Neutral Citation Number: [2019] EWHC 3190 (QB)

Case No: QB-2019-2869

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/11/2019

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

UUU	**Claimant**
- and -	
BBB	**Defendant**

- -
- -

Desmond Browne QC and Jonathan Barnes (instructed by **Stephenson Harwood LLP**) for the **Claimant**
The Defendant appeared in person

Hearing date: 21 November 2019

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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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THE HONOURABLE MRS JUSTICE STEYN DBE

Mrs Justice Steyn :

A INTRODUCTION

1. The Claimant has brought a claim pursuant to s.3 of the Protection from Harassment Act 1997 by which he seeks an injunction. An interim injunction was granted by Morris J on 9 August 2019 ("the Order") following a private hearing which was on notice to the Defendant but which he did not attend. The Order provided for a return date of 16 August 2019. However, the return date was adjourned by a consent order approved by Murray J on 16 August 2019 and came before me yesterday.

2. The Claimant seeks an extension of the relief granted on 9 August 2019 over to the final hearing of this matter or further order in the meantime, save for an amendment which reduces the information or purported information which is the subject of the injunction. The Defendant resists the continuation of the injunction pending a final hearing.

B PRELIMINARY MATTERS

3. There are a few preliminary matters that I should address before I turn to the substance of the application.

Anonymity and Private hearing

4. At the outset of the hearing, I granted the Claimant's application for a private hearing and for maintenance of the anonymity granted by Morris J. The Defendant took no objection to that application.

5. The general rule is that a hearing is to be in public; a hearing may not be held in private unless, and to the extent that, pursuant to CPR 39.2(3) it must be held in private: CPR 39.2(1). CPR 39.2(3) provides (so far as relevant):

> "A hearing, or any part of it, must be held in private if, and only to the extent that, the court is satisfied of one or more of the matters set out in sub-paragraphs (a) to (g) and that it is necessary to sit in private to secure the proper administration of justice –
>
> (a) publicity would defeat the object of the hearing;
>
> …
>
> (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality".

6. In respect of anonymity, CPR 39.2(4) provides:

> "The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice."

7. As I explained yesterday, when I granted both derogations from the principle of open justice, I was satisfied, having regard to the sensitive and personal nature of the matters threatened to be disclosed, whether they are true or false, and having regard to the nature of the case as one in which blackmail is alleged, that a public hearing or identification of the parties in connection with the claim would frustrate the aim of the proceedings.

8. The public interest in open justice is satisfied, in this context, by the Court giving a public judgment. Although the parties are anonymised, given that this is a public judgment, I have explained the facts and referred to the correspondence in more general terms than I would otherwise have done in order to avoid identification of the parties or disclosure of confidential information.

Full and frank disclosure before Morris J

9. The Defendant has submitted that the Claimant failed to make full and frank disclosure at the hearing before Morris J. In support of this submission, he relies on six brief emails sent on 1 and 2 August 2019 which were not before Morris J at the hearing on 9 August. These emails show arrangements were made to set up a meeting on Tuesday 6 August 2019 between the Defendant and a legal representative for the Claimant. The Defendant suggests the fact that the Claimant's response to the Defendant's emails was to seek to negotiate a settlement undermines the allegation that his emails were seen as harassing or blackmailing the Claimant.

10. There is no substance to the contention that there was no full and frank disclosure. The Claimant's representatives drew the Judge's attention to two lengthy emails from the Defendant dated 8 and 9 August. In the first of these emails the Defendant quoted the Claimant's email response to the Defendant's emails and said that the Claimant and his lawyer told him on four occasions that they would make a settlement offer and that they wanted to meet to resolve matters. In the second email which was sent just before the hearing began, the Defendant stated that he had had a settlement meeting with the Claimant's lawyer that morning, that there had been two settlement meetings that week and that settlement negotiations were ongoing.

11. Morris J referred in his open judgment at para 8 to the fact that he had been shown the two emails from the Defendant timed at 10.52pm on 8 August and 11.47am on 9 August. He also expressly noted in paragraphs 8 and 9 that settlement negotiations were ongoing. It is manifest that there was no failure to comply with the duty to give full and frank disclosure.

Without prejudice correspondence

12. The Claimant has relied on certain correspondence which is marked "without prejudice". The Claimant submitted that he was entitled to do so, as Morris J found at paragraphs 8 and 9 of his judgment, relying on *Ferster v Ferster* [2016] EWCA Civ 717 and *Boreh v Republic of Djibouti* [2015] EWHC 769 (Comm).

13. In Ferster Floyd LJ said:

> "23. In the end, as Mr Hollander accepted, what is involved here is an evaluation of whether the threats unambiguously

> exceeded what was "permissible in settlement of hard fought commercial litigation" (*Boreh v Republic of Djibouti* [2015] EWHC 769 Comm, at [132] per Flaux J). … I agree with the judge that the threats here did unambiguously exceed what was proper, essential for the reasons she gave. …
>
> 24. It is not necessary for the threats to fall within any formal definition of blackmail for them to be regarded as unambiguously improper. …"

14. In my judgment, the threats which I describe below, made under cover of without prejudice correspondence, went far beyond what is proper or permissible in hard fought commercial litigation. The threats were of immediate publicity being given to matters concerning the Claimant's private life. The Defendant clearly intended the Claimant to recognise that such revelations would be damaging to him personally, and to his business. The purpose was to obtain an immediate financial advantage for the Defendant in the form of a share of the company or monetary payment. The Defendant claims the allegations are true and that he was only seeking that to which he says he is entitled. Whether or not that is so is nothing to the point. As in *Ferster*, the threats placed the Claimant under quite improper pressure and there was no attempt at the time to make any connection between the allegations which were the subject of the threats and the Claimant's demand for settlement of his contractual claim.

15. In any event, by the time of the return date hearing before me, both parties had chosen to put without prejudice correspondence into the hearing bundle and it is clear that they had waived privilege.

C THE THREATS

16. Until recently, the Claimant and the Defendant were longstanding friends. A contractual dispute has arisen between them ("the contractual dispute"). The Defendant sent the Claimant a letter before action on 27 June 2019 in respect of the contractual dispute, claiming that the Claimant had failed to provide him with an agreed share in a company. Although the Claimant disputes the Defendant's claim, no complaint is made about the terms of the letter before action (as sent). I express no view about the merits of the contractual dispute which are not relevant to the application before me.

17. The claim, and the present application, stems from an email sent by the Defendant to the Claimant on 27 July 2019. The Defendant threatened in that email to "fully advise" many people (specified in terms of organisations, bodies of people and identified individuals), relevant to the Claimant's business interests, of various specified matters personal to the Claimant. The email stated: "In the absence of you honouring our agreement or proposing a realistic settlement in respect of the claim", the Defendant would disclose those matters "along with all available supporting evidence". It was said this would be done "in parallel" with legal proceedings being issued in respect of the contractual dispute.

18. In the email the Defendant stated that it would be a "serious miscalculation" for the Claimant to think that the Defendant would not execute these "next steps". In the

absence of a reply, the steps would "be actioned" and in those circumstances the Claimant "will be the ultimate loser".

19. The Defendant followed this up two days later by sending an email to four business associates of the Claimant, copied to the Claimant. The email stated that the Claimant had failed to honour the agreement with him and had missed various extensions to settle the contractual dispute. Without disclosing the personal matters, the Defendant made clear his intention to advise the same group of people he had referred to in his email of 27 July of the specified matters.

20. On 30 July 2019 the Defendant sent a further email to the Claimant. He stated, "I want what is due to me and if you continue to force it, I will do whatever is necessary to achieve that, irrespective of potential consequences". He made an offer to settle the contractual litigation for a percentage share or £1 million and said that if neither of these options were of interest to the Claimant, he would "proceed with the litigation and associated course of action as advised to you". The same day, the Defendant also sent a further email to the same four business associates, again copied to the Claimant, indicating that he was "postponing" acting further in the hope of reaching an agreement with the Claimant within the next seven days.

D THE APPLICATION

The parties' submissions

21. In summary, the Claimant contends as follows:

    i) The Defendant's threats constitute blackmail contrary to section 21 of the Theft Act 1968, which provides:

> "(1) A person is guilty of blackmail if, with a view to gain for himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief—
>
> (a) that he has reasonable grounds for making the demand; and
>
> (b) that the use of the menaces is a proper means of reinforcing the demand.
>
> (2) The nature of the act or omission demanded is immaterial, and it is also immaterial whether the menaces relate to action to be taken by the person making the demand."

    ii) The offence is made out if it is established that the Defendant (a) made a demand, (b) with a view to gain for himself, (c) with menaces, (d) that was unwarranted.

    iii) The mere fact that the threat is to do something a person may be entitled to do neither causes the threat not to be a "menace" nor provides a reasonable or

probable cause for the demand: see *Thorne v Motor Trade Association* [1937] AC 797, per Lord Atkin at p807.

iv) The threat of publicity in order to extract a settlement of a civil claim or greater compensation was a clear case of blackmail. No honest individual could have believed that the threats made by the Defendant were a "proper means of reinforcing" his demands in relation to the contractual dispute.

v) Whether the Defendant's allegations were true or false, truth is not a defence to a charge of blackmail: *LJY v Persons Unknown* [2017] EWHC 3230 (QB) at [40].

vi) The Defendant's threat if carried out would amount to harassment contrary to s.1(1) of the Protection from Harassment Act 1997, that is, to conduct on at least two occasions which is from an objective standpoint calculated to cause alarm or distress and oppressive, and unacceptable to such a degree that it would sustain criminal liability. In *Hayes v Willoughby* [2013] 1 WLR 935, at [1], Lord Sumption defined harassment as "*a persistent and deliberate course of unreasonable and oppressive conduct, targeted at another person, which is calculated to and does cause that person alarm, fear or distress*".

vii) If the threat of publication to multiple parties was carried out it would amount to the tort of harassment. And the harassment is aggravated by the fact that the threatened disclosures would breach the Claimant's legitimate expectations of privacy and fall foul of Article 8 of the European Convention on Human Rights ("ECHR"). The intrusive nature of such allegations is the key, whether they are true or false: see *McKennitt v Ash* [2008] QB 73, per Longmore LJ at [85]-[86].

viii) The application is for an interim non-disclosure order to which section 12 of the Human Rights Act 1998 ("the HRA") and the *Practice Guidance: Interim Non-Disclosure Orders* [2012] 1 WLR 1003 apply. Section 12(3) of the HRA requires the Court to be satisfied that the applicant is likely to establish at trial that a threatened publication should not be allowed. "Likely" generally means "more likely than not" but that criterion does not bind the Court in a case where it is necessary to hold the ring pending the Court having an opportunity for proper consideration: *Cream Holdings v Bannerjee* [2005] 1 AC 253.

ix) The Court may grant injunctive relief to restrain the threatened conduct where, if carried out, it would amount to the tort of harassment. It is not necessary to show that the tort has already been committed. See *LJY* at [35] and [37].

x) Where there is intimidation by means of blackmail, the Court can grant injunctive relief to restrain both the unlawful act or acts and the threat to commit them: see *Clerk & Lindsell on Torts*, 22nd ed., §24.68, citing *News Group Newspapers Ltd v SOGAT (No.2)* [1987] ICR 181 at 204.

xi) There is a serious and ongoing risk of the Defendant carrying out his threats.

22. The Defendant represented himself courteously and made his points clearly both in writing and orally. In summary:

i) He denied that he had blackmailed or harassed the Claimant, or that he had ever intended to do so. He suggested the allegation of blackmail was "farfetched".

ii) He said that it was "illogical and wrong to suggest I am committing blackmail when telling the truth and being offered monies in respect of my own claim".

iii) He said that "he was not seeking to secure monies in respect of my comments", only for the Claimant to "honour our deal". "Rather than blackmail or damage him, my intention was actually to behave as a "tough parent" as we have been close friends for many years". He also suggested his "comments" were "not made to elicit monies but to help UUU" because he considered that these matters would come out one way or another in the context of the contractual dispute.

iv) He accepted, with hindsight, that his email of 27 June 2019 "was over the top and aggressive". In his oral submissions he acknowledged that it had been "intended to apply pressure". He had been "very angry". It was "not well-considered" and it was a "wrong thing to do".

v) The Defendant said that he is prepared to give undertakings that "I will not harass and blackmail the Claimant". But he is not prepared to give what he describes as "belt and braces" undertakings proposed by the Claimant which detail in paragraphs (a) to (g) and (j) (the Claimant having offered to remove (h) and (i) the matters the Defendant undertakes not to use, publish, communicate or disclose (corresponding to the matters which the Defendant threatened to disclose in his email of 27 July and to the terms of the interim injunction granted by Morris J). The Defendant is prepared to give undertakings in respect of paragraphs (f), (g) and (j), but not (a) to (e).

vi) He contends that the injunction should be lifted because it stifles his ability to bring his claim in respect of the contractual dispute and his freedom of expression. It is contrary to the public interest and the Claimant has not come to the court with "clean hands".

vii) In his oral submissions, as well as in writing, he was particularly concerned that notwithstanding the private hearing and Morris J's anonymisation of the proceedings, the Claimant has told others about the injunction. The Defendant submitted that it is important that the injunction is discharged to enable him to defend himself.

viii) Save to the extent implicit in the arguments summarised above, the Defendant did not take issue with the Claimant's exposition of the applicable legal principles.

Decision

23. In my judgment, the Claimant's submissions as to the legal principles which I should apply, as I have summarised them in paragraph 21 above, are a correct statement of the law.

24. The Claimant has established that it is more likely than not that the Defendant's emails of 27 July and 30 July would be found at trial to constitute blackmail:

    i) The Claimant made an express demand for a 5% benefit in respect of various companies or a "realistic settlement" (27 July) and then £1 million as an alternative to the proposed 5%.

    ii) These demands were made with a view to the Defendant gaining the shares or sum sought.

    iii) The threats of disclosure to a wide range of people of damaging allegations amounted to menaces.

    iv) Whether or not the Defendant had reasonable grounds for making the demand (which he may have done, depending on the merits of the contractual dispute, which I have not considered), his demands were unwarranted unless the Defendant believed that the use of the menaces was a proper means of reinforcing the demand. Plainly, the Defendant's threats were not a proper means of putting pressure on the Claimant. It is probable that the court will conclude at trial that the Defendant did not believe it was a proper means of reinforcing his demand.

25. The Defendant submits that what he threatened to disclose is true. I express no view on the truth or falsity of the underlying allegations. What is clear, and unsurprising, is that truth is not a defence to a charge of blackmail. As Tugendhat J said in *ZAM v CFW* [2013 EWHC 662 (QB), [2013] EMLR 27, at [50], "in most cases of blackmail the information which the blackmailer threatens to publish is true". In *LJY*, Warby J observed at [40], "Truth is not a defence to a charge of blackmail. Indeed, much blackmail gains its persuasive power from the fact that the allegation is true".

26. The Defendant submits that he was only seeking to gain that which he believes is his due pursuant to an agreement with the Claimant. Even if that is right, and assuming in his favour that he has a good claim in relation to the contractual dispute, it is clear that he made demands for his own financial gain. Of course, such demands (whatever their merits) would not have constituted blackmail if they were unaccompanied by unwarranted menaces.

27. It is to the Defendant's credit that he has acknowledged that it was wrong to have written the email of 27 July. But it is probable the court will find at trial that he has sought to downplay what he did and his intentions. For example, he suggested that the "next steps" referred to in the email of 27 July were simply the commencement of litigation, whereas most of the content preceding the reference to next steps consists of the threat of disclosure, along with all available supporting evidence. It is obvious that the next steps the Defendant suggests the Claimant is under the misguided impression he will not execute are, or at the very least include, the threatened disclosure. The Defendant claimed there was nothing wrong with his email of 29 July, whereas it must be read in the context of the 27 July email, and in that light the reinforcement of the threat is manifest. The same is true of the email to the Claimant sent on 30 July by which the Defendant threatened to proceed with the "associated course of action as advised to you" (i.e. disclosure of the allegations) unless he settled the contractual dispute by giving the Defendant a 5% share or paying him £1 million.

Similarly, the Defendant's claim that he was seeking to help the Claimant cannot withstand any scrutiny of the documents.

28. The Defendant has also sought to pray in aid the public interest in disclosing some of the matters he referred to in his 27 July email. The fact that some of those matters might potentially have been disclosed lawfully, in the public interest, does not detract from the likelihood of the court finding at trial that the threat to disclose them, accompanied by a demand, amounted to blackmail. In *Thorne v Motor Trade Association* [1937] AC 797 Lord Atkin observed at 806:

> "In *Ware & De Freville v Motor Trade Association* and again in *Hardie & Lane v Chilton* Scrutton LJ appeared to indicate that if a man merely threatened to do that which he had a right to do the threat could not be a menace within the Act. With great respect this seems to me to be plainly wrong: and I entirely agree with the criticism of this proposition made by the Lord Chief Justice in *Rex v Denyer*. The ordinary blackmailer normally threatens to do what he has a perfect right to do – namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened. Often indeed he has not only the right but also the duty to make the disclosure, as of a felony, to the competent authorities." (emphasis added)

29. In my judgment, the Claimant has also shown that it is more likely than not that he will establish that he has already suffered significant alarm, fear and distress as a result of the Defendant's course of conduct, which was clearly deliberate, and that the threat of publication to numerous people or bodies would be a course of conduct as required by the Protection from Harassment Act 1997 which would cause further substantial distress. Truth is not a defence to harassment: see *LJY* at [40]. On the evidence before me, it seems unlikely that if the Defendant were to carry out his threat, he would be able to avail himself of any defence within s.1(3) of the Protection from Harassment Act 1997.

30. Against that background, I turn to consider the justification for continued interim restraint. In *LJY*, Warby J observed at [29]:

> "Generally, the Court has taken the view that blackmail represents a misuse of free speech rights. Such conduct will considerably reduce the weight attached to free speech, and correspondingly increase the weight of the arguments in favour of restraint. The Court recognises the need to ensure that it does not encourage or help blackmailers, or deter victims of blackmail from seeking justice before the court. All these points are well-recognized: see *YXB* [17]. It can properly be said that the grant of a privacy injunction to block a blackmail serves the additional legitimate aim of preventing crime."

31. Warby J continued at [40]:

> "… The considerations already canvassed at [29] above are persuasive in the context of harassment, as they are in misuse of private information."

32. The Defendant has offered to undertake not to harass or blackmail the Claimant. However, an undertaking in such bare terms would not be satisfactory or sufficient. First, although the Defendant seeks to give undertakings in such a form, in fairness to him, he should know in clear terms what it is he restrained from doing. Secondly, in circumstances where the Defendant disputes that anything he has done constitutes blackmail or harassment, and he refuses to give undertakings in respect of the matters referred to at paragraphs (a) to (e) of confidential schedule 2 to the Order imposed by Morris J, a bare undertaking not to harass or blackmail the Claimant does not remove the threat. In his email of 17 November 2019, offering a "simple undertaking not to harass or blackmail" the Claimant, the Defendant repeatedly states that he has no intention to disclose matters "at this time", the clear implication being that the threat remains.

33. At the hearing on 9 August, Morris J referred to the Defendant's email that morning in which he stated, "for the record at no time have I nor would I ever deploy tactics of blackmail or harassment" and continued at [9]:

> "Despite what the Defendant has said in his email of today about not going public, I accepted the arguments of Mr Browne QC, counsel for the Claimant, that such an assurance does not meet the concern that the Claimant has. What, markedly, the Defendant has not said (and has not undertaken to do) is that he will not at any time in the future carry out his threat to disclose the information, most particularly after negotiations have ended. That means that the threat still exists and hangs over the ongoing negotiations and thus has the oppressive effect upon the Claimant in those negotiations, to which he objects. It is for this specific reason and in the absence of the undertakings to withdraw the threat that I have concluded that it was appropriate to grant the interim relief sought." (emphasis added)

34. The position remains that the Defendant has not undertaken, and refuses to undertake, not to disclose the information which he threatened on 27 July 2019 to disclose to many people. He has continued, for example in a letter dated 5 October, to seek to use the threat by offering to give the undertakings sought (and so not to carry out his threat) only as part of a global settlement of the contractual dispute in which he seeks a large monetary payment. Similarly, a text message sent by the Defendant to the Claimant on 11 November seeks to maintain the oppressive effect of the threat upon the Claimant in the negotiations regarding the contractual dispute, stating "…I assume that your lawyers have told you that if you lose at trial, everything then becomes public, including the BBB and UUU statements to date".

35. I do not accept the Defendant's contention that the injunction stifles his ability to litigate the separate contractual dispute. He has disclosed draft particulars of claim in respect of that matter, drafted by a member of the Bar. Although the pleading may need some amendment as the Defendant states that his representatives in respect of

the contractual dispute have had to withdraw due to a conflict of interest, there does not appear to be any reason why the Defendant could not issue and progress his claim, if he wishes. The Claimant has offered to remove paragraphs (h) and (i) from the order sought with a view to accommodating any concerns the Defendant had that his ability to litigate his claim was being stifled. The Defendant was not able to explain how, with those paragraphs removed, he could maintain that the order inhibits his ability to bring his claim.

36. The Defendant's contention that relief should be refused because the Claimant does not have "clean hands" is based on his assertion that the Claimant has lied about various matters in his evidence. Those allegations have not been tested and I cannot reach any conclusions in respect of them at this stage. Resolution of such issues, insofar as they are relevant, will be a matter to be determined on the evidence given at the final hearing. The Defendant's untested allegation that the Claimant has lied is not a basis on which I could properly refuse interim relief.

37. The Claimant has explained the circumstances in which he informed a small number of investors of the injunction, by emails drafted by his solicitors. In short, those individuals had prior knowledge of the way the Defendant had threatened the Claimant and so the Claimant updated them with the information that an injunction had been obtained, without disclosing its contents. I appreciate the Defendant's concern that the Claimant's emails state that the Defendant's allegations "are without exception untrue", whereas the Defendant wishes to be able to tell the recipients of those emails that his allegations are (he contends) true. In addition, although the emails do not expressly state that the injunction obtained on 9 August was an interim injunction, it can fairly be said that the impression is conveyed that a final judgment has been given. Nevertheless, this is not a sufficient basis in the circumstances to refuse to continue the injunction until the final hearing.

E CONCLUSION

38. I conclude that the interim restraint granted by Morris J on 9 August 2019 should be extended over to a final hearing, subject to modification to remove paragraphs (h) and (i) of confidential schedule 2. The Claimant has demonstrated a proper basis for such restraint until a final hearing can determine the underlying merits and any appropriate permanent relief.