Neutral Citation Number: [2019] EWHC 423 (QB)

Case No: QB/2018/000581

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2019

Before :

MR JUSTICE JULIAN KNOWLES

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Between :

(1) TRIAD GROUP PLC **(2) NICHOLAS EDMUND BURROWS** **(3) ALISTAIR MCINTYRE FULTON**	**Claimants**
- and –	
MIRA MAKAR	**Defendant**

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- -

Jacob Dean (instructed by **Freeths LLP**) for the **Claimants**
Reuben Comiskey (instructed by **DMH Stallard LLP**) for the **Trustee in Bankruptcy**
The Defendant did not appear and was not represented

Hearing date: **12 February 2019**

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Judgment Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

The Honourable Mr Justice Julian Knowles:

Introduction

1. At the conclusion of the hearing on 12 February 2019 I granted the Claimants' application for judgment in default of Acknowledgement of Service and Defence in their claim in contract, harassment and defamation against the Defendant, Mira Makar. I said I would give my reasons later, and this I now do.

2. The application was needed because the Claimants sought an injunction restraining the Defendant *inter alia* from making defamatory or harassing statements, and thus a hearing was required (CPR r 12.4(2)(a)). The Claimants asked the Court to grant judgment with damages to be assessed (CPR r 12.5(3)) and to grant injunctive relief in accordance with that sought in the Particulars of Claim (PoC). I granted the relief the Claimants sought, with costs, and an order has been sealed and served on the Defendant by email, post and through her letterbox.

3. CPR 12 PD 5.1 provides that applications for default judgment must be made on notice, however pursuant to CPR 12.11(2) any evidence relied on by a claimant in support of his application for judgment in default need <u>not</u> be served on a party who has failed to file an Acknowledgment of Service. Nevertheless, in this case (and in light of s 12(2) of the Human Rights Act 1998) the Claimants quite properly made efforts not only to give notice of the application to the Defendant, but also to serve on her all the supporting evidence and associated documentation. No indication was received from her that she intended to attend the hearing on 12 February 2019 and the Claimants accordingly asked me to proceed in her absence pursuant to CPR 23.11(1). I granted that application. I was satisfied that the Defendant had had notice of the application and I was satisfied that she had intentionally chosen not to attend.

4. The Defendant is an undischarged bankrupt. Her Trustee in Bankruptcy attended the hearing through counsel but did not make any written or oral submissions.

The test for granting default judgment

5. CPR 12 PD 4.1 provides that on an application for default judgment the court must be satisfied that:

> "(1) the particulars of claim have been served on the Defendant (a certificate of service on the court file will be sufficient evidence),
>
> (2) either the Defendant has not filed an acknowledgment of service or has not filed a defence and that in either case the relevant period for doing so has expired.
>
> (3) the Defendant has not satisfied the claim, and
>
> (4) the Defendant has not returned an admission to the Claimant under rule 14.4 or filed an admission with the court under rule 14.6."

6. CPR 12.11(1) provides that:

> "[w]here the claimant makes an application for a default judgment, judgment shall be such judgment as it appears to the court that the claimant is entitled to on his statement of case."

7. CPR 12.4(2) provides that, where the Defendant is an individual the claimant must provide the Defendant's date of birth, if known, in the evidence in support of the application notice for default judgment. This is given at [19] of the Second Claimant's witness statement.

Summary of the Claimant's case

8. The factual background to this claim is set out at paragraphs 1 – 20 of the PoC and further detail is given the witness statements of the Second Claimant at [41-51] and the Third Claimant at [5-17].

9. Until 2005 the Defendant was a director and the former CEO of the First Claimant (the Company), of which the Second and Third Claimants are current directors. The First Claimant is an IT company offering services to a variety of clients across the private and public sectors. On her departure the Defendant retained a large and valuable shareholding in the Company.

10. The Defendant's departure from the Company was not harmonious, and legal proceedings in the Employment Tribunal were issued. Those proceedings between the Company and the Defendant were compromised in November 2006. As part of the settlement agreement the Defendant agreed (in summary) not to publish disparaging or derogatory statements concerning the Company or any of its officers or employees.

11. Since around 2009 the Defendant has been engaged in a campaign against the Claimants relating to a number of perceived grievances about their conduct. In this claim, for reasons of proportionality, the Claimants confine their specific complaints to the Defendant's conduct since the beginning of 2017.

12. The conduct relied on by the Claimants has four main components:

    a. communications made directly to the Claimants in early 2017;

    b. allegations concerning the Claimants made to third parties beginning in the second half of 2017;

    c. allegations made by the Defendant on numerous postings on Twitter in the latter half of 2018; and

    d. allegations made by the Defendant on the investment information website 'ADFVN' in late 2018 and early 2019 (including since the issue and service of the proceedings).

13. The Defendant's conduct and her statements and publications are described at [40] et seq of the PoC. There are very many. Much of what she has published or otherwise communicated is incoherent, but a lot of it seems to centre on her belief that the Claimants have interfered in her affairs and her shareholding to her financial disadvantage. She has also complained about her bankruptcy. She has made many, many accusations including that the Second and Third Claimants and others have been guilty of dishonesty and criminal offences in respect of her, for example, by dishonestly altering records in relation to her shares. In addition, she has accused the Claimants of behaving in a way which caused physical injury and harm to her mother. Mr Dean told me, and I accept, that his clients found these accusations especially offensive and upsetting.

14. The Claimants' case is that Defendant's conduct throughout this period amounted to a breach of the term of the 2006 settlement agreement summarised above, and also that it amounted to a course of conduct constituting harassment of Second Claimant and Third Claimant, with the harassment being carried out with the intention to persuade the Company to do something that it is not obliged to do, and has included the publication of a series of seriously defamatory allegations of Second Claimant and Third Claimant.

15. The Company sought an injunction requiring the Defendant to comply with her obligations under the 2006 agreement and restraining her from pursuing any course of conduct which amounts to harassment of the Second Claimant or Third Claimant. The Company makes no claim for damages.

16. The Second Claimant and Third Claimant sought injunctions restraining the Defendant from publishing a series of specified defamatory allegations and restraining her from harassing them. They also claimed for damages for libel and harassment, which are subject to assessment following my order.

Service of the pleadings and other documents

17. Pursuant to CPR r 6.17(2) where the Claim Form is served by the claimant and not the Court the claimant must file a certificate of service within 21 days of service of the PoC and may not may not obtain judgment in default unless a certificate of service has been filed. I have seen the certificate of service and I am satisfied that those provisions have been complied with.

18. I am also satisfied that the certificate of service complies with CPR r 6.17(3)(a) in that it states the category of address at which the claimant believes the claim form has been served, namely 'usual residence' pursuant to CPR 6.9(2). The box is ticked stating that the documents were served by personally handing to or leaving them with the Defendant.

19. I am also satisfied that the certificate of service complies with CPR 6.17(3)(b) in stating the date on which the Claim Form was left at the Defendant's usual residence in the Barbican, namely 21 December 2018.

20. Although other methods of service, and means of bringing the proceedings to the attention of the Defendant, were also employed, it is the service evidenced by the certificate on which the Claimants rely and which I am satisfied about.

21. Pursuant to CPR 12 PD 4.1 a compliant certificate of service is sufficient evidence that the proceedings have been served for the purposes of obtaining default judgment. Nevertheless, the Claimants provided me with further evidence as to how the proceedings were served on the Defendant in order to show that she was aware of the proceedings.

22. The Claim Form, PoC and response pack were emailed to the Defendant on 18 December 2018, using the email address which I am satisfied from the evidence I was shown that she has used to correspond with the Claimants for many years.

23. There is evidence upon which I was satisfied that the Defendant is the registered proprietor of a property in Ben Jonson House, Barbican, and that she referred to it as such in a tweet in 2018.

24. I was shown evidence which showed that a process server from Global Investigations Ltd attended that address on 21 December 2018. A neighbour confirmed to the process server that the Defendant lived at the address. The Defendant identified herself to the process server through the closed door of her flat. The Claim Form, PoC and response pack were then posted through her letterbox. Further copies of these documents were emailed and posted on December 2018 and January 2019 because a document had been omitted from the earlier versions.

25. In a letter dated 4 January 2019 letter the Defendant was warned that if she did not file an Acknowledgment of Service or Defence then an application would be made for judgment in default. She was asked whether she needed more time to file her defence, referring to the rule which allows the parties to agree an extension of time.

26. No response was received.

27. I was shown evidence which satisfied me that the Defendant is aware of the proceedings:

    a. In December 2018 and January and February 2019 the Defendant made a series of postings on the ADVFN website on a page dedicated to the Company. On 19 December 2018 (the day after the proceedings had been sent to her by email) she made a reference to Mr Dean, counsel for the Claimants who signed the PoC and who appeared before me on this application, and she made other comments showing she had seen the proceedings. I was also shown evidence that earlier that day she had telephoned Mr Dean's chambers inquiring about the proceedings.

    b. Similar comments are made by the Defendant in later postings which I was shown.

28. From all of this I was satisfied that the Claimants are entitled to judgment in default because the Defendant has been properly served with the proceedings; the Defendant is in fact aware of the proceedings; and no Acknowledgment of Service or Defence has been filed.

Service of this application

29. On 23 January 2019 the application notice seeking judgment in default, the draft order and the supporting witness statements of the Second Claimant and Third Claimant were

sent to the Defendant by first class post. She was informed that the application had been listed for 12 February 2019, with a time estimate of half a day, and a time to be confirmed. That information was also on the face of the issued application notice. She was informed that the witness evidence relied on postings by her on ADFVN which she had made since the proceedings were issued, and that any further postings would be put before the Court at the hearing.

30. That letter was returned marked 'RTS' (Return to Sender') and 'addressee unknown'. An identical letter with a very slightly tweaked address was then sent to the Defendant on 28 January 2019.

31. The same material was sent to the Defendant by email on 1 February 2019.

32. I was shown evidence demonstrating that a series of unsuccessful attempts had been made to leave the documents with the Defendant at her address, on 30 and 31 January 2019 and on 2, 5 and 6 February 2019. On 31 January 2019 the process server was told by a neighbour that the Defendant lived in the property in question, but that she had not seen her for a few days. In contrast, on 2 February he was told that the Defendant had not lived there for four years and that the caretakers of the building had been forwarding on mail for her. A further attempt was made on 5 February 2019. The process server was again told that the Defendant no longer lived at the flat. This time he was told that the Estate Office had no forwarding details for her. On 6 February 2019 the documents were successfully posted through the letterbox.

33. I was satisfied from the fact that neighbours indicated that the Defendant lived at the flat, that she identified herself to the process server on 21 December 2018, and that she stated that she lived at the flat in September 2018, that the information that she had moved away some time ago was incorrect. I was shown postings by the Defendant on the ADVFN website in January 2019 indicating that she still lives at the Barbican. I am accordingly satisfied from what is set out above that the Defendant had notice of the application and hearing on 12 February 2019 and that she intentionally chose not to attend. For that reason I allowed the Claimants' application to proceed in her absence.

The judgment sought by the Claimants on their statement of case: principles

34. The draft Order seeks:

    a. An Order that judgment be entered for the Claimants on each of their claims against the Defendant (addressed below), with the Second Claimant and Third Claimant's claims for damages to be assessed;

    b. A series of Orders by way of injunctive relief against the Defendant, in the terms of the relief sought in the prayer to the PoC. This restrains the Defendant from making defamatory statements about the Claimants and from harassing them.

    c. Costs of the application and the claim, to be summarily assessed; and

    d. That the order be endorsed with a Penal Notice.

35. The Claimants are entitled to 'such judgment as it appears to the court that the claimant is entitled to on his statement of case' (CPR 12.11(1)). The extent which that requires an examination by the Court of the merits of the case was considered by Briggs J (as he then was) in *Football Dataco Ltd v Smoot Enterprises Ltd* [2011] 1 WLR 1978 at [16] – [19], saying the following at [19]:

> "I consider that the requirement in rule 12.11(1) that it must appear to the court that the claimant is entitled to judgment needs to be interpreted in the light of the aggregation of the prescribed circumstances in which an application under Part 23 (rather than a mere request) is required. I do not consider that rule 12.11(1) requires the court to second-guess an assertion in the particulars of claim that, as a matter of law, the facts alleged provide the claimant with a cause of action. Rather, the purpose of the requirement for an application is either to enable the court to tailor the precise relief so that it is appropriate to the cause of action asserted, or otherwise to scrutinise the application in particular circumstances calling for more than a purely administrative response. It is in those respects that it must appear to the court either that the applicant is entitled to the default judgment sought, or to some lesser or different default judgment."

36. In *S v Beach* [2015] 1 WLR 2701, [53], Warby J said:

> "Judgments under CPR Pt 12 will, in the nature of things, almost invariably have been granted in the absence of evidence or representations from the Defendant. More than this, applications under Part 12 will normally be presented and decided on the basis of no evidence from the claimant other than the claim form, particulars of claim and proof of service. Evidence going to the merits is not required. The relief granted will normally be sought and granted as CPR r 12.11 prescribes, on the basis of the claimant's statement of case. That procedure is efficient and proportionate. Such a judgment is final and, to the extent it involves consideration of what relief is justified on the basis of the facts alleged in the statements of case, it does have an element of merits assessment."

37. As against this, I also note that pursuant to s 12(4) of the Human Rights Act 1998, the Court must have 'particular regard to the importance of the Convention right to freedom of expression, given the Claimants are seeking to restrain the Defendants' right to publish material about them.

The Claimants' claims

38. I now turn to the claims of the three Claimants. I was entirely satisfied, having carefully considered the PoC and the evidence and the submissions of the Claimants' counsel that,

in accordance with the principles that I have set out, the Claimants were entitled to the relief that they sought in the draft order (subject to minor editing). My reasons in respect of each Claimant and each cause of action are as follows.

The Company

39. The Company's claim is based on the settlement agreement dated 4 November 2006 and s 1(1A) of the Protection from Harassment Act 1997 (the PHA). The Company's claim is only for an injunction, not damages.

(i) Claim based on breach of the settlement agreement

40. The settlement agreement is exhibited to the witness statement of the Second Claimant. The relevant clause is 5.1. I have already summarised its effect. Clause 6.1 states that the Defendant had received 'independent legal advice … as to the terms and effect of this Agreement'. The adviser in question signed the agreement confirming that he had given such advice.

41. I was satisfied that the material set out in the PoC demonstrates that the Defendant has been in repeated breach of this clause throughout the period in question. These breaches have not been acquiesced in by the Claimants but rather have been the subject of repeated complaint by solicitors for the Claimants in a number of letters

42. I was sure that the evidence of a continuing threat by the Defendant to act in breach of the settlement agreement, unless restrained from doing so, was compelling. It is demonstrated by the number of breaches to date. As set out in the PoC, the Defendant's breaches have continued over a number of years, despite numerous proper complaints by the Claimants through their solicitors. This culminated in an almost daily campaign by the Defendant on Twitter in late 2018 which preceded the Claimants issuing these proceedings. Even after the issue and service of the proceedings the Defendant has continued to act in breach of her contractual obligations, although her campaign has now moved from Twitter to ADFVN. I was shown numerous examples of postings.

43. I was also shown postings by the Defendant in breach of the settlement agreement following the service of the witness statements of Second Claimant and Third Claimant in support of the application.

(ii) Claim based on harassment

44. The Company's claim in harassment under s 1(1A) of the PHA depends on it showing that the Defendant has been engaged in a course of conduct which amounts to harassment against the Second Claimant and Third Claimant, which she knows or ought to know involves harassment of the Second Claimant and Third Claimant, and that by her actions she has intended to persuade the Company to do something that it is not entitled to do or not to do something that it is entitled to do.

45. Harassment is not defined in the Act, but is stated by s.7 to include "alarming the person or causing the person distress". S.7(4) of the Act provides that conduct for these purposes includes speech. Conduct must attain a certain level of seriousness to amount to

harassment for the purposes of Act, see *Majrowski v Guy's and St Thomas NHS Trust* [2007] 1 AC 224, [30], per Lord Nicholls.

46. I am satisfied that the nature, frequency and quantity of the statements made by the Defendant (including since the PoC were issued) easily passes the threshold so as to amount to harassment for the purposes of the PHA. The Defendant's complaints are in large measure incoherent, in that it is frequently far from clear just what it is that she is complaining about. But even if this were otherwise, that could not justify the means by which the Defendant seeks to press those grievances. The daily attacks on the Second Claimant and Third Claimant, and their nature, are plainly oppressive and unacceptable.

47. The Second and Third Claimants have described in their witness statements the hurt and upset they have suffered as a consequence of the Defendants' conduct as well as the potential reputational damage they fear if it continues.

48. There can be no doubt that the Defendant knows, or ought to know, that her conduct amounts to harassment of the Second Claimant and Third Claimant, as she has been informed as much in the letters from the Claimants' solicitor. It would also be apparent to any reasonable person (see s 1(2) of the PHA) that the intensity of the Defendant's campaign, particularly that carried out on Twitter in late 2018 (and now continued on ADVFN), would cause alarm and distress to the Second Claimant and Third Claimant.

49. I was sure that the First Claimant was entitled to the injunctive relief it was seeking.

Second Claimant

(i) Harassment

50. For the same reasons, I am sure that the Second Claimant is entitled to the relief he seeks in respect of harassment.

(ii) Defamation

51. The past acts of defamation which Second Claimant will rely on at the assessment of damages hearing, should that become necessary, are set out in detail in the PoC. There have been very many tweets. They are on a similar theme but they contain a variety of different meanings. The specific tweets on which the Second Claimant relies are specified in the PoC at [96]. The Second Claimant is named in all of them except two. The case on innuendo in relation to those tweets is set out at [97]. The pleaded meanings include that the Second Claimant has been guilty of theft and other acts of criminal dishonesty in relation to the Defendant.

52. I was sure that the pleaded meanings are borne out by the tweets and that they are capable of causing serious harm in accordance with the principles in *Sube v News Group Newspapers* [2018] EWHC 1234 (QB), [23]-[25].

53. There is of course no pleaded defence from the Defendant; however, there no basis in the material before me to conclude that there is any viable defence, whether of Truth, Public Interest, qualified privilege or otherwise.

54. For the reasons I have already given, namely the Defendant's behaviour in continuing to publish even in the face of these proceedings, I am sure that there is a sufficient risk of further publication justifying injunctive relief.

Third Claimant

(i) Harassment

55. For the same reasons, the Third Claimant is entitled to the relief he seeks in relation to his case on harassment.

(ii) Defamation

56. There are also a large number of tweets and other posting naming the Third Claimant. I am satisfied these bear the meaning that he has been involved in criminal behaviour and serious wrongdoing, and that there is a risk of further publications which would cause serious harm.

57. For the reasons already given I am satisfied that injunctive relief is necessary to restrain the Defendant from further publication.

Conclusion

58. It was for these reasons that I granted the relief sought by the Claimants in their draft Order (subject to minor amendment). It was also appropriate, in the circumstances of this case and in particular in light of the Defendant's behaviour in the face of these proceedings, to make a summary assessment of the Claimants' costs, to be paid by the Defendant.