Neutral Citation Number: [2020] EWHC 2594 (QB)

Case No: QB-2020-003338

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 September 2020

Before :

MR JUSTICE LAVENDER

- -

Between :

NCL

Claimant

- and -

MME

Defendant

- -
- -

Victoria Simon-Shore (instructed by **Thrings LLP**) for the **Claimant**
The **Defendant** did not appear and was not represented

Hearing date: 23 September 2020

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JUDGMENT

Mr Justice Lavender:

(1) Introduction

1. The Claimant applied, without notice to the Defendant, for interim injunctive relief to restrain the Defendant from continuing to publish a book which the Claimant alleges that the Defendant has written and published himself and offered for sale ("the Book"). It is the Claimant's case that the Book not only discloses significant amounts of very private information concerning her without lawful justification, but that it also tends to identify the Claimant as a complainant of a sexual offence, in breach of the Claimant's statutory right to life-long anonymity in that regard.

(2) Background

2. The Claimant had a relationship with the Defendant which ended some time ago. She complained to the police that in the course of that relationship the Defendant had committed a sexual offence to which section 1(1) of the Sexual Offences (Amendment) Act 1992 ("the 1992 Act") applied. The Defendant was not charged with an offence, but his employer instituted disciplinary proceedings which had an adverse consequence for him.

3. Recently, the Book was offered for sale to the public. Even more recently, the Claimant became aware of this fact. The author of the Book is not named in it, save by a pseudonym. He describes a relationship with a woman, her allegations against him and the subsequent disciplinary proceedings. The Claimant contends that it is clear that the Defendant wrote the Book, that it is an account (from his perspective) of his relationship with her and that both he and she are identifiable from the Book.

4. The Claimant contends that this disclosure of her personal information, in respect of which she says that she has a reasonable expectation of privacy, is an unjustified interference with her private life, in particular because the level of intrusion is wholly disproportionate to any competing right held by the Defendant, and publication of the Book therefore amounts to the tort of misuse of private information. The Claimant further contends that her common law right to privacy is strongly enhanced by her entitlement under section 1(1) of the 1992 Act to life-long anonymity. The Claimant intends to claim a permanent injunction and damages. Her primary objective is to prevent the private information in the Book coming to the attention of her family or friends or those who know her at work.

(3) The Author of the Book and the Identification of the Protagonists

5. There is a strong case that the Defendant is the author of the book. The author of the book describes in some detail events which, on the evidence submitted by the Claimant, appear to be events of the Defendant's life, which the author describes from the perspective of the Defendant. It is very difficult to imagine anyone else having either the ability or the inclination to write this book. The case for the Defendant being the author of the Book is strengthened by a number of pages on websites and on Facebook to which I was taken, which

appear to have been created by the Defendant and which contain, inter alia, photographs of the Defendant and references to, and even attempts to promote, the Book.

6. The disciplinary proceedings against the Defendant were the subject of publicity at the time and are no doubt well-known to many who knew and/or worked with the Defendant and/or the Claimant. The Claimant has a strong case that it is likely that there are a large number of people who, if they were to read the Book, would recognise it as a book written by, and about, the Defendant.

7. Likewise, the Claimant has a strong case that many people would recognise the woman in the book as her. For instance, the Book contains details which are unique to her, such as the combination of: (a) her job and her employer at the time of the relationship; (b) her job and her employer shortly after the relationship; and (c) her current job. Moreover, it was not submitted to me that the fact of the Claimant's relationship with the Defendant (as opposed to the details of what they did in private in the course of that relationship) was confidential. It follows that the Claimant has a strong case that it is likely that there are a large number of people who, if they were to read the Book, would recognise that it was a book about the Defendant and, consequently, that the Claimant was the woman referred to in the Book. The Claimant's case is, in effect, that the Book is a *roman à clef* whose key is not hard to find.

(4) Derogations from Open Justice

8. At the outset of the hearing I was invited to make an order for anonymity. I had regard to what is said about open justice in paragraphs 9 to 15 of the *Practice Guidance: Interim Non-Disclosure Orders* [2012] 1 W.L.R. 1003. Anonymity is an exception to the principle of open justice which can only be ordered where it is strictly necessary. That test is met in the present case because naming the Claimant would defeat the object of these proceedings and thereby frustrate the administration of justice.

9. Moreover, naming the Claimant in this case would identify her as the person who made the complaint of a sexual offence. That would be contrary to section 1(1) of the 1992 Act, which provides as follows:

> "Where an allegation has been made that an offence to which this Act applies has been committed against a person, no matter relating to that person shall during that person's lifetime be included in any publication if it is likely to lead members of the public to identify that person as the person against whom the offence is alleged to have been committed."

10. I was also invited to hold the hearing in private. I declined to do so, on the pragmatic basis that the hearing, although open to the public, was not in fact attended by any member of the press or public. I could be sure of this because the hearing was conducted remotely via Skype for Business. However, I indicated that I would give a written judgment after the hearing which was in a form suitable for publication.

11. I was also invited to make an order under CPR 5.4C(4) that no copies of the statements of case or witness statements be provided to a non-party without further order of the court. This is another order which (at least insofar as it concerns statements of case) should only be made if it is strictly necessary. (Insofar as it concerns witness statements, it merely repeats and gives emphasis to CPR 5.4C(2) at this stage of the proceedings.)

12. In my judgment it is strictly necessary to restrict access to the statements of case. The Claim Form will necessarily identify the Book and the Particulars of Claim will necessarily contain much private information. Providing copies of them to the press or public would be likely to lead to the identification of the Claimant and to frustrate the object of these proceedings.

13. I declined, however, Miss Simon-Shore's invitation to me to make a "super injunction". I saw no reason for making such an order.

(5) Without Notice Application

14. The Claimant did not give notice of her application to the Defendant. She contended, pursuant to CPR r.25.3(1), that there were good reasons for not giving notice and, pursuant to section 12(2) of the Human Rights Act 1998, that there were "compelling reasons why the respondent should not be notified."

15. The Claimant rightly accepted that the burden was on her to establish a proper basis for making the application without notice. Warby J observed in *Birmingham City Council v. Afsar* [2019] EWHC 1560 (QB) that the law is "particularly strict" when it comes to applications for relief which, if granted, would interfere with the right under Article 10 ECHR. As Warby J stated in paragraph [20] of his judgment in that case, section 12(2) is a jurisdictional threshold in that, unless the requirements of the subsection are satisfied, the court has no power to grant an injunction.

16. Miss Simon-Shore also drew my attention to paragraphs 21 and 22 of the Practice Guidance, which are in the following terms:

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

> would defeat the purpose of an interim nondisclosure order. Different considerations may however arise where a respondent or non-party is an internet-based organisation, tweeter or blogger, or where, for instance, there are allegations of blackmail."

17. The Defendant is not a media organisation. There is, as I have explained, a strong case that the Defendant is the author of the Book and Miss Simon-Shore submitted that the Book itself is strong evidence that the Defendant cannot be trusted not to disclose private information, although she also relied on other evidence in support of her submission that there was a real risk that the Defendant, if notified of this application, would do the very thing which the Claimant seeks to prevent, i.e. to bring the private information in the Book to the attention of the Claimant's family or friends or those who know her at work.

18. Moreover, the author of the Book expresses strong negative feelings about the woman with whom he had a relationship and even describes himself, in effect, as wanting to cause her harm. In all the circumstances, I consider that there is a sufficient risk of the kind described by Miss Simon-Shore to amount to a compelling reason why the Defendant should not be notified.

(6) The Injunction Application

19. The Claimant seeks an order prohibiting both what she contends would be further breaches of section 1(1) of the 1992 Act and what she contends would be further breaches of her right to privacy more generally.

(6)(a) Section 1 of the 1992 Act

20. In *In re Press Association* [2013] 1 W.L.R. 1979 Lord Judge CJ said as follows:

> "It is a criminal offence to contravene s.1 of the SO(A)A, whether by naming or enabling a "jigsaw" identification to be made. The ambit of the offence is not limited to the press. In short, it encompasses publication of prohibited material by anyone by whatever means publication occurs, and extends to bloggers and twitterers or any other commentators",

21. In relation to "jigsaw" identification, subsection 1(3A) of the 1992 Act provides as follows:

> "(3A) The matters relating to a person in relation to which the restrictions imposed by subsection (1) or (2) apply (if their inclusion in any publication is likely to have the result mentioned in that subsection) include in particular—
>
> (a) the person's name,
>
> (b) the person's address,

(c) the identity of any school or other educational establishment attended by the person,

(d) the identity of any place of work, and

(e) any still or moving picture of the person."

22. In paragraph [29] of his judgment in *O'Riordan v DPP* [2005] EWHC 1240 (Admin), Rose LJ said as follows:

> "A useful definition of "likely to lead to identification" is to be found in the judgment of the former President of the Family Division, Dame Elizabeth Butler Sloss, in the Attorney General v Greater Manchester Newspapers Limited The Times, 7th December 2001, … She said:
>
> > "The use of the word "likely" in the order is not to be equated with statistical probability that it will lead to the identification of the boys or their whereabouts but to the real risk, the real danger, the real chance that it may lead to that dangerous situation."

23. In my judgment, the Claimant has what appears to be a strong case that the continued publication of the Book would be contrary to section 1 of the 1992 Act.

(6)(b) Privacy: Is Article 8 Engaged?

24. Article 8 ECHR provides as follows

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

25. The first question in a case such as the present is whether the Claimant's Article 8 right is engaged, i.e. whether the Claimant has a reasonable expectation of privacy in the information sought to be enjoined.

26. Miss Simon-Shore referred me to paragraphs 35 and 36 of the judgment of Sir Anthony Clarke MR in *Murray v Express Newspapers Plc* [2009] Ch 481, which were in the following terms:

> "35 … The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. The nature of the question was discussed in Campbell v MGN Ltd. Lord Hope

emphasised that the reasonable expectation was that of the person who is affected by the publicity. He said, at para 99:

> "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity." We do not detect any difference between Lord Hope's opinion in this regard and the opinions expressed by the other members of the appellate committee.

36. As we see it, the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher."

27. I do not propose to give details in this judgment of the nature of the information contained in the Book, but it is plainly information in respect of which the Claimant had a reasonable expectation of privacy. Moreover, that expectation is not defeated by the fact that the Book has been available for sale for a relatively short period of time: see *PJS v News Group Newspapers* [2016] AC 1081 at [32(iii)], per Lord Mance, and at [58], per Lord Neuberger.

(6)(c) Is Article 10 engaged?

28. The second question is whether other Convention rights, in particular under Article 10, are engaged. It is rightly conceded that the Defendant's Article 10 rights are engaged.

29. Article 10 ECHR provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

(6)(d) Is the Claimant Likely to Succeed?

30. The third question is whether the Claimant has shown, as required by subsection 12(3) of the Human Rights Act 1998, that she is likely to succeed at trial in establishing that publication should not be allowed. Subsections 12(3) and (4) of the Human Rights Act 1998 provide as follows:

> "(3) 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.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to-
>
> (a) the extent to which-
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code."

31. Miss Simon-Shore referred me to a number of authorities on the nature of the balancing exercise to be conducted at trial: *Campbell v MGN Ltd* [2004] 2 AC 457 at [58], per Lord Hoffmann, at [117], per Lord Hope and at [140]-[141], per Baroness Hale; *X v Persons Unknown* [2007] EMLR 290 at [25], per Eady J; *McKennitt v Ash* [2008] QB 73; *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB) at [127], per Eady J; *Terry v Persons Unknown* [2010] EWHC 119 at [69], per Tugendhat J; *K v News Group Newspapers Ltd* [2011] 1 WLR 1827; *PJS v News Group Newspapers* [2016] AC 1081 at [20] and [32], per Lord Mance; *Bull v Desporte* [2019] EWHC 1669 (QB).

32. On the facts of this case, it seems to me that the Claimant is more likely than not to succeed at trial, on the basis that the invasion of privacy by the Book is serious, extensive and disproportionate to any legitimate purpose in publishing the Book. The Book purports to expose alleged corruption and an alleged miscarriage of justice, but it appears to do no more than re-state the author's case on the issues dealt with in the disciplinary proceedings. It certainly does not appear that the public interest required all of the salacious detail included in the Book. In any event, the contention that there was either corruption or a miscarriage of justice does not appear to be at all persuasive. Moreover, as I have noted, the author of the Book expresses strong negative feelings towards the woman and a wish to do her harm.

33. It follows that I do not need to rely on what Lord Nicholls said in paragraph 22 of his speech in *Cream Holdings Ltd v. Banerjee* [2005] 1 A.C. 253 about the

application of section 12(3) in a case where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal. However, if I were wrong in my primary conclusion, I would certainly conclude that the level of likelihood of success was appropriate for a case such as the present.

(6)(e) Would Damages be an Adequate Remedy?

34. The fourth question which I have to address is whether damages would be an adequate remedy for the Claimant if I refused her application and the Defendant continued to publish private information about the Claimant. It seems clear to me that this is not a reason for refusing the injunction sought. Money cannot address the harm which the Claimant might suffer.

35. By contrast, a period of delay in the marketing of the Book does not appear to be likely to cause the Defendant (assuming that he is the author of the Book) any harm other than perhaps modest financial harm. Indeed, an unsuccessful attempt to ban the Book might even serve to increase its sales. Further, in the unlikely event that the Defendant was not the author of the Book, it is difficult to see what damage the injunction sought might cause to him.

(6)(f) Privacy: Delay

36. Since this judgment is to be published, I will not specify when the Book was first made available for sale. However, I will state that I would not expect a self-published book of this nature to have achieved a large number of sales since then.

37. There was then a period of time before the Claimant became aware that the Book was on sale. Thereafter, she appears to have acted promptly in the circumstances, taking the view that the appropriate course was to invite the police to take action before taking action herself. I do not regard her conduct during this period as a reason for refusing the relief sought.

(7) Conclusion

38. For the reasons given in this judgment, I granted the injunction sought by the Claimant and made an order for anonymity and an order that no copies of the statements of case or witness statements be provided to a non-party without further order of the court.