Case No: JLJ/15/0774

[2015] EWHC 3373 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 28th October 2015

BEFORE:

MR JUSTICE JAY

BETWEEN:

(1) RUSSELL BRAND
(2) JEMIMA GOLDSMITH

Claimant

and

SZYLVIA BERKI

Defendant

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MR AIDEN EARDLEY (instructed by Archerfield Partners LLP) appeared for the Claimants

The Defendant appeared In Person

Judgment
As Approved by the Court

MR JUSTICE JAY:

1. The trial of this action is due to start on 30 November 2015 with a time estimate of four to five days. The pre-trial review was fixed for today's date with a time estimate of two hours, but coupled to it are now three further applications which I need to deal with before the PTR, and in what I consider to be their logical sequence. First, the defendant Ms Sylvia Berki's application for third party disclosure from Thames Valley Police restored at the direction of Master Leslie. Secondly, the defendant's application seeking permission (1) to rely on expert evidence; (2) to rely on the witness statement she had already served in the proceedings and the transcript of her tape recorded interview; and (3) to file a further witness statement for trial. Thirdly, there is the claimants' application for summary judgment pursuant to CPR Part 24. The claimants are Mr Russell Brand and Ms Jemima Goldsmith.

2. The background to this case is conveniently set out in the judgment of Carr J given on 11 September 2014 ([2014] EWHC 2979 (QB)). As I indicated at the start of this hearing, I make the same orders as did Carr J in relation to confidentiality and reporting restrictions: see paragraph 8 of her judgment. When the Order is prepared following today's hearing and upon the conclusion of this judgment, those ancillary orders must be included.

3. Since Carr J's judgment there have been various interlocutory skirmishes which it is unnecessary to rehearse. The defendant made an application for third party disclosure from Thames Valley Police. The latter had been frankly very dilatory in its reaction to it. It was only on Friday of last week that the Thames Valley Police finally complied with Master Leslie's order and it is the defendant's contention that the police are in contempt of court.

4. On 6 July 2015, at the first Case Management Conference before Master Leslie, when the defendant as she has done throughout appeared in person, various disclosure orders were made. Neither party was given permission to adduce expert evidence and the Master ordered: "the parties shall by no later than 4.00pm on 2 October 2015 serve on each other the signed statements of those witnesses of fact upon whose evidence they seek to rely and any notices that may lead to such evidence" (see paragraph 5 of his order). The claimants complied with the order relating to witness statements, but the defendant did not.

5. The defendant had filed four witness statements in this litigation dated respectively 28 August, 17 October, 8 December 2014 and 3 March 2015. None of these, save possibly for the first, dealt in much detail with the events of 7 June 2014. Indeed, their primary focus seems to be matters somewhat peripheral to the issues in dispute. On the other hand, these statements are capable of throwing light on aspects of the defendant's motivation.

6. On 19 October 2015 the defendant filed a fifth witness statement in support of her present application. She says that she has been suffering from a disability and asserts that the claimants' solicitors have intentionally ignored her request for

disability-friendly material. In paragraph 4 of that witness statement the defendant uses a somewhat tit-for-tat argument; she says that the claimants' solicitors through Mr Bacon are now trampling over her rights, whereas when he was acting for other claimants pursuing an "infamous historian", as she puts it, he was successful in defending their rights. This was the Irving v Penguin Books case. I explained during argument that I simply did not understand why this particularly outrageous allegation was contained in a witness statement, and it is fair to say that the defendant has now resiled somewhat from it.

7. The fifth witness statement is in my view lengthy, discursive and rambling. However, it does set out the defendant's position in relation to the application she is bringing, and it also contains a voluminous critique of the claimants' primary evidence. But, to my eyes the defendant's fifth witness statement fails properly to set out her version of events. It is in truth no more than a commentary on the claimants' version, as well as an opportunity to deal yet again with extraneous and irrelevant matters. In that witness statement I am able to discern that the defendant seeks to adduce evidence of the transcript of her police interview which took place on 14 July 2014.

8. As I have said the defendant has been acting in person throughout. My impression from pre-reading her documents was that she was a reasonably intelligent and articulate woman, and I reiterate she is not presenting her case in her mother tongue, which of course is Hungarian. English I would imagine is her third language. However, it was during the course of listening to the defendant's submissions that I realised that I had underestimated her intellectual capacity. She is a highly intelligent woman, whose command of English is most impressive. She must have had some legal assistance (as she accepted) in preparing her defence, but since then she has been on her own.

9. There are aspects of the defendant's character and personality which I do need to address. There is evidence in the bundle, although it is far from recent, dealing with symptoms of anxiety and depression. The defendant mentioned post-traumatic stress disorder, which seems to have flowed from the circumstances of a previous relationship, though I have seen no direct evidence of that. She said on numerous occasions that she was "(**inaudible**) disabled". I have now seen a medical certificate dated 11 December 2003 by an expert in learning abilities and rehabilitation in Hungary. This certificate states that in intellectual terms the defendant's performance falls into the extremely high intelligence range. I have no difficulty with that. As for her reading abilities and her possible diagnosis of dyslexia, there are issues which the expert has addressed. Her reading comprehension is slightly imperfect; she makes some mistakes which are typical of someone with dyslexia. The summary of the opinion is that the defendant has residual symptoms indicative of untreated dyslexia and reference is made to the relevant ICD code. My interpretation of the certificate is that the defendant has not received a full diagnosis of dyslexia, and in any event I have to look at the matter more broadly.

10. It is clear from the five of the statements which the defendant has filed and served in these proceedings that she is quite capable of setting out her case in writing. The fifth witness statement in particular is a voluminous document, and I see little or no evidence that she is significantly hampered by the demands of the Civil

Procedure Rule, save for the obvious fact that she acts in person. Indeed, I would go further; she is more competent than many litigants in person who appear in the High Court.

11. That said, I do need to remind myself that on 1 October 2015 a new provision was introduced into the CPR, namely rule 3.1A. In exercising my case management powers in the conduct of this hearing, I must have regard to the fact that the defendant is unrepresented and I must also adopt a procedure which furthers the overriding objective. I have interpreted this rule as permitting me to give the defendant some degree of latitude.

12. I will deal in more detail with the factual background to this case when I come to address the claimants' application for summary judgment. At this stage it is convenient to turn to the defendant's application for third party disclosure. It is clear from the extremely helpful skeleton argument from Mr Aiden Eardley of the claimants that there had been difficulties with third party disclosure against Thames Valley Police, notwithstanding the clear terms of the order Master Leslie given on 3 February 2015 that such disclosure must be provided. The defendant when opening her case to me went through the relevant history in a manner which although not very precise was accurate, since it is substantially borne out by the chronology contained in Mr Eardley's skeleton argument. The position is that the police did not comply with the order within the time scale prescribed by Master Leslie. There was an unfortunate period of delay. The reasons for that delay do not require investigation by me.

13. The police appear today represented by Mr Peter (**inaudible**) of counsel. I heard oral evidence from the solicitor now with conduct of this case, namely Ms Westley. She has been conducting this litigation since the summer and in my view she has been acting more diligently and expeditiously than her predecessor who, she explained to me, was a temporary solicitor or paralegal. The position has been reached whereby the police have now complied with the order of Master Leslie. They have given full disclosure of documents. Inspection has been given of all documents, save for those which on the face of things do appear to be privileged. The documents of which inspection has been given include CCTV footage, the defendant's video interview with the police, a precis of Mr Brand's police interview and an audio recording of the police interview of Ms Goldsmith.

14. The defendant was apparently sent a file containing some relevant documents which she says she received as late as last Friday. She said that she had not had the opportunity to analyse the file in any detail and I must take that into account. The defendant also said, as I have indicated, that in her view the police are in contempt of court. Although they have been dilatory, there is no basis for me coming to that conclusion; there is no properly constituted application in any event which I have to decide.

15. The issue for me is whether I should order further disclosure in the light of what I now know and what I have been told by Ms Westley, namely that the disclosure exercise is now complete. In my judgment I should not. There would be no useful purpose in making further orders under this rubric, so the defendant's application for further disclosure is refused.

16. Next, I need to address the defendant's application for expert evidence. This relates to CCTV footage of the outside of the Coach House, which is where the

relevant encounter occurred on 7 June 2014. I should make clear that I have not been able to review this footage since there are constraints with the Government computer with which I am working. I understand that this footage has recently been disclosed and that it was not available when Master Leslie made the order refusing expert evidence on 6 July. In those circumstances I am prepared to consider the issue afresh rather than be bound by Master Leslie's order which was never appealed.

17. The issue under the Civil Procedure Rules is straightforward: is expert evidence reasonably required to resolve these proceedings? The defendant says that the CCTV is taken as it were from a bad angle and that it may be difficult to see what is going on. The issue is whether, on my understanding, the defendant was attacked by a dog. That may or may not be visible on the CCTV. In my judgment, there is no basis for permitting expert evidence to be adduced to resolve that issue. It is simply a question of fact, to be resolved as necessary by judicial observation, in the same way as these questions systematically are in criminal trials up and down the country day in and day out when juries interpret CCTV evidence without the benefit of expert evidence. Such evidence is required in a small number of cases, but otherwise would usurp the fact-finding function of the jury as it indeed would the fact-finding function of the judge in these civil proceedings. So that part of the defendant's application is refused.

18. Next in time is the defendant's application to adduce witness evidence. As I have said, the timetable for the service of witness evidence was 4.00pm on 2 October (which was 26 days ago). The defendant was out of time and the trial is now five weeks hence. The evidence falls into two categories: first, the evidence filed by the due date (2 October); and, secondly, the fifth witness statement filed on 19 October, and any other witness statement the defendant wishes to file: for the avoidance of doubt, any evidence which falls outside the time limit of 2 October 2015. I should make clear that I agree with Mr Eardley that strictly speaking the defendant is in breach of the Master's order in relation to evidence falling in the first category, namely witness statements one to four. This is because under the rules, if she was intending to rely on them at trial, which apparently she would be, these statements have to be re-served. However, it must be obvious that the defendant's breaches are significantly less serious in this regard than they are in relation to evidence which post-dates 2 October.

19. I agree with Mr Eardley's legal analysis, which the defendant did not address, that she is now debarred pursuant to CPR rule 32.10 from adducing any witness evidence at trial unless she can persuade the court to grant relief from sanction under CPR rule 3.9. In the absence of submissions from the defendant on the issue, it seems to me that I should do the best I can and notionally advance arguments which she might have done had she been legally represented before reaching a conclusion on the issue. The test that is that laid by the Court of Appeal in Denton v TH White Ltd [2014] 1 WLR 3926; it is the familiar three-stage test. The first issue is the seriousness of the breach or breaches. The second issue the reasons for the default. The third is the more open-textured one, of all the circumstances of the case, including the need for litigation to be conducted effectively, efficiently and at proportionate cost; the need to enforce compliance with rules, practice directions and court orders; and proportionality generally.

20. First, then, the seriousness of the breach. In my judgment, the breach is

somewhat of a technical nature in relation to the first four witness statements. It is a breach, but not a particularly serious one. However, as soon as the deadline passed and a significant period of time elapsed as it has the breach obviously becomes more serious. I say that in the context of reading the defendant's fifth witness statement, which in my view as I have said is discursive, inflammatory and fails really to engage with the real issues. In so far as the defendant submitted too she really ought to be given permission to serve a witness statement which is not yet in existence, the breach by definition is even more serious since it is not available for present consideration.

21. The second Denton issue is the reasons for the default. A number of factors here are prayed in aid, including the defendant's mental health, the fact that she acts in person, her residual dyslexia and the mistaken belief that she clearly advanced in her oral argument that she did not understand how Master Leslie's order related to her four witness statements which were already in being. In my judgment, most of these considerations do not really advance her cause. There is no recent evidence of any mental health issue. However, I am entitled to take into account in the defendant's favour that at times her presentation became overly impassioned and emotional, and therefore it may be reasonable to infer that there might be some issues which an expert in this field may be able to assist the court with. However I emphasise there is no evidence to that effect. I have already dealt with the defendant's dyslexia.

22. The far more compelling point from her perspective, and it is of course her best point, is that I suspect that she probably was under a mistaken belief that the earlier witness statements prepared for interlocutory purposes would in some way be admissible at trial, without more. So this is another consideration which is in the defendant's favour, at least as regards witness statements one to four. I must emphasise that it simply does not help her at all in relation to anything else.

23. The third consideration is all the circumstances of the case. Of course, here I have to look extremely broadly. Mr Eardley submits that I should look closely at the content of all the witness statements and conclude that given that they do not really assist the defendant on the merits, that is a reason under Denton for excluding them. He further submits that this is another opportunity which the defendant has taken and will take if permission is granted to permit reliance on further evidence to raise irrelevant abusive and scurrilous matters.

24. Further, my attention is drawn to Mr Bacon's third witness statement which gives a history of non-compliance by the defendant with court orders.

25. The fourth general point that Mr Eardley makes is that the defendant appears to be impecunious; that this litigation is very expensive from the claimants' perspective, and will be all the more so if there is a four to five day trial and that I should, as it were, bite the bullet at this juncture.

26. I address the issue in this way. In my judgment, it is inappropriate for me to analyse the content and merits of the defendant's witness statements at this stage. It becomes appropriate to do so only under the rubric of the claimants' application for summary judgment. That the defendant may well treat any further permission to adduce evidence as an opportunity to raise irrelevant abusive and scurrilous matters is again a factor which weighs very weakly in the balance. If the matter were to proceed to trial, she would be free to say what she likes - subject to further court order and judicial case management during the course of the trial - either by

way of submission or from the witness box. That said, shat she said in the witness box, subject to any further order I might make, would have to have been trailed in a witness statement. It is not, as it were, open season.

27. The defendant's history of non-compliance is a relevant factor which weighs against her. The fact that she is probably impecunious and that this litigation is very expensive for the claimants is a factor which weighs weakly in the balance since it would apply whatever the strength of the case. In my judgment, though, there continues to be a fundamental difference between witness statements one to four on the one hand and the post-2 October fifth witness statement, and any other witness statement I might grant permission for the defendant to serve, on the other hand. The breach of the rules is of a technical nature in relation to witness statements one to four and it is difficult to see that the claimants have suffered any prejudice.

28. Overall, having regard to all the relevant factors, I am prepared to grant the defendant relief from sanction as regards her first four witness statements. However, I adopt a completely different approach in relation to the fifth witness statement and anything else. She is in serious breach; no good reason has been advanced; Master Leslie's order was in quite clear terms; and the claimants will be prejudiced. Moreover the trial date is now pending and it is contrary to the overriding objective and the smooth conduct of litigation for late evidence adventitiously and inexcusably to arrive on the scene.

29. At this stage it is convenient to deal with another application which the defendant made, or rather one which I teased out of her, which runs like this. She said that she should be permitted to give oral evidence notwithstanding that there may not be an antecedent witness statement. This permission should be granted owing to her dyslexia-related difficulties. There is provision under the rules to dispense with the requirement under CPR 32.4(2) to file a witness statement. When I asked the defendant why she did not ask Master Leslie to dispense with this requirement, she did not give a satisfactory answer, save to say that the police evidence has arrived extremely late. However the late arrival of evidence of a third party has no bearing on the defendant's obligation either to serve witness statements or make an application dispensing with that requirement. She should have made an application to Master Leslie that she was not intending - because she could not - to serve witness statements for the purposes of the trial. In any event, I have to say that the defendant's application under this head – one which I have said I really extracted from her – seems to me to be wholly without merit. It is not as if she had not able to prepare, write and serve five witness statements already. There is no reason why the requirements of the rules do not apply to the defendant in the same way as they apply to the claimants. I reiterate the evidence relating to dyslexia is not strong enough to justify what would have to be a wholly exceptional course. So, to the extent that the defendant does make an application absolving her from the obligation to file a witness statement, that application is refused too.

30. It is also convenient at this stage to deal with the police interview, which took place on 14 July 2014. It lasted two hours, and a transcript is available. There is also, I understand, a video or DVD of that interview. The question arises whether the defendant may rely upon it at trial. My answer to that question is as follows. If the matter proceeded to trial it would in my view be preferable for the trial judge to resolve questions of admissibility under the Civil Evidence Act 1995 having regard

to the notice requirements in section 2. However, at this stage the issue arises whether this hearsay evidence should be taken into account by me for the purposes of bolstering the defendant's defence to the application for summary judgment which she faces today. If I thought that it were highly likely, for example, that the trial judge would preclude reliance on this hearsay evidence, then it probably would be artificial and wrong for me to have regard to it. However that is not my conclusion. I am persuaded it would be right to consider the substance of the police interview given by the defendant on 14 July 2014 when I come to consider, which I am about to do now, the claimants' application for summary judgment.

31. This application was advanced by Mr Eardley on the back of an extremely detailed skeleton argument. The background to this case is clearly set out in the judgment of Carr J. In very brief outline there was an encounter between the parties at the second claimant's home in North Oxfordshire on 7 June 2014. At least from the pleadings there is a dispute as to what happened.

32. The claimants' case is founded on a course of conduct by the defendant which they say amounts to harassment likely to and in the event which did cause them anxiety and distress. Mr Eardley took me through the relevant material in the voluminous bundles. I propose to deal with the matter in this way. Immediately following the encounter, there were electronic messages between the parties which suggested that nothing untoward occurred. However, things turned nasty, if I can put it in those terms, fairly soon thereafter. The defendant thought it appropriate to complain about the treatment she said she sustained on 7 June 2014 not merely to the police, which was of course her entitlement (albeit that complaint was not made until 14 June), but also to a number of newspapers. The relevant complaints are summarised at paragraph 20 of Mr Eardley's skeleton argument and reflect the Particulars of Claim.

33. In my judgment, two points emerge. First, that the defendant has made a series of scarcely veiled threats, some of which I have to say are extremely unsavoury. Secondly, the defendant's case as to what happened has evolved over time. The word people like to use these days is "morphed". Although I do not completely like this verb, it accurately describes this state of affairs. There are obvious inconsistencies in the defendant's account, both in relation to an alleged allegation of assault and also the behaviour of the first claimant's dog. The defendant makes quite a lot about the dog, but it is startling that nothing in relation to it has featured in the pleaded defence.

34. There are also some rather unpleasant tweets which the defendant was somewhat coy about in her oral submissions. Shortly after lunch the defendant submitted to me that she did not admit that she was involved in those tweets. I found that surprising given that her defence did admit that fact. She blamed the barrister for having wrongly prepared her defence. Then I asked the defendant directly, and required her to answer yes or no, as to whether she accepted that these were her own tweets, and I received a maundering and prevaricating reply, which I felt at the time was wholly unsatisfactory. I am not giving the defendant permission to amend her defence if that is the application which I should interpret her as having made.

35. The police investigated the defendant's allegations and it is fair to say that in her oral argument the defendant was extremely critical of that investigation. Indeed, it was a *leitmotif* of her submissions that she was not harassing the claimants at all,

rather she was exercising her right to reveal serious matters. It was these rights which were being thwarted by police inaction and failure. Be that as it may, the police acting in pursuance of their public functions have investigated the defendant's allegations, and have interviewed both of the claimants. The police came to the conclusion that the relevant test for prosecuting the claimants has not been satisfied. There is a report in File 2, page 161 in particular, which summarises the police analysis of the defendant's interview. The defendant was vague at interview as to what she was alleging actually occurred, and appeared to have focused on what could have happened rather than what did happen. The case relating to the dog was not consistent with the pleaded case or rather the case in the defendant's witness evidence. There were also important discrepancies as regards the allegation of assault which has not been consistently advanced.

36. It is against that background, which is not a particularly fruitful one for the defendant's purposes, that I need to consider the four witness statements which I have given the defendant permission for these purposes to adduce. The first witness statement does contain some sort of account of what had occurred. It is the statement dated 28 August 2014 prepared, I believe, for the purposes of the hearing before Carr J. Mr Eardley's characterisation of that statement was that it dealt with matters in a "minimal and uninformative way that was unlikely to assist the defendant". That submission was supported by the overall terms and tenor of the witness statement, and was somewhat fortified by comparing paragraph 15 of the defence with paragraph 55 of the first witness statement, and noting the inconsistency. Moreover, the police interview carried out on 14 July 2014 does contain a vague and unsatisfactory account in relation in particular to the assault matter.

37. My approach to the summary judgment application is as follows. First of all I can take the law of harassment, if I may put it in those terms, from Carr J's synopsis of it in her judgment dated 11 September 2014. The leading case in this area is probably Thomas v MGM [2002] MLR 4 and the principles are well-established. The court must adopt an Article 10 compliant approach to the Protection from Harassment Act 1997 and must consider the history of reasonableness both in terms of, as it were, primary liability and the defence under section 1(3).

38. Secondly, I note Carr J's view that the defence probably would not succeed at trial. However the issue for me is not the same, for two reasons.

39. First of all, the CPR rule 24.2 test is stricter than the probabilistic test that Carr J applied on 11 September 2014. In other words, the burden of persuasion from the claimants' perspective is higher.

40. I need to be persuaded having regard to all the available evidence that there is no real prospect of success; in other words a prospect which is only fanciful. Again, in this domain the law is extremely familiar: see, for example, ED & F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472 and Three Rivers v Bank of England (No 3) [2003] 2 AC page 1. Although it is axiomatic that this court, generally speaking, is not the ideal forum to resolve disputes of fact, I am entitled to adopt a common sense approach to evidence which inadequate, internally inconsistent and more often than not unsupported by anything else.

41. The other respect in which my consideration of this issue differs from Carr J's is that over the 14 months or so which have elapsed since the hearing before her, the evidential picture is more complete. We have the claimants' full witness

statements and the defendant's witness statements, which I have consistently observed are incomplete and inadequate. They fall a long way short of supporting those matters set out in the defendant's pleaded case.

42. It seems to me that if there were to be a trial, the court would not be directly trying the rights and wrongs of what happened on 7 June 2014, but the truth of what occurred on that date does bear on the issue of whether the defendant's conduct was reasonable or unreasonable. If, for example, the defendant could persuade the court that her version of events were right, then I think Mr Eardley would accept that she would find it somewhat easier to persuade the court that either she did not harass the claimants or that she acted reasonably at all material times. I need to emphasise however that even if the defendant's version of events were accepted that would not prove that she did not harass the claimants or that she acted reasonably. The events of 7 June are also relevant in so far as they throw light on the issue of credibility of witnesses and on the defendant's motives. However, for the purposes of Part 24 these matters are difficult to resolve. They are likely to be resolved in the claimants' favour, but I cannot say that the defendant has no real prospect of success.

43. The second main suite of issues which will fall to be resolved at trial relate to the evaluation of the defendant's conduct said by the claimants to amount to harassment. That conduct in itself is not disputed. She does apparently dispute whether she foresaw that journalists would contact the claimants seeking their account of what occurred. It is obvious to me looking at the matter objectively that that is what they would have done, since that is standard, indeed proper, journalistic practice.

44. What would really be in dispute are the defendant's reasons and motives at all material times. However, two points need to be made. First, that the test in relation to this cause of action, and the statutory defence, is an objective one; and, secondly, I have to say that I am able to draw a very strong inference from all the material, including the defendant's witness statements and the tenor and content of her oral presentation to me, that her reasons and motives are precisely as the claimants say they are. It is clear that her reasons and motives are to harass them, regardless of the rights and wrongs of what occurred on 7 June. Although I cannot properly find on the existing material that the defendant embarked on a campaign to extract as much money out of the claimants, and the press, as possible, my more limited conclusion as to the defendant's reasons and motives is sufficient for present purposes.

45. I have to stand back from all this material and ask myself whether this defence has a real prospect of succeeding at trial in the light of my earlier rulings. I approach that fundamental question in a cold and analytical way, and exclude more subjective matters, such as the impact the defendant's presentational style (as opposed to the substance of what she said) would be likely to have on any tribunal. Adopting that approach, I have reached the conclusion that the defence does not have a real prospect of success. This is a clear case of harassment, and the defendant would be highly unlikely to persuade any court that she had reasonable grounds for embarking on the admitted course of conduct.

46. It follows that I accede to this application for summary judgment and the claimants are entitled to a final injunction in the appropriate form.