Neutral Citation Number: [2023] EWHC 2355 (KB)

Case No: KB-2023-003577

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/09/2023

Before :

MRS JUSTICE HILL DBE

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Between :

BBG	**Intended Claimant/ Applicant**
- and –	
PERSONS UNKNOWN Using the names and telephone numbers listed in Confidential Schedule B to the Order dated 20 September 2023 and who are responsible for communicating with the Claimant via those numbers	**Intended Defendants/ Respondents**

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Kirsten Sjøvoll (instructed by Cohen Davis for the Claimant)

Without Notice

Hearing dates: 18 and 20 September 2023

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Approved Judgment

This judgment was handed down remotely to the parties on 22/09/2023

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MRS JUSTICE HILL DBE

Introduction

1. On the afternoon of Monday 18 September 2023 I heard an urgent, without notice application on behalf of the Intended Claimant / Applicant ("the Claimant") at a private hearing. The application was for an interim injunction to restrain the Intended Defendants ("the Defendants") from disclosing the Claimant's private information and from further harassing him through attempts at blackmail and extortion. I indicated during the hearing that I would grant the application. Certain issues arose in the perfecting of the draft of the order which were addressed at a further private hearing conducted by MS Teams on 20 September 2023, after which the order was finalised. These are my necessarily brief open reasons for making the order and for its detailed terms.

The facts in outline

2. My understanding of the facts as summarised below is, by necessity at this stage, derived solely from the witness statements from the Claimant and his solicitor.

3. The Claimant is an openly gay man, active in his religious community. The Defendants are persons unknown who have been engaging in a campaign of blackmail and harassment against him since July 2023. Specifically, they have been making threats to disclose confidential and private information about him, including intimate and explicit material, among the Claimant's community and the wider public. The risk of adverse publicity from this disclosure is being used to coerce the Claimant. As far as the Claimant is aware, the threat has only briefly come to the attention of a third party, namely his religious community's Facebook page. A limited disclosure was made on that page and then promptly removed.

Hearing in private

4. At the outset of the 18 September 2023 hearing I granted an application made by Ms Sjøvoll on the Claimant's behalf that the application should be heard in private.

5. The Practice Guidance: Interim Non-Disclosure Orders [2012] 1 WLR 1003 ("the Practice Guidance") at [9]-[15] reiterates the fundamental nature of the open justice principle. Derogations from the general rule that hearings are carried out in public can only be justified in exceptional circumstance when they are strictly necessary as measures to secure the proper administration of justice.

6. However, I was satisfied that this test was met in respect of this application. This was because, for the purposes CPR 39.2(3)(a), publicity would defeat the object of the hearing. There is extensive authority supporting a private hearing on an application such as this, which relates to theft of confidential information and blackmail: *Armstrong Watson LLP v Persons Unknown* [2023] 4 WLR 41 at [18].

7. In addition, a private hearing was appropriate under 39.2(3)(c) because the hearing would involve consideration of confidential information and publicity would damage that confidentiality; and more generally under CPR 39.2(3)(g) in order to secure the proper administration of justice.

8. The same reasoning applied to the further hearing on 20 September 2023.

Application without notice

9. Under CPR 25.3(a) the court may grant an interim remedy on an application made without the usual notice having been given if it appears to the court that there are "good reasons" for not giving notice.

10. CPR PD 25A, para. 4.3(3) requires the applicant should take steps to notify the respondent informally of an application, "except…where secrecy is essential".

11. However under the Human Rights Act 1998 ("the HRA"), s.12(2), in applications where the relief, if granted, "might affect the exercise of the Convention right to freedom of expression", and where the respondent is neither present nor represented, additional requirements apply. These are to the effect that no such relief is to be granted unless the court is satisfied (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".

12. The Claimant made this application without notice. The application was supported by evidence stating the reasons why notice had not been given, as required by CPR 25.3(2) and (3). This was primarily in the form of a witness statement from the Claimant's solicitor.

13. Here, the Claimant's evidence explained that notice had not been given due to a concern that if the Defendants were put on notice of the hearing, the time prior to the hearing would be used to disseminate the private information, thus defeating the purposes of the application. Ms Sjøvoll submitted that this was a real risk, not least because the actual identities of the Defendants remained unknown and because the Defendants have given a clear indication of their intention to disclose the information if their demands are not met: on that basis, there was a real risk that giving them notice of the application would have a "tipping off" effect. Further, as in *Armstrong* at [14], providing notice would have given the Defendants the opportunity to read what the Claimant has been doing to investigate their conduct through his liaison with the police.

14. I accepted those submissions, noting that the courts have found in similar blackmail cases that it is appropriate to proceed in the first instance without notifying the intended defendants of an interim application for precisely these reasons: see the cases cited in *Armstrong* at [13].

15. In *Armstrong* at [12] Ritchie J did not consider that the HRA was engaged on the facts of that case, which are similar to this. I make no decision on that issue in this case, but consider that even if s.12(2) is in issue, there are compelling reasons why the Defendants should not be notified of the application for the purposes of s.12(2)(b).

16. If s.12(2) is not engaged, then these reasons show that secrecy was essential for the purposes of CPR PD 25A, para. 4.3(3) and provide "good reasons" for not giving notice under CPR 25.3(a).

Urgency

17. The Claimant's evidence and submissions also explained why the application had been brought urgently, in the court vacation.

18. These are, in summary, that although the blackmail has been ongoing since July 2023, the Defendants are continuing with their conduct. The Claimant's strategy of ignoring them does not appear to have worked. On the contrary it appears to have led to an

escalation of their conduct: on or shortly before 7 September 2023, the Defendants made the disclosure as threatened to the Claimant's religious community Facebook page, demonstrating that they are willing to carry out their threats.

19. On Thursday 14 September 2023 the Claimant met with the relevant police authorities, as a result of which he concluded that any arrests of the perpetrators are not likely to be imminent.

20. On Friday 15 September 2023 the Claimant received another "missed call" from one of the Defendants which he interpreted as a further threat, given that they have no genuine reason to contact him other than in connection with the alleged blackmail.

21. In light of this evidence I was satisfied that it was necessary to consider the application on an urgent basis.

Anonymity for the Claimant, reporting restrictions and access to the court file

22. In cases such as this where there is a strong case for believing that there has been an attempt at blackmail, anonymity is often appropriate. This is on policy grounds, to ensure that the court does not provide encouragement or assistance to blackmailers and does not deter victims of blackmail from seeking justice from the court: *ZAM v CFM and TFW* [2013] EWHC 662 (QB) at [35], [39]-[41] and [44].

23. Ms Sjøvoll also highlighted the concern that it would frustrate the purpose of the injunction sought if the Claimant's application had the effect of making public the very allegations in respect of which he is seeking relief.

24. I was therefore satisfied under the HRA, s.6 and CPR 39.2(4) that it was strictly necessary to order that the Claimant remain anonymous. Non-disclosure of his identify is necessary to secure the proper administration of justice and in order to protect his interests.

25. For the same reasons it was appropriate to order that under the Contempt of Court Act 1981, s.11 there shall be no publication of the identity of the Claimant or of any matter likely to lead to the identification of the Claimant in any report of, or otherwise in connection with, these proceedings.

26. The Claimant also sought an order preventing the Defendants from disclosing the fact or existence of the order to any other person other than their legal advisers. Ms Sjøvoll accepted that this was an exceptional course. However she contended that the evidence indicated that such an order was appropriate because this case involves blackmail being perpetrated by persons unknown, such that without such an order there is a real of the Defendants "tipping off" other individuals with a consequent risk of disclosure of the Claimant's information. There is a lack of apparent cogency between the Defendants; there is some suggestion that their activities derive from organised crime; and there is an international element to them.

27. I accepted those submissions and considered that this exceptional course was appropriate, on the basis that it is limited to such time is necessary, namely to the return date, when it will be reviewed. The extent to which the Defendants have complied with the requirement noted below that they disclose to the Claimant's solicitor within 48 hours details of any disclosure that has been made to third parties is likely to assist in this task.

28. In order to make the order protecting the Claimant's identity effective, and in light of the confidential material contained within the Schedules to the injunction, I was also satisfied that it was strictly necessary to make orders limiting access to the court file to non-parties, who will need to apply for access to any documents on the court file.

The Defendants as Persons Unknown

29. The Claimant does not know the actual identities of the Defendants and so the application and the intended claim is brought against "Persons Unknown". However the Defendants are capable of identification, because the Claimant has access to the user names and telephone numbers they have used to communicate the threats to him. The Defendants are defined solely by reference to their conduct in contacting the Claimant, all of which is said to be unlawful.

30. For these reasons, I was satisfied that the injunction would be directed against particular wrongdoers, who are capable of being identified and served with the order, if necessary by alternative service; that they would understand that the injunction is directed against them: and that they are defined by reference to their conduct, in accordance with *Bloomsbury Publishing v News Group Newspapers* [2003] 1 WLR 163 at [22] and, to the extent necessary, *Canada Goose UK Retail Limited v Persons Unknown* [2020] EWCA Civ 303 at [82(2)] and [(4)].

31. The actual user names and telephone numbers of the Defendants are contained in Confidential Schedule B to the order. This is appropriate so as to reduce the risk of "jigsaw" identification of the Claimant and so as to further open justice principles by, for example, making it easier for an open judgment to be prepared.

32. The Claimant has provided an undertaking to continue to take reasonable steps to trace and serve the Defendants as named individuals, as contemplated by Eady J in *X and Y v Persons Unknown* [2006] EWHC 2783 (QB) at [78].

The injunction

33. The Claimant brings proceedings for misuse of private information and harassment.

34. As a result of the HRA, s.12(3), if this injunction might affect the exercise of Convention rights to freedom of expression, to secure the relief sought the Claimant gad to show that he is "likely" to succeed at trial in establishing that publication should not be allowed. Guidance on the application of s.12(3) was given in *Cream Holdings v Bannerjee* [2005] 1 AC 253 at [22]-[23].

35. By necessity, the decision on this application was made on the basis of the evidence before the court on the application, namely the witness statements from the Claimant and his solicitor. This evidence may well be incomplete. However I have sought to assess the evidence as best I can, without engaging in speculation, to arrive at an assessment of the most likely outcome if all the evidence was before the court at a trial.

36. In my judgment the information which is the subject of the blackmail and threats of further disclosure is plainly private and confidential. The Claimant has been recorded without his consent and is now being blackmailed with the threat of his private information being made public to his friends and family, his religious community and via the press to the public at large. The private, consensual, sexual encounter at the heart of the material is information in respect of which the Claimant had a reasonable expectation of privacy. It is difficult to see what contribution to any debate of general

interest or public interest the Defendants could advance to justify publication. Blackmail victims should be afforded protection by the courts.

37. For these reasons I accepted Ms Sjøvoll's submissions that if the Defendants' Article 10 rights are engaged at all, they are weak; and that the Claimant is likely to succeed in showing a misuse of his private information at trial.

38. The Claimant is also likely to satisfy the court that the Defendants' persistent and deliberate campaign against him constitutes a course of conduct amounting to harassment under the Protection from Harassment Act 1997, s.1. The conduct is criminal in nature in that it amounts to blackmail of the Claimant and is likely to be found at trial to have crossed the boundary between "what is unattractive, even unreasonable, and conduct which is oppressive and unacceptable": *Hayden v Dickenson* [2020] EWHC 3291 at [40(ii)].

39. To the extent that the injunction does not engage Convention rights to freedom of expression, I consider that there is a serious question to be tried on the Claimant's claims for the purposes of the test set out in *American Cyanamid v Ethicon* [1975] AC 396 per Lord Diplock at 407G. Further, damages would not be an adequate remedy for the Claimant if the injunction was not granted and the publication occurred. There are also presently doubts about whether any order for damages could be met by the Defendants given how little is known about them. The Claimant has provided the usual cross-undertaking in damages in Schedule B to the order.

40. In summary, the injunction restrains the Defendants from contacting the Claimant or those linked with him; using, publishing, communicating or disclosing the confidential information as defined in Confidential Schedule A; or publishing any material likely to identify the Claimant as a party to these proceedings and / or as the subject matter of the information. The acts are clearly defined.

41. To the extent necessary, for the purposes of *Canada Goose* at [83(3), (4), (6) and (7)], I am satisfied that interim injunctive relief is appropriate, because there is a sufficiently real and imminent risk of torts being committed to justify precautionary relief; that the prohibited acts correspond to the threatened torts; that the terms of the injunction are sufficiently clear and precise as to enable persons potentially affected to know what they must not do; and that the interim injunction has clear temporal limits, expiring as it does on the return date.

42. The order also requires the Defendants to disclose to the Claimant's solicitor within 48 hours details of any disclosure that has been made to third parties.

Time for service on the Defendants of the claim form and Particulars of Claim

43. The order makes provision for the Claimant to file and serve the unsealed claim form (and application) forthwith.
44. Time for service of the Particulars of Claim has been extended until further order and is to be determined at the return date.

Alternative service under CPR 6.15(1)

45. The Claimant sought an order for alternative service of the claim form, the injunction and other documentation in these proceedings on the Defendants by way of instant WhatsApp message to the telephone numbers set out in Confidential Schedule B to the order. This was appropriate as it is currently the only way the Claimant has of communicating with the Defendants and would enable proceedings to be served promptly. For these reasons I was satisfied that there is a "good reason" to authorise

service by a method or at a place not otherwise permitted by Part 6, for the purposes of CPR 6.15(1).

46. The order also makes provision for the Defendants to notify the Claimant of their address for service within 24 hours of service of the order. If complied with, this would enable to the court to have a record of the Defendants' addresses and for them to be served personally with documents in future, to ensure as far as possible that they are on notice of the court's order and the prohibitions to which the Defendants are subject.

Service out of the jurisdiction

47. The Claimant also sought permission to serve the relevant documents the jurisdiction if that is where the Defendants are based, under CPR 6.36, 6.38 and PD 6B.

48. This was appropriate given the evidence referred to in the Claimant's solicitor's witness statement suggesting that the Defendants may be based abroad, namely the fact that the phone numbers used appear to be African and the reference to African bank transfers. Further, the initial incident which led to the recording of the Claimant's private information took place in a European country outside the UK. The disclosures are all threatened to take place in England and Wale, which is where the Claimant is based. The harm will therefore be suffered in this jurisdiction for the purposes of PD 6B 3.1(21).

49. This case was therefore on all fours with *PML v Persons Unknown* [2018] EWHC 838 (QB) at [18], cited in *Armstrong* at [25] and the approach taken in *Armstrong* itself at [26]-[30]. As noted by Ritchie J in *Armstrong* at [36], the fact that an injunction may not be effective is not a reason not to grant it; and as Ms Sjøvoll submitted, it cannot be said at this stage that that is the case here.

Other provisions and return date

50. The order also includes the provisions set out in paragraphs 10-22 of the model order appended to the Practice Guidance regarding the protection of hearing papers, the provision of documents and information to third parties (such as media organisations, should any interest in the subject matter of this application be expressed, which it has not been to date), variation or discharge of the order, costs and other matters. I considered that these were all appropriate.

51. The order will be reviewed on the return date of 19 October 2023.

Publication of this judgment

52. I have received and accepted submissions from the Claimant as to the contents of this judgment, to ensure so far as possible, that the judgment itself does not contain material which would lead to the identification of the Claimant by way of "jigsaw" identification.

53. For similar reasons, and given the order made at [27] above, I agreed to postpone publication of this judgment until the return date, noting the similar course taken in *DFT v TFD* [2010] EWHC 2335 (QB) at [36]-[39]. I was informed after the return date hearing that the Claimant was content that publication could take place.