Neutral Citation Number: [2019] EWHC 1958 (QB)

Case No: QB-2019-002073

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/07/2019

Before :

THE HONOURABLE MR JUSTICE WARBY

- -

Between :

Advertising Standards Authority Limited	**Claimant**
- and -	
Robert Neil Whyte Mitchell	**Defendant**

- -
- -

Aidan Eardley (instructed by **Bates Wells & Braithwaite London LLP**) for the **Claimant**
The Defendant was not present or represented

Hearing date: 22 July 2019

- -

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 WARBY

MR JUSTICE WARBY:

1. This is an application for default judgment.

2. The claim is brought by the Advertising Standards Authority ("ASA") for an injunction to restrain the use or disclosure of information which was mistakenly passed to the defendant, when a member of the claimant's staff misaddressed an email, seeking legal advice in relation to an advertising standards complaint. The defendant is one of those to whom the complaint related.

3. The factual background is set out, sufficiently for present purposes, in the judgment I handed down on 11 June 2019, giving my reasons for granting the initial application for an interim injunction, which came before me on 7 June: [2019] EWHC 1469 (QB). As appears from that judgment, the basis for the claim is that the information in question is confidential, part of it being protected by legal professional privilege, and that its unauthorised use or disclosure by the defendant would represent a breach of confidence, save for certain specified and limited purposes concerned with the decision-making of the claimant, and in respect of one document in which no confidentiality is claimed. The defendant did not appear at the initial hearing. I was satisfied that a trial Court would be likely to uphold the claim.

4. At a return date hearing on 14 June 2019, I continued the interim injunction until trial or further order. Again, the defendant did not appear and was not represented. He did lodge some written representations, in which he opposed the continuation of the order, and maintained the position adopted earlier, that this Court has no jurisdiction over the matter, because he is not domiciled in England and Wales. It remained my view that the claimant was likely to establish at a trial in this jurisdiction that the Courts of England and Wales have jurisdiction over the claim, and that it should be upheld: see [2019] EWHC 1527 (QB).

5. In view of his response to the claim, it was foreseeable that the defendant might decline to engage further with the proceedings, and that there might be an application for judgment in default. Accordingly, the Order I made on 14 June contained express provision for any such application to be expedited, so that it could be heard before the end of July and thus before the Long Vacation.

6. So it is that today Mr Eardley appears again on behalf of the ASA, contending that the defendant has failed to acknowledge service and that default judgment should now be entered in his client's favour.

7. The papers before me now contain, in addition to the material that I have already seen, Particulars of Claim, which were served on 20 June 2019; a second witness statement made by the defendant on 24 June 2019, in purported compliance with my Order of 14 June 2019; the application notice seeking default judgment, which was filed on Monday 15 July 2019; and a witness statement from Mr Earle of the ASA's solicitors Bates Wells & Braithwaite, dated 15 July 2019. That statement verifies the failure to acknowledge service, and generally updates the position, exhibiting relevant correspondence and the defendant's witness statement.

8. Significant features of the chronology are that on 3 July 2019, Bates Wells & Braithwaite wrote to Mr Mitchell with an open offer to settle the entire litigation if he

would give undertakings to the court and agree to an order for payment of the ASA's costs in the sum of £27,000. They made clear that if the parties could not reach agreement on this basis, "the action will need to proceed to a further hearing". Mr Mitchell replied later the same day in robust terms, rejecting the offer "as it is seen as a crass attempt at extortion of your fees under threat of further court action against me personally". He went on to say:-

> "So I will 'see you in court' the next time and I will have much to say, as is my legal rights and human rights both of which I contest are being suppressed in this matter – an absolute disgrace in itself for your client – the ASA – whose own tag line is about upholding 'legal, decent, honest and truthful'.
>
> So I think it is time to have my day in court – as a Litigant-Person.
>
> In conclusion please be aware that there are no reporting restrictions on what I will have to say in overseas jurisdictions…"

9. That was all said on the afternoon of 3 July 2019. Despite this, Mr Mitchell did not acknowledge service within the time limit for doing so, which expired on 4 July 2019.

10. On 8 July 2019, the ASA's solicitors asked whether "leaving aside costs", Mr Mitchell was prepared to provide the undertakings. A week later, on Monday 15 July 2019, Mr Mitchell replied, maintaining that he had "never indicated an intention to release" the information the subject of this claim. He described the injunction as a "smokescreen" for misconduct by the ASA. He made clear that he would not be signing the latest undertaking, and rejected the "offer re costs". He declined to engage in what he described as "hypothetical" correspondence.

11. Thus, it was on 15 July 2019 that the application notice now before me was issued. The application notice was served on 17 July 2019, by email, following some delay with the Court administration. Service by email was good service, because of an order I made on 7 June, allowing service by an alternative method.

Short notice

12. The first question that has arisen is whether I should proceed, in circumstances where only short notice has been given of the application. Although it is now 22 July, the weekend accounts for two of the intervening days. So only two clear days have passed between service of the application notice and today. The general rule is of course that there should be 3 clear days' notice: see r 23.7(1)(b). The court has power to abridge time or, under CPR 23.7(4), to direct that, in the circumstances of the case, sufficient notice has been given, and hear the application.

Approach to hearing in absence

13. The question of whether to do that needs to be considered in conjunction with another important preliminary issue, namely how the Court should respond to the fact that the defendant is not present or represented at this hearing.

14. I dealt with this in *Brett Wilson LLP v Persons Unknown* [2015] EWHC 2628 (QB) [14]-[16]. The principles I derived from statute, authority and the Civil Procedure Rules are conveniently summarised in the headnote to the report of my decision in [2016] 4 WLR 69:-

> "where a litigant failed to appear without giving a reason it was necessary to consider first whether they had had proper notice of the hearing date and the matters, including the evidence, to be considered at the hearing; that where satisfied that such notice had been given, the court had to examine the available evidence as to the reasons why the litigant had not appeared, to determine whether that provided a ground for adjourning the hearing; that section 12 of the Human Rights Act 1998 was engaged because the order the claimants sought involved "relief which, if granted, might affect the exercise of the Convention right to freedom of expression" within the meaning of section 12(1); that section 12(2) prohibited the court from granting such relief if the respondent was neither present nor represented, unless satisfied "(a) that the applicant has taken all reasonable steps to notify the respondent, or (b) that there are compelling reasons why the respondent should not be notified""

15. I have to bear in mind that the defendant is not only absent, he is also a litigant in person, that is to say he has not appointed any lawyers to represent him in this litigation. CPR 3.1A(2) expressly provides that where the court is exercising any powers of case management in such a case it "must have regard to the fact that at least one party is unrepresented". A "lack of representation will often justify making allowances in making case management decisions and in conducting hearings": *Barton v Wright Hassall LLP* [2018] UKSC 12 [18] (Lord Sumption).

16. On the other hand, the Court is required to give effect to the overriding objective of the CPR, to deal with cases justly and at proportionate cost. That requires the Court to look at both sides of the matter, and to ensure that a case is dealt with both fairly and expeditiously.

17. The factual position here appears to be as follows. The defendant has had actual notice of the claimant's intention to seek default judgment from at least last Wednesday, 17 July 2019. That is the day on which the application papers were sent to him by email. I have no reason to doubt that he received and read those papers at that time. He has also been given notice in correspondence of the date and time of this hearing. Bates Wells & Braithwaite have emailed him and texted him with full details. He has had an ample opportunity to submit written representations seeking an adjournment, or in opposition to the application, or to engage legal representation to do one or other of those things. He has in fact made no response whatever. He has Tweeted, shortly after 3pm on Friday 19 July 2019, telling Twitter that the ASA had submitted a claim "by default" including applications for an injunction and costs.

18. Taking those facts in the context of his previous response to this claim and earlier applications, I conclude that the ASA has taken all practicable steps to notify the defendant, but the defendant has deliberately chosen not to "have his day in court", or to engage with this application using the procedures made available by the Court for

that purpose. He has decided to allow the application to proceed unchallenged, otherwise than through correspondence and on Twitter. This is not a case of a litigant in person who has found himself in difficulties dealing with court processes, and needs more time.

19. On that footing, it is clear to me that a further delay would merely serve to run up further costs and to consume further resources, to no useful purpose.

20. I therefore conclude that the requirements of s 12(2) are satisfied. I direct that in the circumstances sufficient notice has been given, and proceed to consider the application for judgment.

Default Judgment

Threshold conditions

21. The conditions that must be satisfied are set out in CPR 12.3 and 12PD 4.1. I am persuaded that the threshold conditions are met. The relevant matters are these:

    (1) The Particulars of Claim were served on 20 June by the method provided for in the Order of 7 June, and I have a certificate of service and evidence of it having been filed at Court

    (2) The time limited for acknowledging service has expired without the defendant doing so;

    (3) There are no pending applications for strike-out or summary judgment;

    (4) Although the defendant has satisfied the claim in part he has not done so in full. He has provided a witness statement in which he confirms that he has irretrievably deleted the email and attachments from both of his email accounts and that neither he nor the Banks Claims Group Ltd made any hard copies. But he has declined to give undertakings not to use or disclose the information contained in the Email and its attachments. He has also declined to pay costs.

Jurisdiction

22. Next, I should address the issue of jurisdiction. On 7 June 2019, when the application first came before me, I was satisfied that the claimant was likely to succeed at trial on that issue. I do not now need to deal with it further, because the defendant has failed to take the opportunity which the rules provide, to raise an issue about jurisdiction. A defendant who wishes to dispute the Court's jurisdiction must indicate that fact on his Acknowledgement of Service and then, within 14 days, make an application for an order declaring that the Court lacks jurisdiction: CPR 10.1(3)(b) and CPR 11(1)(a) and (2). Despite claiming in correspondence that the court lacks jurisdiction, the defendant has done neither of those things.

The substantive relief claimed

23. CPR 12.11(1) deals with the way the Court should approach a default judgment application. It provides:-

> "Where the claimant makes an application for default judgment, judgment shall be such judgment as it appears to the court that the claimant is entitled to on his statement of case".

24. I addressed the effect of this provision in *Brett Wilson* at [18-19], holding that it means that the Court must examine the Claim Form and Particulars of Claim but will not investigate the merits and will not usually consider evidence. I adopted what I had said in the earlier case of *Sloutsker v Romanova* [2015] EWHC 2053 (QB) at [84]:

> "This rule enables the court to proceed on the basis of the claimant's unchallenged particulars of claim. There is no need to adduce evidence or for findings of fact to be made in cases where the defendant has not disputed the claimant's allegations. That in my judgment will normally be the right approach for the court to take. Examination of the merits will usually involve unnecessary expenditure of time and resources and hence [be] contrary to the overriding objective …"

25. If I were to proceed on that basis, without more, I would grant the relief sought. The claim form and Particulars of Claim contain assertions of fact which, on a proper application of the law, support the claims for relief contained in the Particulars of Claim. There is nothing in the unchallenged statements of case that casts doubt on the validity of the claims advanced by the ASA.

26. In *Sloutsker* and in *Brett Wilson* I acknowledged that the general approach might need modification in an appropriate case, where some particular circumstance required the court to look beyond the statements of case, in order to deal with the matter justly. I gave some examples of circumstances where the Court might find itself obliged to hold back. The examples given were of cases where the pleaded case on the facts could be seen on its face to be untenable or overstated, so that the entry of judgment in accordance with the facts alleged would represent an injustice to the defendant. I made clear that these were non-exhaustive examples.

27. This case provides another illustration of a circumstance that requires some limited regard to be had to evidence. The defendant has voluntarily provided the claimant with some of the remedies claimed in the statements of case. He has stated, in a witness statement, that he has deleted the email from his two email accounts and made no hard copies. The ASA accepts that evidence. Quite properly, therefore, Mr Eardley has drawn it to my attention and does not seek any order for such deletion.

28. The claimant has also put before me evidence from Mr Earle, its solicitor, on the question of whether I should grant a final injunction. And Mr Eardley has addressed me, briefly, in writing and orally, on the factual position as things stand. The contention is that, for reasons elaborated in the evidence and argument on this point, there is "still a threat or real risk … sufficient to justify a final injunction."

29. I am far from sure that this is necessary or appropriate, in the circumstances of this case. One of the considerations that troubled me in *Sloutsker* and *Brett Wilson* was the risk that claimants might run up excessive legal costs preparing and adducing evidence on applications for default judgment, with a view to proving matters that did not need proof because they had not been denied by the defendant. That seemed to me to be not only

pointless, not least because it went beyond what the rules required. It seemed in addition to risk unfairness to the defendant, if he she or it were to be saddled with the additional legal costs incurred. If that were not so, then the procedure would risk unfairness to the claimant, or an unnecessary dispute between the claimant and its lawyers.

30. I do not say there will be, but I suppose there might be, cases in which an applicant for default judgment needs to adduce evidence in fairness to the defendant, for instance if it tends to contradict or undermine the claimant's pleaded case. It might perhaps be thought that proceeding on the basis of mere uncontradicted assertion would not be compatible with the Court's duty under s 6 of the Human Rights Act 1998. But I do not understand s 6 to impose any investigative obligation, in a case where the defendant does not take advantage of the procedures made available by the Court to dispute the rights asserted by the claimant. In any event, the evidence that the ASA has adduced on this point is not material that needs to be considered by the Court for either of those purposes. It consists of evidence about two matters that are said by Mr Eardley to add particular weight to the case for final injunctive relief.

31. In fairness to Mr Earle and Mr Eardley I should say that the evidence is limited, and that I agree with their assessment. I add that Mr Mitchell appears be labouring under a misapprehension when he suggests that he is free to publish in foreign jurisdictions. The injunction that is in place, and the injunction I am granting today, both take effect against him personally; they are not territorially limited in their effect. I will not go beyond that because it remains my view not only that such evidence is unnecessary, but also that it is undesirable for the Court to engage with it.

Disposal

32. For the reasons given in this judgment, I grant the order sought.