Neutral Citation Number: [2023] EWHC 874 (KB)

Case No: QB-2021-002600

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

Royal Courts of Justice,
Strand,
London,
WC2A 2LL

Date: 14 March 2023

Before:

MRS JUSTICE FARBEY DBE

- -

Between:

RICCARDO FRATI — **Claimant**

- and -

KAREN BOWEN-CARTER — **Defendant**

- -

- -

MR DAVID SHERBORNE (instructed by **BRABNERS LLP**) for the **Claimant**
MR EDWARD LAMB (instructed by **KAREN TODNER LTD**) for the **Defendant**

- -

APPROVED JUDGMENT

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

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.

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MRS JUSTICE FARBEY:

Introduction

1. The claimant is a consultant cosmetic surgeon. The defendant is his former patient. By notice of application dated 17 August 2022, the claimant applied for the committal of the defendant for contempt of court under the provisions of CPR Part 81. The claimant alleges that the defendant has on four occasions breached an undertaking given to this court. The undertaking was given on an interim basis pending the trial of the claimant's claims against the defendant in libel, malicious falsehood and harassment. The defendant undertook that she would not:

> "(1) Communicate with or contact or attempt to contact the Claimant directly or indirectly, other than through his solicitors, whether by telephone, email, online or otherwise howsoever.
>
> (2) Contact staff or other patients of the Claimant either directly or online.
>
> (3) Intimidate, harass or pester the Claimant or his patients or staff."

2. The claimant contends that the defendant breached the second of these undertakings (hereafter "the second undertaking") because she contacted four of the claimant's patients online. For ease of reference, the four individuals whom the defendant contacted were referred to at the hearing before me as Patients 1 – 4. I shall adopt that nomenclature. The allegations are:

   i. **Patient 1**: On 25/26 October 2021, the defendant sent six messages to Patient 1 (Fiona Emerson) on Facebook.

   ii. **Patient 2**: In April 2022, the defendant contacted Patient 2 (Cindy Muhidin) on Instagram.

   iii. **Patient 3**: In April 2022, the defendant contacted Patient 3 (Lisa Robson) on Facebook.

   iv. **Patient 4**: In April 2022, the defendant contacted Patient 4 (Charlotte Jacques) on Facebook.

   There is no dispute that (i) the defendant made the online posts that underlie the contempt application; and (ii) Patients 1 – 4 were either current or former patients of the claimant.

3. The claimant submits that the terms of the second undertaking covered both current and former patients. He submits that the online messages posted by the defendant amounted to "contact" with his patients so that the terms of the second undertaking were clearly breached. He relies on the evidence of his solicitor, Ms Helen Otty, who has provided two affidavits and a witness statement in support of the application. Pursuant to case management directions, the defendant indicated in advance of the hearing that she did not require Ms Otty to be cross-examined.

4. The defendant submits that the reference in the second undertaking to "other patients" is unclear and ambiguous. It does not clearly extend to former patients. On a reasonable interpretation, it may refer to individuals currently receiving treatment or care from the claimant and may exclude individuals who have completed their treatment and care. The defendant submits that the lack of precision in the language makes the second undertaking unenforceable or, in the alternative, the imprecision would make it unjust to treat the defendant as contemptuous. In addition, not all the posts amounted to "contact" with a patient.

5. The defendant has provided an affidavit. She chose not to be cross-examined and has, to this extent, exercised her right to silence (*Discovery Land Company LLC & Ors v Jirehouse & Ors* [2019] EWHC 1633 (Ch), paras 29 – 30). The defendant supplied evidence from a number of witnesses who were not tendered for cross-examination.

6. The application proceeded by way of written submissions from Mr David Sherborne on behalf of the claimant and Mr Edward Lamb on behalf of the defendant. I am grateful to both counsel for their helpful submissions.

The High Court claims

7. As I have mentioned, the present application is made during the currency of civil claims. In order not to pre-empt the trial judge on contested matters of fact, I shall state very shortly and in uncontentious terms the background facts which led to the commencement of the claims.

8. On 2 November 2020, the claimant performed six cosmetic surgical procedures on the defendant. She says that she was extremely unhappy with the results and with the care she received before and after the surgery. She posted a number of reviews online. The claimant regarded one of those reviews (posted on 21 May 2021 and deleted on 24 May 2021) as false. He claims that the review conveyed the message to the public that he was fraudulently providing half-price surgery to celebrities in exchange for the posting of false reviews on social media promoting his services. He contends that the words used in the defendant's review were defamatory and caused serious harm to his reputation.

9. The claimant further claims that the review was published maliciously and caused financial loss to his business. He pursues damages for malicious falsehood. Importantly for the purposes of the present application, he claims that the defendant also pursued a course of conduct against him which amounted to harassment.

10. By a claim form issued on 6 July 2021, the claimant commenced proceedings against the defendant for defamation, malicious falsehood and harassment. By an application notice issued on the same day, he applied for an injunction pursuant to sections 1 and 3 of the Protection from Harassment Act 1997. In response to the application, the defendant agreed to provide the undertakings to the court in the terms I have set out above. The terms of a consent order were agreed.

11. On 20 July 2021, Saini J made an order in the agreed terms ("the Order") without a hearing. The Order is endorsed with a penal notice in conventional terms. There is one mistake. The penal notice is on its face directed to "the first and second claimant" as well as being directed to the defendant. That is plainly a drafting error and nothing can

possibly turn on it. The Order stipulates that the defendant shall comply with the undertakings until further order. The undertakings are attached to the Order and are in the same terms as the draft injunction which accompanied the application notice.

12. On 2 September 2021, the defendant filed a Defence denying all three claims. On 22 February 2022, the claimant served a Reply. On 4 July 2022, the defendant applied to strike out the claims or alternatively for summary judgment. That application was heard on 28 November 2022 and judgment was reserved. I was not asked to postpone the contempt hearing or this judgment pending the outcome of that application.

The Facts

13. I turn to the evidence that is relevant to the question of whether the defendant has breached the second undertaking. In making findings of fact, I have kept in mind that the burden of proving any breach lies on the claimant. The standard of proof is the criminal standard; in other words, the claimant has to satisfy me so that I am sure that any alleged contempt has been established. On the basis of the witness statements and documentary evidence before me, I am sure of the following matters.

Patient 1

14. On 25/26 October 2021, the defendant used the name “Roxy Rox” to send five messages to Patient 1 in response to Patient 1's post to a Facebook group devoted to issues relating to aesthetic surgery. When Patient 1 did not respond, the defendant posted a sixth message:

> "All very strange that you are not replying so I can only assume your post was not genuine? No doubt a plant from the Frati mafia."

The defendant deleted the first five messages. She did not delete the sixth.

15. The claimant had operated on Patient 1 on 8 August 2021. During a follow-up appointment in the first week of November she expressed her concerns about the sixth message. She continued to see the claimant for follow-up appointments until 28 November 2021. She was therefore a current patient of the claimant at the date of the sixth message.

16. In her affidavit, the defendant points to Patient 1's own post on Facebook in late October 2021. In that post, Patient 1 had indicated that, despite nearly three months having passed since her surgery, she was in pain and unable to breathe out of her left nostril. She was seeking a recommendation for someone to "fix this".

17. The defendant says that she had in mind the passing of time since Patient 1's surgery and the fact that she was seeking a recommendation for someone else to fix her problems. She says that in those circumstances she had inferred that Patient 1 was not the claimant's current patient and that the doctor/patient relationship had ended.

18. The defendant explains sending the sixth message by saying that she contacted Patient 1 in a private message in order to share her experience and with a view to obtaining witness evidence for the libel case. There is no plausible connection, however, between

seeking witness evidence for legal proceedings and calling someone a plant for the Frati mafia. Nor does it amount to a sharing of experience. I reject the defendant's account of her rationale for sending the sixth message because it is not credible.

19. The defendant explains the wording of the sixth message by saying that when Patient 1 did not respond to her previous messages she "immediately considered" that Patient 1 must have been a plant for the claimant. It is, however, implausible that the claimant would have planted Patient 1 to publicise post-operative pain and to tell a Facebook group of concerned individuals that she could not breathe out of one nostril. It is implausible that the claimant would have planted Patient 1 to seek a recommendation about going to another doctor to "fix" her problems. So far as the defendant seeks to justify treating Patient 1 as a plant, I reject her evidence because it lacks credibility.

20. The defendant says that when she used the term "mafia", she did not intend to denigrate the claimant's Italian origins. She says that the claimant's dissatisfied patients would commonly use that term to refer to him. She thought that Patient 1 "would be familiar with this phrase". It is, however, irrelevant that other people may have used that term. In the context of a surgeon's professional services, it is a derogatory term because it implies organised criminal activity. It insults the claimant's Italian origins, whether or not the defendant intended to insult him in that way. The critical point, however, is that the defendant contacted Patient 1 when she was a current patient of the claimant.

Patient 2

21. On around 4 April 2022, the defendant contacted Patient 2 on Instagram under the name "eye_kandi_art_gallery_official" which reflects her professional life in the art world. Patient 2 had said on Instagram that she was "looking and feeling so poorly" four days after surgery. The defendant replied: "another poor person".

22. Patient 2 had become the claimant's patient in May 2021. She underwent surgery in June 2021. By email to the claimant's solicitors dated 9 June 2022, Patient 2 said that she remained a patient under the claimant's care as at that date. In a witness statement dated 13 January 2023, she resiled from the position taken in her email, saying that she had described herself as a patient in order to emphasise that she needed attention in relation to her complaints against the claimant. Given the inconsistency, I give her evidence little weight. I accept the evidence of Ms Otty that Patient 2 had follow-up appointments until August 2021 and that in April 2022 she remained on the database of the claimant's registered patients.

23. In her affidavit the defendant says that she had contacted the administrator of the Facebook group, Claudine King, to check whether Patient 2 was a patient of the claimant before she communicated with her. She was advised that Patient 2 was no longer a patient. If she was given such advice, it is surprising that no mention was made of it in the otherwise detailed solicitors' correspondence concerning communication with Patient 2. By letters dated 29 December 2022 and 9 January 2023, the claimant's solicitors requested copies of any communications between the defendant and Ms King. None has been produced. I have not had the benefit of oral evidence on the point which may have reassured me that the defendant's written evidence is reliable.

24. In her witness statement Ms King refers to being contacted by the defendant who asked her whether Patient 2 was a client of the claimant. Ms King states that she "didn't feel"

that that was the case because Patient 2 had entered NHS care "within days of her procedure" and had not seen the claimant again.

25. Ms King's evidence about her contact with the defendant is vague. She gives no indication of how or when she gave the defendant this information. If she did communicate with the defendant about the timeframe for Patient 2's treatment and care, the information provided to the defendant was wrong.

26. The defendant has at times maintained that the words "another poor person" were general in nature; they were publicly posted; and they were not directed to Patient 2. No one was tagged in the comment. The defendant says in her affidavit that she did not consider that the Order prevented her from making general comments in a public place. No mention of the defendant's belief that she was permitted to make group communications was made before she filed her affidavit. The belated nature of the explanation reduces its credibility.

27. The defendant posted a comment under Patient 2's photograph in direct response to Patient 2's post. Patient 2 used the online name "drfrati.healingjourney". I am therefore sure that the defendant did not stumble upon Patient 2 during the course of sending a public message to a group of people whose identity would not reveal whether they had ever been a patient of the claimant. I am sure that she deliberately searched out or used the group on Instagram because she knew it would attract those who had been, or were, or could become the claimant's patients. I am sure that she deliberately posted the words "another poor person" because she knew that her post would be read by concerned individuals including Patient 2. That is sufficient to constitute “contact” with Patient 2. That other people may also have read the defendant's post does not prevent it from being contact with Patient 2. I am sure that the defendant contacted Patient 2 after her follow-up appointments had ended but while she was still registered as a patient.

Patient 3

28. In April 2022, the defendant used her personal Facebook account (using her own name) to reply to a public comment made by Patient 3 criticising the claimant. The defendant’s reply said: "Lisa Robson, I DMd you". As Ms Otty explains, this means that the defendant sent a "direct message" to Patient 3.

29. Patient 3's final appointment with the claimant was in December 2020. She was therefore a former patient when the defendant contacted her.

Patient 4

30. In April 2022, Patient 4 posted a message on Facebook saying that she had asked to cancel her surgery with the claimant and to receive a refund. The defendant used her personal Facebook account to reply: "when will it ever end?" Patient 4 cancelled surgery due to take place on 27 April 2022. She rescheduled her surgery for 18 May 2022 and thereafter she has had follow-up appointments. She was therefore a current patient at the time of the defendant's message.

31. The defendant says in her affidavit that she commented "when will it ever end" in a thread of messages where Patient 4 had herself posted comments. She says that there were a large number of posts in the thread and that her own brief comment came towards the end of the thread. She says that her comment was inconsequential when compared with the rest of the posts. However, the screenshots of the relevant posts demonstrate that the defendant posted a message on a social media forum in response to Patient 4's post. For reasons I have already covered in relation to Patient 2, the post amounted to "contact" with Patient 4. I am sure that the defendant contacted Patient 4 and that, on the basis of the schedule of appointments that I have seen, Patient 4 is a current patient.

The Parties' Submissions

32. Mr Sherborne submitted that it is clear and unambiguous that the reference to "other patients" in the second undertaking means all patients, both current and former (to the extent that they have not had appointments or surgery recently). The word "other" means people other than the defendant. Given that she was a former patient herself, having not had any treatments for several months at the point she gave the undertakings, the language was plainly wide enough to cover more than current patients.

33. Mr Sherborne submitted that it was not realistic to suggest that "other patients" had the more limited and unnatural meaning of "other current patients". Contacting those who have had surgery and been happy with the results (i.e. former patients) is the very mischief complained of in the Particulars of Claim. In any event, Patients 1, 2 and 4 were current patients when contact occurred.

34. Mr Lamb submitted that the undertakings given by the defendant are not capable of forming the basis of a committal because they are ambiguous and unclear. In particular, the meaning of "other patients" in the second undertaking is far from clear because it could or could not include former patients. Each interpretation would be reasonable. It is vital that those to whom a court order is addressed are able to understand clearly what they are and are not to do. If there is any uncertainty in its meaning, the Order should be construed in a less rather than more onerous manner (*Commission for Equality & Human Rights v Griffin* [2010] EWHC 3343 (Admin), para 23, per Moore-Bick LJ). The least restrictive interpretation should be applied in order to protect the defendant's rights under Article 10 of the European Convention on Human Rights.

35. Mr Lamb submitted that the claimant's definition of the word "patient" would prevent any contact with a person who had been a patient of the claimant since his registration with the General Medical Council in 2000. Not only would this be far too broad and incapable of determination by the defendant, but it would cover communication that had nothing to do with the harassment claim, albeit that it would prevent the defendant from legitimately approaching former patients for witness statements in the main claims.

36. Mr Lamb submitted that, given the ambiguity of the second undertaking, it was not possible for the defendant to have knowledge of all the facts which would make doing an act a breach of the order (*Cuadrilla Bowland v Persons Unknown* [2020] EWCA Civ 9; [2020] 4 WLR 29, para 25). The second undertaking was either unenforceable or it should not as a matter of fairness be enforced.

Legal Framework

37. An undertaking given to the court represents a solemn commitment to the court. Breach of an undertaking is always serious because it undermines the administration of justice. It may amount to a contempt of court and be sanctioned as a contempt by an order for committal (*Navigator Equities Ltd v Deripaska* [2021] EWCA Civ 1799; [2022] 1 WLR 3656, paras 82 and 83 per Carr LJ).

38. The legal test for contempt has been recently restated in *Cuadrilla,* above, para 25, per Leggatt LJ:

> "... a person is guilty of contempt of court by disobeying a court order that prohibits particular conduct only if it is proved to the criminal standard of proof (that is, beyond reasonable doubt) that the person: (i) having received notice of the order did an act prohibited by it; (ii) intended to do the act; and (iii) had knowledge of all the facts which would make doing the act a breach of the order: see *FW Farnsworth Ltd v Lacy* [2013] EWHC 3487 (Ch), paragraph 20. It would not necessarily follow from proof of these facts that the person had knowingly disobeyed the order; but the judge took the sensible approach that, unless this further fact was established, it would not be appropriate to impose any penalty for the breach."

39. This statement of the test reflects longstanding authority that, where the court concludes that a party has acted on the basis of an interpretation of the order which is not reasonably arguable, it is not necessary to demonstrate that the putative contemnor knew that he or she was acting in breach of the order in the sense of believing that his or her conduct was a breach (*Pan Petroleum AJE Ltd v Yinka Folawiyo Petroleum Co Ltd* [2017] EWCA Civ 1525, para 43; citing *Masri v Consolidated Contractors* [2011] EWHC 1024 (Comm), para 155, per Christopher Clarke J). It is whether the conduct itself was intentional that counts. Posting messages on social media is plainly intentional conduct.

40. In determining the meaning of a court order, its terms are to be restrictively construed. Given the penal consequences of breach, the terms must be clear and unequivocal and strictly construed before a party will be found to have broken them (*Pan Petroleum*, above, para 41).

41. An interim order represents the court's determination of how it should "hold the ring" pending trial of the issues. As expressed in *Attorney-General v Punch Limited* [2002] UKHL 50; [2003] 1 AC 1046, para 43:

> "The claim having come before the court, it is then for the court, not the parties to the proceedings or third parties, to determine the way justice is best administered in the proceedings. It is for the court to decide whether the plaintiff's asserted right needs and should have any, and if so what, interim protection. If the court orders that pending the trial the defendant shall not do certain acts the court thereby determines the manner in which, in this respect, the proceedings shall be conducted. This is the

> court's determination on what interim protection is needed and is appropriate."

42. It follows that parties to civil proceedings are required to respect the court's view of the justice of interim protection as expressed in the court's order. Although the *Punch* case relates to injunctions, there is a public interest in applying the same reasoning to an order requiring a party to comply with undertakings attached to or otherwise incorporated into the order.

43. The purpose of an order is expressed in its terms: the purpose and the terms are co-extensive (*Punch*, above, para 40). Nevertheless, the terms relate to particular parties in a particular claim (*Punch,* above, para 40). The context of the proceedings is relevant to understanding the court's purpose in granting interim relief. While the words of an order are to be given their natural and ordinary meaning, they are to be construed in their context and with regard to the object of the order (*Pan Petroleum*, above, para 41).

44. Court orders are to be construed objectively (*Pan Petroleum*, above, para 42). The construction of an order depends on what the language of the order would convey in the circumstances in which the court made it, so far as these circumstances were before the court and patent to the parties (*Pan Petroleum*, para 42; citing *Sans Souci Ltd v VRL Services Ltd* [2012] UKPC 6, para 13, per Lord Sumption).

45. Judges are, moreover, entitled to assume that parties will respect their orders against the background of the proceedings in which they are made. Language is flexible and the court is entitled to proceed on the basis that the parties do not need to be instructed about the meaning of words that derive their colour and sense from the context of the issues in dispute. Otherwise, those to whom an order was addressed "might be able to dispute its meaning when in fact it is perfectly clear what the court meant and ... they must have been aware of its meaning" (*Griffin*, above, para 25, per Moore-Bick LJ).

46. The inherent flexibility of language means that no judicial order will enable the parties to know with complete certainty what acts fall within or outside its prohibitions. As observed by Lord Morris of Borth-y-Gest, rules of law cannot enable people to regulate their conduct with complete assurance: "[t]hose who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in" (*Knuller (Publishing, Printing and Promotions) Ltd v Director of Public Prosecutions* [1973] AC 435, 463 E–G).

47. Put differently, the interests of justice at which a court order strikes should not be undermined or defeated by reference to semantic arguments about the reach of the order if its purpose is in truth readily discernible from its context. If that were not the case, the court's powers and duties to hold the ring would be impaired. The court would yield some of its authority (as the sole arbiter of the interests of justice) to the parties.

48. The court will also not insist on complete precision in the language of an order if the extent of any vagueness or ambiguity is immaterial in the context of what a person has done. Returning to *Cuadrilla*, Leggatt LJ held:

> "59. ... In principle, people should not be at risk of being penalised for breach of a court order if they act in a way which the order does not clearly prohibit. Hence a person should not be

> held to be in contempt of court if it is unclear whether their conduct is covered by the terms of the order. That is so whether the term in question is unclear because it is ambiguous, vague or inaccessible.
>
> 60. It is important to note that whether a term of an order is unclear in any of these ways is dependent on context. Words which are clear enough in one factual situation may be unclear in another. This can be illustrated by reference to the ground of appeal which was abandoned. The argument advanced was that paragraph 2 of the Injunction was insufficiently clear to form the basis of a finding of contempt of court because the 'PNR Land' was described by reference to a Land Registry map and such maps are, so it was said, only accurate to around one metre. Assuming (which was in issue) that there is this margin of error, the objection that the relevant term of the Injunction was insufficiently clear would have been compelling in the absence of proof that Ms Lawrie crossed the boundary of the land as it was marked on the map by more than a metre. As it was, however, the judge was satisfied from video evidence that Ms Lawrie entered on the land by much more than a metre. The alleged vagueness in the term of the Injunction was therefore immaterial."

The Order

49. The Order which the defendant now regards as too unclear to be enforceable was the subject of agreement between both parties before it was submitted to the court for approval by consent. In the section of the Order containing the defendant's undertakings she acknowledged that:

    i. She understood the terms of the undertakings;

    ii. She understood that the undertakings were irrevocable and permanent unless set aside or varied by the court; and

    iii. She had received independent legal advice.

50. Relying on the defendant's consent, the claimant settled the application for an injunction by being party to a consent order. By doing so, the claimant forewent the opportunity to have a hearing of the application at which any points of dispute about the wording would have been determined by a judge. The defendant played her part in indicating to the court that the application for an injunction had been settled between the parties. The consequence of the defendant's submissions would be that the matter was never properly settled because the second undertaking which she presented to the court was actually unenforceable.

51. In my judgment, two consequences flow from this unsatisfactory state of affairs. First, as a matter of legal policy the defendant cannot now complain if the court engages in the task of saving its own properly made order by undertaking the interpretive task for itself, thereby clarifying the Order's terms. Secondly, the court may treat with

scepticism the defendant's belated assertion that the order is unclear and may consider whether the defendant has done no more than resile from undertakings which she herself presented to the court as the means of settling the interim dispute.

Interpretation

52. I turn to the proper interpretation of the Order. In my judgment, the context in which the Order was made is significant. As I have set out above, the written application for an injunction demonstrates that the claimant was seeking relief under the relevant sections of the Protection from Harassment Act. Given that the injunction application was brought under the law of harassment, it is legitimate for the court to consider the context of the harassment claim made against the defendant. The harassment claim is set out in a discrete section of the Particulars of Claim. There are Particulars of Harassment which refer to the defendant's online conduct and which allege among other things:

> "15.2 As outlined [elsewhere in the Particulars of Claim], the Defendant has carried out a course of conduct which was intended to and did cause the Claimant anxiety, alarm and distress through the use of malicious, intimidating, offensive, defamatory or abusive statements, both by means of online postings relating to and in communication directly with the Claimant.
>
> 15.3 This has included making very serious, abusive, and untrue allegations against the Claimant that he is guilty of perpetrating a fraudulent scam…
>
> 15.4 The Defendant has further posted similar such statements on the RealSelf, an online platform or healthcare 'marketplace' at the URL realself.com for potential patients seeking cosmetic surgery to interact with existing patients and even surgeons or obtain advice in relation to the same. Having concluded that she has violated its content guidelines (including posts containing harassing, threatening, abusive or defamatory content or blackmail), RealSelf has removed her posts and comments from the website and blocked her from any further posting on the platform.
>
> 15.5 The Defendant has also contacted other patients of the Claimant who have posted reviews of him on RealSelf, accusing those who have done so positively of having faked their reviews."

53. In my judgment, the conduct which the claimant wished to stop is the posting of online content which could stir up criticism of the claimant so that existing and potential patients could or would be dissuaded from using his services as a doctor. The question is not whether or not this sort of online conduct constitutes harassment in the legal sense, which is a matter for the trial judge. It is, however, plain that the claimant's application for an injunction was a request to the court to hold the ring by prohibiting such conduct pending trial. It defies common sense to assert that only online

communication with patients currently engaging in treatment or currently under the claimant's care could lead to the spread of such criticism.

54. The matter is put beyond doubt by the language of para 15.5 of the Particulars of Harassment which deals with the defendant's contact with "other patients". In my judgment, this language refers to other people in the sense of people other than the defendant. Just as the defendant has undergone surgery and is no longer a patient, "other patients" means people who either (like the defendant) have undergone, or who are undergoing, surgery and other treatment or care. I therefore agree with the claimant that, in the context of the harassment claim made against the defendant, the reference to “other patients” means present and former patients.

55. The harassment claim, properly construed, provides the context of the application for an injunction filed on the same day as the claim form. The draft order filed with the application notice contains a prohibition on contacting "other patients of the claimant either directly or online". It is proper to infer therefore that the claimant sought in submitting the terms of the draft order to request the court to hold the ring by prohibiting the sort of conduct which formed the subject of the harassment claim.

56. The terms of the second undertaking were in materially identical terms to the draft order. I adopt the approach in *Pan Petroleum* and consider the language of the undertaking in the context of what it would have conveyed to the court in the circumstances in which the court made the Order, so far as these circumstances were before the court and patent to the parties. The Particulars of Claim provide the background to the proceedings in relation to which an interim order was sought. The nature of the harassment claim, the terms of the draft order for an injunction and the terms of the second undertaking are all of a piece: they would have conveyed a consistent picture to the court. The context in which the defendant gave the undertaking was patent to her. It flowed from court documents filed in proceedings in which she was a party. There was nothing obscure about them.

57. The word "patient" is not so narrow that it is bound to exclude all those who have finished their treatment. Nor do I need to consider whether patients who have long ago ceased to be registered with the claimant would fall within the terms of the undertaking. On the evidence, none of Patients 1 – 4 fell into that category. All of them fell into the category of people who could be targeted by the defendant for the purpose of the wrongdoing that the undertakings were intended to prevent. I regard this part of the defendant's submissions as a red herring.

58. I am not persuaded that the defendant's resort to Article 10 advances her submissions. As Mr Lamb accepted, parties are permitted to make, and the court is permitted to enforce, wider terms of settlement between the parties than an injunction that would have been obtainable from the court (*Mionis v Democratic Press SA* [2014] EWHC 4104 (QB), para 7). The defendant decided to enter into the undertakings as the means of settling an interim dispute having had legal advice. She cannot now complain of any breach of Article 10.

59. Read and interpreted in the context in which they were given, the terms of the second undertaking are clear and unambiguous. The second undertaking means that the defendant was prohibited by court order from contacting not only present but also former patients. The undertaking is enforceable by way of contempt proceedings. It is

not unjust to enforce it. Further and in any event, Patients 1 and 4 were under the claimant's care when the defendant contacted them. Patient 2 was on his database of registered patients. In relation to the defendant's contact with them, the objection that the second undertaking was insufficiently clear is immaterial as the contact would fall within it even on the defendant's narrower interpretation (*Cuadrilla*, above, para 60).

The Breaches

60. Mr Lamb conceded that, if the court were to find that the second undertaking was enforceable, the defendant has breached it in relation to Patients 1 – 3. That concession is properly made and I accept it.

61. In relation to Patient 4, the defendant denies that she breached the undertaking. She maintains that her comment was an observation in reference to a number of posts by different disgruntled people. While made in response to a post by Patient 4, the defendant's conduct did not amount to contact with Patient 4 on any reasonable interpretation of "contact".

62. As skilfully as this submission was put on the defendant's behalf, I do not agree with it. The defendant's message was one message in a thread of comments directed to Patient 4. I agree with Mr Sherborne that the defendant's message amounted to "contact" with Patient 4 within the natural and ordinary meaning of the word. I am therefore sure that the defendant breached the undertaking by contacting Patient 4.

Knowledge and Intention

63. I am in no doubt that the defendant knew that each of Patients 1 – 4 was a patient of the claimant (within the meaning of the second undertaking) when she contacted them. Patient 1 had in the comments section underneath her post identified the claimant as the doctor who performed her surgery. The description of Patient 1 as a plant from the Frati mafia would not make sense if applied to someone other than the claimant. Patient 2 used the online name "drfrati.healingjourney". In the context of the message thread it is plain that Patient 3 was discussing the claimant and that the defendant DM'ed her in the context of that discussion. The same applies to Patient 4.

64. I am sure that the defendant had knowledge of all the facts that would make contact with Patients 1 – 4 a breach of the second undertaking (*Cuadrilla*, above, para 25). This was not contact made to those who just happened to have undergone, or planned to undergo, cosmetic surgery with any one of a number of doctors. The defendant targeted them because they were the claimant's patients.

65. The defendant's contact with Patients 1 – 4 was intentional because she intended to post the various messages. As I have set out above, it is not necessary for the claimant to prove that she had the further and additional intention of breaching the Order itself (*Pan Petroleum*, above, para 43).

Conclusion

66. I am sure that the defendant contacted Patients 1 – 4 in breach of the second undertaking. She intended to contact them. The claimant has proved to the criminal

standard that the defendant was in contempt of court on all the occasions that are alleged.

67. As for the separate question of whether she intended to breach the Order and her attitude towards it, I shall sentence the defendant on the basis that each of the breaches was reckless rather than a deliberate flouting of the Order. She did not think about what she was doing. She skated on thin ice. She was reckless in her attitude to her solemn commitment to this court.

68. For these reasons, this application is allowed.

(**Submissions Continued**)

Sentencing Remarks

69. Ms Bowen-Carter, in sentencing you I shall not repeat the facts that I have set out in my main judgment. As required by the well-established case law, I shall adopt an approach analogous to that in criminal cases where the Sentencing Council's guidelines require the court to assess the seriousness of a person’s conduct by reference to culpability and to the harm caused, intended, or likely to be caused. I apply the criminal standard of proof in relation to all factual matters. I have explained the meaning of the criminal standard in my main judgment.

70. In relation to culpability, it is essential to the administration of justice that orders of the court are complied with. They are not optional and you were not allowed to take things into your own hands. Your conduct is serious because you have breached the terms of your undertaking in relation to four different patients of the claimant. I am not sure that you intended to breach your undertaking as such, but you knew that you were contacting the claimant's patients or former patients. I am sure that you were reckless in doing so. You did not think in the slightest about what you were doing. You paid no attention to the terms of your undertaking which was a solemn promise to this court.

71. Although any breach of an undertaking is serious, the most serious breach committed by you related to your contact with Patient 1. She was one of the claimant's current patients. You contacted her on six occasions. You say that Patient 1 welcomed your contact. That does not matter. You were not allowed to contact her at all. The sixth message is the only message not deleted by you. It is on the basis of this sixth message that I shall assess the seriousness of what you have done. You were spiteful to Patient 1. You accused her of being a plant for the claimant. Your message had nothing to do with reaching out to fellow patients for mutual support or gathering evidence for your libel case as you claim. You targeted Patient 1 with this accusation simply because she had not replied to your other messages.

72. In terms of harm, I am sure that you intended harm to the claimant by sending the sixth message to Patient 1. You made your comment about her being a plant for the Frati mafia when you ought to have been only too aware that this was the kind of allegation that the claimant wanted to stop pending the trial of his claims against you. You did not care that one claim made by the claimant was harassment. You did not care that the claim made by the claimant was that you were using your online presence to contact his patients, whether former or current, to harass him. I am not deciding the merits of

the harassment claim, which will be decided on another date in this court at trial, but you did exactly the kind of thing that your undertaking was intended to stop.

73. The messages to Patients 2 and 4 were a degree less inflammatory and were part of longer threads. The message to Patient 3 was, in itself, anodyne but you have not disclosed the direct message to Patient 3 to which you referred. Overall, I have concluded that the harm caused to the claimant relating to contact with Patients 2 – 4 was less than the harm caused by your contact with Patient 1. I shall therefore treat the contact with Patient 1 as the lead contempt and the sanction will reflect the overall seriousness of all your contempts.

74. It is an aggravating factor (in other words, something that makes your contempt more serious) that you have little insight into what you have done. In your affidavit you accuse the claimant of making a misconceived application for contempt - which goes beyond merely opposing the application as you were entitled to do. Your criticism of the claimant demonstrates that you do not accept any responsibility for what you have done and you have no genuine remorse. You also say in your affidavit that Patient 1 showed different dates of surgery in different online postings. Instead of taking responsibility for your actions, you imply that she misled you or caused you some form of problem.

75. In your second affidavit (produced for this sentencing hearing) you say: "If I have breached the undertakings, then I apologise". Your conditional apology rings hollow. You have heard my judgment and you say today through your barrister that you now understand that you must keep away from former as well as current patients. However, you have still not offered a credible apology or expressed any meaningful remorse.

76. On the other side of the scales, it is a strong mitigating factor that the contempt application brought more public attention to your own surgery and treatment in relation to your appearance and body shape which are personal matters. I accept that your humiliation in being found in contempt of court is very public. Before these contempts you were a person of positive good character. You have reached your fifties without ever having stepped into a courtroom other than in relation to the High Court proceedings.

77. Imprisonment is always a punishment of last resort. Given your mitigation, the custody threshold is not met and I shall not pass a sentence of immediate or suspended imprisonment.

78. On your behalf, it is submitted that the finding of contempt does not require the imposition of any sanction over and above the public humiliation attaching to the delivery of a public judgment identifying your reprehensible conduct. However, an important part of sentencing someone for contempt other than punishment is to secure compliance with a court order in the future. Given your lack of insight, your lack of remorse and the fact that you have repeatedly breached your undertaking, I am far from persuaded that the publication of my judgment alone will stop you from breaching your undertaking again. This must be marked by a sanction over and above the publication of the judgment.

79. Balancing all of these factors, I am going to impose a fine in relation to your contempt relating to Patient 1 that takes into account the overall seriousness of all your contempts.

I must take into account your means of paying a fine before I fix the level. The claimant disputes the veracity of the evidence that you have provided to the court about your income and assets. The claimant says that it lacks detail and does not cover everything that the court would expect to see, such as your business accounts and tax returns.

80. I regard it as a disproportionate use of court time to enter into a fractious and probably arid inquiry into whether or not you have more funds than you admit. It does not matter because I accept that the publication of my judgment will cause significant humiliation so that the additional punishment of a high fine would not be just and proportionate.

81. You are legally aided for the purpose of this application but you have instructed lawyers on a private basis in relation to the main claims and you own a small art business. I have seen some evidence of your income and savings, as well as some other evidence about your assets. I have taken all the evidence into account in setting the level of your fine.

82. For the contempt of contacting Patient 1 on 25/26 October 2021, you will be fined the sum of £1,200. You must pay this fine in full by Wednesday, 14 June 2023. If you fail to pay the fine in full by that date, it will be enforced by this court as a judgment debt. As I have treated the contempt in relation to Patient 1 as the lead contempt and imposed a fine that takes account of your overall conduct, I shall impose no separate penalty on the other contempts.

83. This contempt application was a separate and distinct application in the overall civil proceedings. As you have been unsuccessful in this distinct part of the case, it warrants a separate costs order. As the unsuccessful party, you will pay the claimant's costs of and occasioned by the contempt application. Costs will be subject to a detailed assessment at the end of the proceedings but you will within 28 days pay the sum of £20,000 on account.

84. I make it plain to you - so that you can be in no doubt - that you are not allowed to contact the claimant's patients unless and until the Order made by the court which prohibits you from doing so is varied or discharged. If you do this again, you may be brought to this court again and face further contempt proceedings. If you are found guilty of contempt again, you may go to prison.

85. I shall order expedited transcripts of my judgment and of these sentencing remarks to be produced at public expense.

(This Judgment has been approved by Mrs Justice Farbey.)

Digital Transcription by Marten Walsh Cherer Ltd
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Telephone No: 020 7067 2900 DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com