Neutral Citation Number: [2012] EWHC 3151 (QB)

Case No: HQ12D04321

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/11/2012

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

- -

Between :

APW	**Claimant**
- and -	
WPA	**Defendant**

- -
- -

Hugh Tomlinson QC & Lorna Skinner (instructed by **Mischcon de Reya**) for the **Claimant**
Matthew Nicklin (instructed by **Carter Ruck**) for the **Defendant**

Hearing date: 6 November 2012

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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.

Michael Tugendhat

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THE HONOURABLE MR JUSTICE TUGENDHAT

Mr Justice Tugendhat :

1. This judgment is given on the return date of an order made on 16 October 2012 when Roderick Evans J accepted undertakings from Defendant in the form of an agreed order. The undertakings were offered without prejudice to Defendant's right to seek to vary or discharge the undertakings, but he did not in fact make such an application.

2. The hearing was in private. This is a public judgment. In order that the judgment should be available to the public immediately, I have omitted from it information which might lead to the identification of the parties. I delivered a draft of this judgment to the parties at the end of the day of the hearing. This is the final form of that judgment, following editorial corrections.

3. The Claimant is a woman aged within a few years of 30. The Defendant is a man with whom she was in a relationship for some time until this summer, when the relationship came to an end.

4. The Claimant is well to do, and is known to many members of the public from appearances by her, and references to her, in the news media.

5. At the hearing before me the Defendant did not offer undertakings. The Claimant asks for injunctions to restrain what she claims is a threat by the Defendant to harass her and to publish private and confidential information about her. The Defendant submits that there is no threat such as to justify an injunction. He is not threatening or intending to do what the Claimant alleges.

6. Although an injunction to restrain disclosure of private information commonly engages the Convention right of freedom of expression (Art 10), that right is not engaged in the present case, since the Defendant's case is that he is not threatening or intending to publish the information in question. The parties agree that the approach of the court is not governed by the Human Rights Act s.12, but by the general principle applicable to interim injunctions.

7. The general principle to be applied in an application for interim injunctions is to be found in the *American Cyanamid* case discussed in the White Book Vol 2 para 15-7 and following. There are three basic questions: (1) Is there a serious question to be tried? If the answer to that question is "Yes" then (2) Would damages be an adequate remedy for a party injured by the court's grant of, or its failure to grant, an injunction? (3) If not, where does the "balance of convenience" lie?

8. The information the publication of which the Claimant asks to be restrained is listed by her in a Confidential Schedule to the order of 16 October. As to most of the items, there is no dispute that these are kinds of information of a private nature that it would unlawful for the Defendant, or anyone else, to publish. This court commonly grants injunctions to restrain publication of information of this kind. There is an issue as to some items of information, which I do not need to resolve.

9. To support her application for an injunction to restrain harassment the Claimant relies on past acts, which she submits demonstrate that there is a sufficient risk or threat that similar acts will be repeated in the future, unless restrained by an injunction. There is an issue between the parties as to whether the past acts relied on amounted to

harassment. The past acts are of two kinds. One kind is text messages or e-mails. The other is occasions when the Defendant came near to, or into, restaurants (or in one case a hotel) which the Claimant had been in the habit of frequenting, and at which, on three occasions, she was actually present when the Defendant approached. The Claimant characterises these as the Defendant stalking her.

10. So far as relevant the Protection from Harassment Act 1997 provides:

> "1 (1) A person must not pursue 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…
>
> (2) The person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to or involved harassment of the other.
>
> (3) Subsection (1) … does not apply to a course of conduct if the person who pursued it shows – … (c) that in the particular circumstances the pursuit of the course of conduct was reasonable. …
>
> 2 (1) A person who pursues a course of conduct in breach of section 1 is guilty of an offence…
>
> 3 (1) An actual or apprehended breach of Section 1 may be the subject of a claim in civil proceedings by the person who is or may be the victim of the course of conduct in question…
>
> 7(2) References to harassing a person include alarming the person or causing the person distress.
>
> (3) A 'course of conduct' must involve – (a) in the case of conduct in relation to a single person conduct on at least two occasions in relation to that person.…
>
> (4) "Conduct" includes speech".

11. In *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233, [2002] EMLR 4 Lord Phillips MR said at para [30]:

> "The Act does not attempt to define the type of conduct that is capable of constituting harassment. "Harassment" is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in section 7 and which is oppressive and unreasonable. The practice of stalking is a prime example of such conduct."

12. The 1997 Act also creates a criminal offence. So the conduct in question must be serious enough to attract the sanction of the criminal law.

The facts

13. A brief outline of events relating to, and following, the break-up of the relationship between the parties is as follows. In July the Claimant came to learn of information about the Defendant ("the Defendant's Information"). This is information of a private nature that it would normally be unlawful for anyone to publish. The part of the Defendant's life to which this information relates is the same as the part of the Claimant's life to which some of the information relates which is the subject of her application to the court.

14. There is no dispute that Claimant told the Defendant that the relationship was over and she did not want anything further to do with him. She told him this at least twice in July. He did not accept this was final. He sent her a number of texts or e-mails during the remainder of July and up to and including one on 6 October. On 1 October her solicitors had written asking him to desist, and the one on 6 October was the only one sent after that request.

15. The Claimant did not keep copies of any of the messages sent before 1 September. But she did keep copies of 22 messages that he sent to her in September and the one sent in October.

16. He sent messages on each of 1 and 7 September. The gist of these is that he still loved her and missed her. The Claimant makes no specific comment about these in her witness statement. Nothing turns on the messages sent before that.

17. He sent 11 messages on 9 September, numbers 3 to 13. In the first of these, number 3, he asked for a meeting to talk with her. There is a reference to a possible meeting in a public place or restaurant. This could reasonably be understood as a threat to accost her in such a place without prior arrangement, if she did not agree to a meeting, and to discuss private matters in public. That is how the Claimant says she understood it. She states in her witness statement that she was "extremely concerned" by this, but she continued to ignore his messages, as she had done since she had last spoken to him in July.

18. In the next two messages of 9 September, numbers 4 and 5, he asked for a meeting, but there is no suggestion that this might be in a public place or without prior arrangement. In message number 6 the gist is that he still loved her. The Claimant makes no specific comment about these in her witness statement.

19. By the time he sent message number 7 he had learnt that she had been on a date with a friend of his. In messages number 8 to number 13 he expresses anger that she had done this. The messages are short, and contain no threats. The Claimant states that these messages caused her "particular concern and distress".

20. On the 10 September there were two messages, numbers 14 and 15. In these he states that he is "sorry for yesterday" and still loves her. On 17 September he wrote one message, number 16, in which he again says he still loves her. The Claimant makes no specific comment in her witness statement about these three messages.

21. On 22 September the Defendant sent two messages. The first, number 17, is obscure, and the Claimant makes no comment about it in her witness statement. The second,

number 18, is a quotation from a Blackberry messenger status (that is the message which her Blackberry messenger friends see when they converse with her). The Claimant states that she has about 20 such friends. By this time the Defendant was not a Blackberry messenger friend of the Claimant. But they had a number of mutual friends, and one of those passed on the message to the Defendant, who was thus able to forward it back to the Claimant. From its content it is obviously addressed to the Defendant. The term by which she addresses the Defendant in that message is a crude reference to the Defendant's Information, which, when she learnt of it, had led her to break up with him.

22. The Claimant says this about that message:

> "I only kept that quote as my status for a brief period and it was not a message I wanted published widely. It was a petulant and childish thing to do, but I wanted my close friends – some of whom are also friends of the Defendant – to know how upset and frustrated I was. I regret it now, and will not repeat this or any similar behaviour. It is clear that one of our mutual friends told the Defendant about the status … I deleted it that same day".

23. Shortly after this, a third party made available to a wide section of the public a report of conversations with the Claimant. One of these conversations had taken place in early August, after the break-up of her relationship with the Defendant. The third party made public what the Claimant had said in the August conversation. What is made public includes the Defendant's Information, and what Claimant had said about her reaction to learning that information. The Claimant immediately sent a message to her friends drawing their attention to what the third party had made available, saying she "love[d]" it.

24. On 24 September the Defendant sent three messages. In the first and second, messages 19 and 20, which were sent at 09.44 and 10.55, he queried why she had done this. Referring to what the third party had made available to the public of a conversation with the Claimant, including the Defendant's Information, he threatened to publish information concerning the Claimant of the kinds listed in the Confidential Schedule (that is the information in respect of which the Claimant now asks for an injunction). In the third message that day, number 21, sent just under an hour after message 20, he retracted this threat, saying he would never talk.

25. Commenting on this the Claimant states:

> "Whilst the third message appeared to take back the threats in the first two, I was very concerned by how volatile and emotional the Defendant appeared to be and about what he might do next". She understood him to have said that people were encouraging him to talk about me and to disclose information about me to the media".

26. On 28 September the Defendant sent one message to the Claimant, number 22. The Claimant states that this attached a photograph of them together. She states that she found it to be "the most disturbing and obsessive messages". She was particularly

distressed that the message expressed a determination to see her, or to speak to her, again "if it's the last thing I do".

27. It was following that message that the Claimant instructed solicitors to write to the Defendant on 1 October, as they did, asking for undertakings.

28. The Claimant has one or more personal assistants, and goes about accompanied by security guards.

29. On 3 October an incident occurred. An assistant had borrowed the phone of a make-up artist to call the Defendant to communicate to him a request from the Claimant that he return a number of valuable items which the Claimant had bought for him. The assistant gave her name. The Defendant did not answer. But later that evening he called back more than once. The owner of the phone did not recognise the number, but eventually he picked up the phone, and passed it to the assistant. There were then further calls. The communications ended with the Defendant sending a message: "U are fucking with the wrong people I will get a trace on your fone and have u paid a visit soon". The Defendant explains that he thought that the calls purporting to come from the Claimant's assistant were a scam.

30. On 4 October solicitors for the Defendant replied to the Claimant's solicitors. They complained that the Claimant had made no effort to prevent breaches of the Defendant's privacy, but that the Defendant had no intention of publishing anything concerning the Claimant. They said he agreed that he would not send the Claimant any further messages and would not confront her should he see her in a public place. They requested an undertaking from the Claimant that she would not publicise details of the Defendant's private life, and identified aspects of the Defendant's Information in particular.

31. On the same day the Claimant's solicitors replied. They complained of the message left on the phone of the make-up artist the previous day.

32. There then followed incidents on the weekend of Friday 5 October to Sunday 7 October. On the Friday evening the Claimant was dining with her father at a restaurant. The security guards identified the Defendant's car as apparently approaching the restaurant. They caused her to be, in her word, "evacuated" from the restaurant.

33. On the Saturday evening the Claimant states that she had arranged to go to a second restaurant. It is common ground that the Defendant arrived at the restaurant with a friend. She did not see him, but someone else did, and the manager asked the Defendant to go elsewhere, which he did. As he left he sent the 23rd and last of his text messages which read: "I will leave… don't worry enjoy your night".

34. On the Sunday the Claimant made it known publicly that she would be dining at a third restaurant. The Defendant arrived at that restaurant with a friend. The Claimant states:

> "In order to ensure my safety, my security personnel evacuated me through the kitchen staff entrance".

35. The Claimant accepts that in relation to the third restaurant, the fact she had publicly announced where she was going to dine provides a plausible explanation for his legitimately knowing her whereabouts, but states that she did not know how he could have known her whereabouts on the other two evenings. The Defendant states that he did not know her whereabouts on any of these occasions, and that these were locations which he, as well as she, had been accustomed to frequent. So the fact that he was near her at the times that he was near her was a co-incidence.

36. The Claimant then makes reference to incidents in the past which she refers to as a "history of violence".

37. On 9 October the Defendant's solicitors wrote that the Defendant had destroyed certain photographs which the Claimant had referred to. They said that they would provide "mutual undertakings".

38. In a further letter of 9 October the Claimant's solicitors wrote describing the incidents over the weekend, saying they were suggestive of harassment, and strongly suggested that the Defendant had unlawfully obtained private information about the Claimant's movements. They said "your client turned up at restaurants where our client was present". That was an error in relation to the Friday. Her case is not that he entered the restaurant, but that his car appeared to be approaching it.

39. On 10 October the Defendant's solicitors wrote a letter with his explanation of each of the matters complained of. They said that on the Friday evening the Defendant "did not 'turn up' at a restaurant …" They also said that the Defendant was at home all night that night. Subsequently the Defendant has stated that he did go out that night in the car to fetch a take away. The Defendant's solicitors again wrote that they would provide draft undertakings.

40. On 11 October the Claimant's solicitors wrote setting a deadline for the undertakings at 6pm on Friday 12 October. On 12 October the Defendant's solicitors wrote that they could not meet that deadline.

41. On 15 October the Claimant's solicitors wrote complaining of an incident at another restaurant where the Defendant arrived at some time before the Claimant was due to arrive.

42. No form of undertaking was provided by the Defendant's solicitors. On 16 October the Claimant made her application to the interim applications court, and the order was made as set out in Paragraph 1 above.

Discussion

43. The Claimant has shown a good arguable case that she was distressed by those messages which she identifies as having distressed her. I also accept that the sending of such messages is arguably a course of conduct amounting to harassment within the meaning of the Act. I stress the words "arguably" and that her case is sufficient to satisfy the first question that has to be considered.

44. I also accept that there is a sufficiently arguable case that a court could infer that the three incidents over the weekend of 5 to 7 October were not co-incidences. I make no finding on disputed evidence.

45. But I do not accept that, even if the Defendant was going to restaurants where he knew the Claimant to be present, that would amount to harassment within the meaning of the Act. There is no evidence that the Defendant has committed or threatened any violence or confrontation in a restaurant or similar public place, whether with the Claimant, or anyone else.

46. Where a couple have broken up, one party to the relationship cannot complain that the other party simply goes to restaurants or other public places where the first one is, or may be, present, but then leaves immediately when requested to do so. I make no finding that the Defendant was in fact under any legal obligation to leave when requested, but record that it is the Claimant's case that that is what he in fact did.

47. As to the text messages which did distress the Claimant, I find that the context in which they were sent is significant as to there being any risk or threat of repetition. The fact that the Defendant wrote what he did on 24 September, following the events of the previous two days, gives rise to no inference that he would repeat such messages in any other circumstances.

48. If no injunction is granted, and if the Defendant does in the future commit an act amounting to harassment, then he will face a remedy in damages for what he has done. There may then also be a further application for an injunction on the basis of evidence as it is at that time. I do not say that damages are an adequate remedy for harassment that has occurred, although it is in some cases the only remedy available. But the fact that damages could and would be awarded if the Defendant were to commit such an act in the future seems to me to be sufficient protection for the Claimant's interests as matters stand today.

49. In any event, and whether or not the Defendant's conduct in going to the restaurants on the weekend of 5 to 7 October was stalking, it does not follow that an injunction is a necessary or proportionate measure as at the date of this hearing. In my judgment, for the court to grant an injunction against the Defendant in the circumstances of the present case, as they appear on the evidence before the court today, would be excessive and disproportionate.

50. I repeat that I make no findings of fact on disputed evidence. And I make no findings as to whether or not an injunction would have been granted by the court on 16 October on the evidence as it then stood.

51. For these reasons this application will be dismissed.