse of private information

10. In order to succeed at trial in a claim for misuse of private information a claimant must establish first of all that he has a reasonable expectation of privacy in respect of the information at issue. The test is an objective one, which depends on all the circumstances. These include "the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher": *Murray v Express Newspapers* [2008] EWCA Civ 446, [2009] Ch 481 [36]. Some general rules can be found in the authorities, to which I will return, but the determination is always highly fact-sensitive.

11. If a reasonable expectation of privacy is established, the court must then consider how the balance between privacy and freedom of expression should be struck in the particular circumstances of the case, taking into account the four principles identified by Lord Steyn in *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 [17]:

> "First, neither article [8 or 10] has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."'

12. In applying the ultimate balancing test other rights may fall to be taken into account, including any relevant privacy rights of third parties, and the right of the defendant to speak to others about their own life: see *A v B plc* [2002] EWCA Civ 337, [2003] QB 195 [11xi)]. The right to speak of one's own life is also an aspect of the autonomy protected by Article 8: *Re Angela Roddy* [2003] EWHC 2927 (Fam), [2004] EMLR 8. The process of striking the balance involves consideration of whether it is likely that the court at a trial would find an injunction to be a remedy which it is necessary and proportionate to grant, in order to protect the claimant's reasonable expectation of privacy.

13. Because the ultimate balancing test involves consideration of both sides of the case, and often enough other rights and interests also, it is probably a fruitless exercise to try to ascertain where the burden of proof lies. It is enough to say that "ultimately, in a matter such as this, it is plain that the burden rests on the applicant to satisfy the requirements of s 12(3), HRA, or fail": *Hutcheson v News Group Newspapers Ltd* [2011] EWCA Civ 808, [2012] EMLR 2 [31] (Gross LJ).

14. When considering whether to grant a remedy in a case affecting freedom of expression the court must have regard not only to the importance of that right but also to the extent to which the information at issue is or is about to be public, and whether it is to any extent in the public interest for it to be published: HRA, s 12(4)(a).

Anonymity

15. Anonymity orders are a derogation from open justice, and an interference with Article 10 rights, which must also be shown to be necessary in pursuit of the (inherently legitimate) aim of protecting privacy. The question to be answered when the court is asked to restrain the publication of names on the ground that this is necessary pursuant to Article 8 is "whether there is sufficient general, public interest in publishing a report of the proceedings which identifies a party and/or the normally reportable details to justify any resulting curtailment of his right and his family's right to respect for their private and family life.": *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 1 WLR 1645 [21](3), (5) (Lord Neuberger MR). There is no rule that anonymity is to be favoured over the main alternative, of naming the parties but not disclosing the information that is protected; each case will turn on its own facts: ibid., [39].

16. Anonymisation of the defendant does not automatically follow, even if it is appropriate to anonymise the claimant. The question needs to be considered separately. When considering this issue, the rights in play include not only the Article 10 rights of the general public to be informed about events in public courts but also the Article 8 and 10 rights of the defendant.

Blackmail

17. If free speech rights are misused to blackmail a claimant, or to extort, this will reduce the weight attached to free speech, and increase the public interest in favour of restraint. It will also weigh strongly in favour of an anonymity order. These points are by now well-established: see, eg, *AMM v HXW* [2010] EWHC 2457 (QB) [39]-[41]. Victims of blackmail or extortion deserve protection from the court; and the court must adapt its procedures to ensure that it does not provide encouragement or assistance to blackmailers, and does not deter victims of blackmail from seeking justice before the courts: see *ZAM v CFW* [2013] EWHC 662 (QB), [2013] EMLR 27 [35]-[36], [42]. It is necessary, however, for the court to proceed with some care when faced as it quite often is with an allegation that the defendant is blackmailing the claimant.

Evidence

18. A claimant who seeks an injunction to restrain misuse of private information is asking the court to attach more importance to his right to respect for his private life than to the defendant's free speech rights. Claimants are expected to speak for themselves, unless there is some good reason why they cannot do so. Ordinarily, therefore, at every hearing at which an order for non-disclosure is sought there should be evidence from the claimant. If the rights of any third parties such as partners are relied on, they too should ordinarily speak for themselves. If, due to urgency or for any other reason, evidence from these sources cannot be obtained in time, the court hearing an application without notice or on short notice will expect an undertaking to provide it when it can be obtained. If such evidence is still not available on the return date, the court will look for an explanation of why that is. All these points are well-known to practitioners in this field, and to a wider audience, at least since they were made by Tugendhat J five years ago in *Terry v Persons Unknown* [2010] EWHC 119 (QB); see in particular [27]-[36].

Full and frank disclosure

19. The ordinary rule is that applications for interim non-disclosure orders should be made on notice to the defendant, and others whom it is intended to serve with the order, and who may be affected by it. Application without notice may be justified, in exceptional circumstances, but if it is the applicant comes under a duty of full and frank disclosure. Mr Dean relies on the summary I gave in *Sloutsker v Romanova* [2015] EWHC 545 (QB) at [51] which, with adaption to the present case, is this:

    i) An applicant for an interim non-disclosure order is under the duty of full and frank disclosure which applies on all applications without notice.

    ii) The duty requires the applicant to make a full and fair disclosure of those facts which it is material for the court to know: *Brink's Mat Ltd v Elcombe* [1988] 1

WLR 1350, 1356 (1) and (2) (Ralph Gibson LJ). Put another way, disclosure should be made of "any matter, which, if the other party were represented, that party would wish the court to be aware of": *ABCI v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 485, 489 (Waller J).

iii) Non-disclosure of material facts on an application made without notice may lead to the setting aside of the order obtained, without examination of the merits. It is important to uphold the requirement of full and frank disclosure.

iv) But the court has a discretion to set aside or to continue the order. Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues that were to be decided. The answer to the question whether the non-disclosure was innocent is an important, though not decisive, consideration. See *Brink's Mat* at pp1357 (6) and (7) and 1358 (Balcombe LJ).

20. Further points to be derived from *Brink's Mat* are:-

i) The duty applies to facts known to the applicant and additional facts which he would have known if he had made proper inquiries before the application (1356H, Ralph Gibson LJ).

ii) If material non-disclosure is established the court will be "astute to ensure" that a claimant who has obtained an injunction without notice and without full disclosure "is deprived of any advantage he may have gained" (1357C, Ralph Gibson LJ).

iii) The rule in favour of discharge also operates as a deterrent to ensure that those who make applications without notice realise the existence and potential consequences of non-disclosure (1358D-E, Balcombe LJ).

iv) The discretion to continue the injunction, or to grant a fresh one in its place, is necessary if the rule is not "to become an instrument of injustice"; it is to be exercised "sparingly", but there is no set limit on the circumstances in which it can be exercised (1358E-F, Balcombe LJ).

The application to Walker J

21. The evidence was contained in a single witness statement, made by Ms Feely, associate at Manleys solicitors, on 19 February 2015, the day of the application. The first paragraph of the statement said that its contents were within her own knowledge unless otherwise stated. Very little of it could however have been within her own knowledge. Paragraph 2 described the claimant, giving his professional roles and his age. The claimant was said to have "a long-term partner, with whom he lives a married life and who is the mother of his only child, a daughter." The statement gave no explanation of why there was no witness statement from the claimant. An explanation has since been given, to which I shall come. Nothing further was said about the claimant's partner or child or why, given that her rights were implicitly being relied on, the partner had not made a statement. No explanation for the absence of any such statement has been given since.

22. Paragraph 3 of Ms Feely's statement opened in this way: "My colleague Mark Manley ("Mr Manley") received a telephone call from the Claimant's agent ("the Agent") on Tuesday 17th February 2015 to request legal advice". This part of the evidence therefore seems to be Ms Feely's account of what Mr Manley told her he had been told by the Agent. Further degrees of hearsay are involved, as will be clear from the account given, which was as follows.

The Sun contacts the Club

23. On Saturday 14 February 2015 Andy Halls of the Sun emailed the Club's media relations manager ("the Manager"), advising that The Sun planned to run a story the following day, that the claimant and defendant had a sexual relationship after the Club's Players' Christmas Party ("the Party") and seeking comment. In a phone conversation with the Manager, Mr Halls outlined the story: that the claimant and defendant had had sexual intercourse after the Party, following which the claimant bombarded her with intimate and/or explicit text messages, some taken at the Club's team hotel. Told by the Manager that there was insufficient time to investigate, Mr Halls appeared to have been agreeable to delaying publication.

The Club contacts the Agent

24. Ms Feely's statement continues: "[The Manager] then notified the Agent, who discussed this matter with the claimant. He has explained as follows:" At this point in the statement, quite where the "explanation" comes from becomes less than crystal clear. However, it seems from the context and the other evidence that the "he" in this last sentence is the Agent, rather than the claimant, and that it was the Agent and not the solicitors who obtained the claimant's account of events. The facts and matters "explained" are then set out in ten sub-paragraphs:

    i) The claimant attended his friend's house after the Party "together with a number of other players from the Club, and the defendant"

    ii) "The defendant is known to a number of football players based in [the city]".

    iii) "Whilst at his friend's house, the defendant performed oral sex on the claimant."

    iv) Reference is then made to the exchange of "private explicit text messages including explicit picture messages". It is said that "The claimant only did so with a reasonable expectation that the messages and images would remain private and confidential between himself and the defendant and that she would not show them to, or share them with any third party – whether for financial gain or otherwise." As Mr Dean has observed, this statement is at best third hand-hearsay, but is more in the nature of a legal submission than a statement of fact.

    v) "The claimant deleted this material sometime before The Sun contacted the Club".

    vi) "The claimant discussed the matter with his friend", "Mr X".

vii) "The claimant, Mr X and the Agent all agreed that Mr X should invite the Defendant to attend a meeting with Mr X in order to establish the veracity of the Defendant's position, to keep the direct lines of communication open, and to ensure the Defendant was actually in possession of such material." It is notable that this account involves the claimant's representatives taking the initiative in making contact with the defendant.

viii) – x) Mr X made several attempts to contact the defendant, who eventually returned his call, and arrangements were made for the two to meet at a city centre hotel at 1pm on Monday 16 February. The contact described involves telephone calls and voicemail messages only.

"Meeting on 16th February 2015 at the [….] hotel in [the city]."

25. Paragraphs 4 to 13 of Ms Feely's statement appear under this heading. They are introduced with the words "I have been instructed as follows:" A solicitor is "instructed" by a client. But since the claimant was not present at the meeting on 16 February 2015, the information cannot have come from him. Indeed, it is clear from paragraph 11 of Ms Feely's third statement that it was not the claimant who gave these "instructions". The information came from Mr X, who was not Ms Feely's client but a witness. The statement did not explain why neither the Agent nor Mr X had made statements at that point. No explanation has been given since.

26. The account of the meeting given by Ms Feely was that it was attended by the claimant and her mother. Mr X began by asking the defendant what she wanted. She "stated that she was prepared to use this valuable incriminating (private and confidential) material for commercial advantage and that she had already entered into a contract with The Sun." This is unsatisfactory evidence. It is language that the defendant seems most unlikely to have used herself. The impression is of 'spin'. The defendant produced a copy of a written contract providing that she would receive a sum on publication on 22 February 2015. Mr X asked the defendant what she wanted from the claimant, and left her to consider her position. When he returned she said "£100,000 is what I want". Mr X wanted to keep lines of communication open, so told her that he would have to speak with the claimant and his representatives. At his request, the defendant "purported to contact an individual at The Sun to retract her consent", saying her family did not want her to proceed, Later, after the meeting, she sent Mr X a screenshot of an email sent to Mr Halls at 16:41 saying she did not want to proceed. It was left that Mr X would contact the defendant at around lunchtime on 17 February.

"Phone call between Mr X and the Defendant on 17th February 2015"

27. This is the heading to paragraphs 14 to 17 of Ms Feely's statement. She does not say where the information in this section comes from, but it seems inevitable that it must have come from Mr X. The statement says that on the morning of 17 February the defendant made several attempts to call Mr X, and that "after Mr X had fully updated the Agent, the Claimant and the Club" about the meeting the previous day, "the Agent, the Claimant and Mr X made contact with Mr Manley for legal advice." This is however at odds with paragraph 3 of the statement, which refers to a telephone call to Mr Manley from the Agent, which I assess as more likely to be the true position. There is no other indication that the claimant himself was involved at this stage.

28. Following the giving of legal advice, says Ms Feely "the Agent advised Mr X to call the defendant and record the conversation". Again, I note that there is no indication of involvement on the part of the claimant. The reason for the advice, according to Ms Feely, was that "at that point the claimant did not have any hard evidence of the financial demands she was making to the claimant, and that the Defendant was seeking to blackmail the Claimant." Evidently, by this stage somebody had suggested or concluded that this is what the defendant was doing. Ms Feely further explains that Mr Manley had acted in a previous "almost identical" incident and knew the police would want indisputable evidence if they were to bring blackmail prosecutions.

29. Mr X made the call, "in the presence of the Agent and a representative of the Club", whose identity is not given. The claimant evidently was not present. Mr X recorded the conversation on a handheld device. A transcript of the conversation is exhibited. Mr X told the defendant he was "sat in a meeting with erm some of the representatives now" and they were "not prepared to deal at £100,000 so I just need to know from your end where you wanna go from here?" She replied that "you told me to give, to give you something, so I did, so why don't you get back to me with something now?", to which Mr X responded that he had said he "needed a ball park as to what you want". She said "so what do they want to give me then why why why don't you tell me what they can offer to be because to be honest I'm getting sick of it now me [X], I can't be arsed with it." When told that "they're saying nothing…" the defendant responded "Right well fine then, just, well, we'll just leave it then, yeah, we'll just leave it as it is." The conversation proceeded with Mr X prodding further, asking "What do you want to do?"

30. The defendant replied: "Well my situation is just go to the papers on Sunday then yeah? Yeah I cannot be arsed with it, I'm sick to death of being messed about by everyone, you're asking me what I wanted and I said what I wanted and now you're saying no so why don't you come back with something to me then [X]?" He said it was difficult to comment but would come back in the next half hour. She rang off.

31. Evidently, the papers for the injunction application were prepared or finalised between this call, at around lunchtime on 17 February, and the morning of 19 February when the application was made.

Contact with The Sun

32. Ms Feely's statement explained that before 9am on the morning of 19 February 2015 Mr Manley had contacted Justin Walford, the in-house Counsel of the publisher of The Sun, and had given him notice of the application to be made that day. He had given Mr Walford an account of the events to date, including "that the defendant had met with a representative of the claimant and said that she wanted payment of the sum of £100,000 and was willing to cancel the contract if the claimant agreed to pay that sum". Mr Walford had called back and said that the newspaper would not wish to appear at the hearing, would comply with any order, and would not publish anything "other than possibly about a blackmail case if that did proceed." It is evidently these conversations which prompted the line taken by The Sun on Sunday when it published the article on 22 February alleging "blackmail".

The claimant's case of blackmail

33. Ms Feely's statement said this of the recorded conversation of 17 February: "Effectively the defendant is seeking to extort money from the claimant in return for the defendant refraining from selling embarrassing sexual, highly confidential and clearly private information and intimate photographs of the Claimant to the press." She spoke of "convincing evidence that the prospective defendant is seeking to blackmail the claimant" (present tense). She referred in this context to the defendant's conduct on 16 and 17 February coupled with her email retracting permission for the story. In her concluding observations she asserted that "What distinguishes this matter from an application for a standard privacy injunction is the element of blackmail."

34. The skeleton argument put before Walker J also placed emphasis on the allegation of blackmail. Outlining the facts, it referred to the transcript of the phone conversation of 17 February 2015, and quoted the defendant's words as set out in paragraph 30 above, saying of them that these were "her last words during the conversation." Under the heading "Misuse of Private Information" it was said that "a public interest defence would be unlikely to succeed … The public interest in preventing blackmail will generally outweigh the public interest in freedom of expression." Under the heading "The D's Motive" it was said that the defendant had maintained her threat to publish unless paid £100,000 during the phone conversation and that "She is therefore blackmailing the C by seeking the payment of money in return for not publishing his private information."

The hearing and judgment

35. The hearing before Walker J and the short judgment he gave were public, but subject to anonymity orders and reporting restrictions. At the outset of the hearing, having read the papers, the Judge explained that he was granting anonymity "because the claimant's account, if proved to be true, means that there is a hint of blackmail on the part of the defendant. If the name of the claimant was to become public knowledge that would mean that the blackmailer had achieved their threat". He indicated that he had concluded that on the basis of the application and supporting evidence the application should in principle be granted, subject to certain revisions to the draft order. In his short judgment after submissions he reiterated that anonymity was granted due to the "hint of blackmail", and concluded that he was satisfied that the relevant tests and authorities had been put before him and were satisfied.

The case develops

36. On 10 March 2015 witness statements of the defendant and her mother were served. The Particulars of Claim were served on 11 March. On 13 March a third witness statement of Ms Feely and a statement of Mr X were served on behalf of the claimant by way of reply. (Ms Feely's second witness statement dealt with attempts to serve the order on the defendant). There was no evidence from the claimant, his partner, or the Agent.

The events of 15-16 December 2014

37. The defendant's evidence is that on that evening the claimant behaved like a single man out on the town. He did not tell her he was married or in a long-term relationship. When they went back to Mr X's flat and she performed oral sex on him, the other four

players present "kept coming into the room or trying to come into the room so they knew what was going on." She kept telling them to go away and they ended up moving from room to room. The act was "witnessed by several people." None of this is disputed in the reply evidence.

The messages

38. The defendant kept the messages that passed between the claimant and her, and copies are exhibited to her statement. As Mr Dean points out, not only did the claimant initiate the exchanges, it was he and not the defendant who sent explicit photos, he did so without any prior encouragement from the defendant. Mr Dean adds that he did so without making any express request for confidentiality.

The Sun contract

39. The defendant's evidence is that it was The Sun who approached her seeking a story, having learned of her encounter with the claimant from a third party. She signed a contract for £30,000 on 13 February 2015 and attended a photo-shoot at a city centre hotel between 10am and 3pm on Saturday 14th, with a view to publication the following day. During the day the price was negotiated down by Mr Halls, who said that the editor would not pay £30,000 but only £15,000. A revised deal was struck at £17,500. At the end of the shoot Mr Halls said the story would go out on 22 February. My conclusion is that the reason for this was the response of the Manager when called by Mr Halls whilst the shoot was in progress. That may also account at least in part for the reduction in price. The defendant's evidence is that she was not told about any conversation with the Club. It seems clear that by this stage the defendant had disclosed to The Sun a good deal, if not all of the information that she had.

Dealings between Mr X and the defendant

40. The defendant discloses that the first contact by Mr X was on the evening of Saturday 14 February, at 10.45pm. She exhibits a text from him sent at that time asking her to call him. He called her "a lot" on the following morning. They spoke twice during the afternoon. The defendant's friend recorded the conversations, which took place when the two were in the defendant's car. (The reason given for recording the calls is so that the defendant could show The Sun that she had not initiated contact with anyone else about the story). Transcripts are exhibited.

41. In the first conversation Mr X began by asking to "speak to you about a few things if that's alright?" The defendant responded "But I don't know who you are and I don't know what you want to speak to me about." Mr X offered to drop the defendant a line on WhatsApp "explaining a little bit about what it's about and so on and what we want to try and sort out." These last words indicate clearly that there was at this initial stage a plan on the claimant's side "to try and sort out" something. The second conversation took place before any WhatsApp messages. The start was not recorded but the transcript begins with Mr X saying "… can get out of it, trust me." He sought a meeting saying "I want it sorted… We'll talk, and we'll sort it out alright?"

42. The WhatsApp exchanges, which were not mentioned in Ms Feely's evidence, are exhibited by the defendant. They are fairly extensive. In them, after arrangements to meet have been made, the defendant asked Mr X "What we going to be doing

tomorrow?" He answered "We just need a chat that's all I think. Try and help each other out I think … Sort some things out. Then we move on all being well."

43. Mr X does not dispute any of this evidence. Indeed, his statement, served after this evidence was put in, adds a factor to the reasons behind the meeting with the defendant which was not mentioned in Ms Feely's first statement. He refers to discussions with the claimant and the Agent and says "we all agreed that I should invite the defendant to attend a meeting with me *to find out what it was that the defendant wanted*, ..." (the emphasis is mine).

44. The defendant's account of the meeting at the hotel is that it was Mr X who was offering her money, and not her that demanded it. She says he told her she could get out of The Sun contract easily, and asked what the Sun had offered. He said "What do you want" and she said "I don't know". He kept saying "what do you want? Money is no object" and then, after making phone calls he whispered to her "£100,000" to which she said "yes, okay". She categorically denies saying "£100,000 is what I want". She says he told her men from another country were going to get the money in cash and bring it on 17 February. The defendant's mother's statement supports her account of events at the meeting stating, in particular, that in her presence and hearing Mr X whispered to the defendant the sum of £100,000, and said that the money would be paid in cash. Mr X accepts that it was he who asked what the defendant wanted, but he denies that it was he who mentioned the sum of money, or that there was any suggestion of payment in cash.

"Blackmail"

45. The defendant completely rejects this allegation, denying that she made any calls to Mr X on 17 February and maintaining that the true position is this: "after I had agreed to sell my story to The Sun, the claimant's representative contacted me and offered me £100,000 to renege on my agreement with The Sun. I agreed with that proposal, but then, after it became apparent to me that the claimant was trying to back out of that agreement I told his representative that I was not interested in any offers of money [from] him and asked him not to contact me again. I did this in a text message which was not shown to the Judge who granted the injunction."

46. The text, sent at 12:43 on Wednesday 18 February 2015, is exhibited to the defendant's statement. It said "Don't contact me again with any more offers I'm not interested please don't ring this number again!!!!!" Mr X admits that the text was sent. Although express complaint is made of its non-disclosure in the defendant's evidence, to which Mr X refers, his statement offers no apology or explanation for the fact that the message was not mentioned in the evidence for the claimant that was put before the Judge. He says "I believe that this message was to cover up the fact that she had requested the sum of £100,000 from the claimant, and had an idea that I had recorded our telephone call. There is no consistency in this 'WhatsApp' message compared with the others I had received, in terms of time and language used." Mr X does not explain why he believes this. What he means by his references to time and language is obscure, as there is nothing odd about the time or, on the face of it, the language of the message.

47. Ms Feely's third statement does not offer an apology or explanation for the omission of reference to this message, either. She denies the court was misled in any way. She

says that the application "was made on the basis of the instructions received from the claimant and his representatives", and that the facts set out her first witness statement were "repeated as they were put forward to me by Mr X and the claimant's agent ... on behalf of the claimant (whose command of the English language is insufficient for him to provide adequate instructions without assistance.)". These two statements are different, and the former does not explain what part the claimant played in giving instructions. I have indicated my conclusion on that issue above.

48. Ms Feely states that "the text, WhatsApp messages and video clips were deleted by the Claimant". This is clearly a reference to the exchanges between claimant and defendant, and is repeated in the Particulars of Claim. Ms Feely states: "we provided the court with copies of the evidence we were in possession of." She does not say, nor does Mr X or the Particulars of Claim, that anyone had deleted the WhatsApp and text messages that passed between Mr X and the defendant.

Harm or distress

49. The defendant's statement notes at paragraph 50 that there was no mention in Ms Feely's first statement of any distress that would be caused to YXB by the release of any of the information. The response came in Ms Feely's third statement. The information in this statement was, like her first, said to be "derived from my own knowledge unless otherwise stated." At paragraph 18 she refers to the defendant's paragraph 50, describing it as "remarkable" to suggest the claimant would not be distressed. She asserts that it is "obvious that such would result from infringement of his privacy. For the avoidance of any doubt the publication of the claimant's confidential and private information would undoubtedly cause the claimant distress and embarrassment." This once again takes the form of a submission rather than a statement of fact based on what she has been told by the claimant. She goes on "The claimant believes that his sex life is and should remain private and that details of it should not be published to the world at large (whether for commercial gain or not)". This is not much better. Although it does refer to what the claimant believes, it does not state that she has spoken to him about the matter. I note that the statement of truth on the Particulars of Claim is not signed by the claimant but by Ms Feely.

50. Mr Dean made much in his argument of the deficiencies of the claimant's case in this regard, pointing to the lack of any real evidence as opposed to assertion that the claimant would suffer distress or other harm in the event of disclosure. He drew attention to the fact that the Particulars of Claim do not even allege that distress would be suffered. In the course of his submissions in reply, Mr Bennett told me on instructions from the Agent that "publication to the world at large of pictures of the claimant's penis and the texts would cause him embarrassment in the face of his friends, family and girlfriend."

Discussion

Material non-disclosure

51. Mr Dean focuses on three facts, which he submits I can safely conclude are made out, are material, and were not disclosed: the fact that the encounter at Mr X's flat was witnessed by others; the fact that the purpose of the meeting at the hotel was to find out the defendant's price for withdrawing from her contract with The Sun; and the

text message sent by the defendant to Mr X. I agree that all three matters are established on the evidence before me, and that all are material facts which should have been but were not disclosed.

52. The fact that others interrupted the oral sex in the early hours of 16 December is not, as Mr Dean frankly accepted, the most important matter in the world for present purposes. Nonetheless, the extent to which information is already known to others and might be or might have been disclosed by them is a material issue. The fact that there were several other players who knew what had happened was not only unchallenged in itself, it is also something which on the undisputed evidence must have been known to the claimant. The evidence for the claimant does not convince me that any instructions on that, or indeed any issue were taken directly from the claimant. The closest the evidence comes to asserting as much is the passage from Ms Feely's third statement that I have quoted at 47 above, but her evidence as a whole and her reference to language difficulties suggests otherwise. The position appears to be that the claimant's account was given to the Agent and relayed by him to the solicitors. That may account for the fact that this point was not addressed. It was not suggested that this was a deliberate non-disclosure, but it seems to me obvious that it should have been made, and that the approach taken to obtaining instructions is likely to have been at the root of the problem.

53. The purpose of the meeting between Mr X and the defendant is a much more important point. Clearly, the meeting had more than one purpose, but the impression conveyed by the evidence put before Walker J was quite different from the one that emerges from the undisputed transcripts of the two calls between Mr X and the defendant, the WhatsApp exchanges between them, and the statement of Mr X. All of this material supports the conclusion that the main purpose of the meeting was to make sure the defendant's story did not get out, and to that end to find out how much evidence she had and what it would take to buy her silence. In my judgment it cannot sensibly be denied that the picture presented was materially inaccurate, given what Mr X has now said in his statement and the documentary evidence produced by the defendant.

54. Mr Dean goes further and submits that the fuller evidential picture now available makes clear that there had been nothing that could be described as blackmail, which requires an "unwarranted demand with menaces": Theft Act 1968, s 21. Here, there was no demand but rather an unsolicited offer by Mr X, accepted by the defendant, he submits; even on Mr X's version of events, in which the defendant named the figure, it was clearly he who invited her to do so. There were no menaces either, submits Mr Dean. The defendant had already agreed to and disclosed the information. She was initially encouraged and persuaded to retract consent to publication. She was not menacing the claimant with publication. Thirdly, even if she was menacing the claimant she believed she had reasonable grounds for doing so, as she had a contractual obligation to the Sun.

55. I see a good deal of force in the first and second of these submissions. However, the scope of the offence of blackmail is broad, and one must be careful not to take a narrow or literal view of the terms "demand" and "menaces". It is important also not to conduct a mini-trial of such an issue on an interim application, without hearing the recorded conversations, or cross-examination. What I can and do conclude is that the case for describing what took place on 16 and 17 February as blackmail is weak, and

a great deal weaker than it was made to appear on the application to Walker J. In particular, the evidence gave an incomplete and therefore inaccurate account of the reasons for the approach to the defendant on 17 February. The fact that the purpose, or one main purpose of the meeting was to find out the defendant's price could and should have been obtained from Mr X, and was not. The existence and content of the WhatsApp messages between him and the defendant also could and should have been ascertained and disclosed. They strongly support the view that what took place was entirely initiated by the claimant's representatives, with a view to buying off the defendant.

56. What is entirely clear, so far blackmail is concerned, is that it was misleading and wrong to suggest to Walker J on 19 February 2015 that the defendant "is blackmailing" the claimant, without disclosing the WhatsApp message she had sent Mr X at lunchtime the previous day, saying that she wanted no further offers. If that message is accepted at face value it destroys any suggestion that there was blackmail at the time. The reasons belatedly given for suggesting this message was got up by the defendant as some kind of cover story do not strike me as very compelling. At any rate, it cannot seriously be disputed that this was a material item of evidence which ought to have been disclosed and, to his credit, Mr Bennett did not dispute it.

57. Mr Dean invites me to conclude that this was deliberate non-disclosure. It seems to me that it was on any view highly culpable because the text was plainly relevant to the issues that were going to be before the court the following day, and there was plenty of time available to ensure that it was dealt with. I accept the evidence of Ms Feely that it was not known to the claimant's solicitors. It follows that Mr X did not tell them of it. The conclusion must it seems be that either the claimant's solicitors did not take proper steps to ensure that Mr X informed them of any written communications between him and the defendant, or they did and Mr X nevertheless failed to disclose the message. The fact that neither the solicitors nor Mr X acknowledge any fault is troubling. Either way, the claimant must accept the responsibility and the consequences, since both the solicitors and Mr X were acting as his agents.

58. The fact that the message was not disclosed to the solicitors by Mr X had an unfortunate consequence. Counsel, also ignorant of the message, referred in his skeleton argument before Walker J to the defendant's "last words" in the telephone conversation of 17 February. This did not state that these were the defendant's last words to Mr X, but that conclusion was implicit, given the absence of any evidence of any subsequent communications between them. The implication was wrong.

59. In my judgment the importance of the duty of full and frank disclosure, and the seriousness of the material non-disclosure in this case, lead to the conclusion that the injunction, anonymity order, and reporting restriction granted by Walker J and continued by me must be discharged. In my view, the third item of material non-disclosure would of itself be sufficient to justify that conclusion. Taken together with the others, the case for discharge is highly compelling. There is little to put in the scales against it. I bear in mind that the main effect of discharging the orders as to the past is that the claimant will have to pay his own costs of the applications, as well as the defendant's costs of the application to discharge. There might in principle be an application for damages pursuant to the cross-undertaking. None of these consequences can be said to be unjust. There is no effect on the claimant's substantive position.

Re-grant?

60. The next question concerns the future. It is whether to exercise the discretion referred to in *Brink's Mat* to grant a fresh injunction. I have given careful consideration to this question, bearing in mind that the case is of the "kiss-and-tell" variety, and that there is in general no public interest in the disclosure of details about matters of this kind. However, the issue at this stage is not simply whether an injunction would be granted on the evidence as it now appears, although the merits are a relevant factor. It seems to me that I should approach the question of whether the discharge of the existing order should be accompanied by the refusal of fresh restraints on disclosure and identification by asking myself whether the refusal of further relief would in all the circumstances be a just and proportionate response to the non-disclosure. I have reached the conclusion that it would, and that I should refuse further restraint on disclosure of information.

61. The principal factors that I have taken into account in reaching that conclusion are these:

i) The importance of encouraging full and frank disclosure, and the need to deter others from future breaches of that duty, which mean that fresh injunctions should be granted sparingly.

ii) The images, in respect of which the claim is strongest, and to which it is clear that the claimant (understandably) attaches the greatest importance, will be protected in any event, given the defendant's concessions. The primary point made in the statement of Mr Bennett in reply is therefore covered. I add that it is hard to see an answer to the copyright claim in respect of the images. No copyright is asserted, however, in the wording of the text messages.

iii) The claimant's claim in respect of the information is a weak one.

a) Although information about sexual life will generally be a prime candidate for protection, the sexual relationship here was fleeting and involved a single act. The relationship involved no form of intimacy other than the sexual. Relationships of this kind may be accorded less weight than more established ones, when considering whether it is necessary to interfere with the freedom of the other party to speak about the relationship. The point is illustrated by *Theakston v MGN Ltd* [2002] EMLR 22 [63]-[64] and *A v B plc* [11(x)-(xii)], [45], [47].

b) The limited extent of the relationship means that the interference with privacy that publication would involve is correspondingly limited. Put bluntly, beyond identifying the claimant as the "Prem star" referred to in the Sun on Sunday, the defendant does not have a lot of new information to disclose.

c) The claimant's own attitude to the privacy rights relied on is a relevant, and important, factor. When applying an intense focus to the specific rights at issue in the individual case, the court can hardly be expected to attach great weight to the privacy rights asserted on the claimant's behalf if he fails, without justification, to give any evidence himself.

The most remarkable feature of this case is the complete absence of any evidence from the claimant. I do not regard the language difficulties briefly referred to in passing by Ms Feely as coming close to an adequate reason for the absence of such evidence. It is not necessary to have evidence to know that Premier League footballers can afford to retain translators and interpreters if necessary. As it happens, the evidence necessarily implies that the Agent was able to obtain from the claimant personally an account of what took place between him and the defendant. Not only is there no statement from the claimant about his attitude to disclosure, there is not even any hearsay evidence of acceptable quality of what he has to say about the matter. What has been said by Mr Bennett on instructions suggests that the concern is embarrassment, and mainly directed at the images, which are to be protected anyway. This lends support to Mr Dean's submission that the claimant has not shown any great concern about privacy for his sexual conduct.

d) It is clear that this application has been primarily driven by others, and there are strong grounds for inferring as I do that commercial motives play a considerable role. I say that because of the very limited role played by the claimant himself, the extreme weaknesses of the evidence in support of a claim to privacy, and the leading role that has clearly been taken in events by the claimant's Agent on his behalf.

iv) I do not consider it likely that the claimant will establish at trial that the defendant blackmailed him. It can fairly be said, as it can of anyone selling personal information for publication, that the defendant's conduct is unattractive. However, assessing the case on the evidence now before the court the strong probability is that a court would find that the claimant's representatives decided to buy off the defendant, and sought to persuade her to name her price, and that her conduct did not amount to blackmail. I do not believe the policy arguments in favour of protecting blackmail victims are a weighty consideration in the circumstances of this case.

v) Nor is the claimant's claim materially bolstered by the rights of others. Although the claimant's partner/girlfriend has been mentioned in evidence and in Mr Bennett's statement on instructions, her rights are not in the end relied on. Rather, she is identified – after friends and family – as someone in whose eyes the claimant would be embarrassed by certain aspects of the publicity that could occur. I have to consider her rights, but without evidence from her, or information or evidence about her, other than that which I have described I do not think I can attach weight to them now. Nothing is said about whether she does or does not know of what happened between the claimant and defendant. I infer from what has been said that she probably does know, in which case publicity will not be news to her. Nor do the rights of the child in this case feature in the argument or the evidence, save to the very limited extent mentioned. I must assume that the view of the claimant and his advisers is that the child will not be adversely affected by publicity.

vi) Turning to the defendant's rights, she is entitled to be named, if that is what she wants. Although no explanation was offered for this in the without notice

application documents it was in my judgment right to anonymise the defendant at that point, because publicity would have been unjust to her, when she had been given no opportunity to challenge the case against her: CPR 39.2(3)(e) and (g). However, I see no justification for anonymising the defendant at this stage. Mr Bennett advanced no submissions on this point in his skeleton argument, and was unable to do better at the hearing than to suggest that naming her might in some unspecified way lead to the claimant's identification. That is not good enough.

vii) If the defendant is named, a substantial part of the story will be in the public domain, attached to one name. There is likely to be speculation about the identity of the unnamed footballer. Others may unjustly be brought under suspicion. There is thus a degree of genuine public interest in ensuring that the story has an additional name attached to it.

viii) Although I do not see great weight in the defendant's argument that she has been defamed by the allegation of blackmail made in The Sun – she has not been identified to the public as the woman in question, but only to staff at The Sun - I would nevertheless accept that there is a modest degree of public interest in putting before the public the other side of the story.

ix) The claimant's Article 10 rights have some value in striking the balance. I would not place any substantial weight on her right to speak of her sexual experiences with the claimant as such. They are in the nature of gossip or "tittle-tattle", at a relatively low level on the scale: see *CC v AB* [2006] EWHC 3083 (QB), [2007] EMLR 11 [36]. Nor, given the limited identification of her so far, do I place great weight on the defendant's right to speak publicly at this stage of the falsity of the blackmail allegation against her. But the case for interfering with her Article 10 rights is not a strong one either.

x) If the claimant has a justifiable claim that disclosure would represent a misuse of private information, he will have a remedy in damages if it now takes place. Damages, if recoverable, would be proportionate to the harm caused: see *Spelman v Express Newspapers plc* [2012] EWHC 355 (QB) [114].

xi) Finally, I bear in mind two considerations about what might have been, had there been no allegation of blackmail. First, there might have been no application without notice or, if there was, the court might have declined to deal with the matter without notice. Secondly, the court might well have concluded that the appropriate order was one that restrained disclosure of the images and information whilst naming the parties and describing the information as related to a sexual liaison. In that way the fact that the claimant had a sexual relationship with someone who was not his partner would have been known, but without the intrusive detail. In the event he obtained an order that is substantially more restrictive. It is not unjust in the circumstances to deprive him of that potential benefit.

62. In summary, if the photos and video material are taken out of the equation what is left are relatively weak privacy claims, which are not substantially supported by blackmail arguments or third party rights, and which the claimant has not himself given evidence to support. The result is that even if non-disclosure, anonymity, and

reporting restriction orders might otherwise have been continued until trial, a decision to discharge and not to re-grant the orders is in all the circumstances a just and proportionate response to the material non-disclosure for which the claimant must accept responsibility.

Conclusions

63. The evidential picture now before the court is materially different from that which was presented to Walker J, in a number of ways. In my judgment, the evidence on behalf of the claimant at that hearing failed fully and frankly to disclose all the information which was available to the claimant and could have been put forward had proper inquiries been made, and which it was material for the court to know. It is appropriate to discharge the orders made then and continued until this hearing.

64. The grant of injunctions to protect the images for the future is rightly conceded. Otherwise, it is not appropriate to exercise the discretion to grant fresh orders. The discharge of the past orders and the refusal of orders for the future is a just and proportionate response to the non-disclosure, having regard to the protection that there will be for the images, and the relative weakness of the remainder of the claimant's case.

65. In these circumstances it is unnecessary to address the question of a variation to allow disclosure to "friends and family", though I record that this was not opposed in principle and would have been granted in an appropriate form, as a blanket restriction would not be proportionate: see *CC v AB* at [35].