Neutral Citation Number: [2020] EWHC 931 (QB)

Case No: QB-2019-003105

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/04/2020

Before :

MR JUSTICE NICOL

- -

Between :

BVG	**Claimant**
- and -	
LAR	**Defendant**

- -
- -

Christina Michalos QC (instructed by **Carter-Ruck Solicitors**) for the **Claimant**
The Defendant in person

Hearing dates: 30th March 2020

- -

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.

....

MR JUSTICE NICOL

Mr Justice Nicol :

1. This is an application by the Claimant to strike out the defence or, alternatively, for summary judgment to be entered in the Claimant's favour and for a permanent injunction.

2. The claim has two bases: (a) protection of private information and (b) prevention of harassment. Before the claim was issued, Master McCloud on 2nd September 2019 allowed the Claimant to issue the claim anonymising both himself and the Defendant. The parties were permitted to file and serve pleadings and witness statements with confidential annexes if necessary.

3. The Claim Form was issued the same day.

4. On 6th September 2019 there was a hearing before Murray J. for an interim injunction. He granted the injunction and also made various directions. He gave his reasons in a reserved judgment handed down on 11th September 2019. This was a public judgment - see *BVG v LAR* [2019] EWHC 2388 (QBD. His judgment sets out, as far as is possible in a public judgment, the background to the litigation, which I gratefully adopt.

5. Particulars of Claim were served on 25th October 2019.

6. The Defendant filed a Defence. It is not dated but I am told that it was served on 7th November 2019. The present application notice was issued on 31st January 2020. The evidence in support was the 2nd witness statement of Persephone Bridgman Baker, dated 31st January 2020. Ms Bridgman Baker is a lawyer with Carter-Ruck, the Claimant's solicitors. I am also referred to her witness statement, made on 30th August 2019 and the 1st witness statement of the Claimant, also made on 2nd September 2019. Ms Bridgman Baker made another witness statement on 19th March 2020. All of the witness statements and the Particulars of Claim have confidential schedules.

7. The Defendant relies on his witness statement of 11th March 2020. He again denies that he has blackmailed the Defendant. The Defendant did not observe the restrictions in the practice directions made by Murray J. on 11th September 2019. In accordance with those directions, my further references to his witness statement will be included in the Confidential Annex to this judgment.

8. The power to strike out a statement of case is in CPR r.3.4. The grounds upon which Ms Michalos QC, for the Claimant, relies, are in r.3.4(2)(a) and (c) namely that the statement of case (in this case the Defence) 'discloses no reasonable grounds for ...defending the claim' and 'there has been a failure to comply with a rule, practice direction or court order.'

9. Because of the Coronavirus epidemic this application was conducted by telephone. It began as a public hearing and two journalists at least were able to listen in to the call.

10. However, Ms Michalos applied for the remainder of the hearing to be in private. This was because the nature of subject matter was highly personal and could not easily be articulated if the hearing was in public. She referred me to *MNB v News Group Newspapers Ltd.* [2011] EWHC 528 (QB) in which Sharp J. was also dealing with a case of alleged blackmail. At [16] the Judge made the point that there cannot be a public

hearing if the ordinary public procedure in court would jeopardise the very right which the Claimant is seeking to protect. Ms Michalos also submitted that, if the hearing was in public, the Defendant, who is representing himself, would find it more difficult to distinguish between information which could not be referred to in public without infringing the anonymity directions. LAR opposed the application. He disputed that he had blackmailed the Claimant and wished to oppose the Claimant's substantive application in public. I agreed with Ms Michalos that it was necessary for the administration of justice for the application to continue in private. As she submitted, it was not necessary for me, in reaching that conclusion, to make a finding that the Defendant had blackmailed the Claimant, but it would be enough if, on the evidence before me, I considered that there was at least a *prima facie* case that the Defendant had blackmailed the Claimant. I agree that there is such *prima facie* evidence (at least) and I also agree that the existence of such evidence is a further reason for holding the remainder of the application in private.

11. Although that was how the remainder of the hearing was conducted, there is more that can be said in this open judgment.

12. In a Confidential Annex to this judgement, I say more about the factual background to the case. That Annex will be distributed only to the parties.

13. I turn first to the application to strike out the Defence.

14. As I have said, this was on two bases. The first was that the Defence did not comply with the rules or practice direction. CPR r.16.5 prescribes what a defence must contain. It must address each of the allegations in the Particulars of Claim and state which is admitted, which denied or which the Defendant can neither admit nor deny. Where an allegation is denied, the grounds for doing so must be given. The Practice Direction to Part 16 of the CPR emphasises that a defendant should deal with every allegation in the way that the Rules require (see paragraph 10.2). In addition, r.22.1(1)(a) requires a statement of case (which a Defence is) to be supported by a statement of truth. Ms Michalos submits that the Defendant's Defence does not comply with these requirements. It does not address each of the allegations in the Particulars of Claim and say whether that allegation is admitted, denied or not admitted. Nor is the pleading supported by a statement of truth. Doing the best that they can, the Claimant's solicitors have prepared a table which sets out each of the allegations in the Particulars of Claim and specifies whether the Defence admits, denies or does not address the allegation. This is a useful exercise. It should be emphasised that the expression 'NA' in the table means that the allegation in the Particulars of Claim was not addressed, rather than 'not admitted', which is a common response in a Defence to allegations in Particulars of Claim. This table appeared in an exhibit to Ms Bridgman Baker's witness statement of 31st January 2020. The Defendant has not suggested that it was inaccurate.

15. I say more about the Defence, the Defendant's witness statement in response to the present application and Ms Bridgman Baker's witness statement in reply in the Confidential Annex to this judgment.

16. While I accept that the Defence has the deficiencies of form of which Ms Michalos rightly complains, I would not, on that ground alone have struck out the Defence. The power in r.3.4(2) is discretionary. I am conscious that LAR is representing himself and, if the only complaint had been one of form, a strike out would have been an excessive

remedy and a more proportionate remedy would have been to give the Defendant an opportunity to cure the errors by serving an amended pleading which did conform with the rules and the Practice Direction.

17. The second way in which Ms Michalos submits that the Defence should be struck out is because it does not disclose a reasonably arguable defence. There is in this respect a substantial overlap with the other remedy which the Claimant seeks, namely summary judgment. The relevant rule in this regard is r.24.2 which, so far as relevant says,

> 'The Court may give summary judgment against a ...defendant on the whole of the claim or a particular issue if –
>
> (a) it considers that ...
>
> (ii) the defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial.'

18. Ms Michalos submits that is this case. She argues that neither in his Defence nor in his witness statement in opposition to the present application (dated 11th March 2020) is there a defence to the claim for misuse of private information or for the claim in harassment which in either case has a realistic prospect of success.

19. In his judgment on the interim injunction application at [13]-[19] Murray J. sketched the factual background to the claim. I cannot say more in this open judgment, save that, as I have already mentioned, the Defendant strongly refutes the allegation that he ever blackmailed the Claimant. I shall say more about the claims and their refutation in the Confidential Annex to this judgment.

20. So far as the Claimant relies on misuse of private information, there is a two stage analysis, as Murray J. said at [20]: first the Court must consider whether there is a reasonable expectation of privacy in the information in question (see *Campbell v MGN* [2004] 2 AC 457) and then consider what, if any, competing rights must be balanced against the Claimant's rights under Article 8 of the European Convention on Human Rights. Notably, these will include the Defendant's right of freedom of expression.

Misuse of Private Information: Does the Claimant have a Reasonable Expectation of Privacy in the Information in question?

21. A person's sexual life and activities are a clear example of his private life which is protected by Article 8 – see for example *Mosley v News Group Newspapers Ltd.* [2008] EWHC 1777 (QB).

22. At [22 (i)] Murray J. said this so far as that first stage was concerned:

> 'The claimant's Article 8 rights are engaged by the defendant's threatened use of private information relating to the claimant's sexual life. This is particularly so bearing in mind the existence of the clandestinely recorded video footage of a BDSM [bondage, discipline and sadomasochism] session involving the claimant, which appears still to be in the defendant's possession. The claimant clearly has a

reasonable expectation of privacy in relation to his sexual behaviour. Any publication of visual images relating to his sexual behaviour would clearly be a further intrusion into those rights.'

23. I say more about the Defendant's arguments that the Claimant did not have a reasonable expectation of privacy in the information which he wishes to protect in the Confidential Annex to this judgment. It is sufficient to say that I reject the Defendant's arguments and conclude that there are no reasonable grounds for the Defendant to dispute that the Claimant had a reasonable expectation of privacy in the information which he wishes to protect.

Misuse of Private Information: balancing competing rights

24. This is the second stage of the analysis which is required when considering a claim for the protection of private information, see for instance *McKennit v Ash* [2008] QB 73 at [11] and the articulation of the relevant principles by the Supreme Court in *PJS v News Group Newspapers Ltd.* [2016] AC 1081 at [20].

25. As to this Murray J. said the following when considering the application for an interim injunction,

> '[22]
>
> ii) It is not clear, in fact, that the defendant has Article 10 rights in relation to the information he possesses concerning the claimant's sexual behaviour, disclosure of which would contribute nothing to any debate of general interest in a democratic society: *Von Hannover v Germany* [2004] EMLR 21 (European Court of Human Rights) at [76] ....
>
> iii) Lord Mance doubted in *PJS* (*PJS v News Group Newspapers Ltd* [2016] UKSC 26, [2016] AC 1081) whether the mere reporting of sexual encounters of someone, however well known to the public, would even fall within the freedom of expression under Article 10: *PJS* at [24]. The *PJS* case concerned celebrities. Where, as in this case, the claimant is a private individual, who is not a public figure, the argument is even stronger that information about his private sexual activities does not engage Article 10.
>
> iv) Assuming for the sake of argument that the defendant's Article 10 rights are engaged, which is doubtful for the reasons I have given, I have no hesitation in concluding that the claimant's Article 8 rights would far outweigh them.
>
> 23. The foregoing reasons are sufficient to grant the non-disclosure order sought, but when one adds the prima facie evidence that the defendant was blackmailing the claimant, the case for the injunction is, in my judgment, overwhelming. At the hearing before me, the defendant denied that he had blackmailed the claimant, but he appeared to accept the suggestion that I made to him that, given the evidence, it might appear to a third party as though that was what he intended to do. He indicated that when the matter came to trial, he intended to contest any suggestion that he was blackmailing the claimant. Based on the evidence I reviewed, I am satisfied that there is a strong prima facie case that the defendant was, in fact,

blackmailing the claimant, resulting in the claimant making a number of very substantial payments to him over a period of years.

24. Two recent cases, *LJY v Persons Unknown* [2017] EWHC 3230 (QB) (Warby J) at [2], [29]-[30] and *NPV v QEL* [2018] EWHC 703 (QB) (Nicklin J.) at [26] provide authority for the proposition that the presence of a prima facie case of blackmail based on private information strengthens a claim for a privacy injunction in relation to that private information.'

26. As I have said, before me LAR denied, as he had before Murray J., that he had blackmailed the Claimant. He submitted that such payments as he had received were for BDSM services or repayment of loans. In considering the evidence in this connection (and, indeed, the whole of the Claimant's application for summary judgment) I had regard to the following points in particular:

i) I was hearing an application for summary judgment (and to strike out the Defence). Such an application is conducted on the basis of written evidence. At times LAR gave the impression that he wished to subject himself to oral questioning, but that is not the way that such applications proceed. They do not become 'mini-trials' (see for instance *Swain v Hillman* [2001] 1 All ER 91), even on the written evidence, still less with the aid of cross examination.

ii) Blackmail is, of course a criminal offence. By s.21(1) of Theft Act 1968,

> '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) the use of menaces is a proper means of reinforcing the demand.'

iii) Nonetheless, these are civil proceedings and the common standard of proof will apply at trial i.e. the balance of probabilities. It is not the criminal standard where the court must be 'sure' that the elements of the offence have been proved.

iv) But at this stage I am not applying the balance of probabilities test: I have to consider whether the defendant has a 'real prospect' of successfully defending the claim. As Lord Hobhouse said in *Three Rivers DC v Bank of England (No.3)* [2001] 2 All ER 513,

> 'The criterion which the judge has to apply under CPR Part 24 is not one of probability; it is absence of reality.'

v) At the same time, the defence must be more than merely arguable – see *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].

vi) As the White Book says the burden of proof rests on the applicant for summary judgment (here the Claimant) to establish that the Defendant has no real prospect of successfully defending the claim and that there is no other compelling reason for a trial, but if the claimant adduces credible evidence to satisfy those two criteria, then an evidential burden passes to the defendant to show that the

defence does have a real prospect of success or that there is some other compelling reason why there should be a trial.

vii) In deciding whether there is no compelling reason for a trial, it is not sufficient for the defendant to rely, like Mr Micawber, on the hope that something will turn up. At the same time, I should adopt a realistic approach as to whether the evidence might look different when tested by cross examination or when the remaining stages of pre-trial preparation (such as disclosure) have been completed – see for instance *Royal Brompton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550.

viii) Murray J. had been considering an application for an interim injunction which would have impinged on the Defendant's freedom of expression. As Murray J. acknowledged, that meant he had to consider whether, at trial, the Claimant was likely to succeed in being granted injunctive relief (see Human Rights Act 1998 s.12(3)) and, in turn, that meant that, on the balance of probabilities, the Claimant was more likely to succeed than not (see *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253). His decision to grant the interim injunction has to be seen in that light. However, of course, there is before me more evidence than there was before Murray J.

27. I say more about the balancing of the competing rights in the Confidential Annex, but my conclusion is that the balance comes firmly down in the Claimant's favour

The Claim in harassment

28. The Protection from Harassment Act 1997 prohibits harassment which it defines in s. 1(1) as,

> 'a course of conduct—
>
> (a) which amounts to harassment of another, and
>
> (b) which he knows or ought to know amounts to harassment of the other.'

29. Section 1(2) of the 1997 Act says,

> 'For the purposes of this section, the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.'

30. Section 3 of the 1997 Act makes it clear that there is a civil remedy for harassment.

31. There is a partial definition of harassment in s.7 of the 1997 Act. Harassment includes causing the person concerned alarm or distress. The courts have elaborated that harassment requires conduct that is oppressive and unacceptable. To cross the boundary from the regrettable to the unacceptable, the gravity of the misconduct must be of an order which would sustain criminal liability under section 2 of the 1997 Act - see *Majrowski v Guy's and St Thomas' NHS Trust* [2007] 1 AC 224 at [30]. It is clear that threatened publication is capable of amounting to harassment (*LJY v Persons Unknown* [2017] EWHC 3230 (QB) at [33] onwards). By s.7(2) the 'course of conduct' must

include at least two instances. By s.1(3) there is no offence and no civil remedy if the course of conduct was reasonable in the particular circumstances.

32. As to the claim in harassment, Murray J. said,

> '[25] The claimant also seeks protection against harassment by the defendant. I am satisfied that the same behaviour of the defendant that gives rise to a prima facie case of blackmail is also a course of conduct amounting to harassment within the meaning of section 1(2) of the Protection from Harassment Act 1997 ("the 1997 Act") and that no apparent defence arises under s.1(3) of the 1997 Act. Warby J noted in *LJY* [see above] at [33]-[37] that repeated threats to publish private information amounting to a course of conduct could amount to harassment, provided that it is calculated to cause alarm or distress and is oppressive and that it is unacceptable to a degree that would sustain criminal liability. I conclude that those criteria are satisfied prima facie in this case on the basis of the defendant's course of conduct in his communications with the claimant, which have persisted despite contractual undertakings given by the defendant on at least three occasions and despite substantial payments having been made to him in exchange for those undertakings.
>
> [26] I am also satisfied that the claimant has established a prima facie case that he has suffered severe anxiety and distress as a result of the defendant's behaviour, and that the defendant has been aware of this for a period of years.'

33. As to the further evidence before me, I can add in this open judgment:

i) The Defendant has produced no evidence that he lent any money to the Claimant of which the payments by the Claimant were repayments of such loans. So far as the Defendant offers this as an explanation for moneys received by him from the Claimant, I am confident that it has no reasonable evidential basis.

ii) The Claimant has said that the moneys he provided to the Defendant were exclusive of the payments he made for BDSM services. So far as the Defendant has alleged that they were payments for such services, his Defence is so lacking in particulars that I consider it has no realistic prospect of success.

iii) I agree with Murray J. that, as at the date of the interim injunction application, the evidence was strong that the Defendant has suffered considerable anxiety and distress as a result of the Defendant's actions. Nothing in the Defendant's evidence rebuts that evidence. On the contrary, the evidence shows that subsequent to September 2019 the Defendant's conduct has been further calculated to cause the Claimant alarm and distress. The Defendant has no realistic prospect of defending the claim that what he subjected the Claimant to amounted to harassment.

iv) Murray J. considered that there was a strong prima facie case that the Defendant would not have a defence under s.1(3) of the 1997 Act. I go further: in my judgment the Defendant has no realistic prospect of succeeding by reference to that subsection.

v) If anything, the events subsequent to the grant of the interim injunction have shown that the Defendant remains aggrieved by what he perceives as the broadcaster's wrongs against him and the risk of him continuing to harass the Claimant remains very real.

34. I say more in the Confidential Annex.

Conclusion

35. Had the issue of whether the Defendant blackmailed the Claimant been critical to the Claimant's application, I would have considered that there was 'some other compelling reason why the case should go to trial.' While, on the material presently before me I do not consider that the Defendant's response to that allegation has a realistic prospect of success, I recognise that the situation could possibly look different after oral evidence had been given. But I have concluded that it is not necessary for me to reach a conclusion adverse to the Defendant on that issue. Even setting aside the evidence of blackmail, the Defendant has no realistic prospect of defending the claims either for misuse of private information or for harassment and, the issue of blackmail aside, there is no other compelling reason why the case should go to trial.

36. I will therefore grant the Claimant summary judgment on the claim and grant a permanent injunction.

37. The Claimant has not sought damages or repayment of any of the moneys which the Defendant has received.