Neutral Citation Number: **[2022] EWHC 3011 (KB)**

Case No: QB-2021-004686

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

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: 8 November 2022

Before:

THE HONOURABLE MR. JUSTICE NICKLIN

- -

Between:

DR. ERICA SMITH

Claimant

- and -

DR. CHRISTOPHER BACKHOUSE

Defendant

- -
- -

BEN HAMER (instructed by **Brett Wilson LLP**) for the **Claimant**
BARRY COULTER (instructed by **Lewis Nedas Law**) for the **Defendant**

- -

Approved Judgment

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The Honourable Mr Justice Nicklin :

1. The issue that arises today is whether the court can refuse to accept undertakings which a party has agreed to give to the Court as part of a settlement of a civil claim.

2. The background is as follows. The claim was commenced on 23 December 2021. The Claimant complained that she had been the subject of a campaign of anonymous online harassment by the Defendant. Additional claims for misuse of private information and breach of the Claimant's data protection rights were also included.

3. In summary, the Claimant alleged that the Defendant had, from 9 November 2020 to 25 May 2021, conducted a campaign of harassment including

    i) the creation and operation of social media accounts impersonating the Claimant and/or disseminating private information about her, and otherwise misusing her private information and personal data. Posts from these accounts, including manipulated pornographic images, were set out in the schedule to the Particulars of Claim;

    ii) threats made via anonymous texts and online. These included threats of violence, a threat to deceive the police into sending an armed response team to the Claimant's home address and arson;

    iii) misusing the Claimant's email address, phone number and postal address by signing her up to receive unwanted services and messages and providing these details to third parties, including far right hate groups and fetish websites; and

    iv) attempts to access and/or shut down the Claimant's own social media account, including by submitting a false report that she had died, to Twitter.

4. On 29 December 2021, the Claimant made a Part 36 Offer in full and final settlement of her claim. The material terms of that were:

    i) the payment of £49,975 in damages from the Defendant; and

    ii) within 14 days provision of a signed undertaking to the court from the Defendant that he would not:

        "(1) Publish by any means, including but not limited to on the worldwide web, social media, telephone or any form of text, email, instant electronic messaging service, any express or implied reference to or any pictorial depiction of the Claimant, save

            (a) for the purposes of seeking legal advice or in the context of legal proceedings, and

            (b) for complying with any legitimate obligations under his contract of employment.

        (2) Attempt to impersonate the Claimant.

(3) Seek to monitor the Claimant's activities, including but not limited to her activities on the worldwide web, social media or the activities of her friends or family.

(4) Attempt to contact the Claimant by any medium or any platform, including but not limited to telephone or any form of text, email, instant electronic messaging service, in person or otherwise either directly or indirectly save through lawyers or where he is required to do so under a contract of employment for legitimate purposes.

(5) Attempt to contact by any medium or any platform individuals who he knows or suspects are friends, family, acquaintances and/or colleagues of the Claimant save where he is legitimately required to do so under a contract of employment.

(6) Knowingly approach within 50 metres of the Claimant save where he is legitimately required to do so under a contract of employment.

(7) Otherwise engage in any activity that amounts to harassment of the Claimant or any other activity that is likely to cause her distress.

(8) Will not (sic) encourage or permit any third parties to engage in any of the above acts on his behalf".

5. On 15 July 2022, the Defendant made a counteroffer by way of a Part 36 Offer, expressed to be without an admission of liability, to settle the whole of the Claimant's claims in all jurisdictions. Essentially, this offer was in similar terms to the Claimant's offer, save that:

i) the Defendant offered the sum of £35,100 in damages; and

ii) in the undertaking, he deleted paragraphs 5 and 6 and made a minor amendment to paragraph 5 to cater for contact with individuals with whom he has a pre-established relationship.

6. The Defendant's Part 36 Offer was not accepted by the Claimant. On 24 August 2022, the Defendant's solicitors completed and signed the proforma notice of acceptance that had accompanied the Claimant's Part 36 Offer of 29 December 2021. Expressly, the Defendant was stated to accept the offer to settle pursuant to CPR 36.11.

7. On 8 September 2022, the Claimant issued an application notice seeking: "*an order in the form attached reflecting that the claim has been settled and incorporating undertakings the Defendant has given to the court*".

8. The attached consent order provided:

> "UPON the Defendant accepting the Claimant's part 36 offer dated 29 December 2021
>
> AND UPON the Defendant undertaking to the court not to carry out the acts set out in the schedule of this consent order, and upon the Defendant acknowledging that he understands the terms of his undertaking to the court and the consequence of not complying with it

BY CONSENT IT IS ORDERED AND DIRECTED that

(1) The Defendant pay the Claimant the sum of £49,975 in damages by 4 p.m. on 7 September 2022.

(2) The claim is to be stayed save for the purposes of enforcement of the interim costs orders and any application by the Claimant for permission to read a statement in open court pursuant to paragraph 3.2 of Practice Direction 53B.

(3) The Defendant is to pay the Claimant's costs of the claim in a sum to be assessed if not agreed".

9. The Consent Order was signed by the Defendant dated 5 September 2022. The Order had endorsed, upon the front page, a penal notice, in conventional terms, warning the Defendant that, were he to breach the undertaking he had given to the court, he might be found in contempt and face penalties ranging from a fine to imprisonment. The undertaking in the schedule to the Order was in the same terms as had been set out in the Claimant's Part 36 Offer. At the foot of the undertaking was the following signed by the Defendant personally on 7 September 2022:

"(A) I acknowledge that I understand the terms of this undertaking to the court and the potential consequences of failing to comply with it.

(B) Specifically I acknowledge that I understand that if I breach this undertaking to the court then I may be (a) found to be in contempt of court and may be imprisoned, fined or have my assets seized; (b) liable to pay the Claimant damages and/or legal costs and (c), the subject of criminal complaint and prosecution.

(C) I acknowledge that I have received independent legal advice on (i) the terms of the undertaking and wider consent order; (ii) the consequence of breaching the undertaking and (iii) the claim generally".

10. Thereafter, on 22 September 2022, the Claimant issued an Application Notice seeking permission to read a Statement in Open Court, pursuant to CPR Practice Direction 53B paragraph 3.1. Permission was granted by Choudhury J, on 23 September 2022, and the Statement in Open Court was read on 11 October 2022.

11. The Application Notice of 8 September 2022, with the consent order, was referred to me on 10 October 2022, the day before the Statement in Open Court was listed to be read. An email was sent to the Claimant's solicitors, asking whether the Defendant's solicitors would be attending the reading of the Statement in Open Court, and stated: "*The judge is concerned at the breadth of the undertaking and whether it is one that is appropriately given to the Court. He shall wish to address these matters at the hearing tomorrow*".

12. The Claimant's solicitors responded that they and their counsel were not available for a hearing that following day. As to the concerns as to the terms of the undertaking, the Claimant's solicitors said:

> "We believe it reflects the mischief alleged within the pleadings that the undertaking has been freely given by the Defendant with the benefit of legal advice and its breadth has never been the subject of dispute between the parties. Paragraphs (4), (5) and (6) contain carve outs".

13. On 25 October 2022, a further email was sent by the Court to the parties:

> "There is no doubt that the parties to a civil claim can agree whatever terms of settlement they wish. However, when it comes to the Court accepting undertakings from one of the parties, the Judge is concerned to establish what the Court's jurisdiction is when it is asked to accept undertakings by a party as part of a settlement. Can the Court refuse to accept undertakings on the grounds that the court would not, by injunction, grant such relief, (for example, terms too vague/broad) if so, what principles does the Court apply? Can the Court accept some of the undertakings or, respecting the contractual nature of the settlement, is the Court bound to either accept all of it or none of it?"

14. The hearing was fixed for today. Skeleton arguments have been filed and exchanged. I can take the relevant principles largely from Mr Hamer's skeleton argument.

i) Parties are free to settle litigation on terms that are beyond what a Court could order by way of relief: ***Mionis -v- Democratic Press SA*** **[2014] EWHC 4104 (QB)** [7] (and on appeal [2017] EWCA Civ 1194). ***Mionis*** is an example of a person voluntarily agreeing to extensive restrictions on his freedom of expression in terms that the Court would have been unlikely to grant. Nevertheless, having done so, the court was of the view that the Defendant's contractual agreement curtailing his rights was one that could legitimately be enforced by the Claimant.

ii) In terms of punishment for subsequent breach, an undertaking to the Court has the same effect as an injunction order.

iii) Generally, the court cannot rewrite the contractual terms of a settlement agreed by the parties: ***Watson -v- Sadiq*** **[2013] EWCA Civ 822** [49]. In ***Zenith Logistics Services (UK) Limited -v- Keates*** **[2020] 1 WLR 2982** [67], Warby J suggested that, in general and where the parties are represented, the Court should not enquire as to the terms of the settlement that they have reached. The Judge noted that any Tomlin order made by the Court to recognise, and give effect to, the settlement was not giving the Court's "approval" or "endorsement" of its terms. Mr Hamer has noted that the Commercial Court has a different practice. Paragraph D18.5 of the current Admiralty and Commercial Court Guide states that the schedules to a Tomlin Order should be reviewed by the Court. The justification for doing so is said to be that: *"The court will not make an order providing that the parties can reinforce its terms on application without checking whether all the terms make that appropriate*".

iv) The circumstances in which a court can decline to enter a consent order are limited: ***Bruce -v- Worthing Borough Council*** **[1994] 26 HLR 223, 228** and ***Arthur JS Hall & Co. -v- Simons*** **[1999] PMLR 374** [20].

v) As to the precision required in an injunction and an undertaking to the court, Mr. Hamer accepts that ordinarily the terms must be precise. They must clearly

inform the Defendant what conduct is being prohibited: ***Boyd -v- Ineos Upstream Limited*** **[2019] 3 WLR 100** [34(4)]; ***Cuadrilla Bowland v Persons Unknown*** **[2020] 4 WLR 29** [50]; and, in the particular context of harassment, ***Hayden -v- Dickenson*** **[2020] EWHC 3291 (QB)** [53] and ***MBR Acres Ltd -v- Free The MBR Beagles*** **[2021] EWHC 2996 (QB)** [76], [91]-[94].

vi) The proposed undertakings came initially as a result of a Part 36 Offer and that regime permits a degree of flexibility as to the certainty of terms, which is more generous than would be the case were normal contractual principles to be applied: ***Adams -v- Options UK Personal Pensions LLP*** **[2021] EWCA Civ 1188**.

15. On behalf of the Defendant, Mr Coulter initially submitted that the answer to the Court's question was that the Court was bound to accept all of the Defendant's undertakings or none of them; it could not pick and choose the undertakings to accept. He has not provided any authority for that submission. Both parties have made some submissions as to the circumstances in which the Court can, as a matter of contract law, sever parts of an agreement and enforce some parts of the contract, but not others. That is rather a different situation.

16. Here, the position is that the parties have reached a contractual agreement. The Court is not being asked to – and will not –interfere with that agreement. The Defendant has, as a matter of contract, given the undertakings set out in the Claimant's Part 36 Offer. Mr Hamer is correct that there is a degree of flexibility in the Part 36 regime, enabling parties to hammer out the precise terms. For example, the Claimant could have put forward a Part 36 Offer that offered to accept a particular sum of damages together with, say, "*satisfactory undertakings, to be agreed, to prevent repetition of the acts complained of*". That would have been an acceptable Part 36 Offer. The Defendant could have asked for further information if s/he wanted precision as to the terms of the undertaking that would be acceptable. That is what I think is being referred to in the authorities regarding the degree of flexibility of the Part 36 regime, as distinct from the rigour that would be required in contract law.

17. Whatever the extent of such flexibility, it is not something that applies here. The Claimant put forward, precisely, the undertakings that she wanted the Defendant to provide and, ultimately, by accepting that Part 36 Offer, he agreed to them. The terms of the contractual settlement could not be clearer.

18. The issue that has concerned me is rather different. Whilst the Defendant has clearly agreed to provide the specified undertakings to the Court, does the Court have to accept them? I gave the example, during argument, of parties having agreed the settlement of a civil claim on terms that the defendant would undertake to the Court that he would never again eat bananas and would, each Wednesday, sing the Marseillaise in Trafalgar Square. Those are not terms which the Court would ever impose or agree to enforce by way of injunction. Parties are free to agree them, as a matter of contract law, but should the Court accept them as undertakings to the Court and, importantly, be prepared to *enforce* them, if necessary, by way of punishment under a contempt application?

19. I have deliberately chosen in those examples something that shows the absurdity to test the proposition as to whether the court can refuse to accept undertakings. Mr Hamer was inclined to accept that, as a matter of jurisdiction, the court can refuse to accept

undertakings. Nevertheless, he says that the Court should be slow to do so in circumstances where, particularly as here, the parties have reached a contractual agreement and both sides are represented. That, of course, is a matter which is deserving of appropriate weight. However, to be balanced against that, the Court should not uncritically accept undertakings given to the Court, in whatever terms the parties have agreed. For example, in some cases, the undertakings that are agreed may be a reflection of the relative bargaining power between the parties, such that one party is arguably able to extract whatever terms s/he wants as a price of the settlement from the other.

20. Whilst there can be no objection to the terms of contractual undertakings, the problem comes because undertakings given to the Court have the potential to be enforced by the Court. Ordinarily the Court would only impose an injunction (or accept undertakings to the Court in lieu) in terms the breach of which it would be willing to enforce, if necessary by an order for committal. In ***South Buckinghamshire District Council -v- Porter*** **[2003] 2 AC 558**, Lord Bingham explained [32]:

> "When granting an injunction the court does not contemplate that it will be disobeyed: ***In re Liddell's Settlement Trusts*** **[1936] Ch 365, 373-374**; ***Castanho -v- Brown & Root (UK) Ltd*** **[1981] AC 557, 574**. Apprehension that a party may disobey an order should not deter the court from making an order otherwise appropriate: there is not one law for the law-abiding and another for the lawless and truculent. When making an order, the court should ordinarily be willing to enforce it if necessary. The rule of law is not well served if orders are made and disobeyed with impunity. These propositions however rest on the assumption that the order made by the court is just in all the circumstances and one with which the defendant can and reasonably ought to comply, an assumption which ordinarily applies both when the order is made and when the time for enforcement arises. Since a severe financial penalty may be imposed for failure to comply with an enforcement notice, the main additional sanction provided by the grant of an injunction is that of imprisonment. The court should ordinarily be slow to make an order which it would not at that time be willing, if need be, to enforce by imprisonment. But imprisonment in this context is intended not to punish but to induce compliance, reinforcing the requirement that the order be one with which the defendant can and reasonably ought to comply…"

21. When people seek to settle a claim, naturally they will attempt to obtain as wide-ranging protection for the future as is possible. However, there is a tension between seeking to do that whilst at the same time observing the requirement that undertakings, particularly those given to the Court, must state precisely what is prohibited. However, the more imprecise the terms of any undertaking, paradoxically the less likely they are to be effective. That is because if the Court, on a contempt application, considers that the undertaking is ambiguous or unclear as to what it is prohibiting, the benefit of any doubt will be given to the defendant in any contempt application. In the worst case, hopelessly vague undertakings may for this reason prove incapable of being enforced.

22. In this case, my concern is over the breadth (and vagueness) of paragraphs (1) to (3). Mr. Hamer's argument is that should any issues arise as to the interpretation of these paragraphs of the Defendant's undertaking then the Court should address those at the point that a contempt application is brought alleging breach. He submits that there is a further safeguard in that the Claimant will not seek to enforce an undertaking given to the Court if the alleged breach is trivial or minor. Even if the Claimant complained of

such a trivial breach, he argues that the Court can mark its disapproval of bringing a contempt application on such a basis by either dismissing the contempt application or not imposing a penalty.

23. There has also been some focus in argument on the terms of Paragraph (7). That paragraph purports to restrains two things. First, activity that amounts to harassment but also any other activity that is likely to cause the Claimant distress. Applying the authorities identified by Mr Hamer (see [14(v)] above), a Court should be wary of granting an injunction that prohibited a defendant from carrying out any acts that amount to harassment. The reasons are explained in those authorities, but put shortly, even lawyers can reasonably disagree as to what behaviour amounts to harassment, and to add even more to that complexity, some behaviour in some circumstances is harassment, whereas the same behaviour repeated in different circumstances is not harassment. The Court must specify precisely what behaviour of the Defendant is being prohibited. In many instances of typical harassing behaviour, a restriction that the person is not to contact the Claimant directly or indirectly will put paid to most of the allegedly harassing behaviour. Typically, those types of injunction also contain restrictions on approaching the Claimant or going within a prescribed distance of his or her home or work address. The court, therefore, tailors the injunction to identify the particular harassing activity that is being prohibited in a way that makes it clear what the defendant can or cannot do.

24. Although I would not ordinarily grant an injunction in the terms of paragraph (7), I have been persuaded by Mr Hamer, however, that I should accept an undertaking in those terms given to the Court. First, because it is one that has been agreed between the parties. Second, the law generally prohibits harassment. Section 1 of the Harassment Act of 1997 prohibits a person from pursuing a course of conduct which amounts to harassment of another and which s/he knows or ought to know amounts to harassment of the other. A breach of s.1 can give rise both to a civil claim and proceedings for a criminal offence under ss.2-3. Harassment is not defined beyond the limited terms of s.7 of the Act. As such, each citizen is expected to ensure that their conduct is such as to not transgress the law.

25. Where a defendant agrees not to carry out further harassment, it may be because s/he is well aware of what behaviour has previously given rise to the complaint and it may be for his/her own reasons that s/he is willing to give an undertaking in those terms. If there is an alleged breach of paragraph (7) after this undertaking has been given to the Court, then in any contempt application the alleged breach will have to be identified clearly and, ultimately, the Court will decide, after having heard the evidence and applying the criminal standard of proof, whether a breach has been established.

26. In my judgment, however, it is a different matter when the court comes to consider the restrictions imposed by Paragraphs (1), (2) and (3). These restrictions were no doubt intended to deal with what the Claimant and her advisers believed was the menace that they alleged was at the heart of what the Defendant was alleged to have done to the Claimant in the period I have identified. However, these restrictions are too broad. Paragraph (1) arguably prevents the Defendant from ever mentioning the Claimant again in any context. It would even appear to prevent the Defendant apologising to the Claimant, were he minded to do so. Paragraph (2) was clearly intended to prevent a repetition of the Defendant's alleged online impersonation of the Claimant by establishing fake social media accounts, but the terms would also catch any other form

of impersonation, even arguably to mimicry. Paragraph (3) would arguably prevent the Defendant from carrying out an internet search of the Claimant.

27. The problem about accepting such wide undertakings is because it increases the risk or likelihood that the parties will end up back before the Court on a contempt application. The court has limited resources. Experience shows that contempt applications can become hard-fought litigation often involving substantial disputes of fact over what is alleged to have taken place. Undertakings given to the Court that are vague or too wide make it more likely that there will be future disputes. In terms of undertakings, in my judgment the Court can properly want to regulate the instances where it is prepared to enforce future compliance with undertakings to those cases where the parties have made proper efforts to provide undertakings that comply with the requirements of clarity and certainty. The wider the terms of an undertaking, and the more likely that they are to catch behaviour that cannot arguably be of any form of wrongdoing, the more vigilant the Court will be as to whether it is appropriate to accept those undertakings as ones properly given to the Court. The Court will not uncritically sign up to policing an agreement the terms of which are vague and unjustifiably wide. Equally, the Court is not going to agree to its powers of compulsion in respect of injunctions or undertakings to the Court being used to enforce agreements that embrace trivial or insubstantial matters (the banana-eating example).

28. I am satisfied that the Court has the jurisdiction to accept only some of the Defendant's contractual undertakings as undertakings given to the Court. It cannot be right, because the consequences could be absurd, that the Court has to accept any undertakings that the parties have agreed. Whilst I cannot rewrite the undertakings agreed between the parties - because they are the underlying contractual agreement that has been reached between them – I am not bound to accept such undertakings being given to the Court. What the court is doing by accepting undertakings is adding to the powers of enforcement that are available to the Claimant.

29. In this case, I will not accept undertakings (1), (2) or (3). For the reasons explained, these are too vague/wide. In reaching this decision, I take into account that I will be accepting an undertaking from the Defendant in the form of paragraph (7). If the Defendant engages in harassing behaviour of the Claimant that would, arguably, have fallen within paragraphs (1), (2) or (3), then it is likely that it will fall within paragraph (7). However, for there to a breach, the acts would have to amount to harassment. That, in my view, properly protects the Claimant and is a matter that the Court would be prepared to enforce by way of punishment for contempt, should it arise in the future.

30. I asked Mr Coulter whether the Defendant was willing to give some of the undertakings to the Court where the Court refused to accept others, and he has confirmed today on instructions that the Defendant is willing to do that. His position remains that he is prepared to give all of the undertakings but if the Court only accepts some of them, then the Defendant will give those that the Court is willing to accept.

31. For the reasons I have explained in this judgment, the Court will accept the undertakings from the Defendant in the terms of paragraphs (4), (5), (6), (7) and (8). Those will be reflected in the Court's order today and the Defendant knows and has acknowledged that any breach of those undertakings given to the court would potentially expose him to proceedings for contempt of court and the penalties that I have outlined. In respect

of any alleged breach of Paragraphs (1), (2) and (3) by the Defendant in the future, the Claimant will be left to solely contractual remedies.

(This Judgment has been approved by the Judge.)

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