Neutral Citation Number: [2024] EWHC 2696 (KB)

Case No: KB-2024-003459

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24 October 2024

Before :

MRS JUSTICE STEYN DBE

- -

Between :

GONCALO FERREIRA-MALOSSO

Claimant

- and -

JUSTINA NOWAKOWSKA

Defendant

- -
- -

Thomas West, Solicitor Advocate, Richard Slade & Partners Solicitors for the **Claimant**
The **defendant** did not appear and was not represented

Hearing date: 24 October 2024

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Approved Judgment

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THE HONOURABLE MRS JUSTICE STEYN DBE

Mrs Justice Steyn DBE:

Introduction

1. On 17 October 2024, the claimant made an urgent without notice application for an interim injunction, prior to the commencement of a claim in defamation. An interim injunction was granted by the Interim Applications Judge at a hearing, which the defendant did not attend and of which she was given no notice. This is the return date hearing.

2. For the reasons that I will now give, it is clear that an interim injunction was obtained by dint of the Court being misinformed as to the correct test to be applied where an interim injunction is sought in defamation proceedings. The interim injunction is now set aside.

3. It is unnecessary, for the purpose of addressing the current issues, to provide any detail of the statements complained of, and so I have refrained from doing so in this public judgment.

The procedural history

4. At 2.54pm on 17 October 2024, prior to issuing a claim, the claimant filed a without notice application notice seeking:

> "An order for an interim injunction in the form of the draft attached, restraining the Defendant/Respondent from further disseminating defamatory statements about the Claimant, and/or harassing the Claimant, pending the determination of the trial in these proceedings."

5. The draft order was in the form of the model contained in the *Practice Guidance: Interim Non-Disclosure Orders* [2012] 1 WLR 1003.

6. The application was supported by the first witness statement of the claimant, dated 17 October 2024. The claimant's statement explained that the matter was "*extremely urgent*". He is a professional musician, he had a music release pending the following day, 18 October 2024, and he alleged "*the Respondent is attempting to sabotage my career*" ([22]).

7. CPR 25.3(3) provides that if an applicant makes an application without notice, the evidence in support of the application must state the reasons why notice has not been given. As the application was for a without notice order that would affect the defendant's right to freedom of expression, and the claimant did not seek to notify the defendant, the requirement was to state the "*compelling reasons why the respondent should not be notified*": s.12(2) Human Rights Act 1998. The claimant's evidence did not expressly address this issue.

8. The application was heard by the Interim Applications Judge at 3.30pm on 17 October 2024, and as I have said, the application was granted and the order sought was made. The order was duly served on the defendant.

9. Paragraph 5 of the Order required the defendant to disclose to the claimant's solicitors, within 24 hours of service of the Order upon her, the identity of each and every third party to whom she had disclosed the information defined in the confidential schedule, the date of the disclosure and the nature of the information disclosed. The defendant sent the claimant's solicitors emails on 18 October 2024 providing such disclosure.

10. On Monday 21 October 2024, the claimant filed a Claim Form and a copy has been sent to the defendant. It is unclear whether it has yet been sealed, or therefore formally served. The brief details of claim state:

> "The Claimant's claim is for:
>
> 1. A final injunction restraining the Defendant whether by herself, her agents or otherwise howsoever, from continuing to publish, or further publishing, or causing to be published, the content of an email at 15:44 on 15 October 2024 to info@dacru.be, or any similar words defamatory of the Claimant.
>
> 2. Further or other relief that the court deems just.
>
> 3. Costs."

Under the heading "*Value*", it states, "*The Claim is for a non-money remedy only*".

11. The only pleaded cause of action is in libel. However, when I drew that to the attention of Mr West, the Solicitor Advocate for the claimant, he indicated that was an error. The claimant had intended to pursue his cause of action in harassment, too, and so Mr West sought permission (if necessary) to amend the Claim Form, which I grant.

12. Yesterday, I put the claimant on notice of my concern that, on the face of it, the claimant appeared to have misled the court as to the correct test to apply in the context of an interim injunction application in defamation. I stated:

> "The applicant appears to have done so by contending the test is the ordinary American Cyanamid test, and by failing to draw the court's attention to the long-standing *Bonnard v Perryman* rule: see, e.g. *Gatley*, 27-002 and *Duncan and Neill* 26.03. The applicant will need to be ready to address this matter at the return date hearing tomorrow afternoon."

The threshold for grant of an interim injunction in libel

13. The threshold for granting an interim injunction in libel is exceptionally high. The *American Cyanamid* principles do not apply. Interim injunctions to restrain defamatory publications are subject to an even higher threshold than s.12(3) Human Rights Act 1998: *Greene v Associated Newspapers Ltd* [2005] QB 972, applying what is known as 'the defamation rule' or 'the rule in *Bonnard v Perryman*' *(*derived from *Bonnard v Perryman* [1891] 2 Ch 269). At the interim stage, the Court will not grant an injunction to restrain publication of defamatory words unless the claimant can demonstrate that their claim is "*bound to succeed*".

14. *Gatley on Libel and Slander* (13th ed., 2022) addresses interim injunctions in chapter 27. At 27-002, the authors correctly state:

> "Thus the Court will only grant an interim injunction where:
>
> (1) the statement is unarguably defamatory;
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> (2) there are no grounds for concluding the statement may be true;
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> (3) there is no other defence which might succeed;
>
> (4) there is evidence of an intention to repeat or publish the defamatory statement.
>
> To these conditions, which will be examined in turn below, there must be added a procedural requirement imposed by s.12(2) of the Human Rights Act 1998 that the person against whom the injunction is sought must be present or represented at the application, or notified about it, unless there are compelling reasons for not doing so." (Emphasis added.)

15. At 27-006, the authors of *Gatley* cite the decision in *Bonnard v Perryman*, observing that Lord Coleridge's statement of the law "*has been endorsed and applied consistently since 1891*", and that "*the Court of Appeal has unequivocally re-asserted the absolute nature of the rule in defamation cases which it held was unaffected by the Human Rights Act 1998*" (citing *Greene*).

16. *Duncan and Neill on Defamation* (5th ed., 2020), similarly, explains the defamation rule at 26.02 *et seq*.

17. Mr West relies on *RBT v YLA* [2024] EWHC 1855 (KB) in which Aidan Eardley KC, sitting as a deputy High Court Judge, observed:

> "**Interim injunctions to prevent harassment**
>
> 25. Where (as here) an injunction might affect the exercise of a defendant's ECHR Art 10 right to freedom of expression, the threshold test in Human Rights Act 1998, s.12(3) applies: "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". "Likely" generally means "more likely than not", though in exceptional circumstances (such as extreme urgency or a very great degree of risked harm) a lesser likelihood of success will suffice: *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 at [21].
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> 26. In a case where the nub of the application is the protection of the claimant's reputation, the Court will apply the more exacting threshold test identified in *Bonnard v Perryman* [1891] 2 Ch 269 which applies in defamation. Under the rule in Bonnard v Perryman, the Court will refuse interim relief if the defendant

> asserts on some credible basis that publication will be defensible: LJY at [45].
>
> 27. In determining whether the nub of the claim is the protection of reputation the Court must stand back and ask itself what really is the gist and purpose of the application: see *Siddiqi v Aidiniantz* [2019] EWHC 1321 (QB) (Warby J) at [94] and the cases cited there. The rule in *Bonnard v Perryman* is likely only to apply where the protection of reputation is the "sole or main purpose". The fact that the claim may be motivated in part by concern for reputational harm is unlikely to be sufficient to engage the rule: see Linklaters LLP v Mellish [2019] EWHC 177 (QB) at [35]."

18. A claimant cannot avoid the defamation rule by framing their claim in alternative causes of action, such as harassment. The stricter rule will apply if the 'nub' of the claim is the protection of reputation. But if it is principally a harassment claim, and the 'nub' of the claim is not protection of reputation, then the "*more likely than not*" standard will apply. In any event, a "*good arguable case*" is insufficient to obtain an interim injunction in a claim for defamation and harassment.

The hearing before the Interim Applications Judge

19. The claimant's skeleton argument for the hearing before the Interim Applications Judge submitted, under the heading "Jurisdictional Thresholds", that the claimant "*has a good arguable case in defamation and harassment*" and that the "*balance of convenience*" fell in the claimant's favour. Similarly, the claimant's witness statement asserted that he has a "*good arguable case*" and that the "*balance of convenience*" favoured the grant of an interim injunction. In other words, the claimant sought to persuade the Court to grant the application on the basis that the *American Cyanamid* test was applicable, albeit there was no direct reference to that case.

20. Mr West has acknowledged, and apologised, for the failure to make any reference to the defamation rule at that hearing. However, he has sought to persuade me that it would not have applied as there was a claim for harassment and, he submits, the 'nub' of the claim was not protection of reputation. I am not persuaded that is the case. The claimant's witness statement focuses on the damage to his reputation in the music industry through the dissemination of the statements complained of to others in the same industry. None of those publications are said to have been sent to the claimant, albeit he says he has been affected by them. In my judgment, it is readily apparent that the main purpose in bringing the claim is protection of the claimant's reputation, and so the defamation rule applied.

21. Unfortunately, thus misled, the Interim Applications Judge applied the wrong test. He concluded that there was "*a serious issue to be tried*", while acknowledging that he was "*in no position whatever to judge the merits of the allegations which the Respondent makes*", and that the balance of convenience favoured imposing an injunction pending the return date.

22. The claimant could not, and cannot, even assert, still less establish at an interim hearing, that his claim is bound to succeed.

The position today

23. On the papers before me, applying the defamation rule, it is clear that the threshold for granting or maintaining an interim injunction is not met. Indeed, the evidence does not come close to showing the claimant is bound to succeed. He has an arguable case, that is all. The claimant does not contend that he can demonstrate, at this interim stage, that it is clear that the alleged libel is untrue and his claim would be bound to succeed. Accordingly, insofar as the claimant seeks to maintain the *interim* injunction granted on 17 October 2024, I have no hesitation in refusing the application and setting aside the interim injunction.

24. However, earlier today, the parties sought to vacate the hearing, having agreed a draft consent order which would have maintained the injunction on a final basis, with the claimant paying no costs or damages. The defendant has explained in an email to the Court that the statements complained of are true, but for health reasons (which it is unnecessary for me to detail), she simply wants the case to be over.

25. While I understand the strength of the defendant's wish for the claim to be over, and the Court, of course, encourages the settlement of claims, I was not prepared to vacate the hearing. My reasons for requiring the hearing to go ahead were, first, it was necessary to understand whether the Court had, indeed, been misinformed as to the applicable law last week and, if so, to consider what consequences, if any, should follow. Secondly, if the interim injunction fell to be set aside, I considered fairness required that the defendant (who is unrepresented) should be informed of the claimant's lack of entitlement to the order he obtained last week (at least at the interim stage) and of the Court's view of what has happened.

26. I have addressed the without notice hearing. While it is unsatisfactory that the correct test was not drawn to the Court's attention, having regard to Mr West's explanation of the circumstances, and his gracious apology, I am content that no further action, beyond setting aside the interim injunction, is necessary.

27. So far as the consent order is concerned, Mr West has acknowledged before me today that an injunction prohibiting the defendant from pursuing "*any other conduct which amounts to harassment of the Defendant*" is too vague to be maintained. As the draft consent order currently stands, that element of the order would be continued. In addition, the current form of the draft consent order does not address the fact that I am setting aside the interim injunction. I am not therefore prepared to approve the consent order in its current form.

28. In the circumstances, I consider that the just course is to give the defendant an opportunity to read this judgment, and a period of 7 days to reflect on whether she wishes to settle the claim on the terms of the draft consent order (subject to the amendments to which I have referred), or otherwise. If so, the parties can re-submit a draft consent after that period has elapsed for the Court's consideration. I would encourage the defendant to seek legal advice. There are sources of free legal advice available, for example from community law centres.