Neutral Citation Number: [2020] EWHC 1289 (QB)

Case No: QB-2019-000939

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/05/2020

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

CWD	**Claimant**
- and -	
(1) VERITY NEVITT	
(2) LUCY NEVITT	
(3) MICHAEL NEVITT	**Defendants**

- -
- -

Gervase de Wilde (instructed by **Cohen Davis Solicitors**) for the **Claimant**
Catrin Evans QC and Emma Foubister (instructed by **Hodge Jones & Allen Solicitors**) for the **First and Second Defendants**
Sam Tobin appeared on behalf of **PA Media** (intervening)
The **Third Defendant** did not appear and was not represented

Hearing date: 30 April 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MRS JUSTICE STEYN DBE

Covid-19 Protocol: This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 21 May 2020 at 10:30

Mrs Justice Steyn :

A. Introduction

1. The claimant has brought a claim in defamation, misuse of private information and harassment against the three defendants. The first and second defendants are sisters and the third defendant is their brother.

2. The central core of the claim concerns the second defendant's allegation that, on the night of 24 August 2017, the claimant raped her ("*the second defendant's allegation*") and the first defendant's allegation that, earlier on the same night, the claimant sexually assaulted her ("*the first defendant's allegation*", together "*the first and second defendants' allegations*"). In April 2018, the second defendant reported the claimant to the police and, in July 2018, the first defendant did so, too. Following an investigation, on 4 February 2019 the police told the claimant that they would take no further action.

3. The claimant denies the first and second defendants' allegations. The first and second defendants aver that their allegations are true. Where the truth lies will be a matter for determination on the evidence at the trial of this claim.

4. This judgment addresses two applications, both made by notices dated 29 November 2019, namely:

   i) An application by the first and second defendants by which they seek to lift their own anonymity as defendants in these proceedings ("the application to vary the anonymity order"); and

   ii) An application by the claimant for a reporting restriction order to be made under s.11 of the Contempt of Court Act 1981 to protect the claimant's anonymity in these proceedings ("the application for a reporting restriction order").

5. In addition, as all derogations from open justice must be kept under review by the court, and varied or discharged if they cease to be necessary, I have also addressed the question whether any variation should be made to the order of Dingemans J (as he then was) made on 15 March 2019, insofar as it permitted the pseudonymisation in these proceedings of the claimant and the third defendant.

B. The nature of the hearing

6. The hearing of the applications was public. It took place remotely, as a video hearing, in accordance with the Protocol Regarding Remote Hearings dated 26 March 2020 and Practice Direction 51Y, paragraph 3. Members of the press and the public were able to obtain access to this hearing.

7. In accordance with paragraph 2 of the order of Nicklin J made on 21 November 2019, the claimant served the application for an RRO on PA Media (formerly the Press Association).

8. I am grateful to Counsel for the claimant, Mr de Wilde, and Counsel for the first and second defendants, Ms Evans QC and Ms Foubister, as well as to PA Media, for their excellent written and oral submissions on the applications.

C. The history of the proceedings

9. Prior to the issue of the claim, on 15 March 2019, the claimant made an application without notice to the defendants for an interim injunction to restrain what is alleged to be the harassment of the claimant by the defendants and the misuse of private information belonging to the claimant by the defendants. At that stage, the proposed claim did not include a defamation claim. The application was supported by a witness statement dated 13 March 2019 made by the claimant ("*the claimant's 1st statement*").

10. Dingemans J refused to grant an injunction: see *CWD v MXN and others* [2019] EWHC 2553 (QB). In doing so, he referred to s.12 of the Human Rights Act 1998 ("the HRA"), the rule in *Bonnard v Perryman* [1891] 2 Ch 269 and the observation of Warby J in *LJY v Persons Unknown* [2017] EWHC 3230 [2018] EMLR 19 at [14] that if the court detected "*cause of action shopping, meaning that if the court concluded that the claimant's true purpose was to prevent damage to his reputation*", the court would apply the more demanding *Bonnard v Perryman* rule. Dingemans J expressed some concern that there was an element of cause of action shopping in this case, noting that some passages in the claimant's evidence "*indicate that his real concern is to prevent the wider publication of material which he says is untrue rather than which is private*".

11. However, Dingemans J granted an anonymity order in the following terms:

> "2. Pursuant to section 6 HRA and/or CPR r.39.2 the Judge, being satisfied that it is strictly necessary, ordered that:
>
> a) the Claimant be permitted to issue these proceedings naming the Claimant as CWD and giving an address c/o the Claimant's solicitors;
>
> b) the Claimant be permitted to issue these proceedings naming the Defendants as (1) MXN (2) QYR (3) TZU (4) UAV and notifying the Defendants' home addresses once obtained by filing the same in a sealed letter which must remain sealed and held with the Court office subject only to the further order of a Judge or the Senior Master of the Queen's Bench Division;
>
> c) there be substituted for all purposes in these proceedings in place of references to the Claimant by name, and whether orally or in writing, references to the letters CWD; and
>
> d) if necessary, there be substituted for all purposes in these proceedings in place of references to the Defendants by name whether orally or in writing, references to the letters (1) MXN, (2) QYR, (3) TZU, (4) OAV."

12. Dingemans J gave the following reasons for making the anonymity order at [3]:

> "I am, however, satisfied that it is necessary at this stage to anonymise the identity of the claimant. This is so that this judgment can be given in open court without rendering the proceedings futile. I am also satisfied that it is necessary at this stage to anonymise the identities of the defendants, again to avoid rendering the proceedings futile and because two of the defendants assert that they are the victims of sexual offences and therefore have the benefit of lifelong immunity."

13. Dingemans J also ordered that no copies of the statements of case, witness statements and applications will be provided to a non-party without further order of the court; and any non-party seeking such access must make an application on proper notice to the parties.

14. The claim was issued and served on 18 March 2019. The claim form indicated that the claimant intended to pursue the two causes of action identified at the hearing before Dingemans J, namely, misuse of private information and harassment. There were four defendants identified by ciphers on the claim form, however the claim against the fourth defendant has been discontinued.

15. The first and second defendants (then acting in person) sent an email to the court asking for their anonymity to be lifted. On 16 October 2019, Warby J made directions for further consideration of the anonymity order. The matter came on for hearing before Nicklin J on 21 November 2019. At that hearing, the claimant made an oral application for a reporting restriction order and opposed the first and second defendant's request to lift their anonymity. Accordingly, Nicklin J gave directions for the issue and service of the two applications which are now before me, as well as giving case management directions.

16. The first and second defendants' application to vary the anonymity order was filed and served on 29 November 2019, supported by two witness statements made the same day by the first defendant and the second defendant (respectively, "*Verity Nevitt's 1st statement*" and "*Lucy Nevitt's 1st statement*"). The claimant served evidence in response in the form of a witness statement dated 19 December 2019 made by Ms Filiz Kiani, a solicitor in the firm acting on behalf of the claimant ("*Ms Kiani's 2nd statement*").

17. The claimant's application for a reporting restriction order was also filed and served on 29 November 2019, supported by a witness statement made by Ms Kiani, dated 27 November 2019 ("*Ms Kiani's 1st statement*"). The first and second defendants served a document entitled "*Defendants' evidence in answer to the Reporting Restriction Order*", dated 13 December 2019, signed by the first defendant ("*Verity Nevitt's 2nd statement*").

18. On 9 January 2020, PA Media filed written submissions, drafted by Mr Mike Dodd (legal director), on the issues of anonymity and reporting restrictions.

19. The claimant served particulars of claim on 16 December 2019. Whereas, when the matter came before Dingemans J, the claimant's stated intention was to bring a claim for misuse of private information and harassment, a defamation claim has now been pleaded and pursued in the particulars of claim.

20. The first and second defendants served a defence on 17 January 2020, at a time when they were acting in person. On 15 April 2020, they served an Amended Defence, settled by Counsel, by way of substitution.

21. The claimant's Reply is due to be served by 25 May 2020.

22. The third defendant had, by the time of the hearing, taken no part in these proceedings. On 22 April 2020 Master Sullivan granted the claimant's application for an order that a message sent to the third defendant's account on Facebook on 26 April 2019 to bring the claim form to his attention is good service. Pursuant to this order, the particulars of claim have been served on the third defendant. The third defendant was given until 11 May 2020 to file a defence, if he wishes to defend the claim.

D. The application to vary the anonymity order

23. When the anonymity order was made, Dingemans J had two reasons for anonymising the first and second defendants.

24. One reason was that they have a right to lifelong anonymity pursuant to ss.1 and 2 of the Sexual Offences (Amendment) Act 1992 ("the 1992 Act"). The first and second defendants had no notice of the claimant's application for an interim injunction and they were not present or represented at the hearing on 15 March 2019. It was necessary at that stage to protect their right to anonymity as persons who allege that offences falling within s.2 of the 1992 Act have been committed against them.

25. However, the first and second defendants have each stated clearly and expressly in their written statements that they have waived their statutory right to anonymity and they do not wish to be anonymous in these proceedings. The 1992 Act does not impose anonymity on a victim or complainant (to use the terminology in the 1992 Act) who wishes to identify herself (or himself). (See the defence to an offence of publication in contravention of s.1 provided by s.5(2)-(3) of the 1992 Act.)

26. The other reason for anonymising the defendants given by Dingemans J was that it was necessary, at that stage, to avoid rendering the proceedings futile. The claimant initially opposed the lifting of the first and second defendants' anonymity on the basis of the risk that naming them would indirectly enable readers to identify him (by a process referred to as "*jigsaw identification*"). However, by the time of the hearing the claimant accepted that jigsaw identification was no longer a risk because any statements by the defendants identifying him as the person against whom the allegations were made have been removed; and the first and second defendants have given a *contractual* undertaking, until the court has determined the claim, not to identify the claimant in connection with their allegations or these proceedings.

27. Accordingly, the parties agreed that the anonymity order should be varied in such a way as to lift anonymity in respect of the first and second defendants. As it was clear that this aspect of the derogation from open justice which was granted on 15 March 2019 was no longer necessary, I made an order at the hearing on 30 April 2020 that:

> "Paragraph 2(d) of the 15 March Order is amended with the effect that the substitution of the letters (1) MXN and (2) QYR for the names of the First and Second Defendants shall cease,

> and they may be identified by their names, Verity Nevitt being the name of the First Defendant and Lucy Nevitt being the name of the Second Defendant."

28. Accordingly, I have identified the first and second defendants by name in this judgment.

Is continued anonymisation of the third defendant necessary?

29. There is no application before the court to lift the Anonymity Order insofar as it protects the identity of the third defendant. Nevertheless, it is incumbent on the court to keep derogations from open justice under review and PA Media submit that his anonymity should be lifted.

30. The claimant opposes the third defendant's anonymity being lifted. Mr de Wilde points to the fact that the third defendant has not engaged with these proceedings. Consequently, unlike the first and second defendants, the third defendant has not provided the claimant with any reassurance or given any contractual undertaking not to publish the allegations the first and second defendants have made against the claimant or to identify the claimant as involved in these proceedings. The claimant therefore contends that publication of the third claimant's identity may give rise to a risk of jigsaw identification, depending on what the third defendant may choose to publish in future.

31. In my judgment, the anonymisation of the third defendant, provided for in paragraph 2(d) of the Anonymity Order, is no longer necessary and should be lifted.

32. First, the third defendant is, and was identified in Dingemans J's judgment at [4] as, the older brother of the first and second defendants. Insofar as the need to protect his identity, in connection with these proceedings, arose from the need to protect his sisters' statutory right to lifelong anonymity, it has fallen away because they have chosen to be identified as defendants to these proceedings.

33. Secondly, the claimant has accepted that the first and second defendants can be identified in these proceedings without that giving rise to such a risk of jigsaw identification of himself as to necessitate their continued anonymisation. In my judgment, the same necessarily applies to the third defendant, given his acknowledged relationship to them. The suggestion that there is a higher risk of jigsaw identification in the third defendant's case is speculative.

34. As the claimant confirmed, on receipt of a draft of this judgment, that he does not intend to appeal, I have identified the third defendant in this judgment.

E. The application for a reporting restriction order

The distinction between a r.16 Order and a reporting restriction order

35. As Nicklin J observed in *Lupu (formerly AAA) v Rakoff* [2019] EWHC 2525 (QB), [2020] EMLR 6 at [21]:

> "when dealing with applications for anonymity orders, it is important to appreciate that they have two distinct parts: (1) an

> order that withholds the name of the relevant party in the proceedings and permits the proceedings to be issued replacing the party's name with a cipher under CPR 16.2 (e.g. naming the claimant as 'XPZ') ("a CPR 16 Order"); and (2) a reporting restriction order prohibiting identification of the anonymised party ("the Reporting Restriction Order")."

36. No reporting restriction order was sought or made at the hearing on 15 March 2019. The anonymity order of which the claimant currently has the benefit is a r.16 Order. The substitution of a cipher for the claimant's name means that information about these court proceedings to which the public would ordinarily have access, namely the identity of the claimant, is being withheld. Such an order is a derogation from the principle of open justice. But it is a more limited derogation than a reporting restriction order: see *Lupu v Rakoff* at [24].

37. The effect of the claimant's identity being withheld pursuant to a r.16 Order is to avoid the automatic interference with his privacy entailed in the inclusion of his name and other personal details in court documents. Within the proceedings, no oral or written reference may be made to the claimant's name: it must be pseudonymised. Generally, if a party's name is withheld, it will not be discovered. But a r.16 Order is permissive: see *Lupu v Rakoff* at [21] and *CVB v MGN Ltd* [2012] EWHC 1148 (QB), [2012] EMLR 29 at [47]. If the claimant's identity as the claimant to these proceedings is known or discovered, nothing in the anonymity order made on 15 March 2019 prohibits a person who has or obtains such knowledge from publicly identifying the claimant outside the proceedings.

The order sought

38. The claimant wishes to strengthen the anonymity order which he has obtained. By his application dated 29 November 2019 the claimant seeks an order in the following terms:

> "Pursuant to s.11 of the Contempt of Court Act 1981, there shall be no publication in connection with the proceedings of the name of the Claimant, or of any information likely to lead members of the public to identify the Claimant as a person concerned in the proceedings, until the conclusion of the proceedings or further order of the Court."

39. The first and second defendants consent to the claimant's application for a reporting restriction order. The application is opposed by PA Media. As the parties acknowledge, it is not open to them to waive the rights of the public by consent (see *H v Newsgroup Newspapers Ltd* [2011] 1 WLR 1645 at [21(7)]), and so it falls to the court to determine the application.

Jurisdiction to make a reporting restriction order

40. The claimant seeks a reporting restriction order pursuant to s.11 of the Contempt of Court Act 1981, which provides:

> "In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it is withheld."

41. This provision is an ancillary power. It does not itself confer any power upon courts to allow "*a name or other matter to be withheld from the public in proceedings before the court*". Rather, it applies in circumstances where such a power has been exercised: see *A v British Broadcasting Corporation* [2015] AC 588, per Lord Reed JSC at [59].

42. A preliminary question raised in PA Media's written submissions was whether the claimant was in fact named during the public hearing on 15 March 2019. If he was, PA Media submit there is no power pursuant to s.11 to prohibit the publication of the claimant's name in connection with these proceedings.

43. Mr de Wilde, who appeared on behalf of the claimant at the hearing before Dingemans J, as well as before me, has made clear the claimant was not named in open court during the earlier hearing. That is unsurprising. There is no evidence, and nothing in the judgment or order that followed that hearing, to suggest that any of the parties were named. It is clear that the court has allowed the claimant's name to be withheld from the public in these proceedings and so the ancillary power to make a reporting restriction order is available.

44. In addition, the claimant draws attention to three other sources of power to make a reporting restriction order, namely:

    i) The court's inherent jurisdiction to control its own procedures, and to make such orders as are necessary to ensure that justice is done, including granting interim protection against the disclosure of information which it is the very purpose of the proceedings to protect against such disclosure: see *NT1 v Google LLC* [2018] EWHC 261 (QB), per Warby J at [23];

    ii) The implicit statutory power to do what is necessary to comply with the court's duty under s.6 of the Human Rights Act 1998 not to act incompatibly with the Convention Rights, if and to the extent that such power is not otherwise available: see *NT1 v Google LLC* at [24].

    iii) The specific procedural power provided by CPR 39.2(4) which states:

> "The court must order that the identity of any party or witness shall not be disclosed if, and only if, it considers non-disclosure necessary to secure the proper administration of justice and in order to protect the interests of that party or witness."

The open justice principles

45. The principles that apply when seeking any derogation from open justice are summarised in the *Practice Guidance (Interim Non-disclosure Orders)* [2012] 1 WLR 1003:

> "9. Open justice is a fundamental principle. The general rule is that hearings are carried out in, and judgments and orders are, public: see article 6.1 of the Convention, CPR r 39.2 and *Scott v Scott* [1913] AC 417. This applies to applications for interim non-disclosure orders: *Micallef v Malta* (2009) 50 EHRR 920, para 75ff; *Donald v Ntuli (Guardian News & Media Ltd intervening)* [2011] 1 WLR 294, para 50.
>
> 10. Derogations from the general principle can only be justified in exceptional circumstances, when they are strictly necessary as measures to secure the proper administration of justice. They are wholly exceptional: *R v Chief Registrar of Friendly Societies, ex parte New Cross Building Society* [1984] QB 227, 235; *Donald v Ntuli* [2011] 1 WLR 294, paras 52–53. Derogations should, where justified, be no more than strictly necessary to achieve their purpose.
>
> 11. The grant of derogations is not a question of discretion. It is a matter of obligation and the court is under a duty to either grant the derogation or refuse it when it has applied the relevant test: *M v W* [2010] EWHC 2457 (QB) at [34].
>
> 12. There is no general exception to open justice where privacy or confidentiality is in issue. Applications will only be heard in private if and to the extent that the court is satisfied that by nothing short of the exclusion of the public can justice be done. Exclusions must be no more than the minimum strictly necessary to ensure justice is done and parties are expected to consider before applying for such an exclusion whether something short of exclusion can meet their concerns, as will normally be the case: *Ambrosiadou v Coward* [2011] EMLR 419 , paras 50–54. Anonymity will only be granted where it is strictly necessary, and then only to that extent.
>
> 13. The burden of establishing any derogation from the general principle lies on the person seeking it. It must be established by clear and cogent evidence: *Scott v Scott* [1913] AC 417, 438–439, 463, 477; *Lord Browne of Madingley v Associated Newspapers Ltd* [2008] QB 103, paras 2–3; *Secretary of State for the Home Department v AP (No 2)* [2010] 1 WLR 1652, para 7; *Gray v W* [2010] EWHC 2367 (QB) at [6]–[8]; and *H v News Group Newspapers Ltd (Practice Note)* [2011] 1 WLR 1645, para 21.
>
> 14. When considering the imposition of any derogation from open justice, the court will have regard to the respective and sometimes competing Convention rights of the parties as well

> as the general public interest in open justice and in the public reporting of court proceedings. It will also adopt procedures which seek to ensure that any ultimate vindication of article 8 of the Convention, where that is engaged, is not undermined by the way in which the court has processed an interim application. On the other hand, the principle of open justice requires that any restrictions are the least that can be imposed consistent with the protection to which the party relying on their article 8 Convention right is entitled. The proper approach is set out in *H's case* [2011] 1 WLR 1645."

What is the applicable threshold test?

46. Mr de Wilde, on behalf of the claimant, submits that the reporting restriction the claimant seeks is the second limb, or corollary, of the anonymity order which was made by Dingemans J on 15 March 2019 in order to avoid rendering the proceedings futile. He contends that the test is whether this derogation from open justice is necessary, and no more than necessary, to achieve this purpose. Whether it is necessary falls to be determined by weighing up the competing Convention rights, applying the "*ultimate balancing test*" described by Lord Steyn in *In re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593 at [17]. This approach is fact-specific and does not depend on any pre-determined hierarchy of rights.

47. Mr de Wilde relies on the judgment of Tugendhat J in *ZAM v CFW* [2013] EWHC 662 (QB), [2013] EMLR 27 as demonstrating that there is no barrier, in principle, to a claimant who brings a defamation claim being anonymised. In this case, publication was limited and so he is not seeking public vindication.

48. PA Media submit that the main thrust of the claimant's application for anonymity is to protect his reputation rather than his privacy, and they rely on the rule against prior restraint in *Bonnard v Perryman* [1891] 2 Ch 269. In *Greene v Associated Newspapers Ltd* [2005] QB 972 the Court of Appeal confirmed that in an action for defamation a court will not impose a prior restraint on publication unless it is clear that no defence will succeed at trial.

49. *Greene v Associated Newspapers* establishes that, where an interim injunction is sought in defamation proceedings, the test in s.12(3) of the Human Rights Act 1998 ("the HRA") creates a floor not a ceiling; the higher threshold set by *Bonnard v Perryman* still applies. As Lord Sumption JSC explained in *Khuja v Times Newspapers Ltd* [2019] AC 161 at [19]:

> "The rule originated in the division between the functions of judge and jury, the question of libel or no libel being exclusively for the jury. But in its modern form, its function is to balance the freedom of the press and the right of the claimant to protect his reputation, by confining the plaintiff to post-publication remedies to which he may prove himself entitled at a trial. The media are at liberty to publish if they are willing to take the risk of liability in damages."

50. Which of the three possible tests – (i) the rule in *Bonnard v Perryman*, (ii) the ultimate balancing test, subject to s.12(3) of the HRA or (iii) the ultimate balancing test alone – applies in determining this application for a reporting restriction order? This is a difficult question on which, as the defendants did not oppose the order and PA Media were not legally represented at the hearing, I have had relatively limited argument.

51. If the claimant were seeking an interim injunction to restrain publication of the first and second defendants' allegations, the rule in *Bonnard v Perryman* would apply. Standing back to consider what this case is about, it is plain that, although the claimant does not seek "*public vindication*", his true purpose is to prevent damage to his reputation. The pleadings and statements demonstrate that, at its core, the claimant's complaint is that the allegations that have been made against him are false. In these circumstances, although the claimant has brought a claim for misuse of private information, as well as claims in defamation and harassment, as a matter of legal policy the court applies the more demanding defamation rule, that is, the rule in *Bonnard v Perryman*: see *McKennit v Ash* [2008] QB 73, Buxton LJ at [79]; *LJY v Persons Unknown* [2017] EWHC 3230 (QB), Warby J at [42]; *Khan (formerly JMO) v Khan (formerly KTA)* [2018] EWHC 241 (QB), Nicklin J at [72].

52. Applying the rule in *Bonnard v Perryman*, if the claimant had sought to renew his application for an interim injunction at an *inter partes* hearing, such relief would have been refused because the first and second defendants have pleaded that their allegations are true. No doubt recognising this, no such renewed application has been made.

53. In determining the applicable test, it is important to consider the effect of the reporting restriction order that is sought in this case. On an interim basis, it would prevent any person publishing, in connection with the proceedings, the claimant's name or any information likely to lead members of the public to identify him as the claimant. In this context, the defined term "*'publication' includes any speech, writing, programme included in a cable programme service or other communication in whatever form, which is addressed to the public at large or any section of the public*": see s.19 and s.2(1) of the Contempt of Court Act 1981. This definition would not appear to encompass a private disclosure to one individual (see *R (Yam) v Central Criminal Court* [2014] EWHC 3558 (Admin), and so it is more limited than the concept of publication in the law of defamation. Nevertheless, it is broad enough to cover oral or written statements to the public or a section of the public, including via the press or by individuals on social media.

54. In circumstances where (i) the identities of the first and second defendants as parties to these proceedings, (ii) the nature of their allegations, and (iii) the essence of this claim, are in the public domain, any publication of those allegations which identifies the claimant would be *"information likely to lead members of the public to identify him as the claimant"* in these proceedings.

55. I accept that by limiting the prohibition to "*publication in connection with the proceedings*", the claimant has sought to avoid an order that would serve generally to restrain publication of the fact that the first and second defendants' allegations are directed against him. However, the prohibition on any publication "*in connection with the proceedings of the name of the Claimant*" can be read as meaning simply that the

claimant's identity *qua* claimant must not be published; and the following words then also prohibit *"any information likely to lead members of the public to identify him as the claimant"*. Although it is arguable, as the claimant contends, that publication of information likely to lead members of the public to identify him as the claimant would only be prohibited if that publication was made in connection with the proceedings (i.e. if the publication was reporting on, or otherwise referring to, the proceedings), in my judgment, there is a substantial risk such an order would have the unintended effect of restraining publication of the fact that the first and second defendants' allegations are directed against the claimant.

56. Such restraint would be in the form of an order which is not permissive - breach would be a contempt of court - made on an interim basis, pending trial. Although, in principle, a reporting restriction order is concerned with the proceedings, and so may be a more limited form of restraint of freedom of expression, the distinction between an interim injunction and the reporting restriction order sought in this case, having regard to its potential effect, is a fine one.

57. Nevertheless, a reporting restriction order is conceptually distinct from an interim injunction. The order sought is ancillary in nature, designed to support the r.16 anonymity order which is concerned with the court process. In terms, the order sought aims only to restrict the reporting of the claimant's identity as the claimant *in the proceedings*, not to restrain the publication of the first and second defendants' allegations. The rule in *Bonnard v Perryman* is an inflexible one. As far as I am aware, it has only previously been applied where prior restraint of a threatened publication, in the form of an interim injunction, has been sought. Ultimately, I have concluded that I should not apply the rule in *Bonnard v Perryman*, but it is important not to lose sight of the legal policy underlying it, given the close parallel between the effect of an interim injunction and of the reporting restriction order sought.

58. If, as I have found, the *Bonnard v Perryman* rule does not apply in determining this application for a reporting restriction order, does s.12 of the HRA apply? Subsections (1) to (3) of section 12 provide:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ("the respondent") is neither present nor represented, no such relief is to be granted unless the court is satisfied –
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be allowed.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed."

59. Mr de Wilde submitted that s.12 is inapplicable, relying on Lord Reed JSC's observations in *A v British Broadcasting Corporation* [2015] AC 588 at [66]:

> "When an application is made to the court to allow a name or matter to be withheld, that is not an application for relief made against any person: no remedy or order is sought against any respondent. If ancillary directions under section 11 are also sought, prohibiting any publication of the name or matter in question, that equally is not an application for relief made against any respondent: the directions will operate on a blanket basis. In such circumstances there is no respondent who should be notified, or who might be present or represented at the hearing. There is therefore no obligation under section 12(2) of the Human Rights Act to allow the media an opportunity to be heard before such an order can be granted."

60. I readily accept, as this passage makes clear, that the reporting restriction order sought is not an application for relief made "*against*" any person falling within s.12(2) of the HRA. Section 12(2) is concerned with the circumstances in which interim relief may be granted on an *ex parte* basis. But Lord Reed was not there addressing the applicability of the test in s.12(3).

61. The words "*such relief*" in s.12(3) refer back to the description in s.12(1) of "*any relief which, if granted, might affect the exercise of the Convention right to freedom of expression*". On the face of it, s.12(1) and (3) are not limited to relief sought "*against*" any person. As Lord Reed observed at [63]:

> "It appears that … section 12(3) was designed to impose a more demanding test for the grant of interlocutory injunctions than the *American Cyanamid* standard: *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. The effect of the provisions depends however on the language used by Parliament rather than on the particular concerns which may have prompted their enactment." (emphasis added)

62. Focusing on the language of s.12(1), in my judgment it is plain that the reporting restriction order sought by the claimant is "*relief which, if granted, might affect the exercise of the Convention right to freedom of expression*". Any person who knows, or who may come to know, the identity of the claimant would be prohibited from publishing that information. It follows from that element of the proposed prohibition alone that the s.12(3) test applies.

63. In this context, the word "*likely*" in s.12(3) generally means "*more likely than not*", albeit there will be cases (such as where an order is required for a short period pending appeal or where the potential adverse consequences of disclosure are particularly grave) where a lesser degree of likelihood will suffice: *Cream Holdings Ltd v Banerjee* [2005] AC 253, per Lord Nicholls at [22].

64. Accordingly, I should grant the reporting restriction order sought if, weighing the respective Convention rights, it is necessary (and no more than necessary) to do so,

and it is more likely than not that the claimant will succeed in obtaining a final order at trial restraining such publication.

Application to the facts

65. Balancing the Convention rights, the following factors weigh in favour of granting the reporting restriction order sought.

66. **First**, it is, at least, strongly arguable that the claimant's article 8 rights are engaged. He has been accused by the first and second defendants of very serious offences, and he has been the subject of a police investigation. No charges have been brought and he was informed that the police intend to take no further action.

67. In *Richard v British Broadcasting Corporation* [2018] EWHC 1837 (Ch), [2019] Ch 169 Mann J held that "*on the authorities, and as a matter of general principle, a suspect has a reasonable expectation of privacy in relation to a police investigation*" (at [248]). My attention was also drawn to the judgment of Nicklin J in *ZXC v Bloomberg LP* [2019] EWHC 970 (QB). Since the hearing, the Court of Appeal has handed down judgment in *ZXC* ([2020] EWCA Civ 611), upholding Nicklin J's judgment and approving *Richard v BBC*. In *ZXC*, Simon LJ held at [82]:

> "Since the matter arises for decision in the present case, I would take the opportunity to make clear that those who have simply come under suspicion by an organ of the state have, in general, a reasonable and objectively founded expectation of privacy in relation to that fact and an expressed basis for that suspicion. The suspicion may ultimately be shown to be well-founded or ill-founded, but until that point the law should recognise the human characteristic to assume the worst (that there is no smoke without fire); and to overlook the fundamental legal principle that those who are accused of an offence are deemed to be innocent until they are proven guilty."

68. The circumstances of this case, where it is *the alleged victims* who have made public what they say happened to them, may give rise to questions (which did not need to be addressed in *Richard v BBC* or *ZXC*) as to whether and to what extent a reasonable expectation of privacy arises. But at this stage it suffices to note that the claimant has a strongly arguable case that his right to private life is engaged; and the importance of restraining publication of allegations which are not the subject of any charge stems from the human tendency, which the court should not ignore, to assume "*there is no smoke without fire*".

69. **Secondly**, although it is plain, in my view, that "*the nub of the case is a complaint of the falsity of the allegations*" (see *McKennit v Ash* [2008] QB 73 at [79] (Buxton LJ)), it does not seem to me that that renders the claimant's misuse of private information claim, which he brings alongside claims in defamation and harassment, an abuse of process.

70. **Thirdly**, it is readily apparent that the primary purpose of the claim is to prevent further publication of allegations accusing the claimant of rape and sexual assault. He has brought a damages claim, too, but his particulars of claim make clear that the

claimant does not seek public vindication. If the claimant's part in these proceedings were to be made public, his primary object in bringing this claim would be defeated before the parties' respective evidence and arguments have even been heard.

71. **Fourthly**, the order sought would have the effect of holding the position only until trial, at which stage it would be reviewed.

72. **Fifthly**, a r.16 order, allowing the claimant's name to be withheld in the proceedings, has been granted. By granting a r.16 order the court avoids itself destroying the claimant's alleged privacy rights before they have been adjudicated upon, rending the proceedings futile. Having regard to the matters referred to above, I consider that the r.16 order remains a necessary derogation from open justice. Where a r.16 order is granted without a reporting restriction, it can create uncertainty, for those who know the withheld information, as to whether they are required to keep it confidential or not. Twinning a r.16 order with a reporting restriction removes any such uncertainty.

73. However, given the clear and important distinction between a r.16 order and a reporting restriction order, and the greater derogation from open justice and interference with freedom of expression involved in granting a reporting restriction order, the advantage in terms of certainty of combining such orders ought not to lead to reporting restrictions being granted where they go beyond what is necessary in the case.

74. **Sixthly**, a reporting restriction order preventing publication of the claimant's name is a limited derogation from open justice, ancillary to the r.16 order. It does not prevent publication of the identities of the first and second defendants, or of the facts and issues arising in the claim. Indeed, the claimant's anonymity may enable the facts to be addressed more fully in the court's judgment following the trial than would otherwise be the case.

75. On the other side of the balance, the following factors weigh against granting the reporting restriction sought.

76. **First**, a reporting restriction order is a peremptory order affecting the right to freedom of expression of the press and the public. It is a form of censorship. Although I have concluded that the *Bonnard v Perryman* rule is not directly applicable, in view of the close parallel between the effect of an interim injunction and the potential effect of the reporting restriction order sought (to which I have referred above), it is important not to lose sight of the principles which govern pre-emptive restraint.

77. **Secondly**, the r.16 order ensures, so long as it remains in force, that the claimant will not be identified by name, whether orally or in writing, in the proceedings. Any reference to his name in the proceedings is required to be pseudonymised. Consequently, identification of the claimant in connection with the proceedings would not fall within the absolute privilege for court reporting provided by s.14 of the Defamation Act 1996 or the broader qualified privilege provided by s.15 and Schedule 1 to that Act or the common law. In the absence of a reporting restriction order, the press (or any member of the public) would not be prohibited from identifying the claimant outside the proceedings, but they would have to take the potential consequences in defamation. That accords with the ordinary position that the

media are at liberty to publish if they are willing to take the risk of liability in damages.

78. **Thirdly**, although I accept that "*[a]s a matter of principle, there is no reason why an anonymity order should not be made in a defamation action*" (*ZAM v CFW* [2013] EWHC 662, [2013] EMLR 27, per Tugendhat J at [48]), the examples drawn to my attention are cases involving blackmail or libel actions where a child was involved. This is not such a case. I have accepted that the r.16 order should remain in place because otherwise the court would itself put the allegations against the claimant into the public domain and the privileges in respect of court reporting to which I have referred would apply. But it would be a significant further step, in the context of a defamation claim which does not raise issues of blackmail or concern children, to enforce the r.16 order with a reporting restriction.

79. **Fourthly**, the article 8 and article 10 rights of the first and second defendants, who wish to tell their story, are engaged. I note, however, that they have consented to the reporting restriction on the basis that, pending the trial, they do not wish or intend to identify the claimant as involved in these proceedings or the subject of their allegations. I accord considerably less weight to the rights of the third defendant from whom I have not received evidence and who has not engaged in these proceedings.

80. **Fifthly**, the parties to proceedings, particularly claimants, should ordinarily expect their names to be made public. As Lord Woolf MR explained in *R v Legal Aid Board ex parte Kaim Todner* [1999] QB 966 at 978E-G:

> "It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public. A witness who has no interest in the proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation. In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule."

81. However, I bear in mind that where, as here, the question is whether a r.16 order should be reinforced with a reporting restriction order, rather than whether the claimant should be granted anonymity at all, this factor carries less weight.

82. **Sixthly**, although the scope of the reporting restriction order sought is limited, it is important to bear in mind that stories that name individuals are more attractive, and more likely to be published, than those that refer only to unidentified people. In *In re*

Guardian News and Media Ltd and others [2010] 2 AC 697, Lord Rodger addressed this issue:

> "63. What's in a name? "A lot", the press would answer. This is because stories about particular individuals are simply much more attractive to readers than stories about unidentified people. It is just human nature. And this is why, of course, even when reporting major disasters, journalists usually look for a story about how particular individuals are affected. Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed… More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] 2 AC 457, 474, para 59, "judges are not newspaper editors". … This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.
>
> 64. Lord Steyn put the point succinctly in *In re S* [2005] 1 AC 593, 608, para 34, when he stressed the importance of bearing in mind that
>
> > 'from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer.'"

83. As these passages make clear, the concern is not only that reports about unidentified people are less interesting to readers, but also that matters of public interest are less likely to be published or, if published, to engage the public, if those involved cannot be named. In this case, PA Media submit that:

> "issues of rape and sexual assaults, and of the apparent failure of the police and criminal justice system to deal with allegations properly, have been in the headlines for some time now … These are clearly issues of considerable public importance."

84. In my judgment, weighing the Convention rights that are in issue, the result is finely balanced but ultimately, I have concluded that I should not grant the reporting restriction sought by the claimant.

85. If, as I have concluded, application of the ultimate balancing test is subject to meeting the test in s.12(3) of the HRA, then I reach the same conclusion with less hesitation. Under s.12(3), the onus is on the claimant to demonstrate that it is "*more likely than not*" that he will succeed at trial in obtaining a final order restraining publication of his identity as the claimant and the subject of the first and second defendants' allegations. The parties did not address the merits of the claim and so I will only address the point very briefly.

86. Success or failure in obtaining such a final order is likely to depend substantially on the truth or falsity of the allegations. At this interim stage, when I have not heard any oral evidence and the written evidence of the parties is wholly untested, the claimant has not persuaded me that it is "*more likely than not*" that he will succeed at trial in obtaining such an order. (The position may, of course, be different once the court has heard evidence and submissions at trial.) Therefore, applying s.12(3), I would refuse the claimant's application.

87. If, contrary to the conclusion I have reached, the *Bonnard v Perryman* rule applies, it would inevitably follow that the claimant's application should be refused. The claimant does not contend that, if that rule applies, it is met. The claim is contested. This is plainly not a case where it is clear, at this stage, that no defence will succeed.

F. Conclusion

88. For the reasons I have given (i) the defendants' anonymity is lifted and (ii) the claimant remains anonymised in these proceedings, in accordance with the order of 15 March 2019, but his application for a reporting restriction is refused.

Postscript

89. Following circulation of my draft judgment, I received further submissions from Counsel for the claimant addressing the effect of the reporting restriction order sought. In circumstances where the effect of the order sought was not raised prior to the hearing (the first and second defendants having consented to the order), and addressed more briefly at the remote hearing than might otherwise have been the case, I have considered those submissions. I have not sought further submissions in response from PA Media as my conclusion remains unchanged.