

ENGLAND AND WALES / JUDGMENT

Kerner v WX & Anor

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Neutral Citation Number: [2015] EWHC 178 (QB) IN THE HIGH COURT OF JUSTICE QUEEN'S BENCH DIVISION Royal Courts of Justice Strand, London, WC2A 2LL Date: 29/01/2015 Before : MR JUSTICE WARBY

- ----- Between : KATHERINE ELIZABETH KERNER (on her own behalf and in a representative capacity for JACK ROBERT MICHAEL KERNER, a child) 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) Defendants
- -----
- ----- Tim Lawson-Cruttenden (instructed by Richard Slade and Associates) for the Claimant The defendants did not appear and were not represented
Hearing date: 29 January 2015
- -----

Judgment

Mr Justice Warby: 1. 2. 3. 4. 5. 6. This is the return date of the injunction I granted upon the claimant's application of 22 January 2015, to restrain persons unknown from harassing her and her son. The background and reasons for granting that injunction are set out in the judgment I handed down on 27 January 2015, [2015] EWHC 128 (QB). The claimant now applies for that injunction to be continued. The claimant has made a further witness statement explaining the steps she has taken since the grant of the injunction, in compliance with undertakings she gave the court, to attempt to identify the defendants. She has given notice of the injunction to three newspaper groups, none of which has responded. She has contacted the DVLA in an attempt to trace the registered keeper of the car driven by one of the defendants, the registration number of which she took during the events complained of. It seems that she will have to wait up to 4 weeks for that information. The claimant confirms that she will serve proceedings if and when she identifies a defendant but at the moment, neither defendant has been served and neither is before the court nor has either made any representations. It is far from clear that the enquiries currently under way will lead to the identification of a defendant. If they do, they may not lead to the identification of both defendants. The claimant states that if she identifies the driver she will seek to obtain from him the identity of the other defendant, but he may not co-operate. In those

circumstances I have had to consider how this case should be managed at this stage: what form of order is appropriate at this stage, and what if any steps should be required of the claimant, other than those she has already undertaken to carry out. I am satisfied that the need for the injunctions I granted last week has not expired, and they should be continued. I have therefore made an order that they continue until trial or further order. I have however required the claimant not only to renew, in relation to this further order, her undertaking in damages and the undertaking she gave previously to keep third parties informed of the progress of the claim, but also to give an undertaking in the following terms: “if, despite the reasonable endeavours which on 22 January 2015 the Claimant undertook to use to trace the Defendants she has been unable to do so within three months after the date of this Order she will apply to a Judge for directions as to the further conduct of this action.” The purpose of requiring this undertaking is to ensure that the interim order I make today does not by default become in effect a permanent one, because the defendants cannot be traced. There are ways of bringing to a conclusion an action against persons unknown who cannot be traced. The general issue is addressed in paragraph 41 of the Master of the Rolls’ Practice Guidance [2012] 1 WLR 100 as part of a section headed “Active Case Management”: “Where an interim non-disclosure order, whether or not it contains derogations from open justice, is made, and return dates are adjourned for valid reasons on one or more occasions, or it is apparent, for whatever reason, that a trial is unlikely to take place between the parties to proceedings, the court should either dismiss the substantive action, proceed to summary judgment, enter judgment by consent, substitute or add an alternative defendant, or direct that the claim and trial proceed in the absence of a third party (XJA v News Group Newspapers

[2010] EWHC 3174 (QB) at [13]; Gray v UVW [2010] EWHC 2367 (QB) at [37]; Terry at [134] – [136]).

” 7. 8. 9. This guidance relates to actions involving interim non-disclosure orders which affect the Convention right to freedom of expression. Active case management in accordance with this guidance is of particular importance in cases of that kind. The injunctions in this case do not include non-disclosure provisions. However, they do relate to the activities of individuals who are involved with the news media and some at least of the principles that apply in non-disclosure cases are applicable on that account. It is in any event inconsistent with modern litigation principles for the court to allow an interim orders to remain in place with the case otherwise “going to sleep”. Active case management in such actions is only practicable if the action is brought before the court to enable such management to take place. Unless an order is made or an undertaking is given that ensures the case will be brought back, the risk exists that it will simply lie dormant. I express no view at this stage as to what might be appropriate means of disposing of this claim if the defendants or one of them cannot be traced and served. That issue can be addressed if and when the need arises. What would not be appropriate, however, is to leave an interim order in force in perpetuity.

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