Case No.: R/O 104/20

IN THE CROWN COURT AT SOUTHWARK

1 English Grounds, London, SE1 2HU

24 March 2021

BEFORE HIS HONOUR JUDGE BAUMGARTNER

IN THE MATTER OF A RESTRAINT ORDER GRANTED ON 12 NOVEMBER 2020 BY HIS HONOUR JUDGE GRIEVE QC

BETWEEN:

(1) GIANLUIGI TORZI
(2) VITA HEALTHY LIMITED

Applicants

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

RULING

Mr Stuart Biggs (instructed by Janes Solicitors) for the Applicants
Mr Timothy Hannam QC (instructed by the Pre-Enforcement Unit, CPS Proceeds of Crime Division, Crown Prosecution Service) for the Respondent

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I direct that pursuant to Crim PR r 5.5(1)(a) no official shorthand note shall be taken of this Ruling and that copies of this version as handed down may be treated as authentic.

HIS HONOUR JUDGE BAUMGARTNER:

1. In handing down judgment in private in this matter on 10 March 2021, I reserved answering the short question of whether judgment should be delivered in public. This was to allow the parties sufficient time to make any further submissions on the point. I have since received written submissions from Mr Biggs, dated 17 March, and from Mr Hannam QC, dated 19 March, in addition to the ones they each served on and dated 9 March.

2. While the question is short one, the answer is not. It requires an analysis of the principle of open justice in English law and the distillation of the correct approach to delivering a judgment in public in proceedings such as these when the Court has sat in private, taking into account the applicable procedural rules, before scrutinising the parties' submissions against that framework.

3. I turn first to consider the overarching principle of open justice and its application in these proceedings through the relevant procedural rules.

Open justice

4. The principle of open justice is central to the rule of law in this country. The Judicial College's guide to *Reporting Restrictions in the Criminal Courts*, published April 2015 (revised May 2016) (the **"Guide"**), summarises the principle as follows:[1]

> "The general rule is that the administration of justice must be done in public, the public and the media have a right to attend all court hearings and the media is able to report those proceedings fully and contemporaneously. The public has the right to know what takes place in the criminal courts and the media in court acts as the eyes and ears of the public, enabling it to follow court proceedings and to be better informed about criminal justice issues."

The principle that justice is conducted, and judgments are given, in public is "*a sound and very sacred part of the constitution of the country and the administration of justice*": *Scott v Scott* [1913] AC 417, per Lord Shaw, at 473. Any restriction on the rule will be exceptional, and must be based on necessity in order to secure the proper administration of justice: *Scott v Scott*, per Lord Loreburn, at 445-446, *A-G v Leveller Magazine Ltd* [1979] AC 440, per Lord Diplock, at 450; and see further, the Guide, at pp 7-8.

Which procedural rules apply?

5. As I mention in the judgment, the hearing on 26 February was held in private, pursuant to Crim PR r 33.35, and the judgment when delivered was marked accordingly. The default position in criminal proceedings in the Crown Court is that they take place in public in accordance with the principle of open justice. This requirement is set out in Crim PR r 6.2, which makes general rules about reporting and public access restrictions.

6. Restraint proceedings under the 2002 Act are not, however, criminal proceedings. The Criminal Procedure Rules 2020 apply only to criminal cases: Crim PR r.2.1(1)(a). In *Re S (Restraint Order: Release of Assets)* [2005] 1 WLR 1338, delivering the judgment of the Court of Appeal Scott Baker LJ said that "*it is impossible to conceptualise restraint proceedings as criminal*".[2]

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[1] See the Guide, p 7.

[2] At [53]. In so holding, the Court applied the analysis adopted by the House of Lords in *R (McCann) v Crown Court at Manchester* [2003] 1 AC 787 when considering the classification of proceedings for an anti-social behaviour order under the Crime and Disorder Act 1998 as civil in nature.

7. Restraint proceedings, however, can be ancillary to, and in some cases consequent upon,[3] a criminal charge being made against a defendant. They are a creature of statute, akin to proceedings in civil courts. Like civil proceedings, they are not subject to the rules of evidence which apply in criminal proceedings.[4] Before the relevant provisions of the 2002 Act came into force, restraint proceedings were brought in the High Court, a court of general jurisdiction,[5] under the Criminal Justice Act 1988 and the Drug Trafficking Act 1994. The Crown Court, on the other hand, is not a court of general jurisdiction. It has exclusive jurisdiction in trial on indictment,[6] and "*all such … other jurisdiction as is conferred on it by or under this or any other Act*",[7] including the jurisdiction conferred upon it by the 2002 Act to hear and determine restraint proceedings. The Crown Court's jurisdiction to make restraint orders is analogous to the High Court's inherent jurisdiction to make freezing orders,[8] with a number of important distinctions.[9] Unlike the High Court's inherent jurisdiction, the Crown Court's jurisdiction stems from the 2002 Act (and, for external requests, the 2005 Order) itself.

8. Even though, as *Re S* determined, restraint proceedings are not criminal proceedings, the Criminal Procedure Rules (through r 33) make specific provision for the practice and procedure to be adopted in restraint proceedings.[10] There are important features which differ to criminal proceedings. The general rule is that applications in restraint proceedings are to be dealt with without a hearing unless the Court orders otherwise.[11] Provision is expressly made for restraint proceedings to be dealt with in chambers (that is, in private), excluding the public.[12] Although the Criminal Procedure Rules outside of r 33 are not of direct application in restraint proceedings, they provide useful guidance as to how the Court should proceed when considering the principle of open justice, and other procedural matters. Crim PR r 6.2 and Crim PD 6B recognise the importance of dealing with criminal cases in public, and allowing a public hearing to be reported to the public. This largely reflects the equivalent rule in the Civil Procedure Rules 1998, in CPR r 39.2, and in PD 39A. Alongside a number of other factors, emphasis is placed by CPR r 39.2 upon the court being satisfied of the necessity to sit in private to secure the proper administration of justice before a court does so. The fundamental, constitutional principle set out by the House of Lords in *Scott v Scott*, however, remains the touchstone for open justice, whatever the classification of the proceedings.

9. Crim PR r 6.3 provides that the Court must not impose a restriction on public access or reporting unless each party and "*any other person directly affected*" has had the opportunity to make representations. The words "*any other person directly affected*" are of particular relevance to the media. If the media are unable or unwilling to make representations when the court is considering any such restriction, the obligation to ensure that restrictions are only made when justified remains on the court: see *R v Sarker* [2018] EWCA Crim 1341, where the Court of Appeal, Criminal Division considered and quashed a reporting restriction order imposed by

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[3] See, for example, s 40(3)(a) of the 2002 Act.
[4] See, for example, the 2002 Act, s 46 regarding the admissibility of hearsay evidence (and its corresponding provision in the 2005 Order, art 13); and, also, Crim PR r 33.37 (witness evidence to be in writing) and r 33.40 (disclosure and inspection of documents), which apply evidential procedures common to civil proceedings, and r 33.39, by which s 2(1) of the Civil Evidence Act 1995 disapplies in restraint proceedings.
[5] Senior Courts Act 1981, s 19.
[6] Courts Act 1971, s 6.
[7] Senior Courts Act 1981, s 45.
[8] Senior Courts Act 1981, s 37(3).
[9] See, for example, those set out in Sutherland Williams, M, et al, *Millington and Sutherland Williams on The Proceeds of Crime* (5th ed, Oxford University Press, 2018), pp 15-16.
[10] Section 69(3) of the Courts Act 2003 contemplates such an accommodation within the Criminal Procedure Rules "*for different cases or different areas*".
[11] Crim PR r 33.34.
[12] Crim PR r 33.35.

the Crown Court at Worcester under s 4(2) of the Contempt of Court Act 1981 (the **"1981 Act"**) in a criminal trial.

The correct approach

10. In *Sarker* the Court was referred to a long line of authority (including *Scott v Scott* and *A-G v Leveller Magazine Ltd*) making paramount the principle of open justice and the role of the media in reporting what takes place in court. Although the Court was concerned with an application for statutory reporting restrictions under the 1981 Act, Lord Burnett CJ (delivering the judgment of the Court) set out at [29] the rationale for the principle and the importance of media reports of legal proceedings:

> "(iii) Full contemporaneous reporting of criminal trials (and other legal proceedings) promotes public confidence in the administration of justice and the rule of law: *In re S* at [30].
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> (iv) On a practical level, the public nature of court hearings (and media reports of them) fulfils several objectives: (1) it enables the public to know that justice is being administered impartially; (2) it can lead to evidence becoming available which would not have been forthcoming if reports are not published until after the trial has completed or not at all; (3) it reduces the likelihood of uninformed or inaccurate comment about the proceedings; and (4) it deters inappropriate behaviour on the part of the court (and we would add others participating in the proceedings): *ex parte Kaim Todner* at 977E-G per Lord Woolf MR.
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> (v) On the rare occasions when a court is justified in sitting in private, both the public and media are prevented from accessing the proceedings altogether. Reporting restrictions are different. The proceedings are there to be seen and heard by those who attend court, but they cannot be reported. Reporting restriction orders, albeit not as great a departure from open justice as the court sitting in private, are nevertheless 'direct press censorship': *Khuja* at [16] per Lord Sumption."

11. These principles are of equal application in deciding whether a hearing should be conducted, or a judgment should be delivered, in private or in public. Cloaking a judgment by sitting in private leads to the same result as a general prohibition on reporting because it results in the same "*direct press censorship*" Lord Burnett CJ cautions against, and the public would not know about the court's decision.

12. The decision in *Sarker* was framed by s 4(2) of the 1981 Act, which provides for the postponement of reporting where a contemporaneous report would give rise to "*a substantial risk of prejudice to the administration of justice*" in the proceedings, or in any other proceedings pending or imminent. At [30], the Court approved what Longmore LJ had said in *R v Sherwood (ex parte Telegraph Group)* [2001] 1 WLR 1983 to be the proper approach to considering reporting restrictions in this context,[13] which I adapt for the purposes of this ruling and summarise as a three stage approach:

    (1) Would delivering the judgment in public (and any reporting that might consequently follow) give rise to a substantial risk of prejudice to the administration of justice in any proceedings pending or imminent? If not, that will be the end of the matter.

[13] At [22], in turn approved by the Privy Council in *Independent Publishing Co Ltd v A-G of Trinidad and Tobago* [2005] 1 WLR 190, at [69].

(2) If such a risk is perceived to exist, would a reporting restriction eliminate it? If not, there is no need to impose reporting restrictions. If so, could some other, less restrictive, means overcome the risk? In that event, again, there is no need to impose reporting restrictions.

(3) If there is no other way of eliminating the perceived risk of prejudice, the need for reporting restrictions still does not follow. The degree of risk contemplated should be regarded as tolerable in the sense of being "the lesser of two evils". Value judgments may have to be made about the priority between the competing public interests: fair trial, and freedom of expression/open justice.

13. The requirement in s 4(2) of the 1981 Act is that there must be a "substantial risk of prejudice". These words do not mean "weighty", but rather "not insubstantial" or "not minimal". The focus should be on the prejudice it is said would follow by not keeping the judgment private. The risk of prejudice in this jurisdiction is more real than otherwise might be the case where the tribunal of fact is comprised of professional judges, as a lay jury of twelve may not be able to properly discount any irresponsible, unfair, or inaccurate media reporting about the matter.

14. Having set out that three stage approach, I turn next to consider the parties' submissions.

Submissions

The Applicants

15. The Applicants submit the judgment should be made public. Mr Biggs's submissions focus on whether the material before the Court was already in the public domain, and whether such material could prejudice Mr Torzi (or any of his alleged co-conspirators, who are not party to these proceedings) in any criminal proceedings extant or ones that might follow. In short, he submits that the only consideration that militates against a public judgment is whether material not already publicly available may go into the public domain which may be prejudicial to a forthcoming trial.

16. Although Mr Biggs submits there is no evidence before the Court as to the likely format or timescale of any trial, he anticipated any trial would be before a professional tribunal. Given Mr Torzi's written defence to the charges is filed with the Tribunale dello Stato della Città del Vaticano (the Tribunal of the Vatican City State), that must be right.

17. In any event, Mr Biggs submits (and I accept, as it was common ground) that the investigation into the Secretariat's dealings surrounding the Chelsea Property has had significant coverage in the Catholic press, the Italian media, the media in this country, and worldwide. Proceedings here in the High Court are now afoot, brought by Mr Mincione against the Secretariat. Mr Biggs submits that, while no comparative exercise has been undertaken to determine what gaps, if any, remain between that extensive process coverage and the facts and matters referred to in the judgment, a great deal of information is already in the public domain, and there is no basis for concluding that there will be a significant impact by any particular further disclosure.

The Respondent

18. The Respondent opposes publication of the judgment. Mr Hannam QC submits, first, that the circumstances of this case are such that publication of the judgment risks prejudicing not only Mr Torzi's trial, but, secondly, also ongoing criminal investigations into and proceedings against others, including those named in the restraint proceedings. He submits the media interest in the investigation is such that the judgment, if made public, will be reported widely in the Vatican, in Italy, and in the Catholic press. Mr Hannam QC submits this may have an effect on the fairness of the proceedings against Mr Torzi, and against others identified in the

judgment, in particular Monsignor Perlasca, Mr Tirabassi, Mr Crasso and Monsignor Carlino, the latter three about whom Mr Torzi has made what Mr Hannam QC describes as "scandalous" accusations, and which may also be unfairly damaging to the reputations of those who can be identified as their alleged victims.

19. Mr Hannam QC placed particular focus on prejudice to the OPJ's ongoing investigations, both in the Vatican and abroad, and in relation to others apart from Mr Torzi, who might be tipped off should the judgment be made public. He relied upon three letters from Prof Avv Diddi, dated 16, 17 and 20 March 2021, the second of which refers to the confidentiality of those investigations and set outs out the Vatican law which prohibits the publication of documents or parts or summaries thereof used in investigations and prosecutions in that jurisdiction unless referred to in court or until proceedings are concluded. I refer to this letter further below.

Discussion and analysis

20. I have carefully considered the parties' submissions against the approach that I have adapted from *Sarker*, bearing in mind the burden lies on the party seeking to persuade the Court to depart from the open justice principle that it is necessary to do so on the basis of clear and cogent evidence. I remind myself that the obligation to ensure that restrictions are only made when justified falls upon the Court where the media are unable or unwilling to make representations. There has been no media presence throughout these proceedings.

21. The first question to consider is whether delivering the judgment in public (and any media reports that might consequently follow) would give rise to a substantial risk of prejudice to the administration of justice in any proceedings pending or imminent. In addressing this question, I take Mr Hannam QC's two points in turn.

22. Mr Hannam QC's first point is the fear about prejudice to Mr Torzi in any trial he might face in the Vatican. In so far as the facts and matters set out in the judgment are concerned, I do not see how that can be so. They are drawn from Mr Torzi's own detailed written defences provided to the OPJ (dated 12 June 2020) and to the Tribunal (dated 11 January 2021). It is not disputed that the Tribunal is a court comprised of professional judges as the judges of fact, in contrast to the lay jury of twelve as the sole judges of fact in this country. The Tribunal will already be seized of what Mr Torzi has said. Mr Torzi is represented by Italian lawyers in the criminal proceedings before the Tribunal. Neither Mr Torzi nor his lawyers have, through Mr Biggs, raised any such concern. To the extent that sections of the media report the published judgment, there is nothing in it which Mr Torzi does not reply upon in his defence to the charges levied against him by the OPJ. To the extent there is any unfair or inaccurate domestic or international media reports about the matter, I hold little doubt that the Tribunal will be able to put such things out of its mind, knowing what Mr Torzi has said in his defence. I do not consider Mr Hannam QC's first point about the potential prejudicial effect, if any, upon Mr Torzi's potential trial in the Vatican is made out.

23. Mr Hannam QC's second point flows from his first but, instead of Mr Torzi, focusses on the prejudicial effect publication might have upon Monsignor Perlasca, Mr Tirabassi, Mr Crasso, and Monsignor Carlino's position. Each of them is named by the OPJ in the Letter of Request as Mr Torzi's co-conspirators: in Count (a), embezzlement (Perlasca and Tirabassi); in Count (b), embezzlement (Perlasca, Tirabassi, and Crasso); and, in Count (d), extortion (Tirabassi, Crasso, and Carlino). I have not received evidence about the status of criminal investigations or proceedings against these four men, or whether they would be jointly tried with Mr Torzi if proceedings against them were to be commenced. The OPJ's position insofar as Monsignor Perlasca's culpability at times appears to have shifted, as I identified at [69]-[70] of the judgment. The four men are a key feature of the OPJ's case against Mr Torzi, and in Mr Torzi's written defence, and may well in due course feature in any criminal proceedings against Mr Torzi. In any event, the same observations I made about any potential prejudice to a trial of

Mr Torzi apply equally here. I have little doubt that a professional tribunal of fact would discount any media reports about the judgment that had no direct bearing upon Mr Torzi's alleged co-conspirators, as it would any irresponsible, unfair, or inaccurate media reporting about the matter.

24. The OPJ has not provided the Court with any information as to the status of any criminal investigation into or proceedings against these four men or any of them, whether actual or pending, or any investigation into others that may be afoot or contemplated. Three further letters from Prof Avv Diddi dated 16, 17 and 20 March 2021 have been produced by the DPP to support the submission that disclosure of the judgment and the materials referred to during the hearing and quoted in the judgment would prejudice the ongoing investigations of the OPJ, both in the Vatican and abroad, and in relation to suspects other than Mr Torzi, who may be tipped off should they be published. Prof Avv Diddi relies upon the secrecy of the investigation under Vatican law, and in his letter of 17 March, says this:

> "Regarding why would the investigations/trials be prejudiced and why would disclosure have repercussions for the cooperation of other foreign Country we integrate as follows:
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> Torzi case is connected to other subjects involved in the criminal proceedings, it has been amply demonstrated in the 'Witness Statement' of the undersigned Promoter of Justice forward [sic] to CPS. Both Torzi and others [sic] individuals are subject to investigation in other foreign jurisdictions. In some cases, these investigations are delegated on behalf of the Promoter's Office with an MLA request, in other cases the investigations starts [sic] thanks to the information that this Office has provided. To corroborate the charges against Torzi, in the UK Judgement under discussion, information and evidences were communicated (supported by documents and other material such as chat) that can probably have consequences in those foreign jurisdictions. This would happen because some information is not known to the parties involved. This means that the other individual involved in the investigation, being informed of the Sentence, could acquire in their favor the advantage of becoming aware of the progress of the investigations of the promoter of justice."

25. No particular examples or instances of potentially offending matter in the judgment are given, or of who else is under investigation and named in the judgment, or of who or how others might be tipped off, or of how the judgment might prejudice any pending or ongoing investigation into them; the position adopted by the OPJ through Prof Avv Diddi, it seems, is that the judgment simply should not be made public because of the risk that others allegedly involved might be tipped off. Given what the parties agree as the substantial media coverage of the case, I cannot see how anyone said to be connected with the Chelsea Property transaction would not already be aware of the OPJ's interest in the matter and the investigations already underway. The DPP did not draw to the Court's attention any matter referred to in the judgment that was not already in the public domain.

26. As to any Vatican law that prohibits the publication of documents or any summary or part thereof unless referred to in court or until proceedings conclude, that, respectfully, is a matter for anyone subject to Vatican law. The fact that an investigation is confidential in another jurisdiction does weigh in my mind and, to the extent the courts in this country can, is something that should be considered on the basis of international judicial comity and reciprocity, at least as between courts, but to my mind such a blanket claim does not sit well with the principle of open justice. In the same way that investigations here in this country might remain confidential to the authorities, the authorities are aware that they are, nonetheless, subject to disclosure obligations (for example, under the Criminal Procedure and Investigations Act 1996) and, in any event, once proceedings before a court begin, subject to the principle of open justice to the extent any material is deployed before a court.

27. Part of Mr Hannam QC's second point extends to the potential for unfairness to Mr Tirabassi and Mr Crasso that Mr Torzi's accusations might cause, not only in so far as any criminal investigation or proceedings against them is concerned, but also to their reputations and to the reputations of those who can be identified as their alleged victims. While this may be so, that does not form part of the approach that I have to take in applying the principles adapted from *Sarker*. I do not consider that publication of these matters would lead to significant risk of prejudice to the administration of justice in any proceedings pending or imminent. Equally, I do not consider that Mr Torzi has sought to abuse the process of this Court in making these allegations, and nor is that asserted by the Respondent. The allegations made by Mr Torzi form a part of his written defence given to both the OPJ and the Tribunal, and must be seen and fairly reported within that context.

28. In sum, on the basis of the material relied upon by the Respondent, at the first stage I am not satisfied on the basis of clear and cogent evidence that any such prejudice would result. Although that is the end of the matter, I had considered whether, even if there was a significant risk, whether some other reporting restriction might eliminate it. It may, for example, be that something in the judgment which might give rise to a significant risk of prejudice could be redacted, or parties' names anonymised. I am not in a position to consider this any further, however, because (outside the Mr Torzi's accusations against Messrs Tirabassi and Crasso) the DPP has not advanced any particular areas of concern.

29. Having answered "no" to the first stage of the approach adapted from *Sarker*, I do not need to go on to consider the second and third stages. The result is that the judgment will be delivered in public, and I do so by having had this matter listed in public today and by appending a copy of the judgment to this ruling. To readers of the judgment, I draw attention to the task this Court faced in determining the Discharge Application. In considering whether a restraint order should be re-imposed or made, I did not make any findings of fact let alone any findings of guilt or innocence. I sought only to evaluate the evidence put before me in determining whether there was reasonable cause to believe Mr Torzi had benefited from criminal conduct. In doing so, I read the documents and contracts in evidence and referred to in the judgment *de bene esse*, without determining their true construction, meaning and effect. The matters raised by Mr Torzi in his defence as summarised in the judgment should be read with all that in mind.

30. I will hear the parties as to the need, if any, for any consequential orders.