Neutral Citation Number: [2020] EWHC 458 (QB)

Case No: QB 2019- 002549

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2020

Before :

MR JUSTICE NICOL

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Between :

JKL	**Claimant**
- and -	
VBN	**Defendant**

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- -

Daniel Khoo (instructed by **BlackLion Law LLP**) for the **Defendant**
Hugh Tomlinson QC and Aidan Wills (instructed by **Richard Slade and Company**) for the **Claimant and for the witnesses SET and XAM**

Hearing date: 19th February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE NICOL

Mr Justice Nicol :

1. In this claim for misuse of private information, the Defendant has issued applications for specific disclosure of various documents from the Claimant. I also had to consider applications for third party disclosure against two individuals, referred to as SET and XAM. They have provided witness statements and are due to give evidence on the Claimant's behalf at the trial of this claim. At the hearing on 19th February 2020 I indicated that my provisional view was that the Defendant's application should be refused, but, before reaching a final decision I wanted to reflect on the submissions which I had read and heard. This, therefore, is my reserved decision on that application.

2. At the same hearing I dealt with various other applications. One was to vacate the trial date, fixed for the week beginning 16th March 2020. I allowed that application and gave directions for fixing an alternative date. In this judgment it is not necessary for me to elaborate on either that decision or the other matters, apart from the question of disclosure, on which I made decisions.

3. The essence of the Claimant's claim is that he met the Defendant during a visit to London. His meeting with the Defendant took place on 5th/6th July 2019. They engaged in sexual activities which he says were entirely consensual. A few days later he was told by one or more people that the Defendant was alleging that she had been raped and/or sexually assaulted by the Claimant and was minded to go to the media and police, but would not do so or would not pursue her complaint if she was paid a specified sum of money by the Claimant. His allegation, therefore, is one of threatened misuse of private information and of blackmail.

4. The Defendant denies that she threatened to blackmail the Claimant. She maintains, though, that the Claimant did rape and sexually assault her. She has counterclaimed for damages for these wrongs. She says that an intermediary (R) on the Claimant's behalf had offered her money if she would not pursue or would drop her complaint against the Claimant.

5. The Claimant applied without notice to Garnham J. and was granted an injunction on 15th July 2019. The Claim Form was issued the following day. Garnham J. had directed that the return date should be 18th July 2019, but on that date by consent Nicklin J. ordered that the return date be vacated and the injunction was continued until it could be re-listed. Particulars of Claim followed on 2nd August 2019. On 8th August the injunction was continued by Morris J. until trial or further order. The Defence and Counterclaim were filed on 22nd August 2019. The Claimant filed a Reply and Defence to Counterclaim on 1st October 2019. Morris J. also ordered that the trial of the matter should be expedited and listed on the first open date after 22nd January 2020 with a time estimate of 5 days.

6. As part of his order on 8th August 2019, Morris J. had directed the Claimant to confirm which messages were shown to the Court at the hearing before Garnham J. on 15th July 2019 and to provide copies to the Defendant.

7. Each Judge who has dealt with the case agreed that the parties should be anonymised and I also agreed that that was appropriate and necessary. In order to protect the parties' anonymity it has also been necessary to use ciphers for some of the witnesses.

8. The parties have given standard disclosure (the Defendant's list is dated 1st November 2019; the Claimant's is dated 18th November 2019).

9. Witness statements for the trial have been exchanged. Those served by the Claimant include SET and XAM. Neither party has served a witness statement from R.

The Defendant's application for disclosure against the Claimant

10. Mr Khoo's skeleton argument for the hearing attached a draft order. With some justification, Mr Tomlinson QC for the Claimant commented that there was something of a mismatch between the categories of disclosure being sought in this order and those in the draft orders attached to the application notices of 2nd December 2019 and 13th January 2020 seeking orders for disclosure and inspection as against the Claimant. Some of the categories had appeared for the first time in Mr Khoo's skeleton argument for the present hearing. Mr Tomlinson was, however, prepared to address the categories listed in the order attached to the skeleton as long as I recognised that the evidence adduced by the Claimant had been directed to what appeared to be in issue from the application notices. Accordingly, it is convenient to address each of the categories in the draft order attached to Mr Khoo's skeleton.

All documents containing or evidencing communications between the Claimant and R

All documents containing or evidencing the professional connection between the Claimant and R and SET. For the avoidance of doubt those documents shall include documents showing any financial benefit that has or may accrue to any of the Claimant, R or SET as a result of those professional connections.

i) Mr Khoo agreed that these two could be taken together since they both concerned R. He submitted that R was central to the issues in the case. The Claimant alleged that R had been the person through whom the blackmail demand had been communicated to him (or through further intermediaries, notably SET and XAM). The Defendant alleged that it had been through R that the Claimant had tried to buy off her complaint. In the Claimant's pre-trial checklist, R had been identified as one of the witnesses on whom the Claimant intended to rely. Yet, in the event, as I have said, no witness statement or summary from R has been served.

ii) Mr Khoo submitted that R's role had evolved in the course of the proceedings. Before Garnham J. he was simply identified as an intermediary. A number of messages were shown to the Judge, but Mr Hudson QC, who then represented the Claimant, was not able to tell the judge the provenance of those messages. In the 2nd witness statement of Richard Slade (the Claimant's solicitor) dated 5th August 2019 R is described as a friend of the Claimant and someone with whom the Claimant did not have a professional relationship. Mr Slade also says this,

> 'Towards the end of the week of 8th July 2019, someone (possibly more than one person) sent R copies of social media posts made by the Defendant. As a result of his concern about the content of those posts R

decided to contact the Defendant to see if he could make what appeared to be a problem go away.'

In his witness statement for trial the Claimant describes R as 'the manager of an artist with whom I have collaborated.' Thus, Mr Khoo submits that the statement in Mr Slade's witness statement that R did not have a professional relationship with the Claimant was incorrect. He submits that the extent of that professional relationship is material to R's credibility since the closer his professional connection, the greater the stake that R would have in the Claimant's continued professional success and the greater the interest he would have in protecting the Claimant from complaints that would damage the Claimant's reputation.

In her witness statement for trial the Defendant has referred to her communications with R. Some were phone calls. She also sent him certain screen shots from her phone

iii) I reject Mr Khoo's submissions in relation to these two categories.

iv) As Mr Tomlinson submitted, they are both directed at disclosure of documents concerning R's credibility. Exceptionally, the Court can order disclosure of documents that go to credit – see *First Subsea Ltd v Baltec Ltd.* [2013] EWHC 584 (Ch) at [19], but as Norris J. said in that case, such disclosure must be necessary for the achievement of justice in the particular case. In this case, one of the essential issues will be whether the Defendant did threaten to blackmail the Claimant. She will give direct evidence denying that was the case. If R does not give evidence, there will be no direct evidence to counter that. The Claimant is reliant on R's hearsay account. In these circumstances, I do not consider that this is one of those exceptional cases where the Claimant should be required to give disclosure which goes only to R's credibility.

All documents containing or evidencing communications sent or received by the Claimant from his mobile phone in the period 5th July 2019 to 15th July 2019 inclusive

i) Mr Khoo submits that the documents so far produced by the Claimant are incomplete. He argues that it is plain from the documents which have so far been produced that there are other messages which so far remain undisclosed. He argues that it is also clear that persons other than R were sending information to the Claimant. Mr Khoo submits that these documents are relevant to what the Claimant perceived the threat against him to be.

ii) Mr Khoo also submits that the electronic search conducted by the Claimant was insufficiently thorough. A key word search was done electronically and the product was then reviewed by a lawyer. Mr Slade in his 4th witness statement (made on 3rd February 2020) explained that a forensic expert, Consilio, had carried out the electronic search and the resulting 690 documents had then been reviewed by the lawyers. But, Mr Khoo argued, the list of search terms did not include J whom XAM identified as one of his sources, nor was there a search against one of the mobile numbers which appeared in the texts or screen shots.

iii) Mr Khoo submitted that the number of documents which this category would catch would not be excessive. For the much wider date range of 8th June – 14th August 2019 there had only been 2,700 documents. For the far narrower range which this category sought, it could be expected that the number would be relatively modest.

iv) I reject Mr Khoo's application for specific disclosure of this category of documents for several reasons.

v) First, there is the principle that normally the statement of the disclosing party that everything disclosable has been produced is dispositive. I recognise that such a statement is not conclusive, but the evidence to the contrary must be compelling (see for instance *Shah v HSBC Private Bank (UK) Ltd.* [2011] EWCA Civ 1154 at [28]). Despite Mr Khoo's advocacy, that is not the case here.

vi) Secondly, the category is extravagant. It seeks disclosure of all documents within the identified date range, whether having any bearing on the issues in the case or not. Even if the total number of such documents may not be large, I regard such a category as contrary to principle. Disclosure should be confined to what is necessary to deal fairly and proportionately with the issues in the case. That restriction is not respected by Mr Khoo's category. Nor am I persuaded that the circumstances of this case are such that such a novel departure from principle should occur.

vii) Nor am I persuaded that the documentation produced so far has obvious gaps. The Claimant's case is that he was sent through various intermediaries, certain screen shots taken from the Defendant's phone. The screen shot is a form of photograph of what happens to be shown on the phone when it is taken. It is entirely unsurprising that this should be an incomplete record of all the exchanges of texts or messages. Such 'gaps' do not tend to show that there has been incomplete disclosure. Further, in addition to the search terms to which Mr Khoo had referred, Mr Tomlinson observed that Consilio also conducted *ad hoc* searches as set out in the confidential exhibit to Mr Slade's 4th witness statement which had generated a total of some 3,000 documents.

Any medical records (including for the avoidance of doubt, any STI tests and results created or received from July 2018 to date).

i) The current Defence and Counterclaim pleads that among the other loss which the Defendant suffered as a result of the Claimant's rape was that she was infected with chlamydia and 'a urinary tract infection' (see Defence and Counterclaim paragraphs 34.1 and 34.2). The Claimant in his Reply and Defence to Counterclaim says at paragraph 30.

> 'As to paragraph 34:
>
> 30.1 It is denied that the Claimant raped or sexually assaulted the Defendant as alleged or at all. Paragraph 7 above is repeated.

> 30.2 The Claimant is unable to admit or deny that the Defendant suffered the alleged or any injuries, loss or damage set out at paragraph 34.1-34.5 and requires the Defendant to prove that she suffered them and that they were as a result of any sexual activity between the Claimant and the Defendant. The Defendant has failed to serve a report from a medical practitioner about the personal injuries she alleges in her claim...'

ii) The Defendant first indicated that she wished to allege that she had also contracted herpes as a result of her sexual activities with the Claimant was made in her solicitor's letter of 11th February 2020 which enclosed a letter dated 3rd February 2020 from the Chelsea and Westminster NHS Foundation Trust which said that she had tested positive for Herpes Simplex Virus Type 2. The Defendant's solicitors added that they considered an amendment to the Defence and Counterclaim would be an unnecessary distraction when the trial was (then) due to start on 16th March 2020. They asked if the Claimant's solicitors agreed with this approach. They argued that the issue of whether the Claimant had herpes was relevant to the case and they wished to know whether he did and asked to see his sexually transmitted infection test results. The reply of the Claimant's solicitors on 17th February 2020 on this issue said,

> 'It would appear that the Defendant tested positive for herpes 6 months after the events in question. She has not pleaded any claim in respect of that and does not now seek to amend her counterclaim to include such a claim or to obtain permission to produce any medical evidence in support of such a claim. Whether the Claimant "has or ever had" herpes is not relevant to any pleaded issue.

On 18th February 2020 the Defendant's solicitors wrote to the Claimant's solicitors with a proposed Amended Defence and Counterclaim which would add as paragraph 34.1A to the Defendant's pleaded loss,

> 'the Defendant contracted herpes type 2 (HSV-2)'.

and asked the Claimant to consent to the amendment. No such consent had been forthcoming before the hearing of this application for disclosure.

iii) CPR Part 16 deals with statements of case. The Practice Direction to Part 16 addresses, among other things, what must be included in the particulars of claim for certain types of claim and CPR r.16.4(1)(e) requires the pleading to comply with the Practice Direction. For personal injury claims the Practice Direction says at paragraph 4.3,

> 'Where the claimant is relying on the evidence of a medical practitioner the claimant must attach to or serve with his particulars of claim a report from the medical practitioner about the personal injuries which he alleges in his claim.'

I note, therefore, that neither the Rules nor the Practice Direction makes service of a medical report mandatory in a personal injury claim, but, absent such evidence, in most cases a claimant will struggle to establish issues such as causation. That said, I also observe that there has been no application by the

Claimant to strike out or to seek summary judgment in relation to any part of the Defence and Counterclaim.

iv) So far as this category of documents is directed at medical records regarding herpes, it is premature. Unless and until the Defence and Counterclaim are amended there is no issue on the pleadings concerning herpes. It might be said that the Defence and Counterclaim does currently refer to chlamydia and urinary tract infection. However, it seems to me that it is more convenient and sensible for the pleadings to be in their final form before specific disclosure of medical records is ordered. It seems to me that insufficient attention has been given to the evidence which the Defendant may wish to adduce in this regard. The letter from the Chelsea and Westminster Foundation NHS Trust is not in the form of an expert report and, in any case, the necessary permission of the court has not been sought pursuant to CPR r.35.1 to rely on an expert report. It seems to me that the necessary steps are as follows:

a) Within a prescribed period the Defendant files and serves any expert medical report on which she wishes to rely either in support of the present pleading or in support of the proposed amendment to the Defence and Counterclaim and,

b) Within a short period after that the Claimant indicates whether he consents or opposes the application to amend.

c) If the amendment is opposed, there will need to be an expeditious hearing before a Master.

d) Thereafter, either by agreement or by the Master's order there will need to be appropriate disclosure of medical records.

All documents containing or evidencing the financial connections (whether directly or indirectly) between (i) the Claimant and XAM (ii) the Claimant and FBJ (iii) the Claimant and SET from January 2017 to date. That shall include any documents containing or evidencing the contractual relationship between the Claimant and SET

i) In his skeleton argument Mr Khoo said,

'it has recently emerged that, despite the impression given in their witness statements, both XAM and FBJ are financially connected/dependent on the Claimant. S is obviously financially interested (being the Claimant's agent), although the contract between the Claimant and SET has still not been disclosed. The extent of that connection is relevant to both the Claimant's witnesses' credibility, as well as their actions at the time (e.g. XAM's response to the communications from R).'

ii) So far as disclosure is sought on the grounds that it is relevant to the credibility of a witness or R, I have already observed that ordinarily this is not a matter on which disclosure will be ordered. My views are the same in this context as well. Here, too, Mr Khoo has not made out a case as to why exceptionally

disclosure should be ordered on credibility grounds. Nor, with respect to Mr Khoo, did I understand the argument so far as it went beyond credibility.

Further disclosure: (a) metadata and the timing of various communications

Mr Khoo's draft order sought disclosure of these matters. He argued that it was important to establish precisely when the various documents were sent to the Claimant. Mr Slade, the Claimant's solicitor has said that the Claimant's mobile phone does not make or retain any call log. In any event, I was not persuaded that these were important issues in the case. What mattered in the case was (a) what occurred between the Claimant and Defendant and (b) whether as he and his witnesses claim, she threatened to blackmail him or go to the press and, as she has said, whether R had tried to buy her off. In my view the precise timings of the different communications or the metadata have no material bearing on those issues. Certainly, in my judgment, they are not sufficiently important to justify an order for further disclosure.

Further disclosure (b) search of laptops

i) Mr Khoo submitted that the Claimant's laptop had not been reviewed for disclosable documents.

ii) Mr Tomlinson commented that this was one of the categories which had not featured in any of the Defendant's application notices. It had not therefore been addressed in the Claimant's evidence in response to them. However, on instructions, he was able to say that a piece of film had been down loaded on to the laptop of the Claimant's landlord. That piece of film had not been disclosed, since the laptop was not the Claimant's and was not under his control, there was no call for it to be searched. A video of the footage playing on the laptop was taken on SET's mobile phone and that had been disclosed.

iii) Mr Tomlinson was right that this matter did not feature in any of the Defendant's application notices. There was a reference to the film and the laptop in the second witness statement of Daniel Dodman, another of the Defendant's solicitors, but that is no substitute for the identification of the document or class of documents or the nature of the search requested in the application notice itself. This not just a formalistic objection. The Claimant was entitled to know to which categories of documents his evidence in reply should be directed.

iv) However, my refusal to order further disclosure in this regard is not solely on procedural grounds. An application under CPR r.31.12 must be supported by at least *prima facie* evidence that the documents in question are within the control of the respondent to the application – see 2019 White Book para 31.12.2. In his third witness statement (dated 13th December 2019) Mr Slade says that the Claimant had informed him that the only electronic device he used at the time of his communications with the Defendant was a single mobile telephone. I am not satisfied that the Defendant has overcome that hurdle as regards the laptop.

Third Party disclosure applications

11. The Defendant's applications against SET and XAM were based on CPR r.31.14 so far as they concerned documents referred to in their witness statements and r.31.17 for

certain other documents. Mr Slade, Mr Tomlinson and Mr Wills acted for SET and XAM as well as the Claimant.

Application for disclosure of documents mentioned in witness statements

12. SET's witness statement for trial is dated 12th December 2019. At paragraph 5 he refers to receiving a text. At paragraph 7 he speaks of sending a text message. Both of these were on 13th July 2019. At paragraph 9 SET speaks of receiving a series of screen shots apparently taken from the Defendant's phone.

13. Mr Slade says that the screen shots mentioned in paragraph 9 of SET's statement have already been disclosed (on 10th December 2019). Mr Slade says that there was no accompanying text.

14. Mr Tomlinson submitted that the text which SET says he had received on 13th July 2019 and the text he said he sent on the same day had already been disclosed and he referred me to an exhibit to the witness statement of Daniel Dodman of 2nd December 2019

15. XAM's trial witness statement is also dated 12th December 2019. On Monday 8th July 2019 he speaks of receiving what appear to be screen shots or images from the Defendant's phone.

16. Copies of these screen shots were disclosed on 7th February 2020.

17. Mr Tomlinson suggested that an application under r.31.14 should be directed at the party rather than the witness. There is nothing in rule 31.14 to this effect and I can see no reason for such an approach. It may be that it is prudent for the litigant to be a party to the application in case there is, for instance, an issue of privilege which the litigant would wish to assert. No such issue arises in this case and, in any event, the point was a barren one since Mr Tomlinson represented both the witnesses and the Claimant.

18. It may be that the documents referred to in SET's witness statement have already been produced, but that was not said in response to the Defendant's application notice (which did specifically refer to r.31.14 as well as r.31.17). In my judgment, the trial judge would be assisted by a further witness statement identifying clearly the documents referred to in SET's witness statement (other than the screen shots mentioned in paragraph 9 of the witness statement). This further witness statement may, but need not, be made by SET himself, if it is made on the basis of information which he has provided.

Application for other third party disclosure

19. Mr Khoo's arguments for other further disclosure from SET and XAM is based on the Defendant's wish to have as clear a picture as possible in advance of trial as to the communications between each of them, R and the Claimant. The spur for the application for third party disclosure was Mr Slade's comment that the Claimant had no right to inspect documents in the hands of his corporate agent or its CEO (SET).

20. Mr Slade has said that the Claimant has no staff. He uses a single corporate agent, but does not have the right to inspect documents on the electronic devices of the agency's employees. Mr Slade also says that the CEO of the agency (SET) had made available from his mobile every single document which would, in the hands of the Claimant have been disclosable in the case.

21. Mr Khoo submits that the search has apparently been carried out by SET personally, rather than by Mr Slade or someone else from the Claimant's legal team.

22. I am not persuaded that the grounds for such disclosure from a third party have been made out. I refuse this relief.

Conclusion

23. With one qualification I refuse the Defendant's applications for disclosure. The qualification is that the Claimant must file and serve one or more further witness statements exhibiting the documents referred to in SET's witness statement paragraphs 5 and 7.