IN THE HIGH COURT OF JUSTICE **Claim No HQ13 X 01096**

QUEEN'S BENCH DIVISION

HHJ MOLONEY QC (sitting as a Judge of the High Court)

NNN Claimant

And

1. PAUL RYAN

2. DARIUS KENNEDY Defendants

JUDGMENT IN OPEN COURT

(handed down on 23 July 2014)

1. It is a fundamental principle that whenever possible justice should be done in open court. On those occasions when the interests of justice would actually be defeated by sitting or giving judgment in open court, the Court will if possible give a short judgment in open court explaining to the press and public the nature of what has taken place and in particular why it has had to derogate from the principle of open justice. (In addition I have given a fuller judgment in private setting out in more detail, by reference to the evidence which cannot be publicly disclosed, why I have reached my conclusions.)

2. In this case, there are two main reasons why the litigation has been conducted in private and on the basis of the Claimant C's anonymity. First, it concerns confidential information as to his private life, and by its very nature that confidentiality could not be protected if the proceedings had to take place openly. Second, the Defendants had sought substantial payments from C in return for keeping the information secret; this is blackmail, or something very close to it, and it is the long-standing policy of the law that blackmail victims should enjoy anonymity to encourage them, and others in their position, to seek the protection of the law.

3. There has been a previous open court judgment in this case, that of Sharp J dated 20 March 2013 ([2013] EWHC 637 (QB)), to which I refer generally, and in particular for her summary of the law governing anonymity which I adopt. That judgment explained why interim relief had been granted.

4. The case then came before me on 21 July 2014 for the hearing of three applications:

a. the First Defendant D1's application to set aside a default judgment entered against him by Master Cook on 25 May 2014, for failure to comply with an "unless order" of Master Fontaine dated 7 April 2014 requiring him to give disclosure by 21 April 2014;

b. C's application for summary judgment on liability (if D1 was successful in setting aside the existing judgment); and

c. C's application against both Ds for a permanent injunction; (D2 is the subject of a default judgment which he has not sought to set aside, and he has not attended or played any part in the hearing before me).

5. As to the first application, on investigation of the Court files it emerged that, unknown to Master Cook, D1 had in fact filed a list of documents with the Court as soon as possible after 21 April 2014, which was a bank holiday. He had failed to serve it on C's solicitors as he should have done, but the Order of Master Fontaine was not explicit on this point and it was an understandable error on the part of a litigant in person. Furthermore, it appeared from that list that apart from the papers in the case itself D1 did not in fact have any material documents to disclose, certainly none that were not already in C's hands; given the limited nature of his involvement in the underlying incident, as indicated below, this was not surprising. I therefore concluded that, given the nature of and reason for the breach, and the very limited prejudice in fact caused by it to C, it was a proper case for relief from sanction, applying the now current guidance in Denton v. White [2014] EWCA Civ 906.

6. The second application, for summary judgment in C's favour, was at the heart of the case. Could C satisfy the Court that D1 had no real prospect of defeating at trial C's claim for a permanent injunction (damages having been waived)? Or, put another way, was there a factual dispute which needed to be resolved at trial before C's claim for an injunction could be decided?

7. Sharp J has already summarised the essentials of C's case, which are as follows:
a. one night, C had an intensely personal, private and confidential conversation with another person, X;
b. that conversation took place in the hallway of a converted house where X has a flat;
c. unknown to either of them, an eavesdropper recorded a sensitive part of that conversation on a mobile phone;

d. the eavesdropper (now admitted to be D2, who had been a visitor to X's flat) then gave the recording to D1;

e. some time later, D1 went to representatives of C and X and sought a substantial payment in return for not letting the recording become public, as a result of which C obtained interim relief.

8. It will be seen that D1 has no independent knowledge of the original incident (other than listening to the recording). Importantly for the purposes of the summary judgment application, his Defence (and D2's witness statement on which D1 would rely at trial) admit substantially all the main facts and matters relied on by C in support of his claim. D1 does however put certain points in issue, and the question thus becomes: if D1 succeeded in proving those matters at trial, would or might that lead to the Court refusing to grant the injunction?

9. The points D1 put in issue were:

a. had X already told a small number of people the confidential information concerning C which was at the heart of their conversation?

b. was the conversation conducted in a loud and drunken manner, such that there could be no reasonable expectation of privacy in relation to it?

c. did the confidential information show C to be a hypocrite, such that there was a public interest in disclosing it?

d. was it right to characterise D1's conduct as blackmail (given that it had been reported to the police who had taken no action on it) or was it a legitimate attempt to deal with information over which he and D2 had rights?

10. It is not possible to set out in this public judgment the details of the evidence on these points or my reasoning in respect of it, without risking the disclosure of C's identity and the confidential information. I can however state my conclusions. In reaching them, I have applied the now familiar principles of privacy law, as summarised by Ward LJ in K v. News Group [2011] EWCA Civ 439 at para.10 (1) to (5).

11. Even if X had told a small number of people the confidential information, that would not mean that the information had entered the public domain so as to prevent C obtaining relief, especially given that there is no suggestion that C had consented to X's doing so. I am satisfied that further disclosure would be injurious to C.

12. It is clear from the evidence, including the recording and transcript, that the conversation was conducted between two people who believed themselves to be alone in a private or semi-private place (the locked entrance hall of X's apartment building). Indeed they held it there precisely because it was more private than X's flat, in which X had visitors. Even if the conversation had at times been conducted in raised voices, they had no reason to suppose that it was being overheard, still less recorded. Its private nature would have been apparent to any listener, who would or should have realised that it was a confidential matter which he was under a duty not to disclose to the public. In legal terms it is clear that they had a reasonable expectation of privacy, whatever their tones of voice.

13. C is in no sense a role model or person in a position of authority. There is no public interest in the specific content of the confidential information. His occasional public statements to which D1 referred me are conventional in nature, and their contrast with the confidential information is not sufficient to prove him to be a hypocrite. And even if he were something of a hypocrite, in his particular case that would not be a matter of public interest sufficient to override his rights of privacy and confidentiality. These are not fact-sensitive issues requiring a trial.

14.1. I now turn to the "blackmail" issue, and the wider balancing exercise to which it is relevant. As in all cases of this kind, the Court has to resolve a conflict between C's Article 8 right to respect for his private life and D1's Article 10 right to freedom of expression. In such a case the Court must balance the competing rights in accordance with the guidance of Lord Steyn in Re S [2005] 1 AC 593 at para. 17:-

- neither Article has priority over the other;
- it is necessary to apply an intense focus on the comparative importance of the specific rights claimed in the individual case;
- one must take into account the justification for interfering with or restricting each right;
- finally one must apply the proportionality test to each right.

14.2. C's Article 8 right is clearly and strongly engaged, and the harm he is likely to suffer from publication is clear. There is no apparent justification for interfering with that right (other than D1's competing rights).

14.3 In D1's case, the information itself does not relate to him personally in any way, nor did he play any part in the events surrounding it. His own admissions and the contemporaneous notes of his dealings with C's and X's representatives establish that he was undoubtedly seeking a substantial payment from the subject of the confidential material, with the express

or clearly implicit threat that otherwise it would be provided to the media. Whether or not he could successfully have been prosecuted for the crime of blackmail, to which the criminal standard of proof applies, I am satisfied on the balance of probability that his conduct can fairly be classed as blackmail and that he has no prospect of persuading a trial judge otherwise. It is clear that this proposed exercise of his right of free speech would be an improper and abusive one, entitled to little weight in the balance as against C's strong right of privacy and confidentiality. (See for example AMM v. HXW [2010] EWHC 2457 QB at paras 37 to 39, per Tugendhat J.)

15. To sum up, the facts which D1 wishes to put in issue are only of marginal significance in legal terms, compared with the facts which are admitted or indisputable. Even if he proved those disputed facts at trial, he would still have no real prospect of defeating C's claim for an injunction, given the established legal principles which apply to such cases. C's application for summary judgment should therefore be granted.

16. Liability having been established, the third application relates to whether and to what extent I should grant a final injunction. The most recent evidence shows that C's interests, and the harm he is likely to suffer from publication, remain the same and as strong as they were at the time the action was commenced. The information has not entered the public domain. D1 has actively resisted C's claim and these applications; he has offered no undertakings and unless restrained would do his best to publish the information. A final injunction against both D1 and D2 is clearly necessary and proportionate.

17. As to the terms of the injunction, the only point which gave me some concern is whether it should restrict the identification of X in connection with the case, given that X is not a party. Though X has not asserted a privacy right in that way, I am satisfied that if X's name were published as that of the other party to the conversation there is a real risk that this would lead by the "jigsaw" process to the identification of C and the disclosure of the confidential information. I shall therefore grant the injunctive relief sought, including a prohibition on identifying X.

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