Neutral Citation Number: [2023] EWHC 2238 (KB)

Claim No. KB-2023-003419

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ROYAL COURTS OF JUSTICE

Date: 8th September 2023

Royal Courts of Justice
Strand, London, WC2A 2LL

Before:

MR JUSTICE RITCHIE

- -

BETWEEN

JRV [1]
ARC [2]

Claimants

- and –

BRG

Defendant

Tom Blackburn (instructed by **Duffield Harrison solicitors**) for the **Claimants**
The Defendant did not appear

Hearing date: 6th September 2023

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APPROVED JUDGMENT

Judgment approved by the Court for handing down. This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be at 3pm on 8th September 2023

Mr Justice Ritchie:

The Parties

1. The 1st Claimant is a married man. His wife is the 2nd Claimant.

2. The Defendant is a woman with whom the 1st Claimant had an affair.

Bundles

3. For the hearing I was provided with a digital bundle. This contained: the draft Claim Form; the notice of application; witness statements from the Claimants and various exhibits of the Defendant's online Blogs and communications. (A "Blog" is a diary published online so the world can read it.)

Summary

4. On 6th September 2023 I granted an ex-parte interim (short term) injunction in model order format to restrain the Defendant from publicising her affair with the 1st Claimant.

5. The terms of the injunction granted included the following:

> **"Injunction**
>
> 6. Until the return date on 14 September 2023 or further Order of the Court, the Defendant must not:
>
> a. use, publish or communicate or disclose to any other person (other than (i) by way of disclosure to legal advisers instructed in relation to these proceedings ("the Defendant's legal advisers") for the purpose of obtaining legal advice in relation to these proceedings or (ii) for the purpose of carrying this Order into effect) all or any part of the information referred to in Confidential Schedule 2 to this Order ("the Information");
>
> b. Make contact or communicate by any means with the Claimants, or any member of their families and their friends, by WhatsApp, email, telephone, social media or otherwise howsoever, or cause or procure any other person to make such contact, including, without limitation, causing or procuring the Defendant's daughter and/or the Defendant's friend Shanice to request to follow (which means online following) the Second Claimant;
>
> c. follow online the Claimants or any members of their families or friends on Facebook, Instagram or other social media;

> d. Make demands on the Claimants for money;
>
> e. threaten violence against the Claimants;
>
> f. make claims of rape, sexual assault and harassment against the First Claimant, except insofar as such claims are made to the Police or for the purposes of obtaining legal advice from the Defendant's legal advisers;
>
> g. otherwise pursue a course of conduct which amounts to harassment of the Claimants contrary to the Protection from Harassment Act 1997, except that nothing in this Order prevents the Defendant from contacting the Claimants' solicitors;
>
> h. publish any information which is liable to or might identify the Claimants as parties to the proceedings."

6. This judgment contains the reason for granting the injunction.

Anonymity

7. The Claimants applied for anonymity. The general rule is that all hearings are to take place in public and the public have a right to see justice done and know what the Courts are doing. The *Practice Guidance* [2012] 1 WLR 1003 "PG 2012" at paragraphs 9-15 makes the principle of open justice in such applications very clear. Unless clear and cogent reasons are provided by the Claimants for a private hearing it will not be granted and the application will take place in public.

8. In *Khan v Khan* [2018] EWHC 241, Nicklin J was dealing with an application for anonymity in a harassment claim arising from a family dispute. He ruled as follows:

> "32. In the area of media and communications law, issues concerning exercise of the Court's jurisdiction to sit in private and to anonymise one or more parties arise most frequently in privacy claims. When parties are anonymised, or hearings take place in private, that is because the Court has been satisfied that it is strictly necessary to do so. Usually, that is because, if the parties were named and the hearing took place in public, there is at least a risk (and in most cases an inevitability) that the Court by its proceedings would destroy that which the Claimant was, by those very proceedings, seeking to protect. That would be to frustrate the administration of justice.
> 89. There are very few privacy claims, in which interim injunctions are sought to prevent disclosure, where the parties are named. That is because, if the parties are named, the Court will inevitably have to deal in any public judgment with the private matters (the

> disclosure of which the claimant seeks to prevent) at a level of generality to ensure again that that which the claimant is seeking to protect is not destroyed by the proceedings themselves. The most important factor in favour of anonymising one or more of the parties is usually the fact that the Court is better able to explain in a public judgment why an injunction has been granted or refused"

9. CPR part 39 rule 39.2 requires hearings to be held in public and sub-clause (2) requires the Court to consider the duty to protect freedom of expression. Further, sub-clause (3) provides that the hearing must be in private if and only to the extent that the court is satisfied that one or more of the matters in (a) to (g) exists and that it is "necessary for the administration of justice". The Claimant relied on (a), (c) and (g).

10. I consider that the Claimants' rights to privacy can be protected properly by less stringent restrictions than a private hearing: namely anonymity for the Claimants. Anonymity will prevent the hearing from defeating the object of the injunction and protect the Claimants' confidential information.

11. I granted anonymity to the Claimants in the following terms:

> "**Anonymity**
> Pursuant to section 6, HRA, and/or CPR r 39.2 the Judge, being satisfied that it is strictly necessary for the proper administration of justice, ordered that:
> - the Claimants be permitted to issue these proceedings naming the First Claimant as JRV and the Second Claimant as ARC, and giving an address c/o the Claimants' solicitors;
> - the Claimants be permitted to issue these proceedings naming the Defendant, who is identified at Confidential Schedule 3, as BRG;
> - there be substituted for all purposes in these proceedings in place of references to the Claimants by name, and whether orally or in writing, references to the letters;
> - 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."

Procedure – Notice – Ex-parte

12. I take into account paragraphs 18-21 of PG 2012.

13. Section 12(2) of the *Human Rights Act 1998* [HRA] is particularly relevant and states that if the person against whom the application for relief is made

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.

14. I have considered the ex-parte nature of the application and was concerned that the Claimants had not written, through their lawyers, to the Defendant. However, on the evidence, the 1st Claimant has twice requested the Defendant not to publish his confidential private information and once warned that legal proceedings would be taken if she did. In the face of these warnings the Defendant has gradually ramped up the disclosures. In addition, the Defendant tried to blackmail the 1st Claimant less than a year ago and reported to 1st Claimant to the police for rape probably without any genuine foundation (her emails and Blogs do not so assert) and threatened violence by her ex-husband's contacts, in these circumstances and particularly in the light of a journalist contacting the 1st Claimant most recently, I consider that there are compelling reasons why the Defendant should not be notified.

The Chronology

15. The facts set out below are not my findings of fact, they are the assertions made by the Claimants together with the publications and written actions of the Defendant evidenced in the exhibits to the 1st Claimant's witness statement dated 6.9.2023.

16. The 1st Claimant is married to the 2nd Claimant and lives in England. He chose to visit a dating website called "Killing Kittens" in January 2022. This offers casual sex and experimenting with group sex at sex parties with other consenting adults. He and the Defendant contacted each other and started an affair. He asserts that neither knew the other was married. In her later Blogs the Defendant asserted that the failure of the 1st Claimant to disclose his married status was a deception.

17. All went well until August 2022 when mutual disclosure of each being married took place (according to the 1st Claimant). In October 2022 the Defendant became pregnant. She asserted the 1st Claimant was the father. She refused to have a DNA test to prove that assertion. That same month the Defendant made Facebook contact with the 2nd Claimant but quickly withdrew it.

18. In December 2022 the Defendant sought to blackmail the 1st Claimant by demanding £40,000 for a loft conversion and threatened to reveal private and compromising material to his wife and family on the internet if he did not pay up. The Defendant made threats to the 1st Claimant that her "husband" knew people who would "visit" the

Claimants' house, implying violence. The Defendant posted explicit photos and videos of the 1st Claimant on her adult sex profile.

19. Tragically the Defendant suffered a miscarriage in January 2023.

20. In February 2023 the Defendant named the 1st Claimant to a funeral parlour employee without the 1st Claimant's consent.

21. In May 2023 the affair was ended. Shortly after that the Defendant sent a card to the 2nd Claimant disclosing the affair, without the 1st Claimant's consent – it is exhibited. The Defendant contacted the 2nd Claimant on Instagram requesting to "follow" her without the 1st Claimant's consent.

22. On 16th May the 1st Claimant asked the Defendant to stop contacting his family or him. In response, on 30th May the Defendant set up a public Blog on the internet and started drip feeding her version of the details of their affair, her pregnancy and her assertions of the 1st Claimant's behaviour. All of this was contrary to the 1st Claimant express request for privacy.

23. On 31st May the 1st Claimant again asked the Defendant not to disclose his name and warned the Defendant that he would have to take legal action if she did not comply.

24. On 5th June the Defendant responded by publishing more details including mentioning the 1st Claimant's favourite football team and asserting that he had said he was going to leave his wife for her in the Blog. On the 6th June more details were added including reference to an area of London connected with the 1st Claimant. The Defendant also posted a photo of the 1st Claimant partially, but not fully, obscured.

25. On 21st June the Defendant published more on the Blog.

26. On 22nd June the police arrived at the Claimants' house investigating rape and sexual assault allegations made by the Defendant against the 1st Claimant. This caused anxiety and concern to both Claimants. The investigation was terminated by the police. The Defendant's Blog never asserted she was raped or that the 1st Claimant assaulted her.

27. More details were published by the Defendant on her Blog on 3rd July and 14th August 2023 and finally on 27th August the Defendant publicised the 1st Claimant's matrimonial home-town and name and more photos of the 1st Claimant, partially obscured.

28. On the 1st of September 2023 a journalist contacted the 1st Claimant for comments and answers to intimate questions on a story she was writing with the Defendant about the affair.

The applications

29. On 6.9.2023 the Claimants applied for non-disclosure injunctions against the Defendant.

The Action

30. In the Claim Form, which is to be issued imminently pursuant to an undertaking given to this Court, the Claimants seek damages and an injunction against the Defendant for breach of confidentiality, invasion of their private lives, harassment, misuse of private information and costs.

The Law

Power to grant interim injunctions

31. Subsections (1) and (2) of s.37 of the *Senior Courts Act 1981* provide that the High Court may, by order (whether interlocutory or final), grant an injunction in all cases in which it appears to the court "just and convenient" to do so, and any such order may be made either unconditionally or on such terms as the court thinks just. The Court's powers are not derived from this section but rather confirmed by it, see *Fourie v Le Roux* [2007] UKHL 1; at para. [25], per Lord Scott.

32. In *Spry* on Equitable Remedies 9th Ed (2014) at p 333 the editors wrote this:

> "The powers of courts with equitable jurisdiction to grant injunctions are, subject to any relevant statutory restrictions, unlimited. Injunctions are granted only when to do so accords with equitable principles, but this restriction involves, not a defect of powers, but an adoption of doctrines and practices that change in their application from time to time. Unfortunately there have sometimes been made observations by judges that tend to confuse questions of jurisdiction or of powers with questions of discretions or of practice. The preferable analysis involves a recognition of the great width of equitable powers, an historical appraisal of the categories of injunctions that have been established and an acceptance that pursuant to general equitable principles injunctions may issue in new categories when this course appears appropriate."

Lord Leggatt expressly approved of this analysis of the law in *Broad Idea v Convoy* [2021] UKPC 24. Noting that this was a Privy Council decision and only persuasive, the Court of Appeal approved it in *Re G (Court of Protection Injunction)* [2022] EWCA Civ. 1312 at [54-58 and [61].

33. The general principles under which injunctions are granted were expressed clearly by the House of Lords in *American Cyanamid v Ethicon* [1975] A.C. 396. The nine key principles derived from the speech of Lord Diplock at pp.406–409, appear to me to be follows:
    (1) The grant of an interlocutory injunction is a remedy that is both temporary and discretionary.

(2) The evidence available to the court at the hearing of the application for an interlocutory injunction is usually incomplete. It is given in writing and has not been tested by oral cross-examination.

(3) It is not part of the Court's function at the interlocutory stage to try to resolve conflicts of evidence on the written evidence as to facts nor to decide difficult questions of law which call for detailed argument and mature considerations. These are for the trial Judge.

(4) When an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the Claimant's legal rights is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action.

(5) It is to mitigate the risk of injustice to the Claimant during the period before that trial that the Courts grant relief by way of interlocutory injunction.

(6) This power is subject to the Claimant undertaking to pay damages to the Defendant for any loss sustained by reason of the injunction if it should be held at the trial that the Claimant had not been entitled to restrain the Defendant from doing what she was threatening to do.

(7) The object of the interlocutory injunction is to protect the Claimant against injury by violation of his rights for which he could not be adequately compensated in damages at the trial. Before an injunction can be granted the Claimant's need for the protection must be weighed against the corresponding need of the Defendant to be protected against injury resulting from being prevented from exercising her own legal rights for which she may not be adequately compensated under the Claimant's undertaking in damages at the trial.

(8) The Court must weigh one need against another and determine where, "the balance of convenience" lies.

(9) Generally, the Claimant is not required to prove that he will win on the balance of probabilities. However, the court must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried. Unless the material available to the Court fails to disclose that the Claimant has any real prospect of succeeding in the claim for a permanent injunction at the trial, the Court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

34. These principles were also summarised a year later by Browne LJ in the Court of Appeal in *Fellow v Fisher* [1976] 1 QB 122 at p 137. Put more succinctly, in injunction cases generally the Court must consider:

(1) Whether there is a serious question to be tried? If the answer to that question is "yes", then the Courts considers:

(2) Would damages be an adequate remedy for a party injured by the Court's grant of, or its failure to grant, an injunction?

(3) If not, then where does the "balance of convenience" lie?

35. But these principles are adapted for injunctions relating to restraint of publication and the criteria are different in law. Articles 8 and 10 of the *European Convention on Human Rights* [ECHR] and S.12 of HRA have to be considered.

The will you win? test

36. Section 12(3) of the HRA requires a Court dealing with an application for interim relief to consider that 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" (my emphasis). So, the HRA test imposes a higher threshold than merely "serious issue to be tried." It is not as high as needing the Claimant to prove that he is likely to win on the balance of probabilities, but it is closer to that threshold: see *Cream Holdings v Banerjee* [2004] UKHL 44.

The balance of convenience test

37. The relevant test was summarised in *Re S (a child)* [2004] UKHL 47, at [17] by Lord Steyn. So, in an application to restrain publication of private information the Court considers the competing ECHR and HRA rights of privacy and freedom of expression. For the determination of such claims the principles are:

(1) the Court must ascertain whether the applicant has a reasonable expectation of privacy, which protection may be lost if it is shown as a matter of fact and degree in each case that the information is already genuinely in the public domain; and

(2) the Court must conduct the "balancing test", taking into account that:

(i) neither Art.8 nor 10 has preference over the other;

(ii) where the Art 8 and Art 10 values are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary;

(iii) the justifications for interfering with or restricting each right will be taken into account; and

(iv) proportionality will be considered and taken into account.

Case law on privacy in relation to sexual matters

38. In *PJS v News Group* [2016] UKSC 26, the Supreme Court were considering a claim by a claimant and his partner who were in the entertainment business and had two young children. He sought an interim injunction, to restrain the defendant from publishing a story about his alleged extra-marital sexual activities. He asserted that the proposed publication would be a breach of confidence and a violation of his right to respect for his private life guaranteed by Article 8 of the Convention for the Protection of Human Rights. The Judge refused the application but the Court of Appeal allowed the claimant's appeal, ruling that in law he had a legally recognised expectation of privacy and that there was no public interest in the story being published. It was also held that there was a strong likelihood that at trial the claimant would succeed and gain a permanent injunction. The story was then published abroad. The Defendant applied to

discharge the injunction and this was granted on the basis of the HRA S.12(4). On appeal the injunction was reinstated. The key relevant rulings were that the publication would be an invasion of the claimant's right to privacy and the foreign publication was not sufficient reason to undermine that protection at an interlocutory stage. Lord Mance JSC ruled as follows at [32]:

> "In my opinion, the approach is sound in general principle. 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: see paras 34—37 below.
> 33 However, whether an interim injunction should be granted to restrain an anticipated tortious invasion of privacy raises different considerations from those involved in the simple question whether disclosure or publication would constitute a tortious act. The courts have to apply HRA section 12, and, before restraining publication prior to trial, have in particular to be "satisfied that the applicant is likely to establish that publication should not be allowed". They have, under section 12(4), to have particular regard to the importance of the article 10 right to freedom of expression, although, as already explained (paras 19—20 above), that right has no necessary claim to priority over the need to have due regard to any article 8 privacy right which the applicant for an injunction enjoys. Where, as here, the proceedings relate to journalistic material (or conduct connected to such material) the courts must also have particular regard under section 12(4)(a) to two specific factors which point potentially in different directions: (i) the extent to which the material has, or is about to, become available to the public and (ii) the extent to which it is, or would be, in the public interest for the material to be published. Under section 12(4)(b), the courts must also have particular regard to any relevant privacy code."

39. Lord Toulson JSC (dissenting) ruled as follows:

> "88 It is well recognised that repeated publication of private (and especially intimate) photos may properly be prevented by injunction, because the original publication does not necessarily reduce the intrusion caused by re-publication. In *Douglas v Hello! Ltd* (No 3) [2006] QB 125, para 105 the Court of Appeal explained that:

> "in so far as a photograph does more than convey information, and intrudes on privacy by enabling the viewer to focus on intimate personal detail, there will be a fresh intrusion of privacy when each additional viewer sees the photograph, or even when one who has seen a previous publication of the photograph is confronted by a fresh publication of it."

The court gave the example of a photograph taken with a telescopic lens of a film star lying naked by a swimming pool. In the present case what is sought to be restrained is the publication of facts of which there has already been widespread disclosure. Once facts are widely known, the legal landscape changes. In my view the court needs to be very cautious about granting an injunction preventing publication of what is widely known, if it is not to lose public respect for the law by giving the appearance of being out of touch with reality.

89 Lord Mance JSC says at para 33 that the requirement under section 12(4)(a)(i) of the HRA for the court to pay particular regard to "the extent to which the material has, or is about to, become available to the Public" must be considered with reference to the form in relation to which injunctive relief is to be sought. As I read the words of the Act, they require the court to take into account how generally available the information has become from whatever source, be it broadcast journalism, print journalism, the internet or social media. The evident underlying purpose of the subsection is to discourage the granting of an injunction to prevent publication of information which is already widely known. If the information is in wide, general circulation from whatever source or combination of sources, I do not see that it should make a significant difference whether the medium of the intended publication is the internet, print journalism or broadcast journalism. The world of public information is interactive and indivisible."

Applying the law to the facts

40. On the evidence before me (albeit one sided), in my judgment the Claimants are likely to establish that the Defendant has intentionally and progressively blackmailed, harassed and intruded on the Claimants' private lives by her Blogs, her disclosures, her communications to the Claimants, her false reporting to the police and her behaviour. As at present it is difficult to determine what defence the Defendant can have, but that will be dealt with on the return date.

41. I do not consider that damages would be an adequate remedy for the Claimants. Privacy, once destroyed, may change reputations forever and money may come nowhere near resolving that change. In addition, the Claimants' continued embarrassment and anxiety before trial are avoidable and damages will be unlikely to ameliorate them. Nor is there any guarantee that the Defendant can afford to pay any

damages. Private citizen's insurance is unlikely to cover any harassment and torts of invasion of privacy upheld at trial.

42. I balance against the Claimants' rights to privacy, the Defendant's right to tell the story of her life to those she wishes to tell it to. Her freedom of expression is an important right. However, it can be exercised without impinging on the 1st and 2nd Claimants' right to privacy, as exemplified in the Defendant's first written Blog.

43. In my judgment the balance of convenience lies in favour of the Claimants at this interlocutory stage. I can fully understand how after a miscarriage, the life journey travelled by the Defendant is one she may wish to tell to others for support, learning, comfort and other reasons, but the name and personal details of the 1st Claimant and his involvement in the affair are his private matters to be protected, at least for the next week until the return date. I take into account the fact that the 1st Claimant's name and the town where he lives have already been published by the Defendant. But the readership of the Blog is unknown, it is not a national news-paper or online media source and the spread of information may, so far, be very limited. The risk of the re-publication in the proposed news article by the journalist is a quite different and probably a far more serious issue.

Conclusions

44. In my judgment it is right to grant a time limited interlocutory restraining injunction to prevent publication of the confidential information until the return date.

45. There is a more than a serious issue to be tried here. The Defendant faces a blackmail assertion and is likely in my judgment to be injuncted to prevent harassment and trespassing or intruding on the Claimants' privacy.

46. The Claimants face a risk of harm from the Defendant's continued alleged torts and it appears that the Defendant is ramping up her disclosures month by month to cause more embarrassment, anxiety and damage to the Claimants.

47. Whether these allegations are proven is a matter for trial. Whether the injunction will continue beyond 7 days is a matter for the Judge on the return date next week.

END