Dangerous liaison – injunction granted to enforce NDA

The High Court has granted an injunction to a "wealthy and well-known businessman" to stop a woman from disclosing the fact of their short affair, an allegation that he gave her two sexually transmitted diseases and various details of their legal dispute.[1]

The court considered an interim injunction clearly appropriate in this case, because the claimant had a reasonable expectation of privacy in relation to the details of the affair. There was also credible evidence of blackmail, and the parties had entered into a freely negotiated non-disclosure agreement. An anonymity order was also justified, as was hearing the application in private and permitting it to be made without notice to the defendant.

Application for injunction

The claimant, "Mr J", gave evidence in his application that he was married, and that, when he ended his affair with the defendant, "Ms O", she engaged in a campaign of harassment. She denied harassment and instructed a US attorney, through whom she alleged that Mr J had infected her with two sexually transmitted diseases. While indicating his client's willingness to settle, the US attorney referred to the possibility of US proceedings, adding that American juries "take great offense at this behaviour".

Mr J vehemently denied infecting Ms O and sought, through his lawyers, to exchange medical records to support his denial. Ms O then issued proceedings in the USA, but without any details of her case. Meanwhile, Mr J issued a claim in London. Discussions between the parties' lawyers ensued, during which the defendant's attorney said that she needed to be paid off with a significant seven-figure settlement, or else she would file details of her complaint in the USA. Ms O's attorney indicated that he had no interest in discussing the sharing of medical records.

Mr J's evidence was that he felt he had no option other than to agree to Ms O's demands. He agreed to pay $1.5 million to secure her silence. Under the settlement agreement, Ms O agreed to maintain the confidentiality of the existence of any personal relationship with Mr J, details of the affair, the allegation of infection and the legal dispute. Mr J would pay Ms O $1.5 million in three instalments, to be forfeited if she breached (or threatened to breach) confidentiality.

The settlement agreement provided for any dispute as to whether there had been an actual or threatened breach to be referred for confidential arbitration, but made it clear that Mr J had the right to seek injunctive relief arising from any breach of the confidentiality obligations under the agreement, and, in the event of such a breach, Ms O consented to "the granting of a temporary and permanent injunction by any court of competent jurisdiction including but not limited to the High Court in England".

In April 2019, Mr J received information from a mutual acquaintance, "Ms X", that she knew about the settlement agreement and the payment of money to Ms O. Ms X provided Mr J with copies of WhatsApp messages between her and Ms O, which included photographs of Mr J with Ms O. Further, Ms X told Mr J that Ms O had repeatedly disparaged him and had stalked him and his family.

In an effort to show that there had been no breach, Ms O agreed to submit her phone for examination. But examination by an independent forensic expert indicated otherwise, and Mr J demanded repayment of the $1 million that had so far been paid to Ms O in accordance with the settlement agreement. She responded by alleging breaches of her rights under the General Data Protection Regulation, asserting

[1] *SOJ v JAO* [2019] EWHC 2569 (QB) (4 October 2019).

that the scope of the instructions given to the forensic expert had been "wildly improper", and that Mr J and his lawyers "got carried away and ignored the GDPR".

Mr J's lawyers robustly dismissed the suggestion of any breach, pointing out that Ms O had expressly consented to the examination of her phone.

The parties' lawyers then discussed whether they might be able to settle matters, with Mr J's lawyers providing a draft of the complaint that they were preparing to refer to arbitration. Both parties agreed that neither would file for a further week, but during that period Ms O's attorney then threatened further proceedings. It was at this point that Mr J applied for an interim injunction.

Derogations from the principle of open justice

There are three derogations to note in this context:

(a) *Anonymity* – The court must order anonymity if it considers this to be necessary to secure the proper administration of justice and to protect the interests of one or more parties to proceedings.[2] In this case, the judge had no hesitation in continuing an earlier anonymity order, on the bases that: (i) disclosure of the parties' names would defeat the purpose of the application, as it would destroy the privacy of the information sought to be protected; (ii) non-disclosure was necessary to protect both parties' interests (as, on the evidence, the claimant, "Mr J", might be the victim of blackmail, and refusing anonymity would deny him a potential judicial remedy for such wrong, and equally anonymity was necessary to protect interests of the respondent, "Ms O", who had been accused of blackmail, but not yet afforded the opportunity to put her side of the case); and (iii) anonymity would allow the court to explain rather more of the circumstances of the case in a public judgment.

(b) *Sitting in private* – The general rule is that hearings are held in public.[3] Yet a hearing must be held in private if the court is satisfied that it is necessary to secure the proper administration of justice and publicity would defeat the object of the hearing, and/or if the hearing involves confidential information and publicity would damage that confidentiality.[4] In deciding whether to hold a hearing in private, the court must consider any right to freedom of expression that may be affected.[5] In this case, the court was satisfied that it was necessary to sit in private to secure the proper administration of justice, and that publicity would defeat the object of the hearing, and that the case concerned confidential information that would be damaged by publicity. Even if it were possible to deal with such concerns through anonymity and extra care in court, the judge considered that the allegations of blackmail warranted a private hearing at the without-notice stage.

(c) *Service* – The general rule is that respondents to applications should be given proper notice.[6] But applications may be made without notice where there are "good reasons".[7] Where the relief sought may affect the exercise of the right to freedom of expression, section 12(2) of the Human

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[2] CPR rule 39.2(4).

[3] CPR rule 39.2(1).

[4] CPR rule 39.2(3)(a), (c) and (g).

[5] CPR rule 39.2(2).

[6] CPR rule 23.7(3).

[7] CPR rule 25.3(1).

Rights Act 1998 requires the court to be satisfied that there are compelling reasons for the respondent not to be notified. In this case, the court was satisfied that there were compelling reasons for Ms O not to be notified of the application. On the evidence before the court, threats had been made to disclose confidential information through the issue of proceedings in the USA, and if notice of the application were to be given, there was a real risk that such threat might be carried out in an attempt to deprive the application of any practical utility.

Decision

Mr Justice Pepperall began by observing that privacy and confidentiality cases necessarily involve a balance between the applicant's Article 8 right to privacy and the respondent's Article 10 right to freedom of expression. Such cases require an "intense focus" on the comparative importance of the competing rights. Further, it is not enough to show that there is a serious issue to be tried and, under section 12(3) of the Human Rights Act 1998, the court will not grant relief unless it is satisfied that the applicant is likely to establish that publication should not be allowed. In this context, "likely" means "probably" or "more likely than not" (see *Cream Holdings Ltd v Banerjee*).[8]

The law is nevertheless clear that there is no general public interest in other people's sex lives (see *PJS v News Group Newspapers*).[9] In this case, Mr J had a reasonable expectation of privacy in relation to the details of his affair with Ms O. Notably, Ms O had not claimed any public interest in disclosing the details of their relationship. Their story did not, at least on Mr J's account, involve any criminal offences or especially reprehensible behaviour. Nor did it involve, for example, a relationship between a chief executive or senior public official with a subordinate employee in the same organisation, where it might be said that the relationship was, by its very nature, an abuse of power.

The judge also observed that "the weight that may be attached to an obligation of confidence may be enhanced if it is contained in an express contractual agreement" (see *ABC v Telegraph Media Group Ltd*).[10] In this case, there was a written confidentiality agreement, which had been freely negotiated, and there was no evidence that improper pressure was brought to bear on Ms O. Further, the parties had expressly agreed in the settlement agreement that any breach would be enforceable by injunctive relief.

Also, on Mr J's evidence, there was a credible basis for contending that he had been the victim of blackmail. He had denied that he infected Ms O, and in the judge's view his denial gained some support from his willingness to exchange medical evidence and her apparent reticence to agree to such exchange.

There was also credible evidence before the court that the defendant had committed past breaches of the confidentiality agreement, both in terms of the information obtained from Ms X and the forensic analysis of her mobile phone.

For these reasons, the judge was satisfied that the court was likely to prevent publication at trial. In addition, there was no particular public interest in publication of details of the affair and, all other things being equal, the court should look to enforce the contractual duty of confidence for which the settlement agreement provided. The judge considered it unlikely that Ms O had a claim under the

[8] [2004] UKHL 44.

[9] [2016] AC 1081.

[10] [2018] EWCA Civ 2329.

GDPR, but even if she did, its existence, in his view, was not a reason for denying Mr J injunctive relief pending a return day.

Working through the principles in *American Cyanamid v Ethicon*,[11] the judge was satisfied that Mr J would not be adequately compensated in damages for breach of confidence. While he suspected that Mr J's concerns of significant business harm were overstated, he considered that publication of the confidential information might well cause him and his family "significant embarrassment and upset". On the other hand, it was not obvious that Ms O would suffer any real loss by being unable to breach the settlement agreement.

Mindful that the immediate threat of publication was in the US, the judge was also prepared to grant the injunction on a global basis. Where a threat of publication is made by someone amenable to the court's jurisdiction then the court can restrain such publication anywhere in the world (see *Attorney General v. Barker*[12] and *Linklaters LLP v Mellish*[13]).

Comment

Non-disclosure agreements have recently come under intense scrutiny in the wake of the "me too" movement. Yet in this case, at the stage reached in the proceedings, there was no evidence of criminal conduct or "especially reprehensible behaviour" that might involve an abuse of power. Indeed, the claimant was prepared to meet the defendant's claims head on by disclosing medical records.

There was also credible evidence of blackmail and unchallenged evidence of harassment. One of the reasons was that the defendant was not notified of the application. The claimant's evidence, however, was that, if she were to be so notified, there would be a real risk that she would defeat the purpose of the application by disclosing the confidential information through issuing proceedings in the USA. On that basis, the court was prepared to permit a derogation from the general rule that applications should be made on notice.

Also, the only challenge to the claimant's evidence that the defendant had breached the settlement agreement (evidence that the defendant in fact provided herself) was a dubious argument that the examination of her phone by the claimant's expert somehow breached her rights as a data subject under the GDPR.

Last but not least, the case demonstrates the importance that the courts attach to the need to enforce contractual obligations of confidence where these are "freely entered into, without improper pressure or any other vitiating factor, and with the benefit (where appropriate) of independent legal advice".

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[11] [1975] AC 396.

[12] [1990] 2 All ER 257 (CA).

[13] [2019] EWHC 177 (QB).