IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA & COMMUNICATIONS LIST
[2020] EWHC 3640 (QB)

No. QB-2020-003900

Royal Courts of Justice
Strand
London WC2A 4LL

Monday, 9 November 2020

Before:

MR JUSTICE NICKLIN

B E T W E E N :

AARON WAN-BISSAKA & ANOR — Claimant

- and -

RHIANNA BENTLEY — Claimant

MR A. SPEKER QC and MR L. BROWNE appeared on behalf of the Claimants.

THE DEFENDANT did not appear and was not represented.

J U D G M E N T

MR JUSTICE NICKLIN:

1 The Claimants have applied to the Court for an interim injunction to restrain the Defendant from publishing private information, acting in breach of confidence and alleged harassment of them.

2 The First Claimant is a footballer with Manchester United, the Second Claimant is his partner. They have recently celebrated the birth of their first child on 27 October 2020. The Claimants had kept the pregnancy private to their family and close friends.

3 The Defendant is a former partner of the First Claimant. Their relationship ended in December 2019. On 18 October 2020, the Defendant posted on Instagram as follows:

> "Thank you to everyone who has supported mine & Aarons relationship for the last three years.
>
> I wish nothing but the best for Aaron & @avril_uk for this week on welcoming their new bundle of joy □
>
> A new life is always a blessing □□x".

4 @avril_uk was the Second Claimant's Instagram account. The effect of tagging (as it is known) the Second Claimant like that in the message is that it would have appeared in the timeline of the Second Claimant, and, by so doing, the Defendant was directly addressing or targeting of the message to the Second Claimant.

5 One of the Claimants' complaints is that this posting, particularly on Instagram on 18 October 2020, effectively announced to the world the expected birth of their child, something that the two of them had been keeping a very private matter.

6 The following day, on 19 October 2020, the Defendant posted a further message on Instagram. It consisted of a screen shot of exchanges of messages between her and the First Claimant. The evidence demonstrates that these were private messages that had passed between the First Claimant and the Defendant during the currency of their relationship.

7 In the evidence, I have been provided with copies of articles that appeared in *The Sun* and *MailOnline* on 20 and 21 October 2020, which duly reported on the pregnancy. The Claimants complain that the reporting that attended this announcement was inaccurate. It suggested a very recent split from the Defendant and that he had in some way betrayed her by getting another woman pregnant. On the chronology in the evidence, the First Claimant and the Defendant had split up some time before the Claimants' relationship had started. The first paragraph of the Defendant's Instagram message may have given the impression that either the breakup had been very recent or even that the relationship between the Defendant and the First Claimant was still continuing. The Claimants complain that such an impression would have been false.

8 On 21 October 2020, the Claimants' solicitors sent a letter of claim to the Defendant. They requested undertakings from her that she would not publish any further information or material concerning her relationship with the First Claimant that was not already in the public domain. They sought those undertakings by 4.00 p.m. on 23 October 2020.

9 The Defendant responded very quickly. By e-mail, on 21 October, she sent a message which included the following:

> "Anything and everything I chose/if I chose to put out I have every right to do so as this situation that I'm shedding light to shows my traumatic experience both mentally & physically with regards to Aaron and our relationship of three years.
>
> I have been a victim of so much trauma with your client Aaron Wan Bissaka. It is my Human Right to have freedom of speech especially with a situation that involves myself (Rhianna Bentley). I feel as though all victims have a right to speak on their trauma. Wouldn't you agree? …"

10 On 22 October 2020, the Defendant posted a further message on Instagram with a single sentence: "I Will NOT Be Silenced!".

11 On Friday, 6 November 2020, the Claimants applied to the Court for an interim injunction to restrain the Defendant from publishing further private messages, including photographs, from the period of her former relationship with the First Claimant, and also an injunction to prevent further harassment and further breaches of the Claimants' privacy.

12 A remote hearing took place on the morning of Friday, 6 November 2020. Mr Speker QC represented the Claimants, and the Defendant, on that occasion, joined the proceedings by telephone. The Defendant indicated to me that she would like to be given time to obtain legal advice and representation. She was willing to give a limited undertaking in a form that was acceptable to the Claimants, until the hearing today.

13 This morning, at 10.57, the Defendant sent the following e-mail to the Court, later provided to the Claimants' advisors:

> "Over the weekend I sought the help of a solicitor with regards to this matter and realised I will not have the funds to deal with the matter at present. The very little I have had from the conversation is that I need to get proper help to proceed with a defence. At this time I would like the matter to be adjourned until I can get legal help required for this. Both myself and the family have very little knowledge in preparing for such a hearing and will not be partaking in today's proceedings until I have had time to sort legal aid and counsel for a defence. Therefore I respectfully ask that the matter be adjourned until such time. Given the pandemic and current lockdown the court must understand that it will be problematic to obtain counsel who deals with legal aid matters of this nature. I do hope the court will understand my position and allow this matter to be adjourned in order for the defence to have their side heard in the matter. We will not be offering or making any statement regarding this matter but will sit in on the hearing as a courtesy of the court."

14 In response an e-mail was sent by my clerk to Ms Bentley at 11.30:

> "I passed a copy of your email to the Judge. Could I ask, please, that you ensure that you copy e-mails sent to the Judge to the Claimants' solicitors and Counsel - who are copied into this message.

> The Judge appreciates the position that you are in. He asks whether you would be willing to extend the undertaking that you gave to the Court on Friday for an initial period of three further weeks. That would allow further time for you to attempt to secure legal advice and representations. There would always be a possibility of extending the period of your undertaking if it proved necessary.
>
> On the assumption that you are willing to extend the undertaking you gave on Friday can I ask Mr Speker please whether the Claimants would be content with this proposal. If so, it may be that a hearing at 2.00 p.m. today may be unnecessary."

15 At around 11.45 this morning, someone claiming to be the Defendant's father telephoned my clerk. An email setting out his recollection of this call has been sent to the parties. This is the note:

> "I received a telephone call from someone claiming to be the Defendant's father at 11.45am. The Judge has asked me to send a summary of the call to you - copied to the Defendant.
>
> Mr Bentley stated that he was legally qualified and that this was not a real claim as the Claimant has not received any documents from the High Court. He angrily suggested that this is not a real claim and it has not been served. I suggested that he call the Queen's Bench Division and/or call the Claimant's solicitors. I gave him the number to the Queen's Bench Division. Mr Bentley said that he has nothing to say to the Claimant's Solicitors. He then advised me that Ms Bentley will not be attending the hearing at 2pm and that she has not been able to sleep this weekend.
>
> At this point, he addressed Ms Bentley who may have been in the call the whole time (I'm not sure) he repeated that this was not a real claim and that she won't be attending. This is when another lady who was in call said something (I don't know who this lady was and I can't remember what she said).
>
> Mr Bentley mentioned that he emailed someone, I believe he said TeamsQB (I don't know who they are), who told him that they have no record of this claim on file. I interrupted him again to say that he may have emailed the wrong person and that he should have email QB Judges Listing. I repeated what I said earlier of calling the QB Division.
>
> The call lasted about 9 minutes."

16 If the gentleman who made this call is the Defendant's father, as he claimed, it is unfortunate that he takes the view, and presumably has advised his daughter, that this is not a proper claim. It is. There was a hearing on Friday, which the Defendant attended. There have been some difficulties issuing the Claim Form, but the order from 6 November 2020, that contains the Defendant's undertaking, and directed the hearing today, contains the claim number and indeed the seal of the Court. The Claim Form has not been served yet, but even if it had been available, it would have been understandable in the circumstances for it not to have been served over the weekend. I can well understand the desire on the part of the Claimants not to appear to be heavy handed. That position, in light of Mr Bentley's position,

will have to be remedied urgently. The Claim Form will be served very shortly after this hearing.

17 It is unfortunate also that, perhaps relying on this advice, the Defendant has not participated in the hearing today. The undertaking she gave to the Court expires today. In default of her indicating that she is willing for the undertaking to continue, and the absence of submissions from her today, I have heard the Claimants' application for an injunction and granted it in part. These are my reasons why.

s.12 Human Rights Act 1998

18 I start with s.12 of the Human Rights Act 1998 ("HRA"):

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") 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.
>
> (3) No such relief is to be granted as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

Absence of the Defendant

19 I am satisfied that the Defendant has been notified of the application today. She participated in the hearing on Friday. No reason has been provided for her absence today.

Likelihood of success

20 The Claimant relies upon three causes of action: misuse of private information, breach of confidence and harassment (contrary to s.1 Protection from Harassment Act 1997 ("PfHA").

21 s.12(3) HRA prevents the Court from granting an injunction unless satisfied that the claimant is "*likely to establish that publication should not be allowed*". "*Likely*", in this context, means "*more likely than not*", or a "*probability of success*": ***Cream Holdings -v- Bannerjee*** **[2005] 1 AC 253**, and ***YXB -v- TNO*** **[2015] EWHC 826 (QB)** [9].

22 This is an interim injunction. My task is to assess the likelihood of success based on the evidence before the Court today. Necessarily, at this stage I only have the Claimants' evidence and the very briefest of response from the Defendant. The Defendant has not filed any evidence in answer to the Claimants' evidence so therefore I really only have the Claimants' evidence and their version of events. The Defendant will have an opportunity, if she wishes, to put evidence before the Court, and that evidence may lead the Court to take a different view of the situation. The findings I make in this judgment are necessarily

provisional, and fairness to the Defendant, requires that this judgment is read subject to those caveats.

23 In relation to the misuse of private information claim, I am satisfied that the First Claimant is likely to succeed at trial in showing that publication of the information sought to be restrained in relation to previous relationship communications between him and the Defendant should not be allowed. My reasons for this are as follows:

i) I am satisfied that on the basis of the Instagram posts that the Defendant has published that there is a credible threat from her email on 21 October 2020, and the further Instagram post on 22 October, that the Defendant will publish more information, messages or photographs that date from the period of her former relationship with the First Claimant unless she is restrained by injunction. This information relates to a sexual relationship and includes messages exchanged between the First Claimant and the Defendant. In my judgment, the First Claimant is likely to establish that he has a reasonable explanation of privacy in this information: ***K -v- News Group Ltd*** **[2011] 1 WLR 1827** [10].

ii) Although necessarily each case must be assessed on its own facts, the starting point is that there is not usually any public interest justification for disclosing purely private sexual encounters, or messages, even if they involve adultery: ***PJS -v- News Group Newspapers Ltd*** **[2016] AC 1081** [32]. There is no suggestion of adultery in this case, but that is simply by way of demonstrating that even serious allegations such as adultery do not ordinarily, and without more, justify the disclosure of private information.

iii) It is difficult to assess the basis on which the Defendant has asserted a right to publish private information relating to her former relationship with the First Claimant, if that is what she has done. In the e-mail of 21 October 2020, it appears to suggest that the relationship was not a happy one. That, on its own, would not justify disclosure of other private facts. If there is more to this, the Defendant has not explained what it is, and she has not participated in the hearing today or filed any evidence, so as to provide the Court with any further information.

iv) In the ultimate balancing of any competing interest that might be advanced (see ***In re S*** **[2005] 1 AC 593** [17]), on the evidence available to me today, the Article 8 rights of the First Claimant are likely to prevail, and it is likely that he would obtain a final injunction to restrain further publication of the information I have identified at a trial.

24 In my judgment, in respect of the First Claimant, the breach of confidence claim adds nothing to the misuse of private information claim. Any claim in respect of breach of confidence in relation to the messages that past between the First Claimant and the Defendant, and the information from their period of the relationship between the two of them, then that could only be a claim that could be maintained by the First Claimant in any event.

25 As regards the claim for harassment, it may turn out that that adds little to the claim of misuse of private information. At this stage, I am not satisfied that the Claimants', on the evidence of the Defendant's conduct thus far, have demonstrated that they are likely to prevail at trial and obtain an injunction restraining further acts of alleged harassment. Acts of alleged harassment, particularly where these consist of speech, must be demonstrated to

be of such seriousness as to cross the line between unattractive, even unreasonable behaviour, and conduct which is oppressive and unacceptable. To do so, the gravity of the misconduct must be of an order which would sustain criminal liability under s.2 PfHA: ***Majrowski -v- Guy's & St. Thomas' NHS Trust*** **[2007] 1 AC 224** [30].

26 Ultimately, at trial, the Claimants will have to demonstrate "*a persistent and deliberate course of unreasonable and oppressive conduct, targeted another person, which is calculated to and does cause that person alarm, fear or distress*": ***Hayes -v- Willoughby*** **[2013] 1 WLR 935** [1]. The test is objective: ***Hourani -v- Thomson*** **[2017] EWHC 432 (QB)** [141], and ***Trimingham -v- Associated Newspapers Ltd*** **[2012] EWHC 1296 (QB)** [267]. Although Mr Speker QC submitted that the postings of the Defendant have distressed both Claimants, in my judgment, and put shortly at this stage, and on the evidence that I have, I am not satisfied that the postings of the Defendant viewed from an objective standpoint, are oppressive and unacceptable to such a degree that it would sustain a criminal liability. At this stage, the Claimants have not demonstrated that they are likely to establish that publication should not be allowed on the grounds of alleged harassment. As I indicated during the course of the argument, however, if, after following the grant of this injunction, the Defendant posts material which although not in breach of the injunction does amount to, or arguably amounts to, alleged harassment of the Claimants, both of them, then, of course, the Court may look at the terms of the injunction afresh.

Terms of the Order

27 The terms of the injunction order, that I have granted today, largely mirror the model order from the ***Practice Guidance (Interim Non-Disclosure Orders)*** **[2012] 1 WLR 1003**. At the hearing, Mr Speker properly took me through the changes and additions made to the standard order. I am satisfied that an order in the terms I have made is justified and appropriate on the facts of this case. I should perhaps mention the following specific points:

i) The injunction is being made in relation only to the First Claimant's claim. Because I do not consider that the harassment claim has a prospect of success sufficient to demonstrate success at a trial is likely, no injunction can be made in respect of the Second Claimant's claim at this stage. For the reasons I have explained, the breach of confidence claim in respect of material relating to the period of the First Claimant's relationship with the Defendant can only be maintained by the First Claimant, and on the facts of this case, at this stage, add nothing to the claim for misuse of private information.

ii) The Claim Form, despite its unhappy history of being issued, must be issued and served forthwith and, unless the court makes any further order, in any event by midday tomorrow.

iii) In light of the Defendant's position, I will grant the injunction for an initial period of 3 weeks. This will give the Defendant a chance, I hope, to obtain legal advice and representation. As I say, the decision today is based on the evidence available to the Court today. The Court will review the terms of the injunction and whether it should be continued in 3 weeks' time. The Defendant will have the option of asking the Court to reconsider it, if she wants, at any time between now and the hearing in 3 weeks' time if she gives the Claimants and the Court notice that she wishes to apply to vary or discharge the injunction.

28 Those are my reasons for the order made today.

CERTIFICATE

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