

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST
[2022] EWHC 2902 (KB)



No. QB-2022-000825

Royal Courts of Justice
Strand
London, WC2A 2LL

Thursday, 20 October 2022

Before:

MR JUSTICE NICKLIN

BETWEEN :

QRT

Claimant

- and -

JBE

Defendant

REPORTING RESTRICTIONS AND ANONYMISATION APPLIES:
Orders of 23 March 2022, 4 April and 20 October 2022

MR A. KATZ (instructed by Gunnercooke LLP) appeared on behalf of the Claimant.

MR J. HITCHENS (instructed by Janes Solicitors) appeared on behalf of the Defendant.

J U D G M E N T

MR JUSTICE NICKLIN:

- 1 This is a hearing for directions in a contempt application brought by the Claimant against the Defendant. The background is as follows.
- 2 On 15 March 2022, the Claimant applied to the court for an urgent interim injunction order against the Defendant. The Claimant and the Defendant were in a personal and sexual relationship between around May 2014 to March 2021. The Claimant has alleged that during the course of that relationship, the Defendant took many explicit photographs and videos of them without his consent and had threatened to make public such material unless the Claimant paid him a significant sum of money.
- 3 I should say at the outset and in fairness that the Defendant denies the Claimant's claim. The Defendant maintains that he has no knowledge of these videos or photographs. He denies having made any of the videos of himself and the Claimant and he denies having sent the video to the Claimant. Finally, he denies even having seen the video. Ultimately, the resolution of that factual dispute will have to await trial.
- 4 The Claimant sought an injunction on two bases. First, to restrain a further alleged misuse of private information; and, secondly, on the grounds of harassment. The order was granted by Foxton J on the grounds of a threatened further misuse of private information but refused in respect of the alleged claim for harassment. The interim injunction granted by the Judge was largely in the form of the model order provided with the Master of the Rolls practice note, *Practice Guidance (Interim Non-disclosure Orders) [2012] 1 WLR 1003* ("the INDO Guidance"). There were, however, some significant departures from the terms of the model order which have some importance for the purpose of today's hearing. The operative parts of the injunction which are important for today's purposes are in para.3, the parties were anonymised. The order provided as follows:
 - "3. Pursuant to s.6, HRA, and/or CPR r.39.2 the Judge, being satisfied that it is strictly necessary, ordered that:
 - (a) the Claimant be permitted to issue these proceedings naming the Claimant as 'QRT' and giving an address c/o the Claimant's solicitors;
 - (b) the Claimant be permitted to issue these proceedings naming the Defendant as 'JBE';
 - (c) there be substituted for all purposes in these proceedings in place of references to the Claimant by name, and whether orally or in writing, references to the letters 'QRT'; and
 - (d) there be substituted for all purposes in these proceedings in place of references to the Defendant by name, and whether orally or in writing, references to the letters 'JBE'."
- 5 It is also necessary to note that, in para.4, the court imposed a restriction on non-party access to the court file. Although those orders are unusual in the context of civil litigation, and as derogations from the principles of open justice require clear justification, these are nevertheless fairly standard orders made by the court in interim non-disclosure orders. Usually, such orders are necessary because, if they were not granted, the court would risk by its process destroying that which the Claimant is attempting to protect.

6 As I explained in *Lupu & Ors -v- Rakoff & Ors* [2020] EMLR 6, anonymity orders contain distinct elements:

[21] ...when dealing with applications for anonymity orders, it is important to appreciate that they have two distinct parts: (1) an order that withholds the name of the relevant party in the proceedings and permits the proceedings to be issued replacing the party's name with a cipher under CPR 16.2 (e.g. naming the claimant as 'XPZ') ('a CPR 16 Order'); and (2) a reporting restriction order prohibiting identification of the anonymised party ('the Reporting Restriction Order')... The difference was explained by Tugendhat J in *CVB -v- MGN Ltd* [2012] EMLR 29:

'[47] ... [a CPR 16] order by itself is not an injunction of any kind, and is not an 'interim remedy' under CPR Part 25. It is permissive only. This view is supported by the observations of Henderson J in *HMRC -v- Banerjee* [2009] EWHC 1229 (Ch) [39].

[48] The practical effect of a [CPR 16] Order is that the defendant, or anyone else who happens to know the identity of the claimant, if they do disclose to the public the identity of the party who is referred to in the title to the action, is unlikely by that fact alone to be committing a contempt of court or interfering with the administration of justice.'

See also the discussion in [17]-[25] and *Khan -v- Khan* [2018] EWHC 241 (QB) [81].

[22] The model order in the INDO Guidance contains both elements. The CPR 16 Order is contained in para.3 of the model order. The Reporting Restriction Order is actually part of the injunction in the model order – see para.6(b). The interim injunction restraining identification of the anonymised party binds third parties with knowledge of the order under what is called the *Spycatcher* principle: *Attorney General -v- Newspaper Publishing PLC* [1988] Ch 333, 375 and 380 (and see also *JIH -v- News Group Newspapers Ltd* [2012] EWHC 2179 (QB) [32]; the INDO Guidance p.1009H; and *Jockey Club -v- Buffham* [2003] QB 462). That is a feature particular to interim non-disclosure orders. In other cases, where it is sought to impose both a CPR 16 Order and a Reporting Restriction Order, the terms of the order must expressly provide for both.

7 The order made by Foxton J tracked para.3 in the INDO Guidance and therefore made a CPR 16 order. The operative part of the injunction order provided as follows:

“7. Until the return date on 23 March 2022 or further order of the court, the Defendants must not:

(a) reveal, disclose, send to family, friends and business associates of the Claimant explicit photographs, video recordings, audio recordings and/or still images of the Claimant which depict sexually explicit acts, content and/or context and which were made and/or created during the Claimant and the Defendant's relationship ('the Explicit Material').

- (b) The Defendant must not disclose the Explicit Material to the wider public.
- (c) The Defendant must not disclose or post the Explicit Material on any social media or websites.
- (d) The Defendant must not demand money from the Claimant in exchange for him not disclosing or posting this Explicit Material.

Provided that this order shall not prevent the Defendant from disclosing the Explicit Material to legal advisers instructed in relation to these proceedings for the purpose of obtaining legal advice or representation.”

8 Further restrictions were imposed in the order, under the heading “Protection of hearing papers”, again following the wording of the model order:

- “9. The Defendant must not publish or communicate or disclose or copy or cause to be published or communicated or disclosed or copied any witness statements and any exhibits thereto and information contained therein that are made, or may subsequently be made, in support of the application or the Claimant’s solicitors’ notes of the hearing of the application (‘the Hearing Papers’), provided that the Defendant, shall be permitted to copy, disclose and deliver the Hearing Papers to the Defendant’s legal advisers for the purpose of these proceedings.
- 10. The Hearing Papers must be preserved in a secure place by the Defendant’s legal advisers on the Defendant’s behalf.
- 11. The Defendant shall be permitted to use the Hearing Papers for the purpose of these proceedings provided that the Defendant’s legal advisers shall first inform anyone, to whom the said documents are disclosed, of the terms of this order and, so far as is practicable, obtain their written confirmation that they understand and accept that they are bound by the same.”

9 There are two things importantly to note about the terms of those paragraphs. First, para.7, the terms of the injunction order, did not contain the equivalent of para.6(b) of the INDO Guidance model order. Therefore, the Defendant was not made the subject of any express restriction on his identifying the parties to the proceedings. The order contained no other reporting restriction on identification of the parties. Secondly, para.9, was the standard term restricting the Defendant’s use of the “hearing papers”. The definition of that term means that it is limited to a restriction on the Defendant’s use of witness statements and any exhibits made “in support of the application”. In other words, the restriction is upon the Defendant’s use of the Claimant’s witness statements and exhibits. It is not a restriction on the use of his own witness statements and exhibits, subject always to whatever restriction is imposed on the Defendant by way of injunction.

10 This standard provision in the INDO Guidance model order reflects, again, the particular nature of applications for interim nondisclosure orders. If restrictions in the terms of paras.9 - 11 were not included, a claimant might face the problem of providing to the defendant further private information in support of his/her application for an interim injunction that, if its use were not restricted, could potentially be misused and/or published by the defendant. Paragraph 8 of the model order is designed to prevent that mischief, but that is the extent of

it. If a claimant seeks to limit the use by a defendant of the defendant's own documents or other information, then s/he will have to seek an injunction in terms that would prevent it.

11 On 23 March 2022, the interim injunction was extended by Steyn J until an adjourned return date fixed for 4 April 2022. On 4 April 2022, Saini J extended the interim injunction by consent until trial or further order. The order also continued the directions contained in the original injunction order, particularly para.3 relating to anonymity, para.4 restrictions on non-party access to the court file, and paras.9 - 11 the protection of the hearing papers.

12 In addition, Saini J's order provided the following at the end of the order headed "Interpretation and the persons affected by this order":

"A Defendant who is an individual who is ordered not to do something must not do it himself or in any other way. He must not do it through others acting on his behalf or on his instructions or with his encouragement. Except as provided in below, the terms of this order do not affect or concern anyone outside the jurisdiction of this court. The terms of this order will affect the following persons in a country or state outside the jurisdiction of this court:

- the Defendant or his officer or agent appointed by power of attorney;
- any person who (i) is subject to the jurisdiction of this court; (ii) has been given written notice of this order at his residence or place of business within the jurisdiction of this court; and (iii) is able to prevent acts or omissions outside the jurisdiction of this court which constitute or assist in a breach of the terms of this order; and
- any other person, only to the extent that this order is declared enforceable by or is enforced by a court in that country or state."

13 With that introduction, I can turn now to the contempt application. The contempt application was filed by the Claimant on 17 August 2022 using the prescribed form N600. In response to question 5 on that form, "Nature of the contempt (for example, breach of an order or undertaking, or contempt in the face of the court)," the Claimant stated as follows:

"Breach of: order dated 15 March 2022; order dated 23 March 2022; order dated 4 April 2022. In particular, para.3 anonymity order, para.4 restriction on access documents, and paras.9 - 11 protection of the hearing papers were included in the orders. The precise allegations are contained in a supporting affidavit dated 10 August 2022."

14 In response to question 7 seeking details of the order alleged to have been breached, the Claimant answered:

"Defendant has breached para.3 anonymity order, para.4 restriction on access to documents, and paras.9 - 11, protection of hearing papers of the varied interim order dated 23 March 2022 as well as other orders."

15 Question 12 on N600 form is important. It asks the applicant to provide:

"...a summary of facts alleged to constitute the contempt (set these out very briefly in chronological order in numbered points)."

16 Question 12 on the N600 seeks to ensure that the applicant in a contempt application complies with CPR 81.4(2), the material parts of which provide as follows:

“A contempt application must include statements of all of the following:

...

- (h) a brief summary of the facts alleged to constitute the contempt set out numerically in chronological order.”

In answer to that question on the N600 form, the Claimant simply stated:

“Please see the affidavit dated 10 August 2022 in support of this application.”

- 17 The affidavit referred to was that of Lan Kennedy-Davis. Ms Kennedy-Davis is a United States attorney, based in Orlando, Florida. Ms Kennedy-Davis’ nine-page affidavit is accompanied by a further 150 pages of exhibited documentation. The material section of Ms Kennedy-Davis’ affidavit is contained in paras.14 - 30 under the heading, “*How has the Defendant breached these orders?*” The relevant parts of the evidence are as follows:

“14. The Claimant’s current associate is CW. They both reside together in Claimant’s home in Fort Lauderdale, Florida. [MB] is a local resident in Fort Lauderdale and he brought legal proceedings against CW in the local court. [MB] made several allegations of domestic violence and stalking against CW, all of which are denied by CW and by the court thus far. [MB] appointed Ms Chicotsky as his attorney.

15. On 28 March 2022, [MB] issued legal proceedings against CW in the Circuit Court of the 7th Judicial Circuit for Broward County, Florida (Case No. DVCE-22- 002075) (‘Florida Case’)...

16. On 16 June 2022, CW attended a deposition hearing for the Florida Case. This deposition hearing was conducted virtually by Zoom. Ms Chicotsky, acting for [MB], asked a number of questions. During this process, Ms Chicotsky also showed numerous documents to CW and asked him questions on those documents. There is now shown to me marked Exhibit LKD6 a copy of the transcript of that deposition...

17. Ms Chicotsky asked several questions on documents relating to the proceedings that are pending at the London High Court and she used the document marked ‘JBE11’ from these proceedings at CW’s deposition in the Florida Case and asked him questions about it. Ms Chicotsky made the document marked ‘JBE11’ a formal exhibit to the deposition. Ms Chicotsky asked a number of questions relating to the case itself and she used Claimant’s real name in violation of the Anonymity Order. It is evident that she had in her possession documents and information which were protected by the orders that were issued by the High Court. It is clear that she knew about the Claimant’s involvement in the case, which is before the London High Court, and had sufficient details about that case. Both [MB] and Ms Chicotsky used the documents and information, relating to the London High Court proceedings, against CW in the Florida Case. Ms Chicotsky confirmed that she obtained this information and documents from the Defendant.

18. After I confronted Ms Chicotsky of her misconduct, she sent me a letter dated 22 June and admitted:

‘[The Defendant] provided me with the documentation without advising that the documents provided were under a court seal pursuant to the order dated April 4, 2022, nor was I provided with a copy of the order dated April 4, 2022, until today.’

19. According to Ms Chicotsky, the Defendant retained her ‘to assist in obtaining witness statements in the United States for the proceedings in London’ but did not provide to her the High Court’s orders. Therefore, because the Defendant did not disclose the orders to her, she made them public at CW’s deposition, and the following people were present: CW, [MB], Mr Justin Weisberg and the court reporter. They all now know Claimant’s true identity which is supposed to be protected by the anonymity order of the London High Court.
20. Further, Ms Chicotsky stated ‘no recipients have disclosed the received documents’ showing that she is not the only recipient. There is now shown to me marked exhibit LKD7 a copy of that letter from Ms Chicotsky.
21. On 17 June, the Defendant sent an email to Gunnercooke LLP, mentioning clearly that he knew about the case against CW in Fort Lauderdale. The Defendant admitted in that email that he knew the details of that case. There is now shown to me marked exhibit LKD8 a copy of that email from the Defendant.
- ...
23. The Defendant has been communicating with non-parties about the details of the proceedings which are progressing in the London High Court. The Defendant has been revealing documents and information about these proceedings to non-parties. The Defendant has been making use of prohibited documents and/or allowing prohibited documents to be used by non-parties. According to Ms Chicotsky, the Defendant gave her documents and information about these proceedings and withheld the non-disclosure and anonymity orders from her, and caused her to violate them.”

18 Under a further heading, “Defendant’s actions,” Ms Kennedy-Davis added this:

- “32. It is evident that the Defendant is speaking with others about the current proceedings in the High Court. He is mentioning the involvement of the Claimant in this case. He is sharing documents and information about this case with others including to [MB] who contends that this court has no jurisdiction over him to circumvent this court’s orders. Further, the Defendant has provided the documents and information about this case with Ms Chicotsky, which he claims he is permitted to as he has retained her as his counsel in the USA. However, Ms Chicotsky used the documents and information in another case between [MB] and CW, not to assist him with his case in London. Also, Ms Chicotsky claims that the Defendant withheld the orders from her so she published them publicly. He is doing this in violation of the terms of the orders. He is doing this with the purpose of exerting improper pressure on the Claimant.”

19 Document JBE11, that was used at the deposition and provision of which by the Defendant is said to be a breach of the injunction, is an email dated 22 September 2021 sent to the

Defendant from an email address of CW. I do not need to set out its contents. Its terms were unpleasant, and they were taken by the Defendant to be a threat. The key point for today's purposes is that document was the Defendant's document. It was produced in evidence in these proceedings by the Defendant as an exhibit to one of his witness statements.

- 20 That is the totality of the evidence that is relied upon by the Claimant in support of the contempt application. Mr Katz, as part of his submissions, has initially sought to rely upon evidence contained in a witness statement filed by the Defendant in answer to the contempt application. However, that evidence is not evidence upon which the Claimant can rely at least until such point as the Defendant chooses to give evidence in the proceedings: ***Deutsche Bank AG -v- Sebastian Holdings Inc & Anor* [2020] EWHC 3536 (Comm)** [53].
- 21 At this point in the chronology, I should note that on 18 August 2022, the Defendant sent to the court an Application Notice, dated 8 August 2022, seeking to discharge the interim injunction. I am not going to deal with that application in this judgment and I will decide what should happen to it once I have finished this judgment.
- 22 On 19 August 2022, Eyre J made an order directing that the Defendant's application to discharge the interim injunction would be heard together with the contempt application on a date to be fixed. Subsequently, the hearing of these two applications was fixed for today, 20 October 2022.
- 23 On 12 October 2022, having reviewed the case, I made an order directing that the hearing today would be for directions only. In cases involving litigants in person, it is almost always necessary to have a directions hearing before a substantive contempt application. That is because the Defendant to a contempt application must be advised of various matters, including his or her right to remain silent, his opportunity to seek legal advice and representation, and the availability of legal aid. More practically, a directions hearing gives the court an opportunity to explain the process to a litigant and to encourage him or her to obtain legal representation whilst recognising always that it remains a litigant's choice whether to be represented.
- 24 In this case, I also directed that at the hearing, the court would consider whether to dismiss the contempt application on the basis that the Claimant had failed to comply with CPR 81.4(2)(h), and/or that the contempt application had no real prospect of success. In the reasons accompanying the order, I explained:

“(A) An applicant who brings a contempt application alleging breach of an injunction must specify ‘the facts alleged to constitute the contempt set out numerically in chronological order’ (CPR 81.4(2)(h)). Conventionally, in a contempt application, this is done in a document headed “Grounds” which sets out... in what respects the Defendant is alleged to have breached the injunction order. The Claimant has provided no grounds. The contempt application N600, in section 12, simply refers to the affidavit of Ms Kennedy-Davies. In turn, the affidavit contains only a narrative section in paras.14-30 which, arguably, does not satisfactorily identify clearly what is alleged against the Defendant. More fundamentally, Ms Kennedy-Davis only has direct knowledge of events that took place in the context of separate legal proceedings in Florida to which the Defendant does not appear to be a party. Ms Kennedy-Davis does not purport to give any evidence from her own knowledge of any alleged acts of the

Defendant. Arguably, at best, Ms Kennedy-Davis's evidence might be capable of supporting an inference that the Defendant has made some disclosure to some person at some point. The Court would want to consider whether having regard to the criminal standard of proof required on contempt applications, the application made against the Defendant has any real prospect of success. The court will therefore consider at the hearing whether the contempt application should be allowed to proceed further."

- 25 For the Claimant today, Mr Katz's primary submission was that the evidence contained in Ms Kennedy-Davis' affidavit sufficiently identified the matters relied upon to satisfy the requirements of CPR 81.4(2)(h). In his skeleton, he submitted that there were only two relevant dates, 16 June 2022 and 22 June 2022, and the events on these two dates said to constitute the alleged contempt are sufficiently stated in paras.16 - 18 of Ms Kennedy-Davis' affidavit. He relies on the conclusions of Cockerill J as to the sufficiency of information to be provided in a contempt application in the *Deutsche Bank* case: [86]-[88] and [97].
- 26 Mr Hitchens, who appears today for the Defendant, contends that Mr Katz's analysis of the *Deutsche Bank* case is flawed. He submits he has omitted a key part of Cockerill J's analysis, including, in particular, the requirement that the application notice should "*give the person in contempt sufficient information*" ([81]).
- 27 Mr Hitchens has also referred me to the decision of *City of Westminster -v- Addbins Ltd & Ors* [2012] EWHC 3716 (QB) in which Males J held at [43], applying *Harmsworth -v- Harmsworth* [1987] 1 WLR 1676:
- "...the application notice must contain sufficient detail of what is alleged to enable the alleged contemnor to meet the case against him, but that requirement must be applied sensibly and the level of detail required to be included in order to satisfy this test will depend on the circumstances of the particular case, including the nature of the acts or omissions alleged."
- 28 In my judgment, the answer provided by the Claimant in section 12 of the N600 was a failure to comply with 81.4(2)(h). Referring a Defendant to a contempt application to the evidence in support of the application does not discharge the obligation to identify the brief facts of the alleged contempt (see *Harmsworth -v- Harmsworth* (quoted by Males J in *Addbins*) [41]).
- 29 Even if it were permissible simply to refer a Defendant to the evidence in support, that is unlikely, save in the most straightforward cases, to discharge the important obligation of identifying clearly what it is that Defendant is alleged to have done wrong. The issue of how much information must be provided to a Defendant in a contempt application was reviewed by Cockerill J in the *Deutsche Bank* case in [59]-[98]. After a thorough review of the authorities, the Judge reached the conclusion that the question to be answered is whether there is in the application notice a clear summary, enough to enable the Defendant to understand the case which he has to meet.
- 30 I do not accept Mr Katz's submission that Ms Kennedy-Davis' affidavit contained sufficient information to enable the Defendant to understand the case that he has to meet. Mr Katz placed primary reliance on paras.16-18, but those paragraphs, apart from the final sentence of para.17, do not even mention the Defendant, still less clearly allege what he is alleged to have done in breach of the injunction order. These paragraphs concentrate on what took

place in a hearing in a Florida court in June 2022. The Defendant was not involved in those proceedings. It is not the case that the material dates are 16 June and 22 June as Mr Katz submitted. No doubt these are two important dates in the chronology of the events, but they are not the dates on which the Defendant is alleged to have breached the order. The evidence is entirely vague on what the Defendant is alleged to have done.

31 As I noted in the Order, I can detect that perhaps the case being advanced is an inferential one. In respect of the use of the document JBE11 in the court proceedings, the Claimant wants to rely upon an inference that, at some earlier point, the Defendant had provided that document to Ms Chicotsky and it was this that was a breach of the order. That might be capable of being spelled out, but it has not done so at the moment. Worse, it is clear that the Claimant's case is not so limited. Paragraph 23 asserts, or at least appears to assert, without any evidence in support or further details, that:

“...the Defendant has been communicating with non-parties about the details of the proceedings which are progressing in the London High Court. The Defendant has been revealing documents [plural] and information about these proceedings to non-parties [plural].”

32 Then, in para.32:

“It is evidence that the Defendant is speaking with others about the current proceedings in the High Court. He is mentioning the involvement of the Claimant in the case. He is sharing documents [plural] and information about this case with others [plural], including MB.”

33 Mr Katz, when asked whether he could identify any further information or evidence to support the contention that the Defendant has shared other documents beyond JBE11, was unable to do so. Such details are certainly not contained in the evidence relied upon in the contempt application.

34 In my judgment, the Claimant's application fails to comply with the mandatory requirements of CPR 81.4(2)(h). That would justify the court in dismissing the application. In the alternative, I might have considered whether to give the Claimant the opportunity to amend the contempt application to bring it into compliance with CPR 81.4(2)(h) but there are more fundamental difficulties. Even if the Claimant were able properly to particularise the alleged breach(es), on analysis, the actions alleged against the Claimant, even if they were proved to the required standard, would not amount to breaches of the order.

35 For this part of the judgment, I assume in the Claimant's favour that he could demonstrate, beyond all reasonable doubt, that the Defendant had disclosed JBE11 at a time after the grant of the interim injunction. But even on the assumption that those facts are established, that disclosure is not a breach either of para.7 of the injunction, or the restrictions on the use of the hearing papers in para.9. Fundamentally, the Claimant's lawyers have misunderstood the restrictions that are imposed on the hearing papers. They restrict the Defendant's use of the Claimant's documents. They impose no restrictions, beyond para.7 of the injunction, on what he can do with his own documents.

36 The further allegation that the Defendant has breached the interim injunction by revealing the identity of the Claimant cannot succeed either. Again, I assume for these purposes that the Defendant could demonstrate by admissible evidence to the required standard that the Defendant has done the act alleged. In other words, he revealed the identity of the Claimant in these proceedings. Even if that could be established, it is not a breach of the order. The injunction order does not contain a restriction on identifying the Claimant. That part of

the INDO Guidance model order was not included in the injunction order. It must have been deleted. Mr Katz is not able to assist me on whether it was the Claimant's solicitors or legal team that deleted that paragraph from the model order, or whether it was deleted by the Judge but, in any event, somebody deleted para.6(b) from the model order. It was that which would have imposed restrictions on identifying the parties. That having been deleted and not included in the injunction order, it is simply not caught by the restrictions imposed by the interim injunction or any of the subsequent orders.

37 So, for those reasons, the conclusion I reach today is that the Claimant has no prospect of successfully demonstrating a breach of the injunction order that founds the current contempt application. On that basis, the contempt application will be dismissed.

38 However, there some serious further aspects of this case which require me to say a little more.

39 Exhibited to Ms Kennedy-Davis's affidavit are the documents that have apparently been generated in connection with the Florida proceedings. In summary, a vigorous complaint has been launched against Ms Chicotsky's conduct. That complaint is summarised in the affidavit of Ms Kennedy-Davis, in the paragraphs I have quoted above, but has also been set out in a letter, dated 22 June 2022, sent to Ms Chicotsky by the attorneys in the United States who were representing CW:

"Please be advised that our firm has been retained to address your conduct. We are co-counsel with Mr Justin Weisberg. It has been brought to our attention that you have violated a court order during the deposition of CW in the case of MB against CW. At the deposition, you used a confidential document(s) in direct violation of a sealed order dated April 4, 2022. A copy of the said sealed order entitled 'Non-disclosure order and directions order, injunction, and interim nondisclosure order' and letter redacted to address his contempt of court are attached for your reference. The documents that you possess and used at the deposition contain specific markings JBE11 prominently across the top page which identify it as a document subject to the sealed order. Please be advised that the penal notice on the face of the order states [and then it is quoted and the letter continues]... You are in unlawful possession of the said documents under seal. As you can see, this penal notice applies to you as well. Further, the rules regulating the Florida Bar prohibits you from violating or assisting others to violate court orders, be in wrongful possession of evidence, using evidence in your wrongful possession to harm others, and your obligations of honesty before a tribunal among other applicable rules."

40 Included in that letter was a series of demands which included, finally, a demand that Ms Chicotsky should withdraw from representation in this case as:

"... you cannot unsee the records and information that you unlawfully possess and obtained and have an unfair advantage in this matter. If you fail to give us a written assurance of your agreement to and comply with all of the above within twenty-four hours, we will have no choice but to have your conduct addressed as appropriate."

41 Ms Chicotsky replied on 22 June 2022:

"I am writing to you regarding my representation of MB. I am in receipt of your correspondence dated 22 June. You are correct to assume that I was not

advised of one document that was used in the 16 July deposition of the respondent [CW] was under a sealed order dated 4 April 2022. Therefore, I was not assisting others in violation of the order dated 4 April at the deposition held on June 16, 2022. [Name redacted] has retained our firm for general legal advice and representation due to the common threats that your client CW has made to the Claimant and to assist in obtaining witness statements in the United States for the proceedings in London. I will herein address your formal demand:

- (1) JBE provided me with the documentation without advising that the documents provided were under a court seal pursuant to the order dated April 4, nor was I provided with a copy of the order dated April 4 until today;
- (2) I will forward all documents received by JBE with his permission as the communications currently are attorney/client privileged;
- (3) Same as above;
- (4) No recipients have disclosed the received documents and the documents will remain anonymous and under seal.”

42 She agreed that the document JBE11 would be ‘stricken’ from the exhibit that was used in the deposition of CW. She also agreed that the questions and answers by reference to the document would be ‘stricken’ from the deposition, but she refused to agree to withdraw as the representative of MB.

43 What then happened was that on 5 July, the Claimant’s London solicitors wrote to Ms Chicotsky. The letter they sent was in similar terms.

- “5. We have no objections to your client instructing you to assist with the London case. However, you are not permitted to violate the injunction orders, anonymity orders, or assist him in violating the injunction orders and anonymity orders which you have done repeatedly.
6. The transcript of the deposition of CW shows that you violated the injunction orders and anonymity orders. In the deposition, you used a document from the sealed file specifically marked ‘JBE11’. You also asked numerous questions related to the issues of the London case and the contents of the sealed file. You claim that at the time of the deposition on 16 March that JBE withheld the injunction orders and anonymity orders from you. If this is your story, you shall be a material witness against JBE at our upcoming hearing before the High Court to address his violation of the injunction orders and anonymity orders.
- ...
9. We have reviewed the unredacted copy of the deposition transcript which evidences your violation of the injunction orders and anonymity orders. You disclosed confidential information subject to the injunction orders and anonymity orders to Mr Justin Weisberg, MB, and the court reporter at the deposition. You disclosed confidential information subject to the injunction orders and anonymity orders to many recipients when you uploaded it to the court’s files.”

- 44 Separately in the US Florida proceedings, Ms Chicotsky having not complied with the demand to come off the record, the attorneys for CW then applied to have her removed from the case on the grounds of her alleged breach of the orders of this court. Although Ms Chicotsky filed a response in which she, in my judgment, properly analysed the proceedings and contended that she had not breached the injunction order that was filed on 7 July 2022, nevertheless she decided to cease acting for MB in the proceedings and she was replaced by another attorney on 5 July 2022.
- 45 I have set out those matters because they are of obvious concern. I am willing to accept that the representation of the terms of the orders made by this court – and the contention that both the Defendant and Ms Chicotsky were in breach – was a mistake. However, the serious allegations of misconduct against Ms Chicotsky were wholly wrong. The evidence that I have seen provided in support of this contempt application, does not support the contention that Ms Chicotsky has done anything wrong. Nor, for that matter, does not support the contention that the Defendant has done anything wrong either. For the reasons set out above, the injunction orders made in this case imposed no restrictions on the use of document JBE11. The Defendant in these proceedings did not breach the injunction order by providing it to Ms Chicotsky, and she, in turn, did nothing wrong in using it in the deposition. I have read the parts of the deposition exhibited to Ms Kennedy-Davis’s affidavit, and there does not appear to be any way in which Ms Chicotsky could be alleged to have acted in breach of the court’s order.
- 46 I am obviously concerned about that because serious allegations of misconduct have been made against Ms Chicotsky on what I am satisfied is a wholly erroneous basis. In fairness to Ms Chicotsky, and also because of the importance that the American court has not been misled as to the effect of the English court’s orders, I will direct that a transcript of this judgment must be provided and sent by the Claimant to the attorneys representing the parties in those proceedings, and Ms Chicotsky, to correct any misapprehension as to the effect of this court’s orders and whether or not there has been any breach of those by the provision of the document JBE11 and the subsequent use of that in the proceedings in the Florida court. It will be for the attorneys to decide whether the Florida Court needs to be informed of this decision.
- 47 It is a perhaps sobering reminder of the obligation on parties’ lawyers to read very carefully and to understand the effects of injunction orders. In this instance, and I accept it has been a mistake on the Claimant’s solicitors’ part, they have misunderstood the effect of the injunction order. Very unfortunately, and it is to be regretted, they have pursued Ms Chicotsky with allegations of the most serious of professional misconduct in circumstances where, on the evidence I have seen, it appears clear that she has done nothing wrong.
- 48 Finally, I should express the Court’s gratitude to Mr Hitchens who originally stepped in to act for the Defendant *pro bono* in the period prior to the grant of legal aid. He has now been instructed on a legal aid basis for the purposes of a contempt application, but I express my gratitude for Mr Hitchens’s willingness to act on a *pro bono* basis prior to that. The court is very grateful whenever somebody is to work on *pro bono* basis, and I thank him for that. He has objected to the terms of an email he received from the Claimant’s solicitors complaining about certain errors in his skeleton argument, which he was invited to correct. The email concluded:

“If you do not make these corrections, then we are professionally obliged to take this matter further.”

49 It is unfortunate in the context of this litigation that that final sentence was included. I doubt that counsel instructed on a case would have refused to correct errors that have been drawn to his attention. Threats like that are rarely helpful and often can be counterproductive.

LATER

50 As I said this morning, there is a remaining application which I referred to in the judgment given this morning which relates to the Defendant's application to discharge the injunction. Before lunch, I indicated to Mr Hitchens that I would need some persuasion that there were grounds upon which to discharge the injunction and that he would also need to address the point that has been raised by Mr Katz, which is that the most recent order by which the injunction was continued was one that was entered by the Defendant by consent. That is not to say the court does not retain its jurisdiction over injunction orders that continue in force. The court does always have those powers to reconsider such orders when it is right to do so, for example if there has been a change of circumstances. It nevertheless remains a factor that the current operative injunction was one that was continued by consent.

51 Mr Hitchens in his helpful submissions this afternoon has said that his client would be willing to provide an undertaking to the court in exactly the same terms as the injunction. That is consistent with the Defendant's position in consenting to the injunction but it makes no practical difference whether the court has imposed an injunction by consent or it accepts undertakings from the Defendant given to the court. The consequences of breach are exactly the same. Perhaps it might be possible to identify certain narrow respects in which an undertaking given to the court is different from an injunction but, materially, there is no difference. The Defendant does not suggest that there has been a material change of circumstances that would justify revisiting the order that was originally made. Further, the Defendant's position in the litigation as I have already outlined, is that he does not contend that he has any right to publish the material that is the subject of the injunction. As such, the operative restrictions – whether imposed by injunction or as terms of an undertaking - are not having any real impact on him. For all those reasons, I am not persuaded the court should interfere or alter the injunction that has been imposed most recently by the order of 4 April. It does not appear to me there is any material change or other justification for varying the order that was made.

52 Obviously, I have recorded in this judgment that the Defendant has offered an undertaking in those terms. That may be material should the court, at some later point, come to consider whether there is a credible threat that the Defendant intends to publish the material.

LATER

53 On the application for indemnity costs, I am going to refuse that and order assessment on the standard basis. I do not think it is going to make much difference in this case as I will be carrying out a summary assessment myself. As a matter of principle, however my reason for not ordering indemnity costs is although, arguably, the conduct is outside the norm, that is largely as a result of a mistake by the lawyers involved. It is not therefore conduct which I think should be met with an indemnity costs order.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

*Transcribed by **Opus 2 International Limited**
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital*

This transcript has been approved by the Judge.