



Neutral Citation Number: [2021] EWHC 475 (QB)

Case No: QB-2021-000715

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 March 2021

Before :

THE HONOURABLE MR JUSTICE MORRIS

Between :

COS

Claimant

- and -

(1) PER
(2) PHO

Defendants

Victoria Simon-Shore (instructed by Sternberg Reed Solicitors) for the **Claimant**
The Defendants did not appear

Hearing dates Friday 26 February 2021

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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Approved Judgment**Mr Justice Morris :**

1. Very late in the evening on 26 February 2021, on the Claimant's application made out of hours, I granted an injunction to restrain the Defendants from publishing private information and other information detrimental to the Claimant and ordering them to remove a particular video from the internet.
2. At the end of the hearing I indicated that I would provide a short judgment in open court to provide a brief public account of my conclusions. This is that judgment.
3. The case concerns a private sexual relationship between the Claimant and the First Defendant facts about which the Second Defendant has disclosed and further, more significantly intimate, details of that relationship which she is threatening to disclose. The Claimant's causes of action are breach of her Article 8 ECHR rights of privacy and harassment contrary to section 1(1) Protection from Harassment Act 1997.
4. The information that the Claimant seeks to protect was identified in a confidential schedule to the order I made. I do not set out that information in full here in order to maintain the privacy of that information. However in general terms the order protected the following:
 - (1) Any information or purported information concerning:
 - (i) the nature and details of the Claimant's relationship with the First Defendant, including significant personal matters which arose in the context of that relationship;
 - (ii) the private communications exchanged between the Claimant and the First Defendant, including all text messages and voice recordings; and
 - (iii) photographs and any other images of the Claimant taken without her religious attire.
 - (2) Any information liable to or which might lead to the identification of the Claimant (whether directly or indirectly) as the subject of the proceedings or the material referred to above, including the fact that she has commenced these proceedings or made the application.
5. The injunction was subject to the proviso in paragraph 11 of the order that:

"nothing in this Order shall prevent the Defendants from publishing, communicating or disclosing such of the Information, or any part of it, as was already in, or that subsequently comes into, the public domain in England and Wales (other than as a result of breach of this Order or a publication of the [video])."
6. The Claimant's relationship with the First Defendant and the private communications arose, and photographs were taken, in circumstances where the Claimant has a strong basis for submitting that she has a reasonable expectation of privacy. The evidence of

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the Claimant is that no permission was sought or given either for the disclosure of the details of the relationship or of the private communications.

7. No notice of the application was given in advance to the Defendants and the Defendants were not present or represented. I was satisfied, in accordance with section 12(2)(b) Human Rights Act 1998, that there were compelling reasons why the Defendants should not be notified. There was a real risk that notification would have resulted in the publication which these proceedings have been brought to prevent, in particular the publication of the highly sensitive information relating to the relationship between the Claimant and the First Defendant. The Claimant presented evidence of very recent threats which appear to have been made by the Second Defendant imminently to publish that information and indeed further information was received in the course of Friday afternoon that that information had been disseminated to at least one person.
8. I was satisfied at the outset of the hearing to direct that the hearing be held in private, pursuant to CPR 39.2 and further to direct that the identity of the parties and the action be anonymized. Disclosure of the parties' names would undermine the very purpose of the application, in that it would destroy the privacy of the information sought to be protected and potentially bring to the attention of those who know the Claimant the information in issue. It also has the advantage of allowing me to explain in this public judgement more of the circumstances than would otherwise be the case. I decided that it was appropriate to sit in private because the private material or some of it has already been published in the video. It would follow that if the details of the case were reported there would be a real prospect that the third parties who had already viewed the video in question would link its contents to material referred to in open court and identify the parties including the Claimant.
9. Having heard the argument in private, I concluded that the Claimant should be granted the injunction she seeks until the return date of an application notice on Monday 8 March.
10. As regards the legal principles relevant to the grant of an interim non-disclosure order in circumstances such as the present, the following principles fall to be applied:
 - (1) Section 12(3) Human Rights Act 1998 provides that an applicant for an interim injunction of this kind must satisfy the court that he or she is likely to succeed at trial in establishing that the publication should not be allowed. The contents of this criterion is authoritatively stated in the speech of Lord Nicholls in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 at §§12-23 and, for present purposes, in particular at §§17 and 20-22 as to the degree of likelihood. Likely means "more likely than not". Ordinarily the applicant must show that he will *probably* succeed at trial. However the approach is to be flexible. In particular circumstances a degree of likelihood lower than "more likely than not" suffices. Those circumstances include (a) where the potential adverse consequences of disclosure are particularly great and (b) where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending trial.
 - (2) In a case (as the present case) of misuse of private information, the claimant must establish that he has a reasonable expectation of privacy in respect of the

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information at issue. Sexual activity is a classic instance of information in respect of which there is a reasonable expectation of privacy.

- (3) If a reasonable expectation of privacy is established, the court must then consider how the balance between privacy under Article 8 ECHR and freedom of expression under Article 10 ECHR should be struck; neither Article has precedence over the other; there must be an intense focus on the comparative importance of the rights in the individual case; the justifications for interfering with each right must be taken into account; and the proportionality test must be applied to each right. In this “ultimate balancing test” other rights fall to be considered including “the right of the *defendant* to speak to others about their own life” arising under Article 8. The Court must consider whether it is likely that at trial the court would find an injunction to be necessary and proportionate to protect the claimant’s reasonable expectation of privacy.
 - (4) Despite the requirement to balance each party’s competing rights, ultimately the burden rests on the applicant to satisfy the requirements of s.12(3).
11. Applying those principles to the present case, as regards section 12(3), I considered that the Claimant is likely to establish that publication of the information should not be allowed; and that she will probably succeed at trial. On the information before me there is no real likelihood of the Defendants being able to succeed in, or even to advance, an argument that it is or would be in the public interest for the material to be published. There is a strong argument that the Article 8 rights of the Claimants are engaged and that the arguments in support of any rights of the Defendants under Article 10 are very weak. In any event, I considered that this is a case where a degree of likelihood lower than this standard suffices. In the present case, both of the circumstances identified at §22 in *Cream Holdings* apply, in view of the imminence of the threat to publish and the evidence at paragraphs 84 and 91 of the Claimant’s witness statement of the very serious consequences which would flow from publication.
12. On the uncontradicted evidence before me as at 26 February, I formed the view that the Claimant has, at least, a good prospect of obtaining a permanent injunction at trial. The information is such that she is entitled to a reasonable expectation of privacy. Ms Simon-Shore drew to my attention possible arguments that might be put forward by the First and/or Second Defendants to justify publication. However, at present I do not see that they give rise to any countervailing argument that the Article 10 rights of the Defendants should prevail. Thus at the present stage of the proceedings the balance falls to be struck in favour of the protection of the Article 8 rights of the Claimant. That question will be open to review both at the return date and at any trial.
13. Thus, applying the flexible approach to section 12(3) to the short lived injunction sought I am satisfied that the Claimant’s prospects of success at trial are sufficiently strong to warrant the grant of the interim injunction in the terms sought.
14. Finally, this morning a further, third, witness statement from the Claimant dated 2 March 2021 was drawn to my attention. The contents of that witness statement may be relevant at any further hearing in relation to this matter. However as it was not before me at the time that I granted the out of hours injunction on Friday evening, it is not relevant to the reasons for my decision.