Neutral citation: [2019] EWHC 2569 (QB)

Case No: QB-2019-003362

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/10/2019

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

SOJ — **Claimant**

- and -

JAO — **Defendant**

- -

Adam Speker (instructed by **Carter-Ruck**) for the **Claimant**
There being no appearance by the **Defendant**

Hearing date: 24 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.

....

THE HONOURABLE MR JUSTICE PEPPERALL:

1. SOJ (hereafter "Mr J") is a wealthy and well-known businessman. Between late 2017 and early 2018, he had an intimate relationship with JAO (hereafter "Ms O"). By this application, Mr J applies without notice for an injunction to restrain Ms O from publishing or disclosing the fact of their relationship, her allegation that she contracted a sexually transmitted infection from Mr J in the course of their relationship and various details of their legal dispute.

2. I heard Mr J's application in private on 24 September 2019. The following morning, I granted an injunction in substantially the terms of the draft before me. This is my judgment explaining the reasons for my order.

DEROGATIONS FROM THE PRINCIPLE OF OPEN JUSTICE

3. Rule 39.2 of the Civil Procedure Rules 1998 provides, so far as is relevant:

> "(1) The general rule is that a hearing is to be in public. A hearing may not be held in private … unless and to the extent that the court decides that it must be held in private, applying the provisions of paragraph (3).
>
> (2) In deciding whether to hold a hearing in private, the court must consider any duty to protect or have regard to a right to freedom of expression which may be affected.
>
> (3) A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice–
>
> (a) publicity would defeat the object of the hearing; …
>
> (c) it involved confidential information … and publicity would damage that confidentiality; … or
>
> (g) the court for any other reason considers this to be necessary to secure the proper administration of justice.
>
> (4) The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or a witness."

ANONYMITY

4. I have no hesitation in not disturbing the anonymity order made by Master Davison pending an inter partes hearing in this case:

 4.1 First, disclosure of the parties' names would defeat the very purpose of this application in that it would destroy the privacy of the information sought to be protected.

4.2 Secondly, I consider that non-disclosure is necessary in order to protect the interests of both parties:

a) On the evidence before me, Mr J may be the victim of blackmail. Refusing anonymity would be to deny him a potential judicial remedy for such wrong: LJY v Persons Unknown [2017] EWHC 3230 (QB); [2018] E.M.L.R. 19.

b) Equally, anonymity is necessary to protect Ms O's interests in circumstances where she has been accused of blackmail but not yet afforded the opportunity to put her side of the case: NPV v. QEL [2018] EWHC 703 (QB), [2018] E.M.L.R. 20, at [17].

4.3 Thirdly, anonymity has the advantage that the court can then explain rather more of the circumstances of this case in a public judgment: H v. News Group Newspapers Ltd [2011] EWCA Civ 42, [2011] 1 W.L.R. 1645.

SITTING IN PRIVATE

5. I carefully considered whether anonymity alone might suffice in this case. Not every privacy or confidentiality case must necessarily be heard in private, even where there are allegations of blackmail: see, for example, LJY. For the following reasons, I was, however, satisfied as to each of rr.39.2(3)(a), (c) and (g):

5.1 Publicity would have defeated the object of this hearing.

5.2 The case concerns confidential information that would be damaged by publicity.

5.3 Even if those concerns could be dealt with through anonymity and extra care in court, the allegations of blackmail warrant a private hearing at the without notice stage:

a) There is a threat in this case to make public information about a brief sexual relationship even after Mr J agreed to pay US$1.5 million to keep such matters confidential.

b) On the other hand, it must be remembered that Ms O has not yet had an opportunity to defend her position. Here, the allegations are not made against persons unknown (as in LJY) but against an identifiable person.

c) It is at least arguable that Ms O was not seeking to blackmail Mr J at all but to recover compensation for having been negligently or recklessly infected with one or more sexually transmitted diseases. As an English judge, I am not qualified to take a view on the likely award of an American jury, but it may be that Ms O will in due course be able to defend her initial demand of $2.5 million and subsequent settlement of $1.5 million upon the basis that she was simply seeking to settle a threatened tort action.

d) Equally, it may be that Ms O now has a genuine claim under US law arising out of the recent processing of her personal data. As an English judge, I can take a view as to the availability of a claim under the General Data Protection Regulation 2016 ["GDPR"], but it is not for me to assess the merits of any other claim that she might have under US law.

I am therefore satisfied that it is necessary to sit in private in order to secure the proper administration of justice.

SERVICE

6. The general rule is of course that applications should be made on proper notice: r.23.7(3). The rules do, however, allow parties to make applications without notice where there are "good reasons" for not giving notice: r.25.3(1). There is a further consideration in any case, such as this, where the relief sought might affect the exercise of the right to freedom of expression pursuant to article 10 of the European Convention on Human Rights. Section 12(2) of the Human Rights Act 1998 provides that in such a case:

> "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–
>
> (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."

7. Warby J observed in Birmingham City Council v. Afsar [2019] EWHC 1560 (QB) that the law is "particularly strict" when it comes to applications for relief which, if granted, would interfere with the article 10 right to freedom of expression. As he identified, s.12(2) is a jurisdictional threshold in that, unless the requirements of the subsection are satisfied, the court has no power to grant an injunction.

8. In this case, non-service is a matter of deliberate choice rather than practicality. Adam Speker, who appears for Mr J, argues that there are compelling reasons why Ms O should not be notified of this hearing in that the very purpose of the application is to prevent her from carrying out her threat to disclose confidential information about Mr J through the issue of proceedings in the United States.

9. On 1 August 2011, the then Master of the Rolls issued the Practice Guidance: Interim Non-Disclosure Orders reported at [2012] 1 W.L.R. 1003. Lord Neuberger MR dealt with the operation of s.12(2)(b) of the 1998 Act at paras 21-22:

> "21. Failure to provide advance notice can only be justified, on clear and cogent evidence, by compelling reasons. Examples which may amount to compelling reasons, depending on the facts of the case, are: that there is a real prospect that were a respondent or non-party to be notified they would take steps to defeat the order's purpose (RST v. UVW [2010] E.M.L.R. 355, paras 7, 13), for instance, where there is convincing evidence that the respondent is seeking to blackmail the applicant: G v. A [2009] EWCA Civ 1574 at [3]; T v. D [2010] EWHC 2335 at [7].
>
> 22. Where a respondent, or non-party, is a media organisation only rarely will there be compelling reasons why advance notification is or was not possible on grounds of either urgency or secrecy. It will only be in truly exceptional circumstances that failure to give a media organisation advance notice will be justifiable on the ground that it would defeat the purpose of an interim non-disclosure order. Different considerations may however arise where a

> respondent or non-party is an internet-based organisation, tweeter or blogger, or where, for instance, there are allegations of blackmail."

10. I am satisfied that there are compelling reasons why Ms O should not be notified of this application. On the face of the evidence before me, threats have been made to disclose confidential information through the issue of proceedings in the US. In the event that notice were given, there is a real risk that such threat might be carried out in an attempt to deprive this application of any practical utility.

THE EVIDENCE

11. The evidence before me is contained in Mr J's witness statement and in a statement by his US attorney. It is important that I should make plain from the outset that, because I heard this application without notice to Ms O, this is necessarily a one-sided account of events.

THE RELATIONSHIP

12. Mr J is a married man. He says that after he ended his relationship with Ms O, she engaged in a campaign of harassment. In July 2018, Mr J's solicitors sent a "cease and desist" letter to Ms O. She replied by email the same day giving a very different account of their relationship. She denied that the relationship had ended as early as Mr J alleges. She denied harassment and made plain her upset at both the end of the relationship and the way in which she was cast aside.

THE SETTLEMENT AGREEMENT

13. Ms O instructed a US attorney in late July 2018. Through him, she alleged that Mr J had infected her with two sexually transmitted diseases. While indicating Ms O's willingness to settle, her attorney referred to the possibility of an action in the US and added:

    > "[American] juries take great offense at this behaviour."

14. Mr J vehemently denied having infected Ms O and sought, through his lawyers, to exchange medical records to make good his denial. Ms O then issued proceedings in the US but without any detail of her case. Her attorney explained that the detailed allegations would follow when he filed the subsequent complaint. Meanwhile, Mr J issued a claim in London. On 1 August 2018, Mr J's London lawyers, Carter-Ruck, discussed the case with Ms O's US attorney. Ms O's position was put robustly; she needed to be paid off with a significant seven-figure settlement or she would file the details of her complaint in the US, and her lawyer was not interested in discussing the sharing of medical records. Carter-Ruck's attendance note of the call records Ms O's lawyer as having made the following statements and demands:

    > "Either offer her a lot of money or we file. You can litigate it. Do you want a further discussion or do you want to hang up? …
    >
    > She wants $2.5m – if that's not on the table by Friday 4pm then we file …
    >
    > Whatever you may think about this kind of stuff, it seems that your client has had unprotected sex with a number of different women. He's got a billion dollars; he's

going to face the facts that if he is going to go around having sex with multiple different partners without a condom then he's going to get [them] sick and he's going to have to pay for it ...

He's a billionaire, he didn't get there by being a good fairy. He knows what he did. I have a lot of information on him. I'm ready to go."

15. Mr J says that he felt that he had no option other than to agree to Ms O's demands. Negotiations ensued and he agreed to pay $1.5 million to secure Ms O's silence. By a written agreement dated 6 August 2018, the parties settled their dispute. The following key features of the agreement are relevant to this application:

15.1 Clause 1: Ms O agreed to return all property (including electronically and digitally created or stored property) provided to her by Mr J, provided by her to him or which refers to, depicts or concerns Mr J. Further, she agreed to certify under oath that she had searched for and returned all such property and that she had taken all steps necessary to obliterate any residual electronic and digital property.

15.2 Clause 2: Mr J agreed to pay $1.5 million. The settlement sum was payable as follows:

a) $1 million payable upon receipt of the sworn certification referred to in clause 1; and

b) two equal payments of $250,000 payable upon the first and second anniversaries of the agreement.

In advance of such anniversaries, Ms O was required to certify under oath that she had not violated the confidentiality and non-disclosure provisions at clause 3.

15.3 Clause 3: Central to the settlement was Ms O's agreement to maintain the confidentiality of the details of her relationship with Mr J, the disputed allegation of infection and the parties' legal dispute. Clause 3(a) provided:

> "[Mr J] warrants that confidentiality and non-disclosure of the claims asserted by [Ms O]; the alleged factual basis for the assertion of claims; and the fact and terms of this Settlement Agreement are of paramount importance to him and a material condition of this Settlement Agreement. By executing this Agreement, [Ms O] undertakes never to disclose to anyone or any entity, for any reason, under any circumstance, (i) the existence of any personal relationship with [Mr J]; (ii) any claim, directly or indirectly, that he was the source of any medical condition hitherto alleged or purportedly identified in the future; (iii) any allegation made in the Summons with Notice; (iv) that there was ever any threat of or actual litigation between the Parties; (v) the existence and terms and conditions of this Settlement Agreement including, without limitation, the amount paid by any party in connection with the settlement; (vi) any assertion of fact or opinion or a statement which reasonably would be understood as false, derogatory, or disparaging of, or concerning [Mr J]; and [vii] assisting or aiding anyone in asserting a claim against [Mr J] or asserting a fact or opinion or a statement which reasonably would be understood as false, derogatory, or disparaging … or concerning [Mr J]."

15.4 Clause 4:

a) By clause 4(a), Ms O would forfeit all right to any further monies and be liable to repay any sums already paid in the event that "[she] or anyone acting on her behalf at any time breaches or threatens to breach clause 3 of the Agreement."

b) Clause 4 further provided:

> "(c) In addition …, [Mr J] has the right to seek injunctive relief … arising from any breach of clause 3 of this Agreement.
>
> (d) In the event that [Ms O] challenges the conclusion that she breached clause 3 of this Agreement, including, *inter alia,* by making or threatening to make a disclosure, the burden of proof shall be on her to prove that she was not the source of the disclosure or threat of disclosure by a preponderance of the evidence."

c) By clause 4(f), the parties agreed to refer any dispute as to "whether there has been an actual or threatened breach" of the agreement to confidential arbitration under the auspices of the American Arbitration Association.

15.5 Clause 5 provided:

> "Any violation of the terms of clause 3 will constitute a breach of this Agreement. In the event of such breach, in addition to the above, [Ms O] hereby consents to the granting of a temporary and permanent injunction by any court of competent jurisdiction including but not limited to the High Court in England against her or against any agent acting on her behalf, prohibiting her or her agent from violating the terms of clause 3."

16. On 13 August 2018, Ms O swore an affidavit as required by clause 1 of the agreement confirming that:

16.1 she had "totally and completely obliterated and destroyed" paper, photographic and electronic copies of property provided to her by Mr J or which refers to, depicts or concerns Mr J or his family;

16.2 no such property remained in her possession, custody or control;

16.3 save for an exception not relevant to this application, she had returned and destroyed, and directed her US attorney to destroy, all such property in her possession, custody or control; and

16.4 if she became aware of the existence of any such property, she would promptly return it and totally and completely obliterate and destroy any copies.

17. Upon receipt of the affidavit, Mr J paid $1 million; half to Ms O and half to her attorney as directed by the agreement.

SUBSEQUENT EVENTS

18. In April 2019, Mr J received information from a mutual acquaintance (referred to in this judgment as Ms X) that she knew about the settlement agreement and the payment of money to Ms O. Mr J believes that such information could only have come from Ms O. Ms X provided Mr J with copies of WhatsApp messages between her and Ms O. Such

messages included photographs of Mr J and Ms O together. Further, Ms X told Mr J that Ms O had repeatedly disparaged him and stalked Mr J and his family.

19. Ms X also provided Mr J with a draft non-disclosure agreement by which it was proposed that Ms O would pay $25,000 for agreeing to keep confidential, among other matters:

> "(iv) any facts concerning the relationship between [Ms O] and [Mr J], or the nature thereof; (v) any communications between [Ms O] and [Mr J] … (vi) all documents, photographs, emails, electronic data, or recordings in the possession custody or control of [Ms X] constituting, reflecting or relating to any of the foregoing."

20. On 29 May 2019, Mr J's US lawyers wrote to Ms O putting her on notice that they had evidence of breaches of the agreement. Ms O was invited to disclose all communications that she had had with third parties about Mr J and to allow a forensic examination of her mobile phone, email and social media accounts.

21. In an effort to show that there had not been any breach, Ms O agreed to submit her phone for examination. She posted it to her attorney in the US. Messages recovered subsequently indicated that Ms O believed that her phone was likely to be stuck at US customs for some days and that the phone's data, specifically the WhatsApp data, were likely to be destroyed as part of the searches made by customs officials.

22. On 7 June 2019, Ms O's phone was provided to Mr J's US lawyers. They arranged its examination by an independent forensic expert in the US. Such examination revealed:

    22.1 photographs of Mr J both alone and with Ms O, Mr J's family, Ms O with persons or in locations solely associated with Mr J, personal and business documents taken from Mr J, homes and an office associated with Mr J, hotel rooms that had been occupied by Mr J, and a medicine bottle with a printed label showing that it had been prescribed to Mr J; and

    22.2 evidence of electronic correspondence between Mr J and Ms O.

23. On 23 July 2019, Ms O formally certified under oath that she had not violated the confidentiality and non-disclosure provisions at clause 3 of the settlement agreement. Such certificate was necessary in order to entitle Ms O to payment of a further $250,000 in August 2019. Mr J did not accept her certification. Indeed, by letter dated 5 August 2019, his lawyers gave notice of breach and formally demanded repayment of the $1 million already paid.

<u>THE GDPR DISPUTE</u>

24. On 19 August 2019, Ms O's attorney alleged breaches of her rights under the GDPR. He asserted that the scope of the instructions given to the forensic expert had been "wildly improper" and that Mr J and his lawyers "got carried away and ignored the GDPR." He argued that violations of the regulations fell outside the confidentiality agreement which could not be used to hide illegal activity. His email concluded:

> "Many of the pictures on [Ms O's] phone were extremely personal and the fines imposed by GDPR regulators when that kind of data is improperly processed are brutal. I think that an action in [a US State] court in the current environment would result in a very substantial verdict for my client."

25. These allegations were repeated in a letter dated 21 August 2019. Ms O's lawyer demanded copies of her personal data and wrote that otherwise he would be compelled to seek a declaratory judgment. Mr J's lawyers robustly dismissed the suggestion of any breach, pointing out that Ms O had expressly consented to the interrogation of her phone by providing it together with the necessary passwords.

26. The US lawyers then discussed whether they might be able to settle matters. On 18 September 2019, Mr J's US lawyer provided a draft of the complaint that they were preparing to file with the American Arbitration Association. Both parties then agreed that neither would file for a further week.

27. Meanwhile, Ms O's attorney sent a copy of the report of the 2019 decision of the Supreme Court of New York in Parker v. Rubin. The circumstances of that case were quite extraordinary:

    27.1 Ms Parker claimed that she was paid to have lunch and drinks with a wealthy businessman, Mr Rubin. After a few drinks, she agreed to sign a non-disclosure agreement by which she agreed to pay Mr Rubin damages of $1 million if she disclosed any of the activities or conduct that occurred between them. She was invited to see his penthouse apartment. She then claimed that her drink was drugged and, in her intoxicated state, she agreed to be tied up. Helpless, she then claimed that she was brutally raped and beaten.

    27.2 By a pre-trial motion, Mr Rubin argued that even if her allegations were true, she had no complaint in law. Not surprisingly, the court roundly rejected his arguments. The judgment contained some discussion as to whether Mr Rubin, on the assumed facts, had fraudulently induced Ms Parker to enter into the non-disclosure agreement by failing to disclose his criminal intentions.

28. It is not clear why Ms O's attorney thought the Parker case relevant to the parties' current disputes as to her alleged breaches of the settlement agreement and Mr J's alleged breaches of the GDPR. It appears, however, to be a warning that he might not be able to "hide behind" the settlement agreement. Such impression is bolstered by two further comments by the attorney:

    28.1 In an email sent on 11 July 2019, ostensibly about breaches of the agreement, he wrote:

    > "By the way, it would certainly go for your client's credibility when I ask him if he continues to have unprotected sex with women without telling them that he has … an STD."

    28.2 In a subsequent email sent on the same day, he wrote that Mr J was going to have to testify.

DECISION

(1) THE PROPER APPROACH TO THIS APPLICATION

29. This is an application for an interim injunction. Accordingly, the court is required to apply the well-known principles in American Cyanamid v. Ethicon [1975] A.C. 396. Privacy and confidentiality cases necessarily involve a balance between the applicant's article 8 right to respect for his or her private and family life, home and correspondence; and the respondent's article 10 right to freedom of expression. Such cases require an "intense focus" on the comparative importance of the competing rights. Further, it is not sufficient in these cases for the applicant merely to show that there is a serious issue to be tried. Section 12(3) of the Human Rights Act 1998 provides:

> "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."

30. In Cream Holdings Ltd v. Banerjee [2004] UKHL 44, [2005] 1 A.C. 253, Lord Nicholls of Birkenhead cautioned against reading s.12(3) so strictly that it precludes the court from granting short-term interim relief until the court is able to give the matter fuller consideration. As Lord Nicholls observed, at [18], "confidentiality, once breached, is lost for ever." He concluded, at [22]:

> "Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy s.12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of s.12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

(2) PUBLICATION SHOULD NOT BE ALLOWED

Public interest

31. There is no general public interest in other people's sex lives. In PJS v. News Group Newspapers [2016] UKSC 26, [2016] A.C. 1081, Lord Mance said, at [32]:

> "Every case must be considered on its particular facts. But the starting point is that (i) there is not, without more, any public interest in a legal sense in the disclosure or publication of purely private sexual encounters, even though they involve adultery or more than one person at the same time, (ii) any such disclosure or publication will on the face of it constitute the tort of invasion of privacy, (iii) repetition of such a disclosure or publication on further occasions is capable of constituting a further tort of invasion of privacy, even in relation to persons to whom disclosure or publication was previously made - especially if it occurs in a different medium ..."

32. Indeed, Mr J would have a reasonable expectation of privacy in respect of the details of his affair with Ms O. Here, it is noteworthy that Ms O has not claimed some public interest in disclosing the details of their relationship. Their story does not, at least on his account, involve any criminal offences or especially reprehensible behaviour. Nor does it involve, for example, a relationship between a chief executive or senior public official with a subordinate employee in the same organisation where it might be said that the relationship was by its very nature an abuse of power.

The effect of a contractual duty of confidence

33. The weight that may be attached to an obligation of confidence may be enhanced if it is contained in an express contractual agreement: Campbell v. Frisbee [2003] I.C.R. 141, at [22]. This factor has added weight where the contract was itself in settlement of an earlier legal dispute. In Mionis v. Democratic Press SA [2017] EWCA Civ 1194, [2018] Q.B. 662, Sharp LJ observed, at [67]:

> "… the fact that the parties have entered into an agreement voluntarily restricting their article 10 rights can be, and in my judgment in this case is, an important part of the analysis which s.12 then requires the court to undertake. Whilst each case must be considered on its own facts, where the relevant contract is one in settlement of litigation, with the benefit of expert legal advice on both sides, particularly where article 10 issues are in play in that litigation, it seems to me that it would require a strong case for the court to conclude that such a bargain was disproportionate and to refuse to enforce it other than on ordinary contractual or equitable principles."

34. Sharp LJ added, at [91] and [104]:

> "91. Parties are of course generally free to determine for themselves what primary obligations they accept; and legal certainty requires that they do so in the knowledge that if something happens for which the contract has made express provision, then other things being equal, the contract will be enforced (*pacta sunt servanda*). This is a rule of public policy of considerable importance. Furthermore, the principled reasons for upholding a bargain freely entered into, obviously apply to one that finally disposes of litigation with particular force …

> 104. The wording of s.12 requires a consideration of article 10, because the court is being asked to grant an injunction that affects freedom of expression. However, in my view, the analysis after a settlement agreement has been freely entered into and the parties have waived their respective rights, is not the same as that which arises at the interim stage say, in a contested privacy or defamation action. That is to ignore the importance in the public interest of parties to litigation, including this kind of litigation, being encouraged to settle their disputes with confidence that, if need be, the court will be likely to enforce the terms of a settlement freely entered into on either side."

35. The Court of Appeal further endorsed this approach in ABC v. Telegraph Media Group Ltd [2018] EWCA Civ 2329. [2019] E.M.L.R. 5, at [24]:

> "… the weight which should be attached to an obligation of confidence may be enhanced if the obligation is contained in an express contractual agreement. One type of situation where this consideration is likely to have a significant influence on the balancing exercise which the court has to perform is where the obligation in question is contained in an agreement to compromise, or avoid the need for, litigation, whether actual or threatened. Provided that the agreement is freely entered into, without improper pressure or any other vitiating factor, and with the benefit (where appropriate) of independent legal advice, and (again, where appropriate) with due allowance for disclosure of any wrongdoing to the police or appropriate regulatory or statutory body, the public policy reasons in favour of upholding the obligation are likely to tell with particular force, and may well outweigh the article 10 rights of the party who wishes to publish the confidential information."

36. In this case:

36.1 The confidentiality agreement was agreed in settlement of Mr J's first privacy action in London and Ms O's unparticularised claim in the US.

36.2 The settlement was freely negotiated between the parties' lawyers. Both had independent and expert advice.

36.3 There is no evidence that improper pressure was brought to bear upon Ms O or of any other vitiating factor that would entitle Ms O to seek to avoid the settlement.

36.4 Indeed, far from Ms O being vulnerable, she appeared to have had the upper hand as Mr J felt forced to pay a seven-figure settlement in order to preserve confidentiality.

36.5 Further, the parties expressly agreed that any breach would be enforceable by the grant of an injunction.

The GDPR issue

37. Mr J relies on a further witness statement by his US attorney in which she gives evidence as to matters of US law. The statement is curious:

37.1 First, while foreign law is a matter that should be proved by expert evidence, Mr J's own attorney is not an independent expert who could properly give admissible expert evidence pursuant to Part 35 of the Civil Procedure Rules 1998. Indeed, she

does not even purport to declare her understanding or compliance with her overriding duty to the court.

37.2 Secondly, the territorial reach of the GDPR is not in any event a matter of US law.

38. I decline to place any reliance on the attorney's evidence. I suspect that all that service of her statement has achieved is the possibility of a future dispute as to the extent of the waiver of privilege in her firm's advice to Mr J.

39. The GDPR are regulations made by the European Union. By article 79, proceedings may be brought before the courts of the member state where the controller or processor has an establishment; alternatively, before the courts of the member state where the data subject has his or her habitual residence. Here, it would appear that any claim pursuant to the GDPR should be brought in England & Wales. In any event, it is properly arguable that Ms O's proposed claim would be barred by article 9(1) on the basis that she gave her explicit consent to the processing of her personal data.

Blackmail

40. Blackmail is a criminal offence contrary to s.21(1) of the Theft Act 1968:

> "A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; … a demand with menaces is unwarranted unless the person making it does so in the belief –
>
> (a) that he has reasonable grounds for making the demand; and
>
> (b) that the use of the menaces is a proper means of reinforcing the demand."

41. The "menaces" in a privacy or confidentiality case are likely to be threats of publication. Here, Mr J says that the allegation that he infected Ms O is untrue. Blackmail can, however, be committed and the court may still restrain publication even where the underlying information at the core of the threat of publication is true. As Warby J observed in LJY, at [40], much blackmail gains its persuasive power from the fact that the allegation is true.

42. The presence of blackmail will be an important matter in determining applications for injunctive relief. In LJY, Warby J said, at [29]:

> "Generally, the court has taken the view that blackmail represents a misuse of free speech rights. Such conduct will considerably reduce the weight attached to free speech, and correspondingly increase the weight of the arguments in favour of restraint. The court recognises the need to ensure that it does not encourage or help blackmailers, or deter victims of blackmail from seeking justice before the court. All these points are well-recognised … It can properly be said that the grant of a privacy injunction to block a blackmail serves the additional legitimate aim of preventing crime.

43. Upon Mr J's evidence, there is a credible basis for contending that he has been the victim of blackmail:

    43.1 Mr J denies that he infected Ms O. His denial gains some support from his willingness to exchange medical evidence and Ms O's apparent reticence to agree to such exchange.

    43.2 If there is no truth in the infection allegation then, on the face of the evidence currently before the court, there are no apparently reasonable grounds for her demand to be paid $2.5 million to refrain from pursuing her original claim in the US.

    43.3 Even if Mr J had infected her, such a demand would be most unlikely to be warranted in any action brought in this jurisdiction. I repeat, however, my note of caution at paragraph 5 above that I do not discount the possibility that Ms O will be able to demonstrate that such a demand was reasonable within the context of her intended action in the US.

    43.4 The proposed GDPR action does not appear to have merit, but even if there is some other cause of action available to Ms O in the US, it is doubtful that it warrants her attorney's threats to disclose and rely upon alleged sexual misconduct.

Threatened breach

44. There is credible evidence before the court that Ms O has committed past breaches of the confidentiality agreement, both through the information obtained from Ms X and the forensic analysis of her mobile phone. Further, the evidence indicates that:

    44.1 Ms O's intended GDPR action might well be no more than a device to justify the issue of proceedings in the US; and

    44.2 Ms O is threatening through her lawyer to use the GDPR action as a vehicle for the disclosure and publication of confidential information about the affair (including the allegation of infection) and the parties' dispute and settlement agreement.

Conclusions

45. I am satisfied that the court is likely to prevent publication at trial:

    45.1 There is no particular public interest in publication of the details of this affair. [See paragraphs 31-32 above.]

    45.2 All other things being equal, the court should look to enforce the contractual duty of confidence in this case. Such argument is strengthened given that the agreement was in settlement of an earlier legal dispute that was freely entered into between two parties who were each in receipt of independent legal advice and under which Mr J agreed to pay a significant seven-figure sum. [See paragraphs 33-36 above.]

    45.3 It appears unlikely that Ms O has a claim under the GDPR. [See paragraph 39 above.] It is not, however, necessary to determine at this stage whether she has any proper cause of action. Even if she does have a claim, its existence is not reason for denying Mr J injunctive relief pending a return day.

    45.4 The possibility that Mr J was the victim of blackmail adds further weight to the application. [See paragraph 43 above.]

45.5 There is evidence that Ms O is threatening to breach the confidentiality agreement. [See paragraph 44 above.]

46. This case came before me on 24 September 2019 in a busy interim applications list. Incomplete papers were delivered late in the afternoon before this hearing. It was taken as an urgent application before other listed applications. Although I delayed the handing down of this judgment, I announced my decision and granted injunctive relief at the start of another busy list on 25 September 2019 in view of the fact that there was a real risk that Ms O might disclose the private information at the heart of this case later that day. In view of this pressure of time and the gravity of the potential adverse consequence of disclosure, I consider that this is a case where short-term interim relief might be properly granted even if I am wrong to conclude that Mr J is more likely than not to succeed at trial.

(3) THE ADEQUACY OF DAMAGES

47. I am satisfied that Mr J would not be adequately compensated in damages for breach of confidence. While I suspect that his concerns of significant business harm are overstated, publication of this confidential information may well cause him and his family significant embarrassment and upset.

48. On the other hand, it is not obvious that Ms O will suffer any real loss by being unable to breach the confidentiality agreement. If she does, I am satisfied that her interests are adequately protected by the cross-undertaking in damages offered by Mr J. In any event, if Ms O wishes to dispute the allegation that she has already breached the agreement and is liable to repay monies paid to date then, in accordance with the parties' agreement, she can pursue that matter through confidential arbitration. She can, if she wishes, sue for alleged breaches of the GDPR provided that she takes care not to breach the terms of my order in doing so.

(4) TERRITORIAL REACH

49. The immediate threat of publication is in the US. Where a threat of publication is made by someone amenable to the court's jurisdiction then the court can restrain such publication anywhere in the world: Attorney General v. Barker [1990] 3 All E.R. 257 (CA); Linklaters LLP v. Mellish [2019] EWHC 177 (QB).

50. I restrain the use, disclosure and publication of the confidential information more precisely identified in my order anywhere in the world. It is, however, important that I stress the limitation upon the order that I make. I am not granting an anti-suit injunction; to do so would be both exorbitant and unnecessary. Accordingly, I repeat that there is nothing that prevents Ms O from issuing her threatened proceedings, whether in the US or any other jurisdiction, provided only that in doing so she does not breach the terms of my order.

OUTCOME

51. I therefore granted relief pending a full inter partes hearing when the matter can be further argued.