

Neutral Citation Number: [2015] EWHC 128 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/01/2015

Before :

MR JUSTICE WARBY

IN THE MATTER OF AN INTENDED ACTION

Between :

KATHERINE ELIZABETH KERNER
(on her own behalf and in a representative capacity for
JACK ROBERT MICHAEL KERNER, a child)

Intended
Claimant

- and -

**(1) WX (2) YZ (Persons Unknown responsible for
pursuing and/or taking photographs of the Claimant
and her son at their home on 22 January 2015)**

Intended
Defendants

Tim Lawson-Cruttenden of Richard Slade and Associates for the Intended Claimant
The Intended defendants did not appear and were not represented

Hearing date: 22 January 2015

Judgment

Mr Justice Warby:

1. On the afternoon of 22 January 2015 I heard an application for an injunction to restrain harassment by persons unknown of Katherine Kerner and her son Jack, aged 9, in various ways including by publication. The application was made by Mr Lawson-Cruttenden on what was described as an emergency basis following events that morning outside the home shared by Katherine and Jack Kerner in Kent.
2. The background to the application is a case which has received wide publicity in recent days. Mrs Kerner's husband Stuart, a teacher, was convicted on 5 December 2014 of two offences of sexual activity with a child in breach of trust. On 14 January 2015 he was sentenced to 18 months' imprisonment, suspended for 18 months. The sentence has been the subject of considerable comment. A witness statement of Mrs Kerner explained that her husband was the subject of a great deal of press interest, but she did not seek any orders on his behalf. I was told that he and she were not living together. Her application was limited to protecting herself and her son from what she describes as 'paparazzi activity'.
3. The application was prompted by a series of incidents starting at 6:50am on 22 January, when Mrs Kerner was preparing to leave home to take her son to Breakfast Club at his school, before going to work at a primary school where she is acting head teacher. The statement said that as she left the house Mrs Kerner noticed two cars parked opposite the house. Two men jumped out of them, rushed over to her with photographic equipment and long lenses and immediately engaged in aggressively taking photographs. She ran back into the house and asked them to go away but they did not. One remained for over an hour, continually taking photographs including taking 'intrusive photographs through the front bedroom window' and photographs of Jack.
4. Mrs Kerner prepared a sign with the words 'Under cl 4 of Editors' Code of Practice Cease and Desist from harassing me and my child.' After about an hour she took this outside and held it in front of her face. The man who had remained took pictures of her with the sign. Asked which publication he was working for and who he was he answered 'freelance' and said nothing further. The man photographed Jack as well. Eventually, at about 8.20am he walked across the road made a phone call and drove away.
5. Mrs Kerner's statement said that she and her son were "bruised and shocked" by the events they have had to cope with in connection with her husband's conviction and sentence. She described the events of the morning as a "shocking series of incidents which caused me to be harassed and caused myself and my young son anxiety, alarm and distress". She says Jack was "clearly harassed by the events to which we were both subjected". She expressed the view that there was no valid reason for paying attention to her or her son, and expressed concern that these incidents may be repeated. She said she did not know the identities of the two men, though she took some photographs and has the registration number of one of the cars.
6. On Mr Lawson-Cruttenden's application I permitted Mrs Kerner to act in a representative capacity on behalf of her son pursuant to CPR 19.6. After discussion Mr Lawson-Cruttenden restricted his application to seeking an injunction against the two individuals seen by Mrs Kerner outside her home that morning. I was satisfied

that it was legitimate to bring proceedings against those two as persons unknown, as it had been impossible to identify them in the time available. They have been given the pseudonyms WX and YZ, and a description which specifies them as persons who were responsible for the events of the morning of 22 January.

7. The injunction applied for was solely based on apprehended harassment, within the meaning of the Protection from Harassment Act 1997. It had two limbs. The first, as narrowed down in the course of dialogue during the hearing, sought to restrain harassment by photography or videoing of Mrs Kerner or Jack (defined as “Protected Persons”), or any vehicle or premises belong to or occupied by either of them; or by loitering within an exclusion zone of 100m radius from their home; or by knowingly pursuing either of them.
8. The second limb of the injunction sought was a restraint on harassment by “publishing or procuring publication by any means whatever ... any material identifying a Protected Person or to publish her personal details (including for the avoidance of doubt any names, addresses, telephone numbers, fax numbers, email addresses, car or other vehicle registration numbers or any other material serving to identify any Protected Person).” Mrs Kerner’s evidence was that she did not wish any photographs or her, her son, or her property to be reproduced at all, and that any such publication would cause her anxiety, alarm and distress. She said she anticipated that publication was likely and imminent.
9. I considered s 12 of the Human Rights Act 1998, which was plainly engaged at least by the second limb of the application. I considered that s 12(2) was satisfied in that all practicable steps had been taken to notify the intended defendants of the application. There was no way that they could have been traced and notified in the available time. I was also satisfied that there was a real risk that in the absence of an injunction the conduct of the morning might be repeated by the intended defendants, and that it was on the material before me more likely than not that Mrs Kerner would obtain at a trial relief against harassment by them, by conduct of the kind that was the subject of the revised form of limb one of the application. I therefore granted relief to that effect.
10. I was not prepared to grant relief on the lines of the second limb of the order sought, or any similar relief, least of all in the absence of notice to those against whom such an order would in practice take effect, that is to say the media. This aspect of the application sought an Interim Non-Disclosure Order and was therefore subject to the Master of the Rolls’ *Practice Guidance* [2012] 1 WLR 100 which contains, under the heading “Notice of application” the following:

“19. HRA s12(2) applies in respect of both (a) respondents to the proceedings and (b) any non-parties who are to be served with or otherwise notified of the order, because they have an existing interest in the information which is to be protected by an injunction (*X & Y v Persons Unknown* [2007] EMLR 290 at [10] – [12]). Both respondents and any non-parties to be served with the order are therefore entitled to advance notice of the application hearing and should be served with a copy of the Application Notice and any supporting documentation before that hearing.

20. Applicants will need to satisfy the court that all reasonable and practical steps have been taken to provide advance notice of the application. At the hearing they should inform the court of any non-party which they intend to notify of the order as the court is required to ensure that the requirements of HRA s12(2) are fulfilled in respect of each of them. A schedule to any interim non-disclosure order granted should provide details of all such non-parties.

21. Failure to provide advance notice can only be justified, on clear and cogent evidence, by compelling reasons.....

22. Where a respondent, or non-party, is a media organisation only rarely will there be compelling reasons why advance notification is or was not possible on grounds of either urgency or secrecy. ...”

11. It was clear from the draft order that it was intended once an order was obtained to serve it on or give notice of it to “news or media publishers who may show interest in the subject-matter of this claim”. None had been forewarned of the application. It was not suggested that attempts had been made to do so, or that there was any compelling reason why this should not be done. In any event, it seemed to me that although it is possible to commit harassment by publication the evidence in this case fell a long way short of establishing a likelihood that this would occur, and the form of order sought was clearly far too broad. These points having been raised by me Mr Lawson-Cruttenden did not pursue that aspect of the application.
12. The form of order sought was not based on the Model Order attached to the Practice Guidance. Although the injunction I granted was not one that represented an interference with the right to publish information, it was an injunction against persons unknown involved in the news media, and aspects of the Model Order were appropriate for this case. I therefore required undertakings similar to those set out in Schedule B of the Model Order, and the insertion of a paragraph in substantially the form of paragraph 5 of the Model Order. I granted relief until a Return Date and not until trial or further order as sought.