Case No: G03EC098

IN THE COUNTY COURT AT CLERKENWELL AND SHOREDITCH

The Gee Street Courthouse
29-41 Gee Street
London EC1V 3RE

Thursday, 25 February 2021

BEFORE:

DEPUTY DISTRICT JUDGE MARTYNSKI

BETWEEN:

SOUTHERN HOUSING GROUP LTD

Claimant

- and -

(1) STEPHEN BERRY
(2) MARK BERRY

Defendants

MR S EVANS (instructed by Devonshires Solicitors LLP) appeared on behalf of the Claimant
MS A IRVING (instructed by GT Stewart Solicitors) appeared on behalf of the First Defendant
The Second Defendant did not appear and was not represented

JUDGMENT
(APPROVED)

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Unit 1 Blenheim Court, Beaufort Business Park, Bristol, BS32 4NE
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
(Official Shorthand Writers to the Court)

1. THE DEPUTY DISTRICT JUDGE: This is the case where the first defendant, Mr Stephen Berry, is tenant of the claimant, Southern Housing Group Ltd. He is an assured tenant of a property in north London. The second defendant, Mr Mark Berry, is the first defendant's son, and I understand that he visits him regularly. The first defendant has been a tenant in the property in question for over 20 years.

2. On 23 December 2020 an application was made for an injunction on a without-notice basis. That application was against both the first and second defendants. The application was supported by a witness statement of a housing officer, Mr Galatley(?). That housing officer in his witness statement set out details of various nuisances alleged against the defendants, and those nuisances came from essentially two neighbours of Mr Berry, one being a Mr Kulumanu(?) and one being a Mr Denning(?). In that witness statement there was reference to another, unidentified neighbour having made a complaint, but essentially we are dealing here with the allegations made by Mr Kulumanu and Mr Denning.

3. Those allegations were set out in detail in the housing officer's statement and listed a disturbing number and type of allegations of harassment and other such behaviour from the defendants dating from September 2019. The witness statement was supported by various exhibits, including complaints made by the two complainants, and the witness statement also dealt with (and it dealt with it in some detail) the issue about the first defendant's complaints about Mr Denning's dogs. It seems that the first defendant has or had an issue with the dogs kept by Mr Denning and the mess created by them that he claims was not cleared up by Mr Denning. The focus of this in the witness statement from the housing officer is in fact to turn that slightly on its head and to say that the claimant itself was somewhat harassed by the number of complaints received from the first defendant in relation to this issue. It then went on to state that appropriate action, some sort of plan, had been agreed with Mr Denning and that that had resolved the issue.

4. On the basis, then, of that the application was heard by DJ Naidoo on 5 January 2021. From the accounts that I have, although I do not have a transcript of that hearing, it was

a fairly brief hearing, such hearings of without-notice injunctions being listed in amongst a number of other things that a judge has to deal with on that day, it seems that the judge indicated that she had read the papers, and it also appears that no further substantive submissions were made by the claimant in respect of the application for the injunctions. I should pause here and say that in these applications the reality is, as I say, that the application goes in, squeezed in amongst a number of other pre-listed matters that the judge has to deal with and that the judge in these circumstances is very much reliant on a very fast reading of the application and the evidence in support of it. Anyway, the result of that hearing is that the judge made the injunctions in the same terms as they were applied for but in any event those injunctions were in very wide terms. When I say "wide terms" I think the injunctions also so far as the first defendant is concerned were aimed at preventing him from making further comments in respect of the issue of the dog mess and a power of arrest attached to that.

5. We move on from there and fast-forward to today and what I know today but, more importantly, what the claimant knew prior to making the application issued on 23 December. The claimant knew various things. The claimant knew that the first defendant had a history of mental-health issues, and it knew that because we have a medical report. It is dated 3 August 2020. I shall quote from it briefly. It states that Mr Berry presents with a long history of illness and has been given a diagnosis of major depressive disorder. For my purposes the significant part of that report says this:

> "Following a period of clinical improvement there have been significant concerns surrounding a determination in Mr Berry's mental state over previous months. It is clear that this deterioration is directly linked to ongoing altercations with his immediate neighbours, which have left to Mr Berry struggling with a persistent sense of threat."

6. It concludes, "I would be grateful if you would take the above information into account in looking not Mr Berry's case". It seems that following on from that when considering making the application for the injunctions the housing association undertook a

proportionality and public-sector equality duty assessment, in which it is clearly considering the allegations that have been made by the first defendant's neighbours and the information that it had regarding the first defendant's mental health. The question to be answered in this assessment is: is the behaviour related to the tenant's protected characteristics? The answer that the claimant gives to that in assessing the situation is no; the claimant does not have any information to indicate that the depression is related to the antisocial behaviour.

7. That is the first thing hat the claimant knew. The second thing that the claimant knew was that the first defendant had been making allegations regarding his accusers Mr Kulumanu and Mr Denning. His allegations were serious, possibly as serious as the allegations being made against him. The allegations concerned nuisance and in respect of Mr Kulumanu threats to kill. The claimant knew that these complaints had been passed to the police and knew that the police were investigating these complaints. It turns out that the claimant had gone some considerable distance in trying to meet with the police to discuss these allegations and the police's investigation. For whatever reason that did not produce any hard information (police officers were not available; police officers did not get back to them), but I have seen a later witness statement that sets out the efforts that they made, which seem to be not inconsiderable.

8. That is what the claimant knew at the time when making the application. What I have now is some documents, in the form of emails, that come from the police that suggest (and I am very careful on this) that Mr Kulumanu and Mr Denning have both been charged with offences in relation to the first defendant. Once you drill down into that information the information is that the police have decided to charge them. I do not have any formal evidence that they have been charged, but I have heard in other ways that it is suggested they have been charged and they have gone to court. Mr Kulumanu in particular has been charged with an offence of threatening to kill the first defendant, although I make it clear that so far as the hard evidence is concerned that is only of the police's intention to charge. We also know for a fact as we sit here today that the first defendant has been charged in relation to offences of the kind of harassment of his neighbours and that that case is pending in the criminal courts. I also now know that

there has been some further enforcement against Mr Denning in respect of a continuing problem with his dog's mess. Some form of formal notice has now been served on him by another agency. They, I stress, are the things that we know and the things that we think might be likely from the things that we know now.

9. Back to 5 January, the district judge made the order largely if not completely in terms sought by the claimant. The matter then returned to court on 14 January, and at that stage the issue of material non-disclosure at the hearing of the 5 January is raised by the first defendant. Exactly what happened at the hearing on 14 January is the subject of some dispute between the parties; no one has a transcript of that hearing, and so I cannot form any definite view as to what happened there. Suffice to say, although it does not affect the way I have decided his application, that the first defendant maintains that at that hearing the claimant's position was that it was not aware of the first defendant's mental health when it made the application and that that was a false statement. That is contested by the claimant, and, as I say, my decision today does not turn on any of that.

10. On 14 January the terms of the injunction so far as they concern the first defendant were amended slightly, and this hearing was set so that I could consider whether or not the original injunction order than as modified should be set aside as a result of material non-disclosure from the claimant. At this point I should make it clear that this application to discharge the injunction comes only from the first defendant; the second defendant has not taken any part in that application, and so my comments are directed in respect of the injunction against the first defendant only.

11. So, we go back to the question of the frankness of the application when it was first issued and then presented to the court in early January. There is no question between the parties that there is a duty on the part of a claimant in seeking a without-notice injunction that there should be full and frank disclosure. I have been referred to authorities, but I am going to limit my comments to the case of *Tugushev v Orlov* [2019] EWHC 2031, decided on 26 July 2019, because that case sets out a very useful summary of the principles and considerations to be applied in a case of this kind.

Tugushev is a case of a very different kind to this. It was something to do with a freezing order and essentially commercial in nature, but nonetheless the comments are wide-ranging and applicable to the situation that we have. I go through the various points raised in that judgment starting at paragraph 7, because there very usefully is set out the various things that one must bear in mind and that are relevant, briefly before I focus in on what I consider to be the most germane in this case.

12. (i) The duty of an applicant for a without-notice injunction is to make full and accurate disclosure of all material facts. (ii) The court must be able to rely on the party who appears alone to present the argument in a way not just designed to promote its own interests but in a fair and even-handed manner, drawing attention to evidence and arguments that it can reasonably anticipate the absent party would wish to make. (iii) Full disclosure must be linked with fair presentation. The judge must have confidence in the thoroughness and objectivity of the applicant's case. (iv) An applicant must make proper enquiries before making the application. He must investigate the cause of action asserted and the facts relied on before identifying and addressing any likely defences. (v) Material facts are those which it is material for the judge to know in dealing with the application as made. The duty requires an applicant to make the court aware of the issues likely to arise et cetera.

13. Sub-paragraph (vi) I shall deal with in its entirety:

> "Where facts are material in the broad sense, there will be degrees of relevance and a due sense of proportion must be kept. Sensible limits have to be drawn, particularly in more complex and heavy commercial cases where the opportunity to raise arguments about non-disclosure will be all the greater. The question is not whether the evidence in support could have been improved (or one to be approached with the benefit of hindsight). The primary question is whether in all the circumstances its effect was such as to mislead the court in any material respect."

14. It goes on, for the sake of completeness, (vii) the defendant should identify the alleged failures rather than adopt a scattergun approach, (viii) it is inappropriate to seek to set aside a freezing order for non-disclosure that is particular to that case; (ix) if material non-disclosure is established the court will be astute to ensure that a claimant who obtains injunctive relief is deprived of any advantage (not so relevant in this case, but I shall go back into that a bit later on), (x) immediate discharge is likely to be the court's starting point; (xi) the court will still discharge the order even if the order would have bene made had the relevant matters been brought to its attention (so, it is saying there that the action taken by the court is in the nature of the sanction), (xii) the court nevertheless obviously has a discretion whether to continue the injunction, and (xiii) deals with the freezing order that was particular to that case.

15. Going back and focusing in on the paragraph that I quoted in full, (vi), the "broad sense" and "degrees of relevance", it seems to me in general and in my experience over the years of dealing with these cases, the fact that the first defendant had been suffering with mental-health issues up until at least very recently had a relationship to problems that he was having with his neighbours is pretty relevant if in the knowledge of the claimant. That becomes, to me, more significant, because, of course, what we are also not told on that first application is that he was making counter-allegations against those who accused him, he was having problems with those and the police were involved in the allegations that he was making. That clearly ties it back to what was said in the medical report. I do not think this is a case of overwhelming the court with detail; I think these are matters that in any sense in a case like this are highly relevant, facts that the court should be alerted to on a without-notice application.

16. Just thinking further about that point, how much information does a claimant have to give? Do they have to anticipate everything? We can see an answer to that to some extent in the witness statement presented to the court on 5 January, because the housing officer's statement does in fact go into some considerable detail on the question of the complaints about the dog mess. As I say, that got somewhat turned on its head and turned into a complaint about the first defendant complaining about the other resident and his dog. So, clearly in the housing officer's mind that was not something that was

outside the scope of broad relevance. Surely if that was relevant those other two issues must within that scale have come within the reasonable degree of relevance.

17. Further, I think there is something in the points that have been added. Whilst it is obvious on the face of the papers presented to the judge that the first defendant had been resident for over 20 years (and that is obvious because it gives the start date of the tenancy), that I do not see anywhere brought into the general consideration in balancing this out. For my part, dealing with any kind of housing case, I would always take a look at when the tenancy began, how long that tenant has been maintaining their tenancy. I then look at, if it is a rent arrears case, how long there have been rent arrears; if it is a nuisance case, when the nuisance started. All of these things are little pointers and relevant.

18. Not only that (and I am going to quote from paragraph 27 of the housing officer's witness statement in support of that application, because it gives a flavour of where this witness statement was coming from):

> "The claimant seeks the injunction order and attached power of arrest on a without-notice basis to the first and second defendant in order to protect the other residents on the mews. The residents feel incredibly threatened by the defendants' behaviour and fearful for their lives as a result of the death threats, racist and homophobic remarks. The defendants' antisocial behaviour is having a serious detrimental effect on the other residents' mental health, and residents are scared to leave their properties as a result of fearing the unpredictable behaviour of the first defendant."

19. How that statement sits without a mention of the things that were left out and that I have highlighted is difficult to see. This is the presenting of or has the appearance of the presenting of a highly partisan point of view, not the balanced approach that is required in a case like this, obviously within reasonable bounds; referring quite properly to some very disturbing allegations as against the first defendant, which, I may add, at the end of the day if I found to have been proven I would take a

particularly dim view of in relation to injunction proceedings but also if there were ever to be any possession proceedings, but to refer to the effect on other residents' mental health whilst making those omissions seems to me to be entirely wrong.

20. So, the next question I have asked myself is this: was the non-disclosure innocent? That question is a little off the mark in a case like this. We have cases, usually in the High Court, where there is some sort of commercial dispute, and a lot of this litigation is part of the greater battle for advantage between the parties. It was not in that sense an attempt to gain some sort of advantage. I bear in mind that what I am dealing with here is a no doubt very hard-pressed housing association trying to do a difficult job in difficult circumstances in the best way it can, but it was not innocent, it could not be classed as innocent, in that broad consideration. It was poor practice. One of the many things that housing associations have to grapple with and deal with, I have no doubt with monotonous regularity, is disputes between their residents, and they should be alert to the issue of disability, the issue of cross-allegations, trying to find where the truth lies in all of this and acting appropriately, all of that a pretty impossible task, but when engaged in that exercise there is clearly a duty upon them to bring this to the attention of a third party whom they are asking to adjudicate on the matter.

21. Would the order still have been made had that disclosure been given? I cannot put myself in the mind of DJ Naidoo, and I cannot un-forget everything that I now know, some of which is with the benefit of hindsight. What can I do? I can only try to imagine my own reaction to what I would have done had I known those other matters that were not disclosed. For my part it would have given me cause to pause, reflect and think carefully. The point has been made by Mr Evans, for the claimant, that the enquiry that was directed for today was not directed at the question of specifically without notice, but I must say that one of my reactions to this had I have known what the claimant knew at the time may well have been to refuse to make an order without notice. It seems to me in the circumstances, difficult circumstances, that this is not one of those cases where there was a very pressing need for urgency. This had been rumbling on for some time, clearly to-ing and fro-ing, and this is an application that could have been made on notice.

22. So, I have concluded that there was material non-disclosure of important facts, facts that should have been disclosed. The facts that were not disclosed clearly, it seems to me, fell within the claimant's duty to disclose and may well have affected the order that was made. Even if not, I have to now grapple with the question of what to do with that order, whether or not in the circumstances I should continue the order, and in grappling with that these are the matters that I have taken into consideration. I now know, and I can now rely on whatever knowledge that I have on this case in deciding how this matter continues, that this is a case where there are very much two sides of a story to hear. I suspect that there are ongoing criminal proceedings in respect of various parties. I have reason to believe, although I do not base my decision on this, that the parties may all be on bail of some kind. There are, I am aware, allegations of breach of the injunction, but those either are not specifically particularised or have certainly not been brought to be as a significant development, bearing in mind that it would appear that things have been rumbling on either both ways or one way for some time.

23. There are serious allegations against the first defendant, and I am going to repeat what I said: if there is truth to these allegations then I would hope whoever deals with this would take the same view as I do, which is a particularly poor view of such conduct. But one effect of this injunction may well be to increase the first defendant's sense of injustice in this matter, which I think it some extent is procedurally well founded, and I make clear I am not in a more general sense making any conclusion or assumption that in general terms, in terms of the truth of the allegations, that the first defendant has been dealt with unjustly. I am also concerned now that I know about the various cross-allegations that there might be a sense of betterment and encouragement on the part of the other protagonists if I continue with an injunction against one party where there are cross-allegations of this kind. There is potentially a problem to be caused to the claimant in discharging the injunction but, as is made clear in the case that I have referred to, not one of my main considerations, and so, on balance and with some hesitation, I have decided to discharge that injunction and to now give directions to take this matter to a full, and hopefully final, hearing.

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Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE
Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge