



Neutral Citation Number: [2023] EWHC 113 (KB)

Case No. QB-2021-004135

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

Royal Courts of Justice, Strand, London WC2A 2LL

Date: 26 January 2023

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

Between :

- (1) NICOLE DAEDONE
- (2) RACHEL CHERWITZ
- (3) ONETASTE INCORPORATED
- (4) THE INSTITUTE OF OM LLC
- (5) OM IP CO.

Claimants

- and -

BRITISH BROADCASTING CORPORATION

Defendant

- and -

FLA

Applicant

Aidan Wills (instructed by **Mishcon de Reya**) for the **Claimants**
Catrin Evans KC and **Ben Gallop** (instructed by **BBC Litigation Department**) for the
Defendant
Kate Wilson (instructed by **Simons Muirhead Burton LLP**) for the **Applicant**

Hearing date: 20 July 2022

Judgment No. 2

Approved Judgment

This judgment was handed down remotely at 1pm on 26 January 2023
by circulation to the parties and by release to the National Archives.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. Between 10 November and 16 December 2020, the BBC published an introductory episode and ten full-length episodes of a podcast entitled “The Orgasm Cult.” The series focused on the activities of OneTaste Inc. and its founder and former Chief Executive Officer, Nicole Daedone, in promoting and selling classes and programmes dedicated to the art of “Orgasmic Meditation.” By this action, it is alleged that the podcast was defamatory in that it suggested that Ms Daedone, Rachel Cherwitz and OneTaste controlled a destructive sex cult which, under the false pretence of being a wellness organisation promoting empowerment for modern women, deliberately manipulated and exploited vulnerable women causing them lifelong trauma for the purpose of making themselves wealthy. It is alleged that the podcast was defamatory in that it suggested that Ms Daedone, Ms Cherwitz and OneTaste bore responsibility for serious criminal acts including the repeated rape of a vulnerable woman, sex trafficking, and facilitating and benefiting from prostitution and violations of labour law. Further, it is said to be defamatory in asserting that allegations published by Bloomberg in 2018 were true.
2. FLA is not a party to these libel proceedings but has issued his own claim against the BBC (claim number QB-2022-002110). His draft Particulars of Claim allege misuse of private information and breach of data protection law. FLA says that he was a member of the OneTaste community and the man referred to as “Jake” in episode 9 of the series, which was first published on 16 December 2020. “Jake” is itself a pseudonym and the BBC chose not to reveal the man’s name. FLA says that he can, however, be identified by jigsaw identification from other information included in the podcast. FLA alleges that episode 9 falsely claims that Jake raped a vulnerable woman referred to in the podcast by the pseudonym “Cassidy.”

3. FLA is concerned that highly private and confidential details about him might be disclosed either in the course of his own claim or in these proceedings. By an application notice dated 12 July 2022, FLA sought a non-disclosure order protecting his identity and any other details that might allow his identification. In addition, FLA sought ancillary orders that he should be allowed to issue this application in the name FLA; that his application should be heard in private; that there should be reporting restrictions; and that copies of his confidential witness statement and any other documents that might identify him should not be provided to non-parties without further order. He also sought directions as to whether his application should be heard together with his anonymity application in his own claim; the listing of his application; and the giving of notice to the media.
4. On considering FLA's application on the papers, I gave directions for the hearing of FLA's application on 20 July 2022 at Lincoln where I would then be sitting. I directed that the application, including the supporting evidence disclosing FLA's identity, should be served upon the media through the Injunction Applications Alerts Service. In doing so, I observed:

“It is not appropriate to limit the documents served upon the media to the redacted application notice and draft order, as sought by the Applicant. Media organisations must be able to consider the application properly in order to determine whether they wish to be heard and this is not a case that is so sensitive that the court should direct that the Applicant's name be withheld from the media. Responsible media organisations can be trusted not to defeat the object of the hearing.”
5. I directed that the application would be listed for hearing in public but that, in order that publicity should not defeat the object of the hearing, the Applicant's name should appear in the list as FLA and should not be disclosed save as directed through service upon the Injunction Applications Alerts Service. In so ordering I observed:

“Publicity would defeat the object of the hearing on 20 July 2022 which is to determine an application that the identity of the Applicant should not be disclosed in these proceedings. It is, however, unlikely to be necessary to sit in private since, subject to further argument, I consider that this application can be properly argued with some lesser derogation from the principle of open justice, namely by referring throughout the hearing to the Applicant as FLA and taking care not to disclose in open court any of the matters that would lead to the Applicant's identity being revealed. Accordingly, the application will be listed for hearing in public but at such hearing the Applicant or other parties or non-parties may seek a direction that the court sit in private for some or all of the hearing.”
6. In the event, no other party or media organisation filed evidence in response to FLA's application or appeared before me. The media interest was, of course, represented in any event by the BBC. No party renewed the application to sit in private and accordingly I heard FLA's application in public.

7. Subsequently, on 17 August 2022, Master McCloud ordered in FLA's own claim that:
 - 7.1 he be given permission to issue his claim anonymously using the cipher "FLA" and giving his solicitor's address for service;
 - 7.2 FLA's identity and any other details from which he could be identified should be withheld from the public;
 - 7.3 no copies of the confidential schedule to his Particulars of Claim and witness statements (each of which identify FLA) should be provided to a non-party without further order;
 - 7.4 pursuant to s.11 of the Contempt of Court Act 1981, publication of FLA's name and any other details from which he could be identified should be prohibited; and
 - 7.5 any non-party seeking access to or copies of the confidential schedule to his Particulars of Claim or witness statement must make an application to the court on proper notice.

THE APPLICATION

8. FLA has not been named in this claim. At paragraph 34.1 of the Particulars of Claim, the claimants plead their case as to the alleged natural and ordinary meaning of episode 9. Such meaning includes, among other matters, that the claimants were responsible for the repeated rape of an unnamed young vulnerable woman by her unnamed boyfriend and unnamed others. At paragraphs 52.5(c) and 57.2(p) of the Particulars of Claim, the pleaders deliberately adopt the BBC's pseudonym "Jake." No attempt is made to identify Jake. At paragraph 57.2(p), the claimants specifically plead that the allegation that Jake raped Cassidy is untrue.
9. FLA explains that he is concerned that this claim might attract considerable publicity and lead to the disclosure of his identity. He says that there are copy documents among the papers lodged for the earlier hearing in these proceedings on 7 July 2022 that referred to him by name, albeit no such document was referred to in open court at that hearing. Further, he asserts that there was reference during the hearing on 7 July to a published article which revealed the true identity of Cassidy. He estimates that some 30-40 people from the OneTaste community could identify him.
10. FLA is concerned that there were a large number of people, including journalists, in attendance at the hearing on 7 July. He fears that interested parties may unearth some of the key identifying information that could lead to his identity being publicly revealed.
11. The parties to these proceedings have not filed any evidence in response.

THE ARGUMENT

12. FLA relies on his Article 8 right to respect for his private and family life. Kate Wilson, who appears for FLA, argues that disclosure of his identity would have

serious detrimental consequences for FLA's private life. She submits that, as a non-party, he will have no control over what documents might be disclosed. Further, he wishes to protect his position in respect of his own proceedings.

13. Ms Wilson argues that any examination of the claimants' conduct in respect of, and responsibility for, the criminal acts alleged in episode 9 will necessarily require an examination of the allegations against Jake. Further, she relies on the seriousness of the allegations in episode 9 and contends that these events are likely to play an important role in these proceedings. She asserts that the series appeared to build up to episode 9.
14. FLA is supported by the claimants who make plain that they are very conscious that their claim concerns highly sensitive and private information about third parties. Aidan Wills, who appears for the claimants, insists that they have no intention to cause any third party to suffer any damage or distress. Further, they are content to use the cipher FLA in these proceedings.
15. Catrin Evans KC and Ben Gallop, who appear for the BBC, submit that the basis on which FLA seeks anonymity is unclear. They assume that the application must be put on the basis that an order pursuant to rule 39.2(4) is necessary to secure the proper administration of justice and in order to protect FLA's interests because his identification in these proceedings would defeat the purpose of his own claim.
16. In the course of argument, Ms Evans confirmed that the BBC does not intend to unmask Jake. There are, she submits, no more than a handful of references to FLA in the documents. The appropriate relief is, she argues, provided by a direction under r.5.4C. The BBC argues that the application is premature since the court cannot properly assess necessity until the BBC has joined issue by filing its Defence and witness statements have been exchanged. The risk of jigsaw identification can be avoided by the parties then working together to devise a scheme. It does not, however, oppose relief should the court consider it to be necessary but submits that any relief must be limited to protecting information that is not already in the public domain.

THE LEGAL PRINCIPLES

Non-disclosure orders

17. On 1 August 2011, the then Master of the Rolls issued the Practice Guidance: Interim Non-Disclosure Orders reported at [2012] 1 W.L.R. 1003. Lord Neuberger M.R. said, at [9]-[14]:
 - “9. Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public: see article 6.1 of the Convention, CPR r.39.2 and Scott v. Scott [1913] A.C. 417. This applies to applications for interim non-disclosure orders: Micallef v. Malta (2009) 50 EHRR 920, [75]ff; Donald v. Ntuli (Guardian News & Media Ltd intervening) [2011] 1 W.L.R. 294, [50].

10. Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: R v. Chief Registrar of Friendly Societies, Ex p New Cross Building Society [1984] Q.B. 227, 235; Donald v. Ntuli [2011] 1 W.L.R. 294, [52]-[53]. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.
 11. The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: M v. W [2010] EWHC 2457 (QB) at [34].
 12. There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: Ambrosiadou v. Coward [2011] E.M.L.R. 419, [50]-[54]. Anonymity will only be granted where it is strictly necessary, and then only to that extent.
 13. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: Scott v. Scott [1913] A.C. 417, 438-439, 463, 477; Lord Browne of Madingley v. Associated Newspapers Ltd [2008] QB 103, [2]-[3]; Secretary of State for the Home Department v. AP (No 2) [2010] 1 W.L.R. 1652, [7]; Gray v. W [2010] EWHC 2367 (QB) at [6]-[8]; and H v. News Group Newspapers Ltd (Practice Note) [2011] 1 W.L.R. 1645, [21].
 14. When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of article 8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their article 8 Convention right is entitled. The proper approach is set out in H's case [2011] 1 W.L.R. 1645.”
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18. Open justice is indeed a fundamental principle. It “lets in the light and allows the public to scrutinise the workings of the law, for better or for worse”: per Toulson LJ, as he then was, in R (Guardian News & Media Ltd) v. City of Westminster Magistrates’ Court [2012] EWCA Civ 420; [2013] Q.B. 618, at [1].
 19. Rule 39.2(4) of the Civil Procedure Rules 1998 provides:

“The court must order that the identity of any person shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that person.”

20. It is clear both from the Practice Guidance and the wording of r.39.2(4) that an order under that provision is not a matter of discretion. The court must make such order where it considers that it is “necessary” to secure the proper administration of justice and in order to protect FLA’s interests. The proper approach to applications under the rules was explained by Dingemans LJ in XXX v. Camden London Borough Council [2020] EWCA Civ 1468; [2020] 4 W.L.R. 165. Section 12 of the Human Rights 1998 requires the court to have “particular regard” to the importance of the freedom of expression protected by Article 10 of the ECHR. In Re S (A Child) [2004] UKHL 47; [2005] 1 A.C. 593, Lord Steyn confirmed that the inherent jurisdiction of the High Court to restrain publicity was the vehicle by which the court could balance competing rights under Articles 8 and 10. He identified four principles, at [17]:

“First, neither article has as such precedence over the other. Second, 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. For convenience I will call this the ultimate balancing test.”

Access to court records

21. The general rule is that non-parties can obtain from the court records a copy of any statement of case, judgment or order without the need for an application: r.5.4C(1). Further, non-parties may, with the court’s permission, obtain copies of other documents filed by a party or communications with the court: r.5.4C(2). Rules 5.4C(4)-(6) provide:

- “(4) The court may, on the application of a party or of any person identified in a statement of case—
- (a) order that a non-party may not obtain a copy of a statement of case under paragraph (1);
 - (b) restrict the persons or classes of persons who may obtain a copy of a statement of case;
 - (c) order that persons or classes of persons may only obtain a copy of a statement of case if it is edited in accordance with the directions of the court; or
 - (d) make such other order as it thinks fit.
- (5) A person wishing to apply for an order under paragraph (4) must file an application notice in accordance with Part 23.
- (6) Where the court makes an order under paragraph (4), a non-party who wishes to obtain a copy of the statement of case, or to obtain an unedited copy of the statement of case, may apply on notice to the party

or person identified in the statement of case who requested the order, for permission.”

22. Rule 5.4D(2) provides:

“An application for an order under rule 5.4C(4) or for permission to obtain a copy of a document under rule 5.4B or rule 5.4C (except an application for permission under rule 5.4C(6)) may be made without notice, but the court may direct notice to be given to any person who would be affected by its decision.”

23. Access to court records is one of the ways in which the rules ensure open justice. It recognises that much important information necessary to understand civil proceedings may be provided to the court in written form and scarcely referred to in open court. Furthermore, access to statements of case is necessary in order to allow the public and the press to understand both the identities of litigants and the allegations that they make against one another: DMK v. News Group Newspapers Ltd [2016] EWHC 1646 (QB), at [12].

24. The guiding principle is that the purpose of open justice is “to enable the public to understand and scrutinise the justice system of which the courts are the administrators”: R (Guardian News & Media Ltd) v. City of Westminster Magistrates’ Court [2012] EWCA Civ 420; [2013] Q.B. 618, per Toulson LJ, as he then was, at [79]. In Guardian, Toulson LJ said, at [85]:

“In a case where documents have been placed before a judge and referred to in the course of proceedings, in my judgment the default position should be that access should be permitted on the open justice principle; and where access is sought for a proper journalistic purpose, the case for allowing it will be particularly strong. However, there may be countervailing reasons ...

The court has to carry out a proportionality exercise which will be fact-specific. Central to the court’s evaluation will be the purpose of the open justice principle, the potential value of the material in advancing that purpose and, conversely, any risk of harm which access to the documents may cause to the legitimate interests of others.”

25. Such approach was endorsed by the Supreme Court in Kennedy v. Information Commissioner [2014] UKSC 20; [2015] A.C. 455; A v. BBC [2014] UKSC 25; [2015] A.C. 588; and Dring v. Cape Intermediate Holdings Ltd [2019] UKSC 38; [2020] A.C. 629.

DISCUSSION

Non-disclosure order

26. There is no evidence that either the claimants or the BBC threaten or intend to unmask Jake. Indeed, all parties have gone to some lengths to protect Jake’s identity:

- 26.1 First, in the podcast itself the BBC took the conscious decision to use the pseudonyms Jake, Cassidy and Sam rather than identify any of these people by name.
- 26.2 Secondly, in these proceedings, the BBC has neither confirmed nor denied FLA's claim that he is Jake. The BBC asserts that it has taken that course in order to protect its journalistic sources.
- 26.3 Thirdly, the BBC has made clear that it does not presently intend to identify Jake or FLA in these proceedings.
- 26.4 Fourthly, the claimants support FLA's application and have made clear that they have no intention to cause him or any other party damage or distress.
- 26.5 Fifthly, the claimants adopted the pseudonym Jake in their Particulars of Claim. It is not suggested that the claimants have pleaded any matters in their detailed 66-page Particulars of Claim or in the 54 pages of schedules that have added to the risk of jigsaw identification. Further, they now propose that FLA be referred to by that cipher in these proceedings.
27. This is not, therefore, a case where there are grounds to believe that any party will seek to expose FLA. I accept, however, that the more material that is placed in the public domain in respect of Jake, Cassidy and Sam, the greater the risk that Jake's true identity will be capable of being exposed through jigsaw identification. Such risk is exacerbated by the nature of the claimants' business; the inevitably prurient interest in the sexual allegations made in the podcast; and the seriousness of the specific allegations made in episode 9. Great care will therefore be required, particularly if the parties seek to litigate the truth of the allegations made in episode 9 in respect of Jake, Cassidy and Sam.
28. In this case, it is important to recognise that, by her order, Master McCloud has already decided that it is necessary to order that FLA's identity should not be disclosed in his own claim. I accept that the court must be astute to ensure that the master's order and the purpose of FLA's claim are not undermined by the disclosure of FLA's identity in these proceedings. Accordingly, I conclude that it is necessary to order that FLA's identity should likewise not be disclosed in these proceedings.
29. I am not, however, presently satisfied that it is necessary to make a broader order restricting the reporting of details of this case. In my judgment, the responsible approach to these matters taken by both the claimants and the BBC leads me to some optimism that, together with FLA's lawyers, they should find a way to devise and agree a scheme that will ensure that issues concerning episode 9 can be properly litigated in public while minimising the risk of jigsaw identification, as indeed was possible in NT1 v. Google LLC [2018] EWHC 261 (QB). Further, for the reasons explained below, the particular risk of jigsaw identification can at this pre-trial stage be controlled by orders pursuant to rules 5.4C and 5.4D of the Civil Procedure Rules 1998. For the avoidance of doubt, FLA has liberty to apply to the court for further directions in the event that it proves impossible to devise a workable scheme or some development in this case gives rise to a new risk of his identification.

Order under the Contempt of Court Act 1981

30. Section 11 of the Contempt of Court Act 1981 provides:

“In any case where a court (having the power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.”

31. Having directed that FLA’s identity be withheld from the public, I direct pursuant to s.11 that there should be no publication of the applicant’s true name in connection with these proceedings. Of course, FLA says that he is Jake, but that matter is neither admitted nor, at this stage, proved. For the avoidance of doubt, nothing in my order prevents the media from using the pseudonym Jake to refer to the person who features in episode 9 of the podcast or from reporting that a man who claims to be Jake has obtained this order.

Access to the statements of case

32. FLA is neither referred to by such cipher nor by his true name in the Particulars of Claim. Jake is referred to but the claimants have adopted the BBC’s pseudonym. There is no suggestion that the claimants have pleaded any further facts about Jake, Cassidy or Sam that would allow Jake to be identified. Accordingly, it is not necessary to make any order pursuant to r.5.4C(4) to restrict access to the Particulars of Claim.
33. It is, at this stage, speculation whether there will be anything in the Defence that will give rise to a further risk that Jake is identified. I am not therefore satisfied that it is necessary to make an order pursuant to r.5.4C(4) restricting access in advance to the Defence. Equally, I acknowledge that there is some risk that the BBC inadvertently pleads further details of its case as to the allegations made in episode 9 which, taken with other material already in the public domain, increases the risk of Jake’s identification. Since the cat cannot be put back into the bag, the proportionate response to that risk is not, however, a blanket order preventing public access to the BBC’s Defence in these proceedings but rather to devise a mechanism that allows FLA and his lawyers a reasonable opportunity to check the Defence before the public can have access to it.
34. Accordingly, at my invitation, the BBC has offered an undertaking that it will provide FLA’s lawyers with its Defence in these proceedings within one business day of the time that it is filed. Upon that basis, I will direct pursuant to rules 5.4C(4) and 3.3(1) of the Civil Procedure Rules 1998 that a copy of the Defence will not be provided to any non-party pursuant to a request made within ten days after filing the Defence. Such order is akin to the order that might be made pursuant to r.5.4C(4) by the court “on the application of a party or of any person identified in a statement of case” but is made by the court of its own initiative pursuant to r.3.3(1) since FLA is not a party and it is not yet clear whether he will be identified in the Defence. It is common ground that the court has jurisdiction to make such order.

35. The combination of the BBC's undertaking and such direction will, in my judgment, provide FLA and his lawyers with a reasonable opportunity to consider the Defence and decide whether further relief is required in order to secure the administration of justice. Its effect will be to delay by ten days the rights of the public and the press to obtain copies of the Defence. Such modest interference with public access to the statements of case is in my judgment necessary and appropriate in order to minimise the risk of jigsaw identification.

Access to judgments

36. This judgment will be handed down in public and available both from the court records and through the National Archives without limitation.

Notice of application for other documents

37. As noted above, non-parties can seek to obtain copies of documents from the court records other than statements of case, judgments and orders by making an application pursuant to r.5.4C(2). FLA seeks the following further direction:

“Pursuant to CPR 5.4D(2), any application by a non-party for permission to obtain a copy of any document filed in these proceedings must be made on notice to the parties and the Applicant, via email to his solicitors ...”

38. In my judgment, such direction is clearly appropriate in order that FLA can be heard upon any application by a non-party to obtain such documents from the court records. Most obviously, FLA will be concerned to have notice of any application to obtain a copy of his witness statement or its exhibits. It is, however, appropriate to allow FLA to be heard on any application by a non-party to obtain copies of documents in this case since it is impossible to devise some watertight classification of documents that may, and those which will not, give rise to a risk of his identification. In order to be able to respond to any such application, FLA will himself need access to the document sought by the non-party. He does not, however, seek any further relief in that respect. No doubt he assumes that the claimants will assist him by providing him with copy documents as necessary.

Penal notice

39. I am not persuaded that it is either necessary or appropriate to attach a penal notice to this order.

CONCLUSIONS

40. Accordingly, I order that:
- 40.1 The applicant's identity be withheld from the public in these proceedings and he be referred to by the cipher FLA.
- 40.2 There be no publication of the applicant's true name in connection with these proceedings. Nothing in my order shall prevent the media from using the pseudonym “Jake”, the cipher “FLA”, or from identifying that FLA is a man who claims to be Jake.

- 40.3 No non-party may obtain a copy of the Defence from the records of the court until the date ten days after the Defence is filed. Once that period has expired, the general rule in r.5.4C shall apply unless otherwise ordered.
- 40.4 Notice be given to the parties and to FLA of any non-party application for copies of documents other than statements of case, judgments and orders.
41. I shall of course direct that a copy of my order be published on the judiciary website as required by r.39.2(5).