Neutral Citation Number: [2018] EWHC 703 (QB)

Case No: HQ18M01160

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 March 2018

Before :

THE HONOURABLE MR JUSTICE NICKLIN

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Between :

NPV	**Claimant**
- and –	
(1) QEL **(2) ZED (person unknown allegedly trying to blackmail the Claimant)**	**Defendant**

- -
- -

Adam Speker (instructed by **Carter-Ruck**) for the **Claimant**
The Defendants did not attend and were not represented

Hearing date: 27 March 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE NICKLIN

This judgment has been handed down in private. Until further order of the Court, the contents must not be disclosed or published beyond the parties and their legal representatives. Any other disclosure or publication of the contents of this private judgment would be contempt of court.

The Honourable Mr Justice Nicklin :

1. Yesterday afternoon I granted an interim non-disclosure and harassment injunction against the Defendants. The application was heard in private and made without notice to the Defendants. The order I have made, unless varied or discharged in the meantime, will continue until the application can be relisted on notice to the Defendants for further consideration by the Court on 12 April 2018. I indicated that I would give a reserved judgment explaining my reasons.

Background

2. The Claimant is a successful businessman. He is married. Until late last year, the First Defendant was an employee of a business. She held a customer service role and consequently met members of the public during her work. In early 2017, she met the Claimant in the course of her employment. Thereafter, the Claimant and the First Defendant met socially for a drink in the Autumn of 2017. By doing so, the First Defendant broke rules that prohibited contact between employees and customers. She was suspended and became subject to a disciplinary process. The Claimant supported the First Defendant through this process. The relationship between them developed into a sexual relationship and they had sexual intercourse on several occasions.

3. Whilst the disciplinary process was still ongoing, the First Defendant resigned as an employee. The Claimant gave her some financial support. Increasingly, however, the First Defendant became more demanding. She told the Claimant that she thought that she ought to receive compensation for losing her job. In December 2017, the Claimant and the First Defendant met, and the First Defendant told him that she thought that, as he was partly to blame for her losing her job, he ought to "help" her financially. The Claimant initially refused what he saw as demands for money. During the evening following their meeting, the Claimant received two telephone calls from the First Defendant. She said that she was giving him one last opportunity to help her in the way she wanted, or he would risk the consequences. The Claimant again refused to make any payment.

4. Some ten days later, the Claimant received a telephone call from someone claiming to be a journalist who said that he had information about his affair with the First Defendant and that he was preparing to publish an article about it. The Claimant says that he did not believe that the person was in fact a journalist; rather, he thought the caller was someone connected with the First Defendant who was being used by her to exert pressure on him to meet her demands.

5. Matters developed from there leading ultimately to the Claimant concluding that the threats that the First Defendant was making were credible and that she was threatening him with exposure unless he paid her money. She demanded a very

substantial sum. Perhaps unwisely, the Claimant gave in to these demands. He paid the sum that had been demanded in return for the First Defendant signing a strict confidentiality agreement ("the Confidentiality Agreement").

6. Separately, the First Defendant had threatened her former employer with employment tribunal proceedings for unfair dismissal. No such proceedings appear to have been commenced, although the Claimant states in his evidence that the First Defendant renewed her threats to do so in February or March 2018. The Claimant did not immediately link the two issues.

7. On 21 March 2018, the Claimant received a telephone call from the Second Defendant. He gave only a first name and stated that he worked for a media agency, which he would not identify. The Second Defendant told that Claimant that he was working on an article about powerful people who abused their positions and that he intended to cite the Claimant as an example. The Second Defendant sought a meeting with the Claimant. Rather than attend the meeting himself, the Claimant sent two people on his behalf to meet the Second Defendant on 22 March 2018 ("X" and "Y"). Various meetings or discussions that took place with the Second Defendant after this point have been recorded and transcripts provided to the Court.

8. At the meeting on 22 March 2018, the Second Defendant said:

> "… what I want to tell you is – time is really essential because there has been some sort of agreement that this will come out this weekend. So, erm, at the moment it's 100% control by me but if it goes beyond the weekend… then I will have no control over it."

9. Although he ultimately claimed not to be working with the First Defendant, it was clear that the Second Defendant had in his possession documents that he showed to A and B that could only have come from her, in particular messages that had passed between the Claimant and the First Defendant during their short relationship. The Second Defendant told X and Y that the First Defendant intended to bring a claim against her former employers in an employment tribunal and that the Claimant would be named in what would be public proceedings. The Second Defendant said:

> "… before all of this is going to be published I mean… it will be too late to reverse because it comes out. What I'm offering you is to stop all this."

By "*all this*" he appears to have meant both the employment tribunal claim and the supposed article that the Second Defendant claimed to be preparing.

10. When asked whether, for a certain sum of money, "*this can all go away*" the Second Defendant said: "*Yes*". X said that they would need to discuss the issue with the Claimant and a further meeting was arranged for the following day.

11. On 23 March 2018, the Second Defendant had a further meeting with X and Y. The Second Defendant said: "*… you told me… this is some form of extortion or blackmailing – that's not the case and it's not true*" before then saying: "*All I'm doing is... I'm trying to do a favour to… I could have kept quiet about it and just sold it.*" This is doublespeak. The conversation moved on and the Second Defendant indicated that he was seeking a payment of more than £100,000, even £150,000, in order not to take the material to the newspapers (even a broadcaster) that he said were interested in

publishing a story. The Second Defendant denied that he was a criminal, accepting instead the suggestion by Y (made perhaps ironically) that he was simply a businessman. Later, the Second Defendant stated:

"But you say to me I am trying to extort but no, if I was trying to extort or blackmail I would say 'I will send copies of this to your friends, to your family, to your business, to your associate, to your business enemy, to people around you'. This is what is called 'extortion' but I am not going to do this, and I will never do this because this is criminal, and I am not going to incriminate myself for something that is (inaudible)… What I do is outsource stories and put them to people who are interested today. Extortion is different you can define extortion (inaudible)"

12. On 26 March 2018, Y and another person acting on behalf of the Claimant ("Z") spoke to the Second Defendant on the telephone for approximately 30 minutes. During the call, the Second Defendant again denied that he was attempting to blackmail the Claimant. However, the context and the balance of the call gives cause to doubt that. At one point, relatively early in the conversation, the Second Defendant said: "*I'm not here to blackmail or extort*", but then followed that immediately with: "*I just have an opportunity, uh, a story. And I thought that it would be in his interest to inform him before this story comes out if he's interested to stop it that's up to him. In fact, I'm doing him a favour.*"

13. Throughout the meetings and conversations, the Second Defendant attempted to distance himself from any connection with the First Defendant. During this telephone call he suggested at one point that he had "*no contact whatsoever to her*". That is to be contrasted with the documentation and information that he had and, importantly, during this telephone call his clear indication that he knew about the Confidentiality Agreement. It is difficult to see how he could have obtained these documents and information if it had not come from the First Defendant.

14. In any event, since the Second Defendant was denying that he was in contact with the First Defendant, Y and Z were clearly anxious to establish how he could offer to ensure that the Claimant's identity and information would not be placed into the public domain in the employment tribunal proceedings. Z asked the Second Defendant, directly: "*How do you propose to stop the employment tribunal?*" The Second Defendant's answer is difficult to understand. Z asked whether what he meant was that, from the money paid by the Claimant, he would pay some money to the First Defendant which would be sufficient to satisfy her expectation of what she might have received had the employment tribunal proceedings been pursued. The Second Defendant answered: "*Yes, that's what I thought I would do.*"

15. Y and Z bartered with the Second Defendant and, ultimately, the figure of £75,000 was settled upon, to be paid to the Second Defendant at a meeting to be arranged on Wednesday 28 March 2018. At the hearing, of course, that meeting had not taken place. The Claimant's intention was to serve any injunction granted by the Court on the Second Defendant at this meeting rather than hand over the money.

Hearing in private, anonymity and restrictions on access to the court file

16. I was satisfied that it was strictly necessary to hear the application in private pursuant to CPR Part 39.3(a), (c) and (g). This is a case in which it is alleged that the two

Defendants are blackmailing the Claimant. The First Defendant has already received a large sum in money from the Claimant and the Second Defendant (it is said acting in concert with the First Defendant) has recently demanded more. The threat is that they will make public information that the Claimant and the First Defendant had a brief sexual relationship together with evidence of that relationship in the form of text messages ("the Information"). If the application had been heard in public then the information the Claimant is by these proceedings trying to protect would have been destroyed by the Court's own process: ***Khan (formerly JMO) -v- Khan (formerly KTA)*** **[2018] EWHC 241 (QB)** [81]-[93].

17. I have also made an order anonymising the parties pursuant to CPR Part 39.2(4).

    i) On the evidence that has been produced, I am satisfied that the Claimant has demonstrated at least a *prima facie* case that he has been blackmailed and an attempt is being made to continue that blackmail effort to obtain more money. 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 from the courts: see ***ZAM -v- CFM and TFW*** **[2013] EWHC 662 (QB)** [39]-[41] and [44] *per* Tugendhat J; ***LJY -v- Person(s) unknown*** **[2017] EWHC 3230 (QB)** [2] *per* Warby J.

    ii) At least until the return day when the issue can be reconsidered, the Defendants should be anonymised because the Claimant is making serious allegations of blackmail against them and they have not yet had an opportunity to respond to those allegations.

18. I have also made an order restricting access to certain documents on the Court file. The reasons that justify the Court sitting in private also justify limiting public access to documents that would otherwise be available from the Court file.

s.12 Human Rights Act 1998

19. Section 12 Human Rights Act 1998 ("HRA") provides (so far as material):

> "(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.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied—
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> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.
>
> (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."

Hearing without notice to the Defendants

20. The Claimant made the application for the injunction order without notice to the Defendants. As s.12(1) HRA applies, s.12(2) HRA mandates that the Court cannot grant an injunction unless satisfied that there are compelling reasons why the Defendants had not been notified.

21. As I have summarised, the witness statements of the Claimant and his solicitor provides strong evidence that the Second Defendant has, in the last few days, been actively engaged on attempts to persuade the Claimant to pay him a substantial sum not to publicise the Information. Despite his denials, this appears to me to disclose all the elements of a blackmail attempt. At this stage, I am also satisfied that there is a strong *prima facie* case that the Second Defendant is working together with the First Defendant. Mr Speker has submitted that if the Defendants (or either of them) were to be alerted to this application then there is a real prospect that they will take steps to publicise the Information. I accept his submission and am satisfied that this amounts to a compelling reason why the Defendants should not be notified of the application.

Likelihood of success

22. The Claimant relies upon two causes of action: misuse of private information and harassment (contrary to the Protection from Harassment Act 1997 ("PFHA").

23. s.12(3) HRA prevents the Court from granting an injunction unless satisfied that the Claimant is "*likely to establish that publication should not be allowed*". "*Likely*" means in this context "*more likely than not*" or a "*probability of success*": ***Cream Holdings -v- Banerjee*** **[2005] 1 AC 253**; ***YXB -v- TNO*** **[2015] EWHC 826 (QB)** [9].

24. It is made clear in ***Cream Holdings*** that, in some circumstances, the Court may consider that the only way of doing justice in a case is to grant an injunction for a very short period to allow the injunction application to be fully argued on better evidence. It is not suggested that this present application falls into that category, so the hurdle the Claimant must surmount on this application is to demonstrate that his claims for misuse of private information and/or harassment will probably succeed at trial.

25. This is an interim judgment. My task is to assess the likelihood of success based on the evidence before the Court. Necessarily at this stage, I only have the Claimant's evidence and his version of events. The Defendants will have an opportunity, if they wish, to put evidence before the Court and that evidence may lead the Court to take a different view. The findings I make in this judgment are necessarily provisional. Fairness to the Defendants requires that this judgment is read subject to these caveats.

26. In relation to the misuse of private information, I am satisfied that the Claimant is likely to succeed at trial in showing that publication of the Information should not be allowed. My reasons for this are:

    i) The Information relates to a sexual relationship, and includes messages exchanged between the Claimant and the First Defendant. The Claimant is likely to establish that he has a reasonable expectation of privacy in this information: ***K -v- News Group Newspapers Ltd*** **[2011] 1 WLR 1827** [10].

ii) Although each case must be assessed on its own facts, the starting point is that there is not usually any public interest justification for disclosing purely private sexual encounters, even if they involve adultery: ***PJS -v- News Group Newspapers Ltd*** **[2016] AC 1081** [32].

iii) The blackmail element strengthens the claim. Such conduct considerably reduces the weight attached to be attached to any freedom of expression argument and correspondingly increases the weight of the arguments in favour of restraining publication: ***LJY*** [29].

iv) In the ultimate balancing of the competing interests that might be advanced (see ***In re S*** **[2005] 1 AC 593** [17]), the Article 8 rights of the Claimant are likely to prevail and a final injunction granted.

27. As regards the claim for harassment, it may turn out that it adds little to the claim for misuse of private information. Nevertheless, I am satisfied that, insofar as the injunction sought interferes with the right of freedom of expression, the Claimant is likely to show that further acts by the Defendants of communicating with or about the Claimant should not be allowed. My reasons are:

i) I am satisfied that the Claimant is likely to show that the acts of the Second Defendant in communicating what are alleged to be blackmail demands to the Claimant is a course of conduct that amounts to harassment of the Claimant (see ***Khan (formerly JMO)*** [61]-[69]); it is likely to be found that these demands are oppressive and unacceptable.

ii) The Second Defendant is unlikely to succeed in showing that he has a defence under s.1(3) PFHA: that "*in the particular circumstances the pursuit of the course of conduct was reasonable*". On the contrary, if this was blackmail then that will amount to harassment: ***LJY*** [36].

iii) For the reasons I have already stated (see paragraph 21 above), I am satisfied that the Claimant is likely to show that the First Defendant is a joint tortfeasor with the Second Defendant and thereby also liable for the acts of the Second Defendant.

Terms of the Order

28. The injunction order sought by the Claimant largely mirrors the model order from ***Practice Guidance (Interim Non-disclosure Orders)*** **[2012] 1 WLR 1003**. At the hearing, Mr Speker took me through the changes and additions to the standard order. I am satisfied that an order in the terms I have made is justified and appropriate on the facts of this case. I should perhaps mention the following specific points:

i) The terms of the harassment part of the injunction are wider and more onerous than the court might usually impose in what might be termed a typical harassment case. I am satisfied that the more stringent terms are necessary, at least until the return day, on the basis that the restrictions are justified because of the blackmail element of this case.

ii) The order contains mandatory requirements for the Defendants to state whether either has disclosed any communications between the First Defendant and the Claimant to any other third party. In addition, the Second Defendant has been ordered to disclose his identity and address for service. Both are typical in cases like this where there is a justified concern about further dissemination of the private information and where the threat to publish is being made by someone who is hiding behind anonymity.

iii) I have permitted service of the application upon the Second Defendant by text message. As I have noted above (paragraph 15), the intention and expectation were that the Second Defendant would be served with the injunction order (and other documents required to be served on him) at the meeting due to take place on 28 March 2018. If this does not prove possible, I have allowed service by the only practical alternative means presently available to the Claimant.

Hand-down in private

29. The particular circumstances of this case mean that, for the moment, I have handed down this judgment in private. If it were to be handed down in public before the Defendants have been served, there is a risk that the terms of the judgment will come to the notice of the Defendants and thereby potentially frustrate the order that I have made and the reason for hearing the application without notice to the Defendants. Once the order has been served on both Defendants, the judgment will be made public. I have taken care to ensure so far as possible that the terms of the judgment are not likely to identify the parties.