Neutral Citation Number: [2019] EWHC 2388 (QB)

Case No: QB-2019-003105

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11 September 2019

Before :

THE HONOURABLE MR JUSTICE MURRAY

Between :

BVG	**Claimant**
- and -	
LAR	**Defendant**

Ms Christina Michalos QC (instructed by **Carter-Ruck Solicitors**) for the **Claimant**
The Defendant appeared in person.

Hearing date: 6 September 2019

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 MURRAY

Mr Justice Murray :

1. This is an application dated 2 September 2019 by the claimant, BVG, for injunctive relief against the defendant, LAR ("the Non-disclosure Application"), including an interim non-disclosure order and an order prohibiting the defendant from harassing the claimant by approaching or attempting to communicate with the claimant other than through the claimant's solicitors, Carter-Ruck.

2. The claimant makes the Non-disclosure Application to restrain the defendant from publishing extremely personal and private information about the claimant, including graphic film footage obtained secretly without his knowledge relating to his sex life. The claimant also seeks to restrain the defendant from harassing him by communicating with him in order to make demands of money. I note at this point that the claimant is a retired businessman and a former public servant. During his professional career, he had, at different times, senior roles in public service and in industry, but he was not and is not a public figure.

3. The claimant asserts that his rights under Article 8 (right to respect for private and family life) of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") are engaged and that, given the circumstances detailed in his evidence in support of the Non-disclosure Application, the claimant's Article 8 rights outweigh any rights that the defendant may have under Article 10 (right to freedom of expression) of the ECHR in relation to the claimant's private information.

4. On 2 September 2019 Master McCloud, sitting in private to hear a without-notice application dated 30 August 2019, made an order granting the claimant anonymity, naming the claimant as "BVG" and the defendant as "LAR" for purposes of the proceedings and restricting access to documents in the proceedings.

5. At the beginning of the hearing before me, the claimant applied for the hearing of the claimant's application dated 2 September 2019 to be in private ("the Private Hearing Application") and that there be no reporting of the hearing itself. In support of the Private Hearing Application, Ms Christina Michalos QC, counsel for the claimant, drew my attention to paras 9 to 15 of the *Practice Guidance on Interim Non-Disclosure Orders* [2012] 1 WLR 1003 ("the Practice Guidance"), which considers the principle of open justice in the context of non-disclosure orders, underlines the fundamental importance of the principle and emphasises that any derogations from it can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice.

6. Ms Michalos also referred me to the judgment of the Court of Appeal in *McKennitt v Ash* [2008] QB 73 (Buxton LJ) at [1]-[2] and the judgment of Sharp J in *MNB v News Group Newspapers* [2011] EWHC 528 (QB). I have also had regard, of course, to CPR 39.2(3).

7. In relation to the Private Hearing Application, I was satisfied, having reviewed the claimant's evidence, including evidence provided in a confidential annex to his witness statement, that it was strictly necessary in the interests of justice for the hearing of the Non-disclosure Application to be in private, for the following reasons:

i) the purpose of the Non-disclosure Application and the injunctive relief sought would be frustrated if I did not make an order that the hearing be in private, the hearing involved highly confidential information about the claimant and publicity would damage that confidentiality and it was in the interests of justice that the order be made (in other words, CPR 39.2(3)(a), (c) and (g) apply to this application);

ii) the hearing would need to range widely over the facts and matters in issue, making it practically impossible to have the hearing without the risk of disclosing the identity of the claimant or information that could lead to his being identified (for example, by "jigsaw" identification): *MNB v News Group Newspapers* at [12]; and

iii) this is a claim involving a prima facie case of blackmail, which strengthens the case that it is strictly necessary in the interests of justice to have the hearing in private: see *ZAM v CFM and TFW* [2013] EWHC 662 (QB) (Tugendhat J) [39]-[41] and *LJY v Persons Unknown* [2017] EWHC 3230 (QB) (Warby J).

8. Accordingly, I granted the Private Hearing Application and the remainder of the hearing was held in private. At the conclusion of the hearing I indicated that I would make the order sought by the claimant in the Non-disclosure Application, with my written judgment to follow. This is that written judgment.

9. Although the hearing was in private, this judgment is public, as required by the principle of open justice. It seems to me that a short judgment is sufficient and proportionate in terms of time and cost (see the Practice Guidance at para 45), and that it is not necessary for me to include a confidential annex to this judgment reviewing the factual case in detail. The main elements of the claimant's case are clear and can be described sufficiently in generic terms to indicate the basis on which I have granted the order sought.

10. First, I note the provisions of the Practice Guidance that apply to the hearing and the court's scrutiny of the Non-disclosure Application, in particular, paras 29 to 32, which underline the need for intense scrutiny by the court. The onus is on the claimant, as the applicant, to satisfy the court that the interim non-disclosure order sought is justified. The application must be made on clear and cogent evidence. The claimant is under a duty to make full, fair and accurate disclosure of all material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case.

11. The Non-disclosure Application was made on notice to the defendant, and the defendant chose to represent himself at the hearing.

12. In accordance with paras 33 to 35 of the Practice Guidance, the claimant has prepared an explanatory note to enable non-parties to readily understand the nature of his case. In this judgment, I set out the factual background in a little more detail than appears in the explanatory note, although this summary is necessarily redacted given the nature of the case.

13. The claimant first met the defendant in the 1990s. The defendant provided the claimant with specialised male escorting services known as "bondage, discipline and

sado-masochism" or "BDSM" services, for which the claimant paid a fee. They met irregularly over a period of years. Initially, the claimant used a pseudonym when contacting the defendant and booking his services, however eventually the defendant discovered his identity. The claimant continued nonetheless to see the defendant, but finally broke contact in the mid-2000s. After an interval of a few years, the defendant contacted the claimant "out of the blue", and they began to communicate again periodically. At some point, the defendant told the claimant that one of their BDSM sessions from before they broke contact in the mid-2000s had been secretly filmed.

14. Naturally alarmed by this development, the claimant instructed solicitors (not his present firm), who drew up undertakings for the defendant to make in exchange for two payments to be made by the claimant to a company established by the defendant. By those undertakings, the defendant, among other things, agreed not to request further payment from the claimant and also agreed to deliver up to the claimant's solicitors the relevant video footage.

15. This, sadly, did not end the matter. The defendant subsequently made it clear to the claimant that he had retained copies of the video footage. A pattern developed over the next few years where the defendant would periodically communicate with the claimant, requesting money and making statements which Ms Michalos submitted were clearly veiled threats to expose the claimant publicly. The distress occasioned to the claimant by these threats was magnified by the fact that the claimant has children and grandchildren, none of whom were aware of his BDSM activities.

16. Having reviewed a number of written exchanges between the claimant and the defendant, I accept that there is a strong prima facie case that a number of the defendant's communications to the claimant threatened, in effect, to expose the claimant's sexual activities with the defendant and that the defendant intended that the claimant should perceive them as so threatening.

17. This repeated pattern of communication of veiled threats led to contractual undertakings being given by the defendant to the claimant on two further occasions, in each case accompanied by a substantial payment of money by the claimant to the defendant. The claimant noted in his witness statement that he also continued to see the defendant on a semi-regular basis during their periods of contact, when they would have BDSM sessions in which the defendant provided services to the claimant for payment, their last session having been last year. The claimant also said in his evidence that he tried to maintain a relationship of apparent friendship with the defendant in order to reduce the risk of the defendant exposing his private information.

18. Earlier this year, the defendant renewed contact with the claimant after another interval of a few weeks or months. I reviewed four emails sent by the defendant earlier this year, the tone of which Ms Michalos described as "openly threatening", one of which made reference to the claimant's children. The defendant also made reference to his own physical and mental health, which he claimed was deteriorating.

19. The claimant in his evidence described the impact of these and earlier communications on him, which had at times led him to contemplate suicide. The increased stress caused to the claimant by the most recent communications from the defendant led the claimant to make the Non-disclosure Application.

20. An application of this sort requires the court to identify whether the applicant has a reasonable expectation of privacy such as to engage his Article 8 rights, and, if so, to balance those rights against any competing ECHR rights, such as another person's Article 10 rights. This balancing exercise requires the justification for interfering with each right to be considered by way of a parallel analysis, applying the test of proportionality to each: *McKennitt v Ash* [2008] QB 73 (Buxton LJ) at [11].

21. Neither set of rights has priority over the other. Lord Mance summarised the principles in *PJS v News Group Newspapers* [2016] AC 1081 at [20], and I have had careful regard to that summary. In order to grant interim relief restraining publication before trial, the court must be satisfied "that the applicant is likely to establish that publication should not be allowed": section 12(3) of the Human Rights Act 1998.

22. My conclusions are as follows:

    i) The claimant's Article 8 rights are engaged by the defendant's threatened use of private information relating to the claimant's sexual life. This is particularly so bearing in mind the existence of the clandestinely recorded video footage of a BDSM session involving the claimant, which appears still to be in the defendant's possession. The claimant clearly has a reasonable expectation of privacy in relation to his sexual behaviour. Any publication of visual images relating to this sexual behaviour would clearly be a further intrusion into those rights.

    ii) It is not clear, in fact, that the defendant has Article 10 rights in relation to the information he possesses concerning the claimant's sexual behaviour, disclosure of which would contribute nothing to any debate of general interest in a democratic society: *Von Hannover v Germany* [2004] EMLR 21 (European Court of Human Rights) at [76].

    iii) Lord Mance doubted in *PJS* whether the mere reporting of sexual encounters of someone, however well-known to the public, would even fall within the concept of freedom of expression under Article 10: *PJS* at [24]. The *PJS* case concerned celebrities. Where, as in this case, the claimant is a private individual, who is not a public figure, the argument is even stronger that information about his private sexual practices does not engage Article 10.

    iv) Assuming for the sake of argument that the defendant's Article 10 rights are engaged, which is doubtful for the reasons I have given, I have no hesitation in concluding that the claimant's Article 8 rights would far outweigh them.

23. The foregoing reasons are sufficient to grant the non-disclosure order sought, but when one adds the prima facie evidence that the defendant was blackmailing the claimant, the case for the injunction is, in my judgment, overwhelming. At the hearing before me, the defendant denied that he had blackmailed the claimant, but he appeared to accept the suggestion that I made to him that, given the evidence, it might appear to a third party as though that is what he intended to do. He indicated that when the matter came to trial, he intended to contest any suggestion that he was blackmailing the claimant. Based on the evidence I reviewed, I am satisfied that there is a strong prima facie case that the defendant was, in fact, blackmailing the claimant,

resulting in the claimant making a number of very substantial payments to him over a period of years.

24. Two recent cases, *LJY v Persons Unknown* [2017] EWHC 3230 (QB (Warby J) at [2], [28]-[30] and *NPV v QEL* [2018] EWHC 703 (QB), [2018] EMLR 20 (QB) (Nicklin J) at [26] provide authority for the proposition that the presence of a prima facie case of blackmail based on private information strengthens a claim for a privacy injunction in relation to that private information.

25. The claimant also seeks protection against harassment by the defendant. I am satisfied that the same behaviour of the defendant that gives rise to a prima facie case of blackmail is also a course of conduct amounting to harassment within the meaning of section 1(2) of the Protection from Harassment Act 1997 ("the 1997 Act") and that no apparent defence arises under section 1(3) of the 1997 Act. Warby J noted in *LJY* at [33]-[37] that repeated threats to publish private information amounting to a course of conduct could amount to harassment, provided that it is calculated to cause alarm or distress and is oppressive and that it is unacceptable to a degree that would sustain criminal liability. I conclude that those criteria are satisfied prima facie in this case on the basis of the defendant's course of conduct in his communications with the claimant over a substantial period of time, which have persisted despite contractual undertakings given by the defendant on at least three occasions and despite substantial payments having been made to him in exchange for those undertakings.

26. I am also satisfied that the claimant has established a prima facie case that he has suffered severe anxiety and distress as a result of the defendant's behaviour, and that the defendant has been aware of this for a period of years.

27. Accordingly, I conclude that it is appropriate and in the interests of justice to make the order sought by the claimant in the form sought by the claimant, which as I noted at the outset of this judgment includes an order preventing the defendant from harassing the claimant by approaching or seeking to communicate with the claimant, other than through the claimant's solicitors.

28. These are my reasons for the order that I made at the hearing of the Non-disclosure Application. I also made an order on that date giving directions for the trial of this claim.