Case No: HQ10X03428

Neutral Citation Number: [2010] EWHC 2335 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/09/2010

Before :

THE HON MRS JUSTICE SHARP

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Between :

DFT	**Claimant/ Applicant**
- and -	
TFD	**Defendant/ Respondent**

- -
- -

Hugh Tomlinson QC (instructed by **Schillings**) for the **Applicant**
Mr John Critchley (instructed by **Moss Beachley Mullem & Coleman**) for the **Respondent**

Hearing dates: 16 – 17 September 2010

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Judgment

Mrs Justice Sharp:

1. This is the return date hearing of an application by the applicant to restrain the publication of what is said to be private and confidential information.

The first hearing

2. On 9 September 2010 (the first hearing) I heard an urgent without notice application for an interim injunction in this matter to restrain the publication of what was said to be private and confidential information. No proceedings had yet been issued, and the application was made without notice to the (then intended) respondent, or to the media. Hugh Tomlinson QC appeared for the applicant, as he does at this return date hearing.

3. At the outset of the first hearing, and indeed this one, I made orders pursuant to CPR 39.2(3) (a), (c) and (g) that each should be conducted in private. I was satisfied it was necessary to do so having regard to the nature of the application (which would otherwise be self- defeating).

4. Evidence relating to the substance of the application and to the reasons why the court was being asked to make orders which derogated from the principles of open justice and from the civil procedure rules was placed before the court in confidential schedules to the witness statements of the applicant, his solicitor, Mr Benaim of Schillings, and from a member of a firm of security consultants engaged by the applicant.

5. Broadly, it was (and is) said that the respondent had been blackmailing or attempting to blackmail the applicant, and has threatened to make public private and confidential information concerning a sexual relationship between them unless she was paid very substantial sums. There was evidence that she may not have been acting alone, and that some of her family may have been involved. Shortly before the application it had been made clear to her that no money would be paid, and it was now suspected that the respondent had been in touch with journalists with a view to fulfilling the blackmail threat. However, there was no evidence as to the identity of those journalists, or that any media organisation had shown an interest in the information. There was (and is) in my view, cogent evidence before the court which supports the applicant's case in all these respects.

6. There was also a real concern having regard to these matters, that if the respondent found out (or was 'tipped off') about the application she might avoid service and/or attempt to frustrate any order made before she could be served.

7. In these circumstances I considered it appropriate for an order to be made without notice either to the respondent or to the media (see *ASG v GSA* [2009] EWCA Civ. 1574 at [3] for the position when there is an allegation of blackmail; and *TUV v Persons Unknown* [2010] EWHC 853 (QB) where Eady J considered the issue of prior notification of the media, in particular his observations at [23] to [26]).

8. I granted the injunction for the limited period asked for (that is for 7 days) until the return date. The order provided for the anonymity of the parties, for the restriction of access to documents on the court file, so that none of the confidential annexures to the

witness statements or the names of the parties would be provided to non parties without further order of the court; and for a derogation from CPR 25 PD. 9.2 in that the applicant was not required to provide the material provided to the court, or a note of the hearing on those third parties served with the order unless they specifically asked for that material and gave undertakings to protect the use of that material and the information it contained.

9. The need for such provisions has to be considered on a case by case basis, but they are not uncommon in privacy cases providing (in essence) practical solutions to the inevitable danger that the application itself will result in what is said to be private information becoming public (see for example, what is said in *Terry (previously LNS) v Persons Unknown* [2010] EWHC 119 (QB) at at [22]).

10. The order also provided that there should be no report of the existence of the proceedings themselves. I considered that provision in particular to be necessary for a short period because of the 'tipping off' risk to which I have referred. As Tugendhat J said in *Terry*:

> "138. The reason why, on some occasions, applicants wish for there to be an order restricting reports of the fact that injunction has been granted is in order to prevent the alleged wrongdoer from being tipped off about the proceedings before an injunction could be applied for, or made against him, or before he can be served. In the interval between learning of the intention of the applicant to bring proceedings, and the receipt by the alleged wrongdoer of an injunction binding upon him, the alleged wrongdoer might consider that he or she could disclose the information, and hope to avoid the risk of being in contempt of court. Alternatively, in some cases, the alleged wrongdoer may destroy any evidence which may be needed in order to identify him as the source of the leak. Tipping off of the alleged wrongdoer can thus defeat the purpose of the order.
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> 139. If a prohibition of the disclosure of the making of the injunction is included in an order for the purpose of preventing tipping off, and if the order provides for a return date (as the Practice Direction envisages) then the prohibition on disclosure may normally be expected to expire once the alleged wrongdoer has been served with an injunction, or at the return date (whichever is earlier)."

After the hearing

11. In a second witness statement Mr Benaim has set out what has happened since the first hearing. The respondent was served with the order on the day it was made. She instructed solicitors only yesterday, and a brief witness statement from her was put before the court yesterday. She says that she strongly disputes the allegations made against her, but she consents to the continuation of the injunction granted last week until trial or further order for what are said to be pragmatic reasons. This was confirmed to me by Mr John Critchley who appears on her behalf. It is nonetheless

necessary for the court to be satisfied that the order should be continued because of the provisions of section 12 (3) of the Human Rights Act 1998.

12. A number of media organisations have also been served with copies of the order, as I was told they would be at the first hearing. Two of them including Guardian News Media Limited, asked for copies of the material supplied to the court on the last occasion; and I have received a letter from Ms Gill Phillips, the Director of Editorial Legal Services of Guardian News Media. Ms Phillips says that this does not appear to be the sort of case that Guardian News Media would wish to be further involved with, but sets out some general considerations and various points about the terms of the order which I have considered.

The law

13. The relevant principles may be summarised as follows.

14. *Interim relief before trial*. Since this is an application which, if granted, might affect the exercise of the right to freedom of expression, section 12 of the Human Rights Act 1998 applies and no 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.

> "As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial." See *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253, at [22] per Lord Nicholls.

15. *Private information.* When considering whether the publication of information which is said to be private should be permitted, the court must first decide whether the information in question is private, that is whether the claimant has a reasonable expectation of privacy in respect of that information such that the claimant's rights under Article 8 of the European Convention on Human Rights are engaged (stage 1). If yes, the Court must then engage in a balancing exercise, weighing the Article 8 rights of the claimant against the Article 10 rights of the defendant (stage 2). See e.g. *Murray v Express Newspapers Plc* [2009] Ch 481at [24], [27], [35] and [40].

16. In *Murray* the Court of Appeal said at [35] that the question at stage 1 is "a broad one" which "takes account of all the circumstances of the case". The Court of Appeal also quoted with approval Lord Hope's formulation of the test in *Campbell v MGN* [2004] 2 AC 457, [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 the same publicity"

17. Relevant considerations 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, whether it was known or

could be inferred that consent was absent and the effect (of disclosure) on the claimant (see *Murray* at [36]).

18. The Court should approach the balancing exercise at stage 2 in this way:

> "First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each"
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> per Lord Steyn in *Re S (a child)* [2005] 1 AC 593 at [17].

19. *Public Interest.* It is not enough for information to be interesting to the public. Publication of the information must be in the public interest. The modern approach in any event is to consider public interest as an aspect of proportionality: see *HRH Prince of Wales v Associated Newspapers Ltd* [2008] Ch 57 at [68].

This case

20. Bearing those principles in mind, is the applicant likely to establish at trial that the information he seeks to protect is private and/or confidential and that he is likely to succeed overall at trial? Having regard to the evidence presently before the court, I am satisfied that he is.

21. As to stage one, I respectfully agree with what was said by Eady J in *Mosley v News Group* [2008] EWHC 1777 (QB) at [98] that "anyone indulging in sexual activity is entitled to a degree of privacy – especially if it is on private property and between consenting adults" and that "people's sex lives are essentially their own business" at [98]; see also *RST v UVW* [2009] EWHC 2448 (QB) and *ASG* at [6]. The information in this case concerns the fact and details of private sexual encounters, including during the course of a relationship, between the applicant and the respondent at his home. They had nothing to do with any "public functions" or with the applicant's profession. He holds no public office. The information is known only to a few individuals and is not in the public domain.

22. In relation to the second stage, Mr Tomlinson submits that looking at the matter from the perspective of Article 8, there is a plain interference with the applicant's right to respect for privacy and family life which cannot be justified under Article 8(2).

23. As to the Article 10 rights of the respondent, the evidence before me currently suggests the applicant is likely to establish at trial that disclosure of the information (whether to the media or generally) would be the fulfilment of a blackmailing threat. I accept Mr Tomlinson's submission that the expression rights of blackmailers are extremely weak (if they are engaged at all).

24. At the first hearing evidence was put before the court of information in the public domain about the applicant, in media reports dating back over a number of years. I consider there is nothing in them which arguably gives rise to any "public interest

defence" by suggesting for example that the applicant had waived his privacy rights or that he had sought to mislead the public

25. Bearing these matters in mind, as I have already said in my view the applicant is entitled to a continuation of the injunction already granted subject to consideration of some of the terms which are asked for.

The terms of the order

26. Any provisions derogating from the principles of open justice and the provisions of the CPR must be necessary on the facts of the case. In the light of some the points made by Ms Phillips, Mr Tomlinson has addressed in particular the provision in the order for anonymity and the prohibition against reporting the existence of the proceedings.

27. Mr Tomlinson submits both provisions should remain in place until trial or further order. Anonymity orders have been considered twice by the Supreme Court in 2010; and he has referred me to the judgment given by Lord Rodger in *Secretary of State for the Home Department v AP (No.2)* [2010] UKSC 26 where he summarises the test to be applied as follows:

> "the Court must ask itself "whether there is sufficient general, public interest in publishing a report of the proceedings which identifies [AP] to justify any resulting curtailment of his right and his family's right to respect for their private and family life."" [7]

28. He submits the answer to this question in the present case is plainly "no". In particular, he says the publication of the applicant's name would lead to large scale media intrusion which would, in itself, constitute a very substantial intrusion into his private and family life and would be very distressing for him and his family. There is in addition a very strong public interest in the prevention of blackmail and in encouraging victims of blackmail not to give in. It would be contrary to that public interest to publish the fact that the applicant was being blackmailed. As a result, all that any report of the proceedings could do would be to identify the applicant as the person who has obtained an injunction.

29. As for the prohibition of publication of the fact of the order, he submits if no such provision is made then experience suggests that the press will publicise the fact of the order adding "snippets" of identifying information with a substantial risk of a "jigsaw identification" of the applicant, thus defeating the purpose of the action. Such "jigsaw identification" has taken place in the recent past when other injunctions have been granted, as explained in the evidence. In addition, if the fact that the injunction has been granted is publicised this will, inevitably, lead to press and internet speculation as to the identity of the applicant. Such speculation will itself cause the applicant distress and will interfere with his Article 8 rights. Such speculation risks breaches of the injunction taking place in forums on the internet. There is a temptation for journalists who become aware of the identity of the applicant to release this anonymously. This has happened in previous cases. There is no substantial public interest served by the public availability of the fact of an order – without any background information.

30. He says that in her letter to the Court, Ms Phillips reiterates the well known and uncontroversial point that private hearings and reporting restrictions should be ordered only where strictly necessary. Such necessity is established in this case as there are strong grounds for believing that the respondent is a blackmailer, seeking to extort money by threatening to disclose private information about the applicant.

31. It is not correct he submits (as Ms Phillips has suggested) that the "jigsaw identification" point is purely speculative. The evidence demonstrates that this has taken place in the recent past. It is submitted that there is a serious and substantial risk of it taking place again in the present case.

32. If, contrary to the above submissions, the Court takes the view that information should be released to the public as to the fact of an order in the present proceedings then he submits this should be restricted to information clearly delineated by the terms of the Order. This would avoid the "drip drip" effects of partial revelations in different newspapers and the attendant risk of "jigsaw identification".

33. In my view, it is necessary for the proceedings to continue to be anonymised, but I do not consider it is any longer necessary for there to be an order prohibiting the fact that the order has been made.

34. It seems to me that when assessing need, the court must consider the need for each provision in the context of the protection which may be given by any other terms an order may contain.

35. If the applicant is identified by name, in my view there is a serious risk that the private information which the order is supposed to protect would emerge and that the purpose of the order in protecting private information would therefore be frustrated. I also consider Mr Tomlinson is right when he says the blackmail element of this case brings extremely strong public interest considerations into play. The fact that the applicant has been blackmailed should not be published. A report of the applicant's identity on its own, and absent the underlying details, would not be of sufficient public interest to justify the very substantial interference with his private and family life which would in my view, inevitably result from his identification for the reasons Mr Tomlinson has given.

36. Whether and in what circumstances the court should prohibit the fact that an order has been made at all is in itself a matter of public interest, and indeed particular controversy at the moment. It raises in an acute form the obvious difficulty which arises "*in at the same time complying with the principles of open justice and giving an effective remedy for threatened misuse of private information*." (See *Terry* at [108]).

37. Indeed it is this very controversy which leads to the practical risks to which Mr Tomlinson referred to of jigsaw identification or that information as to the applicant's identity will be made public anonymously – for example by being placed on the internet. I agree that the examples he has drawn the Court's attention to, provide concrete evidence that this has happened when such orders have been made in the past.

38. I also agree with Mr Tomlinson that the Court must take a realistic view. There is it seems to me a risk which cannot be discounted, that what has happened in the past,

may happen in this case. The significance of this risk must be considered when addressing the question which, as Mr Tomlinson said is simple at least to formulate, namely whether the effective protection of the applicant's Article 8 rights requires the substantial derogation of the Article 10 rights and Article 6 rights that making such an order involves.

39. The answer in my view is that it does not but only if the other parts of the order granted at the first hearing remain in place, and there is added to the order the proviso suggested by Mr Tomlinson so the order itself clearly delineates the information which should be released as to the fact of an order. In those circumstances, the risk of jigsaw identification should be minimal. The difficulties posed by the possibility of an anonymous leak can never be eliminated, whatever order is made by the court, in circumstances where an order such as this requires, as is necessary if it is to be effective, the identity of the parties and material relied on in support of an application to be supplied to third parties. But the risk that this may occur of itself, in my view does not make it necessary to prohibit publication of the fact that this particular order has been made.

Addendum

40. Since the hearing on 17 September 2010 I have received further submissions from the parties as to the terms of the proviso mentioned in paragraph 39 above; and as to the judgment, to ensure so far as possible, this judgment itself does not contain material which would lead to the identification of the parties. It was necessary to delay the handing down of this judgment in public until these matters could be addressed.

41. It should be noted that the effect of the proviso to the order (contained in paragraph 1 (a) of the order now made) is that publication of any information as to the subject matter of these proceedings or the identity of the parties to these proceedings, is limited to that contained in this judgment.