Neutral Citation Number: [2021] EWHC 3284 (QB)

Case No: QB-2021-001512

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 03/12/2021

Before :

LORD JUSTICE WARBY

- and –

MR JUSTICE JOHNSON

- -

In the matter of:

The persons formerly known as:

(1) **Craig Winch**

(2) **Debbie Winch**

(3) **Carol Winch**

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And in the matter of an application for a contra mundum injunction

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Kate Wilson (instructed by **Weightmans LLP**) for the **Claimants**

Hearing date: 29 November 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Friday 3 December 2021.

LORD JUSTICE WARBY:

Introduction

1.

This is a claim for a Venables injunction: an order against the world, conferring lifelong anonymity on an adult by prohibiting the publication of information that would be likely to lead to the disclosure of their identities. Orders of this kind get their name from the first case in which the jurisdiction to grant them was recognised and exercised: Venables v News Group Newspapers Ltd [2001] Fam 430 (Butler-Sloss, P). There, the purpose was to protect the new identities given to two notorious child killers. The jurisdiction has been exercised on a handful of occasions since.

2.
This is the judgment of the Court, given after the trial of the claim.

3.
The first claimant, previously known as Craig Winch, is a former participant in serious and organised crime. He has become an Assisting Offender under s 73 of the Serious Organised Crime and Police Act 2005. In other words, he is an informer. More than that, he has provided information and given evidence leading to a substantial number of individuals from organised crime groups ("OCGs") being convicted of serious offences. In colloquial terms he is a "supergrass". The second and third claimants are female relatives of the first claimant. All three are living under new names, to guard against violent retribution by those on whom the first claimant has informed, and their associates.

4.
The essential basis for the present claim is that, on the particular facts of this case, these measures are not enough: the first claimant's activities as an informer have exposed all three claimants to a real and immediate risk of death or serious harm which makes it necessary to go further, and to grant the additional protection of a Venables injunction. At the conclusion of the hearing we announced that we agreed with that proposition and we granted the relief sought, with reasons to follow. These are our reasons.

The proceedings to date

5.
The claim form was issued on 22 April 2021, as reporting restrictions imposed by the Crown Court under s 4(2) of the Contempt of Court Act 1981 reached their expiry date. The claim was brought under Part 8, on the basis that there was unlikely to be any significant dispute of fact. It was formulated as a claim against Persons Unknown. No such persons were served with the proceedings, but the media were given appropriate notice of the claim, and of the claimants' application for an interim injunction. That application was initially made as a matter of urgency on 23 April 2021, when Murray J granted an injunction until a return date of 7 May 2021.

6.
On 7 May 2021 the claimants' application to continue that order until trial came before a Divisional Court (Warby LJ and Nicklin J). The application was supported by one witness statement from each of the claimants, two from their solicitor, Mr Forshaw, and two from an officer from a law enforcement agency ("LEA") who was anonymised as "C". One of "C's" statements was a closed statement. The hearing was in public. The court made orders to protect the identity of "C", and to guard against publicity for details contained in her closed witness statement that could identify the claimants. All the other evidence was open. Nobody filed any evidence in opposition to the application, nor did anyone appear at the hearing to resist the application. An injunction against the world was granted until after judgment in the claim.

7.

The court's reasons were set out in judgments handed down on 18 May 2021: [2021] EWHC 1328 (QB), [2021] EMLR 20. The principal judgment was that of Warby LJ, with which Nicklin J agreed. Having set out the background facts and identified the nature of the claim ([1-4]) Warby LJ reviewed the evidence ([5-13]). The judgment is publicly available and it would be superfluous to repeat the exercise. We merely pick out some of the chief points.

8.
The statement of Winch told of being subjected to "severe violence" by members of the OCGs when he was working with them. He said he was living in daily fear of being recognised. One of his close relatives had been located by OCG members. The statements of the second and third claimants also spoke of being terrified of physical harm. The key evidence was that of Witness C, who described Winch's role in an OCG and his role as an Assisting Offender from 2016. He had taken an active role as the conduit for supply of controlled drugs for an OCG in the North East of England. Having incurred debts to the OCGs he was subjected to violence to secure repayment. The trials in which he gave evidence led to the conviction of 29 individuals and a number of long sentences, including life imprisonment, 30 years, and 28 years. The LEA had identified 12 OCGs consisting of some 174 members who were considered capable of posing a significant threat, eight of them being assessed as "having a high violence capacity". C's evidence was that various OCGs were "actively seeking the first claimant and his family, in order to cause them serious harm or kill them." The threat to the claimants was assessed as "severe" and "extreme" such that, should they be located by OCGs it would be likely to "result in the infliction of serious harm or death".

9.
The evidence was that Winch himself had pleaded guilty to 23 offences, for which he was sentenced by HHJ Sherwin to 15 months' imprisonment suspended for two years. That sentence reflected his assistance and the danger to which the Judge considered he was exposed as a result. The evidence of "C" referred the court to the sentencing remarks of HHJ Sherwin, passages from which are set out in the interim judgment at [2].

10.
At [14-20], Warby LJ identified the legal principles, before applying them to the facts of the case at [15-28]. The court held that the applicable principles were those summarised by the Divisional Court in RXG v Ministry of Justice [2019] EWHC 2026 (QB), [2020] QB 703 [35], applied in D v Persons Unknown [2021] EWHC 157 (QB) (Tipples J), and considered in Re Al Maktoum (Reporting Restrictions Order) [2020] EWHC 702 (Fam), [2020] EMLR 17 (Sir Andrew McFarlane, P). We take the same view. The principles are fully set out in the interim judgment and given our conclusions it is unnecessary to rehearse them here. It is enough to say this.

11.
According to the authorities the court may interfere with freedom of expression by granting a Venables jurisdiction where a claimant demonstrates "a real possibility of serious physical harm and possible death", which is immediate, and the evidence "demonstrate[s] convincingly the seriousness of the risk". In such a case Article 2 of the Convention (right to life) and Article 3 (prohibition of torture, inhuman or degrading treatment) are engaged. Further, "where an applicant demonstrates by cogent evidence, that there is a real and immediate risk of serious physical harm or death, then there is no question of that risk being balanced against the Article 10 interests": RXG [35(v)]. In Al Maktoum, SirAndrew McFarlane, P applied these principles in granting anonymity to an adult witness. He also held that the outcome would have been the same if it was necessary to balance the applicants'

rights under Articles 2 and 3 against the free speech rights of those who might wish to impart and receive the identifying information.

12.
At the interim stage, the test to be applied is the one set out in s 12(3) of the Human Rights Act 1998, of whether the court is "satisfied that the applicant is likely to establish that publication should not be allowed". The court was so satisfied, as Warby LJ explained at [21-23]:

"21. I am satisfied that the court would be likely after a trial to conclude that the facts of this case place it within the narrow band of exceptional circumstances in which the Venables jurisdiction should be exercised.

22. In my judgment, success for the claimants is more likely than not. The evidence before us is cogent and powerful. It demonstrates a significant and weighty risk that the claimants would be subjected to death or very serious violence if members of the OCGs or their associates were able to locate and identify them. The evidence satisfies me that the OCGs are actively trying to find the claimants, and that there is a real and appreciable risk that they could succeed, if no restrictions are placed on the distribution of identifying information. Our order will significantly mitigate any such risk.

23. I do not consider that these grave risks to the claimants' fundamental human rights fall to be balanced against the free speech rights with which such an order will interfere. I would apply the principles identified in RXG, including those at [35(iv)]. As Lord Rodger has said "… a newspaper does not have the right to publish information at the known potential cost of an individual being killed or maimed": Re Guardian News and Media Ltd [2010] UKSC 1, [2010] 2 A.C. 697 [27]. To be fair, no media representative has suggested that this is the position. The media have been notified of this application and it is uncontested. But if there were a balance to be struck, I would reach the same conclusion as Sir Andrew McFarlane in Al Maktoum."

13.
Warby LJ went on at [24-27] to acknowledge that the order would have "some impact" on the freedom to report the legal proceedings in which Winch had been a witness and a defendant: it would restrict what could be reported about the sentencing remarks of HHJ Sherwin, and prohibit the publication of sketches or descriptions of Winch's physical appearance. It might also "impinge to a degree" on media freedom to report and comment on Winch's various roles in crime and in the criminal proceedings. These derogations from open justice required clear and cogent justification. But the degree of restriction was "relatively modest" and the importance of continuing to withhold it comfortably outweighed the importance of reporting it in connection with the criminal proceedings. The grant of the order was supported by the novel features of the case. The threat was one of "violent and indiscriminate revenge for an act of public service", and the grant of an order would serve the public interest by incentivising informers.

14.
In his judgment, Nicklin J pointed out that the Persons Unknown against whom this claim was initially brought were not individuals who were in principle identifiable but whose identities were not known. In substance, this was a claim against the world at large. It was therefore inappropriate to have any defendant, and formal service on any individual, firm or company could and should be dispensed with. Warby LJ agreed on this issue, and the claim was duly amended by the removal of the "Persons Unknown" defendants.

15.
The court was clear that the media should be notified of such an application but was satisfied that "the fullest information has been provided about this claim to a very large number of media organisations and they have been given every opportunity to make any representations that they wished the Court to consider …" [33].

16.
The court gave directions for the progress of the claim towards trial, which included an order that the trial date should be notified by the claimants to all third parties served with the Order of Murray J or the Order of 7 May 2021. Deadlines were provided for the service of evidence and skeleton arguments by any person who wished to respond to the claim, or to be heard at the trial. The order also provided that in the meantime any party affected by the interim injunction could apply to discharge or vary it on 48 hours' notice.

17.
Notice of the order and the interim judgment explaining it was given to the world at large via the judiciary website and www.bailii.org. The judgment was published in full on both platforms (and has since been reported). The order was placed on the judiciary website, in accordance with the requirements of CPR 39.2(5). That rule provides, among other things, that "Any person who is not a party to the proceedings may apply to attend the hearing and make submissions, or apply to set aside or vary the order."

The trial

18.
The claimants continue to rely on the seven witness statements that were before the court on the interim application. They also rely on a further statement from Mr Forshaw (his third), a second open witness statement from "C", and a second closed statement from the same witness. Like the interim application, the trial has been conducted in public, with an anonymity order to protect the identity of witness "C" and the identifying details contained in her second closed witness statement.

19.
Mr Forshaw confirms that on 12 May 2021 all third parties that had earlier been served with the claimants' application and previous orders in the case were given notice by email of the interim injunction, and a copy of the court's order of 7 May 2021. By email of 28 May 2021, they were all provided with notice of the trial date and a reminder of the deadline by which they were required to serve any evidence in response to the claim.

20.
The further statements of "C" address the risk of death or serious physical harm to which the claimants are said to be exposed. The second closed statement of "C", and the exhibit to that statement, show that since the interim injunction was granted an attempt has been made to identify the first claimant. This can be linked to an OCG. The LEA's assessment is that "the risk to the claimants has not diminished in the months following the conclusion of the criminal proceedings". The risk is said to remain "severe", and the claimants are said to be at "extreme risk". The LEA considers the injunction to have been effective and valuable in managing that risk.

21.
As with the interim application, nobody has filed evidence or advanced submissions in opposition to the claim. Of those to whom the claimants' solicitor wrote with notice of the interim injunction, trial

date and evidence requirements, only one responded. This was North News, which replied to the email of 28 May 2021 to advise that it would not be making any application or submission.

Assessment

22.
The Venables jurisdiction is grounded in the duty imposed on the court by s 6 of the Human Rights Act 1998, to act consistently with the Convention Rights: RXG [24]. The key rights for present purposes are those under Articles 2 and 3. Having reviewed the position and heard the arguments of Counsel, we agree with and adopt the legal analysis contained in the interim judgment, which was based on RXG [35].

23.
At this stage it is not enough for the court to be satisfied that the threshold tests identified in RXG are likely to be met. It must be shown that they are met. But that does not mean that a claimant needs to prove that he or she is more likely than not to be killed or seriously injured if the injunction is not granted. The exercise remains one in risk assessment and, as the court put it in RXG at [35(iv)]:

"… the test is not a balance of probabilities but rather that the evidence must 'demonstrate convincingly the seriousness of the risk' and raise a real possibility of significant harm: a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm."

We add that the decision in RXG was given after the trial of the Part 8 claim.

24.
The fact that, despite ample notice and fairly extensive publicity, nobody has come forward to contest the present claim or the nature of the relief sought does not of itself provide any support for the claimants' case. It does however mean that there is nothing to contradict the evidence adduced by and on behalf of the claimants. And we can reasonably infer from the absence of opposition that none of the many media publishers given notice of the claim considered there was a strong factual or legal argument to be made against the claim.

25.
That said, the fact that the claim has proceeded unopposed does not absolve us of the obligation to ensure that there is no unjustifiable interference with the fundamental right to freedom of expression. We are also alive to the importance of ensuring that any order we make does not unjustifiably impinge on the fundamental principle of open justice, which is a separate though related issue. We have therefore been mindful of the need for transparency and vigilance. Subject to the anonymity orders which we have explained, we have conducted the hearing in open court. We have subjected the factual and legal basis of the claim, and the form of order sought, to close and critical scrutiny.

26.
As we have said, we adopt the legal analysis set out in the interim judgment. But two points of law came to mind when we were reading into the case before the trial. We raised them both with Counsel in advance of the hearing.

(1)
As we have mentioned, the witness statements placed some reliance on the sentencing remarks of HHJ Sherwin as evidence demonstrative of the risks relied on. We raised the question of whether this approach was consistent with the decision in Hollington v F Hewthorn & Co Ltd [1943] 1 KB 587 (CA)

that evidence of a criminal conviction is irrelevant and hence inadmissible in support of a related civil claim.

(2)
The LEA evidently has considerable experience in the assessment of risks posed to those who provide information about OCGs, and it is clear that a sophisticated risk assessment has been undertaken into the risks posed to the claimants. The evidence of “C” included a number of statements of opinion, evaluation, or assessment, some of which we have cited above. These considerations led us to wonder whether this evidence was at least in part expert evidence that fell within the scope of Part 35, such that the claimants required the court’s permission to adduce and rely upon it.

27.
Ms Wilson’s submission was that Hollington v Hewthorn presents no obstacle to reliance on the sentencing remarks. Not only do those remarks not have the same character as a conviction, the underlying rationale of the decision in that case is to avoid unfairness to third parties who might wish to contest the findings, which could not be an issue in the present claim against the world at large. In support of this submission Ms Wilson referred us to the recent decision of the Court of Appeal in Ward v Savill [2021] EWCA Civ 1378 at [81]ff. We did not find this line of argument compelling. Our provisional view is that sentencing remarks such as these are not relevant and hence not admissible as evidence of risk in a context such as the present, as they amount on analysis to third-party opinion evidence: see Hollington v Hewthorn at595 (Lord Goddard CJ, giving the judgment of the court). But we do not think it necessary to decide the point because we accept Ms Wilson’s alternative submission, that the claimants’ case is sufficiently made out on the other evidence before the court.

28.
That evidence includes the statements of witness “C”. Ms Wilson conceded that much of that evidence was given against a background of specialist experience. But she argued that “C” could not be an expert for Part 35 purposes as she lacked the necessary independence, and in any event much of her evidence was on a proper analysis purely factual. We have not been dissuaded from our provisional view that some at least of the evidence adduced from “C” may well be expert evidence that falls within the scope of Part 35. But again, we do not need to decide the point. The claim does not stand or fall on those aspects of the evidence of “C” that might qualify as expert opinion. In the final analysis, it is for the court to make the relevant risk assessment. In this case, there is factual evidence from each of the claimants and from “C” herself that provides a sufficient platform for such an assessment.

29.
In short, we are satisfied that the case for each claimant is made out on the basis of evidence which plainly does not face either of these potential hurdles.

30.
We accept the submission of Ms Wilson that the evidence demonstrates the OCGs’ capacity and propensity to use extreme levels of violence. The evidence is that the violence inflicted on Winch by the OCGs, before he became an Assisting Offender, led to him requiring admission to hospital and undergoing “significant surgery for a life altering injury”. That was in the context of a drug debt he owed to an OCG, causing a financial loss to the OCG. Since then, Winch has provided information about the OCGs to the police and given evidence for the prosecution in five trials and one re-trial. This has resulted in the multiple convictions we have mentioned, for offences including arson with intent to endanger life, possession of firearms, and supply of controlled drugs, and total custodial sentences

exceeding 250 years. Multiple OCGs have sustained very substantial financial losses. Many of their members have lost their liberty for a substantial period of time.

31.
We further accept the submission of Ms Wilson that the evidence of the previous assaults on Winch, taken together with his assistance to the police, the evidence that attempts have been and are still being made to locate him, and the profile of the OCGs, convincingly demonstrates that there is a real and immediate risk to his life and physical security. We have also concluded, in agreement with Ms Wilson, that the evidence sufficiently makes out the threat to the life and limb of the second and third claimants.

32.
In these circumstances we consider ourselves bound to grant an order in appropriate form, to safeguard the lives and physical integrity of all three claimants. We add that if, contrary to our view, there were a balance to be struck we would adopt what was said at the interim stage, in paragraph [23] of the judgment of Warby LJ. If the need to protect free speech and ensure open justice could in principle trump the need to protect life and limb then on the facts of this case the interference our order involves is necessary and proportionate measure for the protection of the claimants' rights under Articles 2 and 3. This means there is no need to say anything about how the balance might have been struck if this had been a contest between, on the one hand, the rights guaranteed by Article 10 and the open justice principle and, on the other hand, the claimants' rights to respect for their private and family life under Article 8 of the Convention.

33.
Although we have expressed doubts as to the admissibility of this material, it is comforting to know that our assessment is consistent with the view that has been reached by the LEA which describes the threat to the claimants as severe, that they are at an extreme risk, and that this has not diminished since the conclusion of the criminal proceedings. And it is reassuring to know that our view is also consistent with that expressed by the sentencing judge, HHJ Sherwin:

"If your life was not in danger before, I am absolutely certain that it is now.

…

…whilst I am sure that everything possible would be done to keep you safe [in the prison system], I am far from sure that any measures would ultimately achieve this. For those who are concerned with punishment I would point out that you have already [redacted] as a result of one attack and received [redacted] as a result of another (during the course of which I am satisfied you feared for your life)…. I [have] no doubt that you are being actively and professionally sought by those who wish you harm and that you will be forced to be vigilant for the remainder of your life… I am sure that your life will be constantly at risk wherever you are."

Disposal

34.
For the reasons we have given, the claim succeeds. In order to protect the claimants from the risk of fatal or other violent retribution by members or associates of the OCGs whose criminal interests have been harmed by Winch's conduct as an Assisting Offender, we exercise the Venables jurisdiction to make a final order against the world that prohibits the publication of information that would be likely to identify the claimants.

The form of the order

35.
The form of order we have granted is on similar lines to that which was granted at the interim stage. It is based on the form of the most recent order in the Venables case itself. The precise terms of the order will be available on the judiciary website, but in summary it prohibits anyone with notice of the order from publishing or soliciting various categories of information.

36.
There are three categories of information: (i) any images or voice recordings or descriptions of, or purporting to be of the claimants; (ii) any information purporting to identify anyone as being the persons formerly known as the claimants; (iii) any information likely to lead to the identification of, or purporting to describe, their past, present or future whereabouts.

37.
For this purpose publication covers publication in a newspaper or broadcast by sound or television or cable or satellite television, or by a public computer network (including social media platforms).

38.
There are provisos which make clear, among other things, that the injunctions do not prevent anyone from publishing any other information relating to proceedings before a court sitting in public; and that internet service providers are only to be considered in breach of the injunction under certain specified circumstances.

39.
These are wide-ranging orders but in our judgment, on the facts of this case, they go no further than is necessary and proportionate to safeguard the fundamental rights at stake.