

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2012

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

Katie Price
- and -

Claimant

(1) Claire Powell (2) CAN Associates Ltd (3) Peter Andre (4) Jamelah Asmar

Defendants

Aidan Eardley (instructed by **Archerfield Partners LLP**) for the **Claimant**
David Price QC and Korieh Duodu (instructed by **David Price Solicitors and Advocates**) for
the **Defendants**

Hearing date: 3 December 2012

Judgment

Mr Justice Tugendhat :

1. This is a privacy action. The claim is for damages for misuse of private information, an order requiring the defendants to deliver up copies of documents and an order requiring them to disclose to the claimant the names of persons to whom the information in question has been disclosed. No interim injunction has been sought, but there is a claim for a permanent injunction to be granted at trial. The action was started on 23 March 2012 with the service of the Claim Form and Particulars of Claim. Defences were served by all four defendants in May, and a reply was served on 31 August 2012.
2. On 26 September 2012 the fourth defendant gave notice that she would apply for an order that the claim be struck out pursuant to CPR 3.4 (2) (b) and/or the inherent jurisdiction of the court because it is said the claim against the fourth defendant is an abuse of process. This judgment is on that application. The other defendants have not made an application, although they have raised similar points in their defences.
3. The main ground advanced for the application is based on *Jameel v. Dow Jones & Co Inc* [2005] QB 946, namely that the claim does not disclose a real or substantial tort, or, in other words, a substantial interference with any privacy right on the part of the claimant. The second, third and fourth grounds relied on are that the claim does not

serve the legitimate purpose of protecting the claimant's privacy, that there is no tangible or legitimate advantage in the continuance of the claim which would outweigh the disadvantages for the parties in terms of expense and a wider public in terms of court resources, and/or that it constitutes an interference with the fourth defendant's freedom of expression that is not necessary for the protection of any privacy right on the part of the claimant.

4. The claimant is very well known. She first came to fame as a model under the name of Jordan, and is now best known as a personality in the press and other media, a writer and business woman. She was married to the third defendant until they divorced in May 2009. He too is a very well known entertainer and media personality. They have two children together who are still very young. These proceedings are a lamentable renewal of civil litigation between the two of them which has been a feature of their relationship since their divorce (for earlier litigation in this court see *Andre v Price* [2010] EWHC 2572 (QB)).
5. The fourth defendant was a friend and confidante of the claimant. She too is a former model. She had met the claimant in that capacity when they were both much younger. The first defendant is the managing director of the second defendant, which is a company providing public relations and celebrity management services. It formerly provided those services to both the claimant and the third defendant, but following the divorce they provided them to the third defendant and not the claimant. The fourth defendant met the third defendant through the claimant, but following the divorce the claimant and the fourth defendant became estranged, and the fourth defendant remained on friendly terms with the third defendant.
6. On 11 November 2011 solicitors for the claimant wrote to the fourth defendant saying that the claimant had recently become aware of contacts that the fourth defendant had had in September 2009 which are the subject of this action.
7. The claim against the fourth defendant is based on matters set out in paragraphs 10 to 16 of the Particulars of Claim. On 18 September 2009 the fourth defendant swore an affidavit ("the Affidavit") prepared for her by Lee and Thompson LLP, who were solicitors then acting for the third defendant. The affidavit bears no heading and was not sworn in relation to any pending proceedings. It covers twelve pages. It describes the fourth defendant's relationship with the claimant, and sets out information which the fourth defendant states she learnt from, or about, the claimant and about the claimant's relationship with a number of other individuals.
8. There are two topics covered by the affidavit which are the subject of the present proceedings. One topic is the relationship of the claimant with a man I shall refer to as Mr A. His name is not a secret, it is referred to in the Particulars of Claim, but there is no reason why in this judgment further publicity should be given to him and good reason why it should not. He is not represented. The other topic is a claim made by the claimant that some years ago she was raped by a man I shall refer to as Mr B. He is not named in the Particulars of Claim.
9. The claimant had a business relationship with Mr A. There have also been allegations in the media that she had a clandestine sexual relationship with him, which she has denied.

10. The Affidavit at paras 10 to 17 contains detailed information about the claimant's relationship with Mr A, the fourth defendant's observations on that relationship as it appeared to her, and information which she claims the claimant communicated to her about that relationship. Much of it relates to highly personal matters. The other part of the Affidavit which is the subject of these proceedings is a single paragraph. In it the fourth defendant states that in the summer of 2008 the claimant communicated to her the identity of the man the claimant alleges raped her a number of years previously.
11. In para 12 of the Particulars of Claim the claimant pleads that the information in question was intrinsically private and that she had a reasonable expectation of privacy in respect of that information, and the claimant disputes the truth of it. She claims that she revealed the identity of Mr B in a confidential conversation between close friends.
12. In para 13 of the Particulars of Claim the claimant alleges that, in October 2009, the first defendant, with the knowledge and approval of the fourth defendant, offered the information contained in the affidavit to *The News of the World* for publication and entered into negotiations for the terms on which the information would be provided for publication. A copy of the Affidavit was provided to *The News of the World* on or about 14 October 2009. On 21 October 2009 the fourth defendant met a journalist from that newspaper and, it is alleged, repeated the information the subject of this action. The Claimant pleads that it is to be inferred that the sole purpose of the Affidavit was to provide comfort to *The News of the World*, or some other newspaper, in the event that they might wish to publish its contents.
13. In her defence the fourth defendant admits that the meeting on 21 October was with a view to a possible article about the Claimant. She admits that there was a discussion about the claimant and Mr A, but she has no recollection, she says, of any other discussion about Mr B.
14. The substantive defence of the Fourth Defendant is that the Claimant has herself published so much material and information about her own private life that the communications by the fourth defendant which are complained of were justified, so that any expectation of privacy which the claimant might otherwise have had is overridden. The particulars of this plea cover some four pages. The particulars include the reference to the issue of *OK!* Magazine dated 29 September 2009. That contains text and photographs produced with the active co-operation of the claimant and Mr A and, apparently, Mr A's wife. These show the Claimant and Mr A in suggestive poses with a view, so it is said, to ridiculing the allegation that there had in fact been a sexual relationship between them.
15. A further particular refers to the issue of the same magazine dated 1 September 2009 and an interview on television on 3 September 2009. In these the claimant claimed that she had been raped some years in the past. She gave certain information which led to widespread speculation as to who Mr B might be.
16. The fourth defendant pleads that the claimant was, in autumn 2009, conducting a wide ranging attack on the third defendant in the media, and the third defendant had commenced defamation proceedings against the publishers of *Now Magazine* over statements attributed to the Claimant. She states that the contents of the Affidavit

were determined by what the third defendant's solicitor judged to be of assistance, or potential assistance, to him. He, the third defendant, had a legitimate interest in obtaining and recording in a formal manner information that was, or could be, relevant to the Claimant and his marriage to her.

17. The Fourth Defendant pleads that the inclusion by the claimant in the body of the Particulars of Claim of the name of, and the allegation involving, Mr A has itself led to foreseeable and widespread reporting of the allegations. All of this reported material remains accessible through the internet.
18. The Fourth Defendant also pleads a public interest defence, pursuant to clause 3 of the Press Complaints Commission Code of Practice. These relate to "preventing the public from being misled by an action or statement of an individual" and "detecting or exposing crime" (which I take to be a reference to disclosing the name of the alleged rapist).
19. The Fourth Defendant states that the motive in swearing the Affidavit was to assist the Third Defendant and was not financial. But she admits that in relation to the meeting with the journalist of *The News of the World* her motivation was partly financial and partly to assist the Third Defendant.
20. She further pleads that there are no reasonable grounds to apprehend further use of the information the subject of this action by the fourth defendant. There is no suggestion that she has repeated her disclosure since 2009. Disclosure was extremely limited, to one or two journalists, with a view to them considering whether they wished to publish. *The News of the World* has ceased to exist. The other media chose not to publish the information in 2009 save to the extent that it had already been made public by the claimant. In an e-mail written before the commencement of the proceedings, on 23 November 2011, she had stated:

"I can assure you that I will not be repeating anything to anyone"

She made the same point on 1 December 2011.

21. In the Reply to the defence of the fourth defendant the claimant made clear that much of the background to this dispute is agreed. The claimant admits that she had inadvertently identified the name of Mr B to a small number, she says two, members of her production crew with whom she was working and who undertook not to disclose the name. She asserts that she has not surrendered her privacy rights, but has always sought to exercise careful control over what specific pieces of information may be publicised.

Submissions for the fourth defendant

22. Mr Price accepts that the court must assume for the purposes of the present application that the claimant will succeed in proving at any trial the facts which she alleges, and which are not already admitted. So no evidence has been adduced from the fourth defendant.

23. *Jameel* was a libel action in which the meaning complained of was the very serious one of funding terrorists. Although the claimants initially contended the circulation within England and Wales was substantial, they later accepted that only three persons had ever accessed the information within the jurisdiction, and not prospect of an injunction being granted. Lord Phillips MR, giving the judgment of this Court, held:

“54 An abuse of process is of concern not merely to the parties but to the court. It is no longer the role of the court simply to provide a level playing field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice. If Dow Jones have caused potential prejudice to the claimant by failing to raise the points now pursued at the proper time, it does not follow that the court must permit this action to continue. The court has other means of dealing with such prejudice. For instance, appropriate costs orders can compensate for legal costs unnecessarily incurred and relief can be made conditional on Dow Jones undertaking not to raise a limitation defence if proceedings are now commenced in another jurisdiction.

55 There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more proactive. The second is the coming into effect of the Human Rights Act 1998. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, in so far as it is possible to do so. Keeping a proper balance between the article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.”

24. In another defamation action, *Wallis v Valentine* [2003] EMLR 175, the Court of Appeal approved the approach taken by Eady J in *Schellenberg v BBC* [2000] EMLR 296, also a defamation action. Eady J had said that he could not accept that:

“there is any realistic prospect of a trial yielding any tangible or legitimate advantage such as to outweigh the disadvantages for the parties in terms of expense, and the wider public in terms of court resources.”

25. On that basis Mr Price submits that the same applies in the present case, with adaptation of the test to the extent appropriate to reflect the fact that it is a privacy action.
26. In an action for misuse of private information which is not based on a relationship of confidence, the claimant has to satisfy the two-stage test set out in *McKennitt v Ash* [2008] QB 73 at [11]. As Buxton LJ said

".....Where the complaint is of the wrongful publication of private information, the court has to decide two things. First, is the information private in the sense that it is in principle protected by article 8? If no, that is the end of the case.

If yes, the second question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by article 10? The latter enquiry is commonly referred to as the balancing exercise...."

27. Mr Price submits that a claimant in privacy has also to satisfy the court that that the past misuse alleged, and any threat of future misuse, are each of such seriousness that the court ought to order a remedy. The most common remedies that might satisfy this requirement are by way of an injunction, or, as has been less common hitherto, substantial damages. He submits that neither is likely to be appropriate in the present, even assuming that the court finds in favour of the claimant on all her disputed factual contentions.
28. The main points made by Mr Price in support of this submission are:
 - i) The claimant is notorious for trading on intimate details of her private life (including sexual and medical matters) which would ordinarily be matters in respect of which a person would have a reasonable expectation of privacy: the information complained of in the Affidavit is essentially the same, being no more than additional detail;
 - ii) The past disclosures alleged are to two journalists and a solicitor, and no harm was caused to the claimant;
 - iii) Those disclosures took place over two years before the claimant found out about them and commenced this action. There is no evidence of any repetition, and the circumstances in which the claimant came to find out about what she complains of are not relied on by her as giving rise to any likelihood of further disclosures;
 - iv) The allegation (which the claimant denies) that she had an affair with Mr A was disclosed to the public at large by the claimant herself;
 - v) The claimant's initial complaint about the allegation involving Mr A was advanced in defamation, but has not been pursued under that heading (Mr Price acknowledges that a claim in defamation would now be outside the one year limitation period applicable to defamation claims, unless the claimant were granted an extension of that period);
 - vi) The fact and manner of the claimant's allegation that she had been raped were such as to excite interest amongst the public about the identity of the man she accused. She has thereby waived her own right to anonymity as a rape complainant, and defendant's are not entitled to anonymity;

- vii) The claimant's claim for damages is based only on injury to feelings, whereas her own voluntary disclosures of similar facts show that she is not sensitive to disclosures of this kind, and her real complaint is what she claims is the inaccuracy of the information, which is reputational damage for which the appropriate remedy is by way of defamation where the law also allows a defence of truth which is not available in defence of a privacy claim.
29. In addition Mr Price submits that the likelihood of repetition is further diminished by the risk that such disclosure would be likely to attract a claim for defamation by the two men concerned, and in particular Mr B, given the gravity of that allegation.

Submissions for the claimant

30. Mr Eardley reminds the court that the first part of the claim is not made against the fourth defendant. It relates to an e-mail referred to as the Partridge Email which the claimant alleges contains information for which the fourth defendant is a source. The claimant claims that this email shows that in the summer of 2009 the first and second defendants were improperly collating private information about her in order to cause damage to her. It must be assumed that the claim against the first to third defendants will proceed to trial.
31. Mr Eardley submits that it is important that, while the claim against the fourth defendant is not brought in contract, the claimant does allege (at para 12) that there was a relationship of confidence between herself and the fourth defendant, and (at para 16) that before swearing the Affidavit, the fourth defendant and the first and second defendants had signed confidentiality agreements by which they promised and purportedly licensed each other to share private and confidential information relating to the claimant. The claimant further pleaded (at para 8) that the first and second defendants were under an equitable obligation not to use information communicated by the claimant for any purpose other than for the purpose of performing the second defendant's obligations under the Management Agreement. The claimant has also pleaded that the fourth defendant had entered into a formal confidentiality agreement with the claimant dated 28 January 2009, a copy of which is before the court.
32. Given the relationship between the claimant and the fourth defendant, he submits this is an action which could have been brought on the basis of the law of confidentiality as set out in *Argyll v Argyll* [1967] Ch 302, and more recent cases in that line, in particular *Associated Newspapers Ltd v HRH Prince of Wales* [2006] EWCA Civ 1776; [2008] Ch 57.
33. Further in his submission the details in the Affidavit concerning Mr A are the sort of detail of which the court commonly prohibits disclosure, even in those cases where the court does not prohibit the bare fact of a relationship or alleged relationship. He submits that these details have not previously been disclosed to the public at large, and such disclosures as have apparently been made by the claimant herself provide little support for the fourth defendant's case, for the reasons given by Nicol J in *Ferdinand v MGN Ltd (Rev 2)* [2011] EWHC 2454 (QB) para [56]:

“Nor do I think that the earlier publicity which [the claimant] had attracted affects this first question. He said in evidence that he had considered very carefully how much of his private life

he wanted to discuss in the media. There is no basis for arguing that, by his own public statements on his private life he had forsaken a reasonable expectation of privacy in connection with his relationship with Ms Storey. In *KGM v News Group Newspapers Ltd* at [38] Eady J. said that "The so-called 'zonal' argument has become discredited since at least the decision of the Court of Appeal four years ago in *McKennitt v Ash.*"

34. Mr Eardley notes that the sole basis of the application before the court is *Jameel*, and that it is not advanced on the basis that there is no reasonable ground for bringing the claim (CPR r.3.4(2)(a)), nor is there an application for summary judgment on the basis that there is no real prospect of success (CPR r.24.2(a)(a)). So the court must proceed on the basis that the threshold of seriousness required to engage Art 8 has been crossed. He cites authorities for the proposition that unless a threshold of seriousness is passed, there can be no claim for misuse of private information: *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 [2006] UKHL 11 para [83] which he submits must have been intended to read:

"Less serious interference would not merely [not] have been a breach of article 8; it would not have fallen within the ambit of the article at all".

35. In *R(Wood) v Commissioner of Police of the Metropolis* [2010] 1 WLR at para 22 Laws LJ said that if Art 8 is to be engaged the alleged interference must attain a certain level of seriousness. There is a threshold of seriousness in defamation also, but that is different, Mr Eardley submits. It applies to the seriousness of the defamatory meaning of the words complained of. That was undoubtedly passed in *Jameel* (where the allegation was of funding terrorists). Mr Eardley submits that in privacy claims there is little room for a finding that the claim contains allegations serious enough to pass the threshold for the engagement of Art 8, but for there nevertheless to be no real or substantial tort.
36. Mr Eardley also submits that *Jameel* arose in a defamation action because such actions are required to be brought in the High Court. The general rule is that if there is a good claim then it must be tried in a court where it can be tried under a proportionate procedure: *Sullivan v Bristol Film Studios Ltd* [2012] EMLR 27; [2012] EWCA civ 570. He submits that damages should be, and are, regarded by the law as an effective remedy: *Spelman v Express Newspapers Ltd (No 2)* [2012] EWHC 355 at para [114].
37. However, he recognises that there may nevertheless be cases where despite a proven misuse of private information no substantial damages or other remedy may be appropriate. He gives the example of a case where the claimant has sued another defendant on the same or very similar facts, and obtained judgment, so that no further remedy is required to vindicate the claimant's rights.
38. Mr Eardley also relied on *White v Withers LLP* [2009] EWCA Civ 1122, where Eady J and the CA both expressed unwillingness to strike out a privacy claim on *Jameel* grounds. But that case is distinguishable in my view: it turned to a significant extent on the fact that the defendants were solicitors whose professional conduct was in question.

39. Mr Eardley submits that the claimant's evidence that she has been "tremendously hurt and upset" cannot be dismissed summarily. She claims that the fourth defendant was a trusted confidante who has acted in gross breach of trust. A substantial award of aggravated damages would be appropriate to mark the injury for the culpable conduct of the fourth defendant in attempting to sell her confidences to the media, even if the actual harm done was (fortuitously) minimal by reason of the unwillingness of the media to carry out the fourth defendant's plan.
40. The fourth defendant is now clearly aligned with the third defendant. In an article published in the issue of NOW Magazine dated 26 March 2012 she is reported as saying "Jordan's worried because I make Pete happy". The claimant does not allege that the article amounts to a misuse of private information. But she submits that the fourth defendant was not offering to the claimant any real reassurance as to how she would act if she were not subject to the present proceedings, notwithstanding the assurances given in pre-action emails.
41. Mr Eardley submits that in the present case the claimant is in any event entitled to pursue the relief she claims other than damages and injunction. These are for orders for delivery up and disclosure of the identity of third parties to whom the information has been disclosed by the fourth defendant in addition to those already known to the claimant.
42. Further, Mr Eardley submits that it is a notable, but unusual, feature of this *Jameel* application that the other defendants have not joined in. So the case will proceed to trial, if not settled, in any event. The cost of proceeding against the fourth defendant will add little. Proportionality has to be assessed taking that factor into account. He submits that rather than strike the claim out, the court and the parties are all obliged by CPR r.1.2 and 1.3 to find a way to try it proportionately, if it has to be tried at all.

Discussion

43. Anyone who has read the volume of information of a highly personal nature disclosed to the public at large apparently by the claimant herself, including the photos of her in *OK!* Magazine with Mr A, might be inclined to conclude that the claimant is not a person whose feelings are at all sensitive when it comes to interference with her privacy. I have read a volume of material submitted by Mr Price. There is much force in his submission. But in my judgment it would be wrong for the court to form a view about it on the papers.
44. In my judgment the submission of Mr Eardley to this effect is to be preferred, as things stand today on this application. A very different picture may emerge if the case does go to trial. At that point the court could with hindsight take the view that Mr Price's submissions were well founded. But that would not be a reason for saying that the decision I have reached is wrong.
45. I reach the same view on the details relating to Mr A and the identity of Mr B. But for the disclosures to the public at large, which the claimant herself appears to have made or procured, there would be little doubt that she has a strong case against the fourth defendant as to the reasonableness of her expectation of privacy in respect of such information, and the gravity of the breach of trust that she alleges. These details do not at this stage appear to me to be of the "unremarkable" kind that the majority of the

House of Lords found acceptable for publication in *Campbell v MGN* [2004] 2 AC 457, see for example para [26], having regard to the information about which Miss Campbell did no complain.

46. I accept Mr Price's submission that the fact that the claimant has brought these proceedings by itself engages the right of the fourth defendant to freedom of expression. But the court carrying out the balancing exercise which is required when both Art 8 and Art 10 are engaged will also have to take account of the fact that the fourth defendant's case is that there is today no threat by her to disclose, nor any risk that she will disclose the information in the future.
47. I stress to all parties that they are under the obligations set out in CPR r.1.3 to help the court to further the overriding objective, and that that includes resolving this dispute in a proportionate manner.
48. There are a number of cases in which the court has found that a case may cease to be worth pursuing, even if the claimant was fully justified in commencing it in the first place. But in my judgment it cannot be said at this time that this is such a case, for the reasons given by Mr Eardley. It is open to defendants to take steps to address concerns of a claimant which the defendant accepts to be legitimate, or which a defendant has no interest in contesting. The admissions made in the defences in this case are part of that process. There can be circumstances where a privacy action may be struck out on *Jameel* grounds. It is to be noted that in granting such an order, the court is entitled to make it conditional, as Lord Phillips stated in para [54] of his judgment. But the fourth defendant has not proffered any submissions as to conditions which she might accept in any order striking out the action against herself.
49. Also to be recalled is the interests of the two children in resolving any issues between their father and mother, particularly on matters as personal as those in question in this action.
50. It is not necessary for me to express a view on the other submissions made on behalf of the parties.
51. For these reasons this application is dismissed.