

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2010

Before :

THE HONOURABLE MR JUSTICE TUGENDHAT

Between :

DONCASTER METROPOLITAN BOROUGH COUNCIL **Claimant**

- and -

BRITISH BROADCASTING CORPORATION **Defendant**

Mr A Hayden QC and Ms C Procter (instructed by **Doncaster MBC Legal and Democratic Services**) for the Claimant

Mr D Browne QC and Mr A Wolanski (instructed by **BBC Legal Department**) for the Defendant

Hearing dates: 18 January 2010

Judgment

Mr Justice Tugendhat :

1. On Monday 18 January 2010 I refused the application of the Claimant (“Doncaster”) to continue an order (“the Order”) made without notice by the judge on out of hours duty (“the Judge”) on the evening of Thursday 14 January. The Order was made following a telephone application made by Ms Sarah Singleton QC. I stated at the end of the hearing that I would give my reasons in writing, which I now do.
2. Counsel who appeared for Doncaster before me had not made the application the previous Thursday.
3. The substance of the Order restrained the BBC “as well as any other person who is served with the Order or who is otherwise provided or given access to or sight of this order” from publishing “any information obtained from the said SCR or executive summary or any content or part of the said document”.
4. The SCR is a Serious Case Review of the circumstances leading to offences under s18 of the Offences Against the Person Act that had been committed by two eleven year old boys. The boys pleaded guilty to the offences on 3 September 2009. They are due to be sentenced by Keith J on Friday 22 January. The offences were unusually serious, and all the more so for boys of that age. Naturally, there has been extensive reporting

and public discussion of the offences, and of the ensuing criminal proceedings, subject to restrictions on reporting contained in orders made in the criminal proceedings. The “Executive Summary” is a summary of the SCR.

5. A draft of the Executive Summary is before me, but I have not been referred to a copy of the SCR. However, journalists from the BBC have had sight of the SCR.
6. Mr Roger Thompson is the Independent Chair of Doncaster’s Local Safeguarding Children Board (“LSCB”). Ms Lauren Haslehurst is a press officer with Doncaster. Ms Liz MacKean is a journalist working for BBC Newsnight programme.
7. The chronology of relevant events is as follows.
8. On 12 and 13 January Ms MacKean contacted Ms Haslehurst and exchanged e-mails with her, under the subject heading “Newsnight”, to arrange an interview with Mr Thompson. He was described as representing all the local agencies in the case.
9. On 14 January at 10.30am in the Council House at Doncaster Ms MacKean interviewed Mr Thompson. At 14.36 Ms Haslehurst sent to Ms MacKean a further document under cover of an e-mail headed “Newsnight”. The e-mail recorded no concern about the interview or the proposed broadcast. It reads:

“Good to meet you and Robin today. Please see attached document with further key messages I hope you may be able to incorporate as part of the feature. As discussed, I’ll touch base with you again tomorrow to confirm line-up of studio guests”.
10. On 14 January in the evening Ms Singleton submitted to the Judge a document she had prepared, headed “Urgent application to restrain publication of Confidential Information under the Inherent jurisdiction” (“the Outline”), together with a draft of an order she was applying for. The Judge recorded in the Order that he had considered the Outline and heard leading counsel on the telephone.
11. On Friday 15 January Mr Thompson made a witness statement. He refers to the interview and states that, at the start of it, he asked Ms MacKean if she had a copy of the SCR or the Executive Summary. He states she replied that she had access to them, but declined his request to identify her source, and he said he was not willing to discuss the contents. He states that he understood that the broadcast was to be on Newsnight on Friday 15 January. The evidence for the BBC is to the same effect. Mr Thompson also states that he was concerned that the confidentiality of these documents had been compromised, but he considered that they remained confidential. He did not apparently express this concern to the BBC.
12. The Outline refers to the interview, and to Mr Thompson’s finding out that the BBC had access to either the Executive Summary or the whole SCR, (it was unclear which), and that the BBC were intending to broadcast information about it on Friday 15 in Newsnight.
13. The Outline makes no reference to the interview having been pre-arranged, nor to what was discussed at the interview, nor to the e-mail sent at 14.36. The Outline and draft order made no attempt to identify any particular information said to be

confidential, but expressly sought an order relating to “any content of any part” of the SCR or the Executive Summary. It stated that the date for publication of the Executive Summary had been carefully planned to coincide with the sentencing hearing.

14. Doncaster had not at any time prior to the application to the Judge communicated to the BBC any request that they refrain from publishing anything. The Outline does not suggest that there had been any such communication with, or notice to, the BBC.
15. Mr Thompson in his witness statement states that the Executive Summary was to be released, but not before Friday 22 January, and that the SCR was not to be released at all, in accordance with practice. He gives reasons for this, including a reference to the reporting restrictions in the criminal proceedings and the feelings of the families. Mr Hayden did submit to me that these were a basis upon which an injunction can be claimed.
16. Also on 15 January Ms Singleton prepared a note headed “Outline of telephone hearing Thursday 14th January” (“the Note”).
17. On Sunday 17 January Mr Rippon, the editor of Newsnight, made a witness statement. He exhibited the e-mails referred to above. He also exhibited transcripts of the proposed programme (although publishers and broadcasters are not required to state what they propose to publish). He identified the reporting restrictions that are in place in the criminal proceedings. It is not suggested that the BBC is threatening to breach these reporting restrictions. He sets out a number of reasons why he believes that there is a public interest in the disclosure of what he states to be a number of differences between the SCR and the Executive Summary. He states in detail (over several pages) that the Executive Summary is a completely inadequate resume of the contents of the SCR. It does not disclose what the public ought to know, and the Newsnight programme would disclose the failings of Doncaster Children’s Services, without naming or interfering with the rights of any individual. He notes that in the interview, the transcript of which is also exhibited, Mr Thompson accepted that there were serious deficiencies in Doncaster’s handling of the case, and that he spoke of matters which are not in the Executive Summary. No one for Doncaster said anything to the BBC as to there being a need to ensure that reporting should coincide with the sentencing hearing on Friday.
18. I have not needed to consider the issue of public interest.

THE HEARING BEFORE ME

19. Mr Hayden did not put before me a draft Claim Form, or a skeleton argument. He did not have in court a copy of the draft order that had been submitted to the Judge. That was provided at my request, arriving after the conclusion of the hearing.
20. Mr Hayden submitted that the Order should be continued. But he focussed his submissions on two matters which are referred to in the transcript of the programme and which he submits are confidential information.
21. The first is the words: “They were placed with elderly foster parents”.

22. As to this Mr Browne points to the fact that that information was in the public domain. It is included in reports dated 4 September 2009, including one in The Guardian.
23. The second passage Mr Hayden referred to includes the words: “In March 2006 the school decided to exclude one of the boys then aged 8 after he threatened staff with a baseball bat”.
24. Mr Hayden accepted that both passage were minor matters which were not in themselves of significant concern to Doncaster. He said Doncaster’s concern was that if the BBC were proposing to publish these items of what he characterises as confidential information, then there was an implied threat that they would publish other confidential information.
25. Mr Browne responds that the inference to be drawn is the contrary. It is clear that if that is all that the BBC were intending to publish on Newsnight, then it is to be inferred that they have decided not to publish other information which is or may be confidential. In any event, if Doncaster asked the BBC, in the usual manner, the BBC would respond constructively. There is no evidence from any individual that his or their private information is threatened with misuse. He submits, correctly, that an injunction to restrain the publication of confidential information must be specific as to the information which is said to be confidential. Doncaster has not identified such information, whether before or since the Order was made.

CONCLUSION

26. In my judgment there is no evidence before the court that there is or has been a threat by the BBC to publish confidential or private information. On that ground the application must fail. There may well be confidential information in the SCR, but if there is, the fact that the BBC has had access to it is not a sufficient basis for granting an injunction against the BBC. There must be evidence of a threat to publish confidential information.

THE PROCEDURE

27. In this case there have been lamentable omissions by Doncaster to follow the procedure set out in the Civil Procedure Rules governing the application for an interim injunction. I have not refused to grant the order because there have been technical failures. I have refused the order on the merits of the application. But if the proper procedures had been followed, it would have been apparent, before any application was made to the Judge, that no injunction was required against the BBC in this case at all. The failure to follow the correct procedures means that substantial costs have been incurred which need not have been incurred. In any case, the rules are not just technicalities. They are essential measures for preventing unfairness and injustice to a defendant. A defendant has a right to be heard, and to know the case being advanced against him.
28. The procedure to be followed in any application for an interim order is set out in CPR 25.3 and the Practice Direction. In respect of orders which may affect freedom of expression, the Human Rights Act 1998 s.12 contains additional provisions.

29. The requirement that the respondent should be notified of an intended application for an interim injunction, and if he is not notified, that the judge should be informed of the reasons why no notice has been given, is set out twice in the rules of court: see CPR 25.3(1) and (3), CPR PD para 5.3 (“except in cases where secrecy is essential”). HRA s12 (2) also makes the requirement of notice, and does so in more stringent terms, in cases where the right of freedom of expression may be affected (“except where there are compelling reasons why the respondent should not be notified”). But that requirement adds nothing of significance on the facts of this case.
30. In this case notice was not given. Nor were any reasons given in the Outline why notice had not been given. However, the matter appears to have been raised in the telephone call, in terms that are unclear from Note. The Note includes:

“I explained in barest outline why [Doncaster] thought that the application was urgent ... there was nothing to prevent their being used in advance of the programme [Doncaster] was informed of”.

31. There is, on the basis of the Outline and the evidence of Mr Thompson, no reason that could have been given for the failure to give notice to the BBC. Nor was there any evidence that the application was so urgent that it could not have been dealt with in court the next day. There is no evidence that the BBC were intending to publish anything on Thursday night, or before the usual Newsnight late on the Friday evening.
32. CPR PD 25 sets out various other requirements, including the following:

“Urgent applications and applications without notice

4.1 ...

4.2 These applications are normally dealt with at a court hearing but cases of *extreme urgency* may be dealt with by telephone.

4.4 Applications made before the issue of a claim form:

(1) ... unless the court orders otherwise, either the applicant must undertake to the court to issue a claim form immediately or the court will give directions for the commencement of the claim,

(2) where possible the claim form should be served with the order for the injunction, ...

Orders for injunctions

5.1 Any order for an injunction, unless the court orders otherwise, must contain:

(1) an undertaking by the applicant to the court to pay any damages which the respondent sustains which the court considers the applicant should pay.

(2) if made without notice to any other party, an undertaking by the applicant to the court to serve on the respondent the application notice, evidence in support and any order made as soon as practicable, ...

(4) if made before filing the application notice, an undertaking to file and pay the appropriate fee on the same or next working day, and

(5) if made before issue of a claim form –

(a) an undertaking to issue and pay the appropriate fee on the same or next working day, or

(b) directions for the commencement of the claim.”

33. None of these requirements was complied with. There were also other omissions and defects in the draft order, which the Judge remedied by a substantial exercise in re-drafting which he should not have been required to perform.

34. HRA s.12(3) and (4) include further requirements, as follows:

“(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.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code. ”

35. It appears from the Outline and Note that the attention of the Judge was not drawn to these provisions, and that no submissions were addressed to him on these requirements. Mr Hayden did not address any submissions to me on these provisions.

36. In addition any order should have had a provision excepting matters already in the public domain.

37. A further omission by Doncaster was its failure to supply to the BBC, when requested to do so, with a copy of the draft order submitted to the Judge. It is counsel’s duty to draw the attention of a judge to any respects in which a draft order departs from the

normal requirements. See *Memory Corporation v Sidhu (No 2)* [2000] 1 WLR 1443, 1459H-1460B. In this case, in the time available to him, the judge did identify and rectify some of the departures from these requirements, but not all of them. The BBC is entitled to know what was put before the Judge in their absence.

SUMMARY

38. I have refused the application for an injunction against the BBC because there is no evidence that the BBC are threatening to publish any confidential information.
39. The fact that I have refused to grant an injunction against the BBC does not mean that anyone else is free to publish any confidential information that there may be. But an application for an injunction must identify both the information said to be confidential or private, and the evidence of a threat to publish.