Case No: HQ14D0331

Neutral Citation Number: [2014] EWHC 2979 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/09/2014

Before :

THE HON MRS JUSTICE CARR DBE

- -

Between :

(1) RUSSELL BRAND **(2) JEMIMA GOLDSMITH**	**Claimants**
- and -	
SZILVIA (AKA SYLVIE) BERKI	**Defendant**

- -
- -

Mr Aiden Eardley (instructed by **Archerfield Partners LLP**) for the **Claimants**
The Defendant in person

Hearing date: 10th September 2014

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Judgment

Mrs Justice Carr :

Introduction

1. This is the hearing of an application dated 19th August 2014 by the Claimants seeking continuation of an anti-harassment injunction granted on an urgent basis against the Defendant by Lewis J on 12th August 2014. The injunction was made following a hearing at which the Defendant attended in person but on short (and abridged) notice. A Claim Form has since been issued, Particulars of Claim have been served and an Acknowledgment of Service indicating an intention to defend all of the claim has been filed. This application proceeds by way of complete re-hearing, and the Defendant has had and taken advantage of the opportunity to serve a full witness statement for such purpose (dated 28th August 2014).

2. The First Claimant is a well-known comedian and actor. The Second Claimant is a journalist and a UNICEF UK Ambassador in which role she promotes the work of the charity UNICEF within the UK. They have at all material times been in a personal relationship together. The Defendant at all material times held herself out as a professional, qualified masseuse.

3. In June 2014 the Second Claimant arranged a professional massage from the Defendant as a birthday present for the First Claimant. There was a meeting between the Claimants and the Defendant at the Second Claimant's house in Oxfordshire on 7th June 2014. There is a dispute as to what occurred at that meeting. The Claimants say that the First Claimant was uneasy with the Defendant and did not wish to proceed with the massage. The position was uncomfortable but not unfriendly. The Defendant on the other hand alleges that she was the victim of wrongful and criminal conduct. The Claimants deny any such conduct. The Defendant's services as a masseuse were not in the event taken up. She was driven home and paid her agreed fee by the Claimants. Their case is that since then she has unlawfully harassed them and will continue to do so absent the imposition of injunctive relief.

4. Recently, on 5th September 2014, the Defendant issued an application for a general stay and discharge from the interim injunction. She also sought two calendar months to update her medico-legal evidence, together with disclosure of internal CCTV tapes from the Second Claimant's house and various third party disclosure orders against numerous third parties.

5. At the commencement of the hearing the Claimants sought a direction pursuant to CPR 39.2 that the full hearing should be in private, as was the hearing before Lewis J, on the grounds of strict necessity, namely that :

    a) publicity would defeat the object of the hearing;

    b) the hearing involves confidential information and publicity would damage that confidentiality;

    c) it is in the interests of justice.

6. The injunction is sought in harassment, not misuse of private information. Nevertheless, the occasion giving rise to the events in issue here was private. Some of the Defendant's allegations concern extremely private and sensitive matters which have not been reported in the national media. These allegations are contained in a Confidential Schedule to the order of Lewis J. ("the Confidential Schedule"). If they were to receive publicity as a result of being detailed in open court than there would be a significant and unjustifiable interference with the Claimants' Article 8[1] rights to respect for their private and family life and home.

7. I canvassed the possibility of a full public hearing on the basis that the specific matters of confidentiality and sensitivity in the Confidential Schedule need not be mentioned expressly during the hearing. The Defendant indicated that she wished the matter to proceed in public and assured me that she understood that she could not, in that event, disclose any of the allegations identified in the Confidential Schedule in any of her submissions. On the basis of that assurance, I allowed the matter to proceed in public, indicating that the question of a private hearing could be re-considered as matters unfolded during the course of the hearing if necessary. In the event, it did not prove so necessary and the hearing proceeded throughout in public.

8. I did order that the matters identified in the Confidential Schedule be withheld from the public at the hearing. I also then continued the reporting restriction made by Lewis J pursuant to s. 11 of the Contempt of Court Act 1981 to the effect that, until further order, there should be no publication in connection with these proceedings of the matters identified in the Confidential Schedule.

9. These orders constituted a derogation from the fundamental principle of open justice and a prima facie interference with the rights of the public, including the media. But I was satisfied that they were necessary and no more restrictive in their terms than was necessary to achieve the objective of protecting the Claimant's Article 8 rights : see *Practice Guidance : Interim Non-Disclosure Orders* [2012] 1 WLR 1003 (at paragraph 9 to 15) and *JIH v News Group Newspapers Ltd* [2011] 1 WLR 1645 (at paragraphs 21 and 22).

The Facts

10. Following the encounter on 7th June 2014 the Defendant sent various emails (direct to the Second Claimant and/or the Claimants' solicitors) referring to at least one approach to the media, namely the Sun newspaper (on 8th June 2014) and setting out the allegations that she intended to make. I have seen emails to this effect dated 8th, 9th, 24th and 30th June 2014. She appears to have approached the Daily Mail newspaper on or about 19th June 2014 seeking to publicise an allegation of assault by the First Claimant. She emailed UNICEF on 26th June 2014 (forwarded to the Claimants' solicitors), making various allegations against the Second Claimant, including of serious criminal conduct.

11. On or about 14th June 2014, according to the police disclosure notice, the Defendant reported to the police that the First Claimant had assaulted her during her visit. Thames Valley Police conducted an investigation which included interviewing the

[1] Of the European Convention of Human Rights.

Defendant and the Claimants. The Defendant's interview took place on 14th July 2014. For the avoidance of doubt, there is no allegation of harassment against the Defendant arising out of this interview or any contact that the Defendant has had with the police.

12. On 24th June 2014 solicitors for the First Claimant wrote a letter of claim to the Defendant seeking an apology, undertaking, damages and costs. They were not forthcoming from the Defendant.

13. Instead, by the end of June 2014, the Defendants' allegations had escalated to allegations that the Claimants' solicitors (or the police) had interfered with her telephone and emails and or perpetrated some sort of "*cyber attack"*, threatening to make this allegation to the police. On 1st July 2014 the Defendant emailed the Claimants' solicitors claiming that the Claimants' dog had attacked her at the Second Claimant's house and accusing the First Claimant of withholding this from the police. She stated that she had informed the police of the Claimants' possible cyber attack.

14. On 25th July 2014 Thames Valley Police informed the Claimants that there was no case for them to answer and informed the Defendant that the investigation was concluded. The investigation is closed. The Defendant has made a professional standards complaint about the police investigation.

15. This decision appears to have prompted the Defendant, on the same day, to copy or forward to several journalists, a Member of Parliament, the Second Claimant's brother, the Prime Minister and various others alleging that the Claimants might have committed a number of very serious criminal offences. The email was copied to the Claimants' solicitors.

16. On or about 1st August 2014, the Defendant contacted and procured the publication of some of her allegations in the Daily Telegraph newspaper, and also appears to have had contact with the Sunday Mirror newspaper. There followed publication of some of her allegations in the Mail on Sunday newspaper on or about 2nd August 2014. From 4th August 2014 a Hungarian website published various serious allegations made by the Defendant against the Claimants.

17. Finally, also on 25th July 2014 and significantly, the Defendant placed a petition on the website Change.Org headed "*To serve justice and to prosecute Jemima Khan and Russell Brand*" ("the petition"), publicised via her Twitter account. She has also (again since 25th July 2014) used her Twitter account to post repeated Tweets which allege serious criminal wrongdoing on the part of the Claimants.

18. There is a question mark as to whether the Defendant has used reasonable endeavours to remove the petition – it appeared unchanged as at 4th September 2014. But on any view the Defendant has continued to "tweet" in apparent breach of the order. I have seen a very large number of tweets since the order of Lewis J making allegations of criminal and other wrongful activity on the part of the Claimants, including in the category of allegations in the Confidential Schedule. They include highly offensive material.

19. The evidence of the Claimants is that these communications and activities have caused them considerable distress, as set out in their witness statements. The First

Claimant states that he feels that the Defendant is intent on causing him as much harm as she can. He refers to the fact, that once published, people will always think that there is truth in the Defendant's allegations which allegations he finds "*appalling*". The Second Claimant describes her "*significant concern, distress and fear*". The Defendant has made her accusations to many people and organisations, including UNICEF and members of the Second Claimant's family.

20. I add, for the sake of completeness, that the Defendant has also, since the order of 12th August 2014, taken to making increasingly unacceptable and offensive remarks about the Claimants' legal advisers in her communications with them.

The order of Lewis J

21. By his order of 12th August 2014, in summary, Lewis J injuncted the Defendant from :

    a) communicating with the Claimants or either of them, directly or indirectly;

    b) making any approach to or responding to any enquiry from any journalist or media organisation in relation to the Claimants or either of them;

    c) publishing or disclosing to any person any information concerning her attendance at the Second Claimant's home or any allegation or insinuation that the Claimants or either of them had committed any criminal offence or behaved in a manner which might amount to a criminal offence or any allegation or insinuation that the Second Claimant exploited to sought to exploit the Defendant or otherwise act in a manner incompatible with her role as a UNICEF Ambassador.

22. The Defendant was ordered to use all reasonable endeavours to remove the petition. She was not prevented from communicating with Thames Valley Police for the purpose of pursuing her complaint as to its decision not to charge the Claimants with any offence, from communicating with her or the Claimant's legal advisers for the purpose of the proceedings.

23. Essentially, the same injunctive terms are sought to be continued to trial.

24. Lewis J also made a second order setting out steps that the Defendant should take, should she wish to apply to extend the individuals or organisations with which she wished to communicate her allegations against the Claimants.

The Defendant's application for a stay and other matters raised

25. The Defendant seeks a general stay of these proceedings. The court has an inherent jurisdiction to stay the whole or any part of the proceedings, as reflected in CPR 3.1(2)(f). But I can identify no good reason for a stay on the facts here. Indeed, the Defendant's continued conduct militates strongly in favour of the proceedings and this application continuing.

26. To the extent that a stay is sought for the Defendant to obtain medical evidence, there is no indication as to the issue to which such evidence would go. The Defendant's medical condition affords no defence to the substantive claim of harassment, as set out below. Moreover, there is no explanation as to why the Defendant needs two months. She has been on notice of these proceedings for almost a month, and according to an email from her on 12th August 2014 she was seeing her GP and her therapist on 13th August 2014. From her oral submissions it was also apparent that she remains in close contact with one or more therapists. Finally, and in any event, to the extent that the Defendant could establish its relevance, it could be addressed at the directions stage.

27. To the extent that the Defendant's application for a stay was based on the alleged "absurdity" of the proceedings, that it is essentially another way of denying the Claimants' entitlement to injunctive relief.

28. I therefore dismiss the application for a stay. It is necessary and appropriate for this hearing to proceed. As appears below, without injunctive relief, the Defendant is likely to continue her activities which the Claimants, on my findings below, are likely to establish are unlawful.

29. I also record the fact that the Defendant states that she is currently in psychotherapy and considers herself disabled due to her "*learning, mental health, audio processing and endocrinological disorder*". Additionally, it is right to record that her first languages are Hungarian and German, not English. A medical report from 2003 suggests that she has some problems of dyslexia. It states that her reading comprehension was "*slightly imperfect*". But she had "*excellent intellectual capacities*", her performance falling into "*the extremely high intelligence range*". A psychological report from 2013 (prepared in the context of other litigation) stated that her mental state was intact and that she was not depressed. She refers in her witness statement to having post-traumatic stress disorder, but there is no medical evidence to this effect, although there is evidence (in the 2013 psychological report) that she suffered trauma and shock following an alleged assault by her former partner in 2012.

30. Based on her emails, online communications, her witness statement and eloquent oral submissions and her demeanour in court, I was satisfied that the Defendant was well able to understand and participate effectively in the proceedings. She did not need an interpreter (and was in any event informed on 12th August 2014 that she could bring one to court if she so wished). She is able independently to communicate clearly, articulately and intelligently in English, as confirmed in particular by her witness statement. She is university-educated with, for example, political experience, as she sets out in her witness statement. Her witness statement exhibits an offer of appointment with the London School of Economics and Political Science as an intern survey analyst. It is dated 19th August 2014. In answer to a question from the court, she confirmed that she has taken up that position. She declined any assistance with documents during the hearing and declined the offer of time to consider her submissions in response to those advanced orally for the Claimants.

The test to be applied on the application for interim relief

31. The power to grant an interim injunction is found in s.37(1) of the Senior Courts Act 1981 and in CPR 25.1(1)(a).

32. The claim form issued on 14th August 2014 includes a claim for damages and injunctive relief for libel as well as harassment. The "*defamation rule*" precludes the grant of an interim injunction unless it is clear that no defence can succeed – see *Bonnard v Perryman* [1891] 2 Ch 269. However, the Particulars of Claim served subsequently on 28th August 2014 expressly and clearly limit themselves to a claim in harassment only. I proceed on the basis that that is the gist of, indeed the only, claim.

33. The claim for injunctive relief engages the Defendant's Article 10[2] right to freedom of expression. That right is not absolute, and may lawfully be restricted "*for the protection of the rights and freedoms of others*", including Article 8 rights. Neither Article 8 nor 10 has any presumptive priority over the other : there is a balancing exercise to be carried out when both are engaged – see *Re S* [2005] 1 AC 593 (at paragraphs 16 and 17).

34. S.12 of the Human Rights Act 1998 ("the HRA") provides materially as follows :

> "*(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression….*
>
> *(3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.*"

35. This reflects the importance to be attached to the right to freedom of expression (see also s.12(4) of the HRA). Thus, for the injunctive relief sought by the Claimants to be granted, I must be satisfied on the merits that they are likely to establish their claim of harassment. In essence, the Claimants' prospects need to be sufficiently favourable to justify an order in the particular circumstances of the case – see *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 (at paragraph 21). The Claimants accept that on the facts of this case and for present purposes, that means establishing on a balance of probabilities that they will succeed at trial.

36. If this threshold test is met, then the court must go on to consider the balance of convenience in all the circumstances of the case.

The test applied

37. Under s.1(1) of the Protection from Harassment Act 1997 ("the PHA") a person must not pursue a course of conduct :

> a) which amounts to harassment of another; and
>
> b) which he or she knows or ought to know amounts to harassment of another.

A person whose course of conduct is in question ought to know that it amounts to harassment if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of another.

[2] Of the European Convention of Human Rights.

38. References to harassment include alarming the person or causing the person distress s.7(2), and "conduct" includes speech s.7(4). Under s.3(1) an actual or apprehended breach of s.1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question. Conduct must occur on at least 2 occasions to amount to a course of conduct. It is a defence if the course of conduct is pursued for the purpose of preventing or detecting crime or if, in the particular circumstances the pursuit of the course of conduct is reasonable (see s.1(3)(a) and (c) respectively).

39. The test of a person's purpose is not wholly subjective. He or she must have thought rationally about the material suggesting the possibility of criminality and formed the view that the conduct said to constitute harassment was appropriate for the purpose of preventing or detecting it. The test of rationality imports a requirement of good faith and an absence of capriciousness – see *Hayes v Willoughby* [2013] 1 WLR 935 (at paragraphs 13 to 17). Within the scheme of the PHA, the test as to whether or not pursuit of a course of conduct is reasonable must be taken to be an objective one.

40. It has been said that, to amount to harassment, the conduct in question must be grave :

> "*In life one has to put up with a certain amount of annoyance : things have got to be fairly severe before the law, civil or criminal, will intervene*"

(See *Ferguson v British Gas Trading Ltd* [2010] 1 WLR 785 at paragraph 18 and *Majrowski v Guy's and St Thomas' NHS Trust* [2007] 1 AC 224 at paragraph 30). Put another way, the conduct must be "*oppressive and unacceptable*" rather than merely unattractive, unreasonable or regrettable – see *Veakins v Kier* [2009] EWCA Civ 1288 (at paragraph 11).

41. Thus the questions are :

a) Did the course of conduct amount to harassment within the objective test set by s.1(2)? Would a reasonable person think that the course of conduct amounted to harassment of the other?

b) If so, was the Defendant in possession of the information which would lead a reasonable person to think that her course of conduct amounted to harassment?

42. I am satisfied on the basis of the material on this application that the Claimants are likely to succeed in establishing at trial that the Defendant has committed the tort of harassment :

a) the Defendant has been responsible for a course of conduct as set out above, namely a concerted campaign of emails to the Second Claimant, emails to the Claimants' solicitors, emails to journalists, contact with UNICEF and numerous Twitter posts and internet publicity. The Defendant's activities go well beyond annoyance. They can fairly be described as oppressive and unacceptable. What the Defendant describes as her tendency to sarcasm cannot explain away the distressing nature of her comments such as "*I*

send my compliments to JK" (placed above a copy of her communications with the Sun newspaper) ;

b) that course of conduct amounts to harassment within the meaning of the PHA, causing alarm or distress. There is clear evidence that it has done so;

c) the Defendant knew or ought to have known that her course of conduct amounted to harassment. She was the instigator of all relevant activities. The communications were either sent direct to the Claimants or to parties whom she knew or ought to have known would inform the Claimants of their contents.

43. The Defendant contends that she has not committed harassment as alleged. It is for her to uphold the "*moral and legal standards of this country*". The English police, both based on her personal experiences in this and other matters, are "*extremely unprofessional*". It was reasonable for her to go to her MPS and others (although she contacted one of the Second Claimant's family members by mistake only) in order to bring about justice. She only emailed the Prime Minister because he was the MP for Chipping Norton (which is part of the Witney constituency). Her account of events has not changed or been inconsistent in any way. She has never sought to sell her story, and has never wished to bring upon herself the embarrassment caused by the revelation of the incident in question. She has not been in control of the media's activities. The email to UNICEF was written "without prejudice" and/or was confidential. The petition was a peaceful protest and an exercise of her basic human rights. She has acted in good faith throughout. The public interest militates in favour of refusing the application for injunctive relief against her.

44. I have considered carefully any possible defences available to the Defendant arising out of the above or more generally :

a) possible mental health issues do not avail her, since the test of knowledge is constructive and objective. The fact that she may suffer from a mental illness is thus irrelevant by way of defence. Otherwise there would be a significant gap in the protection afforded by the PHA, particularly since the conduct at which the PHA was aimed was likely to be conducted by those of an obsessive or otherwise unusual psychological makeup, or those suffering from an identifiable mental illness – see *R v Colohan* [2001] 2 FLR 757;

b) the prevention and detection of crime : the Defendant's activities cannot be said to be for the purpose of the prevention and detection of crime within the meaning of s.1 of the PHA. Whether or not the Defendant accepts the police decision, the Defendant has reported her allegations to the police who have investigated them. The proposed injunction does not prevent her from communicating with the police in connection with her dissatisfaction with the police decision. Any belief on the Defendant's part that her activities are necessary for the

prevention or detection of crime does not meet the rationality test. The police are engaging with the complaint against them and, moreover, the Defendant herself is threatening private prosecution. It is in any event difficult to see how publicity on Twitter and via the media, let alone an email to UNICEF[3], could advance materially the necessary purpose;

c) nor is there any reasonable (objective) justification for the Defendant's behaviour. There is a clear dispute as to the veracity of the Defendant's allegations. The allegations are wholly denied by the Claimants. The Defendant's claims are on their face internally inconsistent and have enlarged over time. It is noteworthy that the Defendant's first email to the Claimants after her visit (when she had apparently returned home) said that it was nice to meet the Claimants and wished the First Claimant a happy birthday. It is also noteworthy that the Defendant went first to the media, and only a week or so later did she attend the police. The Defendant seeks to explain these matters away by referring to her state of shock at the time, and to the fact that she was advised not to report matters to the police. She says she was in a very difficult situation. She has never been inconsistent, rather her allegations have been mischaracterised by others. As matters stand, however, and without in any way pre-judging the final outcome of a full trial, I incline to the view that the likelihood is that the Claimants will establish that the Defendant's allegations are false. But in any event and centrally for present purposes, whether or not the Defendant's allegations are true is not the ultimate issue at point here. What is at issue is the (unwarranted) manner of her dissemination of her extremely serious allegations about the Claimants. The sheer scale, content and variety of publication by the Defendant makes her conduct unreasonable in all the circumstances. Her own alleged perception of reasonableness cannot assist her.

45. I therefore conclude that, on the material currently available, the Defendant is unlikely to establish a defence to the claim in harassment.

46. As for the disclosure of internal CCTV tapes from the Second Claimant's home, according to the Claimants through their counsel, there are no internal CCTV cameras (nor is there any footage) as the Defendant alleges. There are external cameras. In fact, the First Claimant relies on CCTV footage of the Defendant leaving the Coach House of the Second Claimant's property which he states shows that he did not force her out of the door and that no dog attacked her, as she alleges. I was told that this footage was supplied to the police for the purpose of their investigation. The fact that that footage has not yet been disclosed does not cause me to alter my conclusion on the merits of the application. It will no doubt form part of standard disclosure in due course.

[3] The email was not properly the subject of any "without prejudice" privilege. To the extent that it was confidential, that is no bar to its use in these proceedings.

47. There is no basis for ordering third party disclosure as sought by the Defendant at this stage. Any such application would have to be made under and in compliance with CPR 31.17. No third party has been served with the application.

48. I turn then to the balance of convenience. It is clear on the evidence that the Defendant will continue to harass the Claimants if not restrained. The order of Lewis J itself does not appear to have prevented her from continuing to publicise her allegations online. Damages are no, let alone an adequate, remedy in circumstances such as these. The balance of convenience lies firmly in favour of continuing the injunctive relief sought until the full trial of this matter.

Access to the court file

49. Since the Defendant has now filed an acknowledgment of service, non-parties are now entitled to obtain from the court records the body of any statement of case (see CPR 5.4C(1) and (3)). Consistent with the orders on reporting restrictions set out above, given the likely contents of the Defendant's defence, I make an order under CPR 5.4C(4)A that no-one who is not a party to the proceedings may obtain a copy of the Defence or any further statement of case filed by the Defendant without further order of the court.

Conclusion

50. For these reasons, and subject to finalisation of the precise terms and scope of the Order, I grant the application for an anti-harassment order until trial or further order in principle and dismiss the Defendant's application for a stay and disclosure.