



Neutral Citation Number: [2009] EWHC 3151 (Ch)

Case No: HC09C04462

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2009

Before :

MR JUSTICE MANN

Between :

BKM LIMITED

Claimant

- and -

BRITISH BROADCASTING CORPORATION

Defendant

MS. M. HEAL (instructed by **Alison Castrey Limited**) for the **Claimant**.
MS. H. ROGERS Q.C. (instructed by **Ms. R. Welsh, BBC Legal Department**) for the
Defendant.

Hearing dates: 24th & 25th November 2009

Judgment

Mr Justice Mann :

Introduction

1. On 25th November I indicated that I would refuse to grant an interim injunction sought by the claimant to restrain the broadcast of a programme, or certain material in a programme, which it was the intention of the BBC to broadcast on the evening of the same day. I gave some short reasons at the time in order to enable the claimant to consider whether it wished to have a reasoned judgment that day, so that it could consider an appeal, or whether it would be content for reasons to follow later. Having considered the matter with her clients, counsel for the claimant indicated that she did not wish to seek to appeal, so there was no urgency to the giving of reasons, which could follow later. This judgment contains those reasons.
2. The application before me was an application for an interim injunction to restrain the broadcast of a television programme on BBC Wales in the series “Week In Week Out”, and bearing the further title “Who cares in Wales?”. The application was made on 23rd November, on which occasion Norris J restrained the broadcast of a trailer, refused an order for delivery up of the broadcast or film and adjourned the case for further argument the next day on the injunction in relation to the main programme. It started at 2pm, and was adjourned part heard until the next day. The timetable and the proximity of the broadcast meant that the evidence (particularly from the defendant) was thinner than it would otherwise been, and a number of matters had to be dealt with on the hoof as the application developed. Miss Madeleine Heal appeared for the claimant (“BKM”); Ms Heather Rogers appeared for the BBC.
3. BKM operates a care home in Ystrad Rhondda in Wales called the Glyndwr Nursing Home. It has a number of very elderly residents, some of whom need a significant amount of care and assistance in their day to day personal activities. It is subject to regulation and control by the by the Care and Social Services Inspectorate for Wales (“CSSIW”), and the local authority and local health board have certain responsibilities to the residents as well. In inspections over recent years the inspectors have found shortcomings in the standards of care offered by Glyndwr in areas such as record-keeping, wound care and staffing levels. The reports in question were in evidence before me but time constraints meant that their detail was not examined. The level of complaints was not gone into, so that I do not know the level of seriousness of the shortcomings, save that the BBC would say they were not insignificant. I myself say nothing about them other than to describe them generally.
4. The BBC in Wales wished to make a programme which had as at least part of its theme that regulation of care homes was not working. It wished to portray this in relation to Glyndwr, and apparently took the view that there were still significant shortcomings in the standards of that home. It therefore sent in an undercover reporter (Ms Kirsty Hemming), who worked alongside carers for a week and who, after a day and a half, conducted some secret filming in the home. The content of her filming is not known; nor is the detail of her “findings”, but the latter are said to be not favourable. In correspondence the BBC claims to have identified:
 - i) failings in the lifting of patients (hoists not used where they ought to have been, insufficient numbers of carers lifting and lifting in an inappropriate manner);

- ii) failings in staffing levels that are such that the dignity and care of residents was compromised (though only a couple of examples were given, one being bedroom doors being left open when residents were being assisted with private functions);
 - iii) one carer who did not follow hygiene guidelines on the use of gloves;
 - iv) the references provided for the journalist were not in fact checked;
 - v) an instance where the reporter herself was allowed to wash and dress residents without supervision, and to feed a disabled resident unsupervised.
5. On 11th November 2009 the BBC wrote to BKM inviting the latter to contact them in relation to unparticularised allegations. This was followed the next day by another letter which put some flesh on the bones of the generalised allegation. BKM sought some more detail, and it was provided in an e-mail of 13th November, this time giving some detailed particulars of the incidents in question. In the end the directors of the home declined to be interviewed. One of their complaints is that they have not been able to see the film footage.
6. No-one other than the BBC has seen that footage, or the footage that is sought to be broadcast (indeed at the time of the hearing before me the programme contents were said still to be under construction). It is, however, apparent that the BBC proposes to broadcast film taken surreptitiously in the home and which, presumably, will back up (to some extent) the allegations made against BKM.

BKM's case in outline

7. BKM brought this application to restrain broadcast of the programme not in pursuit of any rights of its own, but in order to protect the rights of the home's residents to privacy and family life under the Human Rights Act. It says that filming in the home was an infringement of their privacy rights and was offensive to their dignity (*Green Corns Limited v Claverley* [2005] EMLR 748 at 31. So far as necessary, BKM also says that the filming was illegal under more general legal principles. Broadcasting film taken inside the home would be a further infringement, particularly if it showed residents and enabled them to be identified. While the privacy rights had to be balanced against the BBC's rights to free expression, the balance came down in favour of granting an injunction because the use of surreptitious filming, and the consequential invasion of privacy, was disproportionate when measured against any public interest in standards of care at the home. BKM put in evidence various complaints from relatives of residents (and one resident herself) about the clandestine filming, and expressions of support for and satisfaction with the standards of care at the home. Apart from one former resident's son who had complained about treatment, there were no other complaints about care standards from those residents who now commented.
8. BKM originally sought an injunction restraining the broadcast of the programme as such pending trial of the action. That was the form of the relief sought when I started hearing the application on 24th November. One of the prime reasons why it was said that that was justified was that the footage, and I think the material for the programme, was obtained illegally. That was always a tall order where the real basis

of the claim, as propounded, was the protection of the privacy of the individual residents, and before I sat to resume the case on 25th November Miss Heal proposed a modified injunction in the following form:

“IT IS ORDERED THAT

Until further Order, the Defendant is restrained from broadcasting by television or otherwise howsoever (including on BBC IPlayer):

(i) any audio and/or film (including such audio and/or film which subsequently has been pixilated and/or distorted in whole or in part) obtained at the Glyndwr Nursing Home between 2-6 November 2009 (inclusive) by the Defendant’s journalist Kirsty Jayne Hemming of either:

(a) any of the 32 residents of the Glyndwr Nursing Home resident during the period 2 – 6 November 2009; and/or

(b) any part of the bedrooms, toilets, bathrooms and/or lounges including the entrances thereto within the Glyndwr Nursing Home (the Surreptitious Film) ;

(ii) any audio or film of comment by an expert or experts in any field on the whole or any part of the Surreptitious Film; and

(iii) any audio or film of editorial or journalistic comment on the whole or any part of Surreptitious Film ; and

(iv) any audio or film in which there is described the whole or any part of the Surreptitious Film.”

9. This was an attempt to limit the use of filmed material so that it excluded any visual or audible reference to the individual residents themselves – BKM consider that filming in bedrooms or lounges may reveal material such as personal items like photographs which would enable residents to be identified. Any individual such as those referred to in the latter half of the draft order might identify residents if they commented on film footage of the residents (or, apparently, the accommodation, judging by the order). It was not clear to me why film of empty bathrooms or toilets was an infringement of privacy rights.

The BBC’s case in outline

10. The BBC relied on its rights to free expression under Article 10, and said that to the extent that there was an infringement of privacy rights, its Article 10 rights were stronger and that an injunction would not be granted at trial; so section 12(3) of the Human Rights Act 1998 meant that an injunction could not be granted at this stage. It defended its decision on the facts to conduct clandestine filming operations and said that it intended to show that this particular home had not been improved, or sufficiently improved, by the regulatory regime. The privacy of the residents would be acknowledged and the broadcast material would not enable the identification of any of the residents. In pre-action correspondence the BBC said that the residents would not be “identified”. The evidence which was placed before me went further (and it was supplemented by assurances given by Miss Rogers in relation to response to additional concerns voiced by Miss Heal). Steps would be taken to make sure that

residents were not “identifiable”. This would include pixilation of faces and, where necessary, hair, clothing and whole body outlines, to prevent any residents from being identifiable from the footage, and no shots of any private areas of the home (such as rooms) would be used in a manner which would show personal effects from which residents could be identified. It would also modify voice recording to disguise the identity of the speaker. The decision to film clandestinely, and to broadcast such material, was justified by reference to the guidelines of the BBC. Ultimately it was in the public interest to allow the material to be broadcast because the general area of care home standards was of legitimate public interest, the failure of regulation was of public interest, and the manner in which this care home in particular still fell short of proper standards was also of public interest. It was never intended to broadcast all the material that was filmed. The broadcast film would be confined to the areas of concern (outlined above). The decision as to what to broadcast was an editorial matter with which the court should not be concerned.

11. So far as the expressed attitude of the residents was concerned, Miss Rogers said that not all of their complaints about what had happened related to invasion of their privacy (though some did). Some related to other matters, including the standard of their care (which was not criticised) and the fairness of criticism of that standard. The letters from residents or their families came after a director, Dr Choudhary, had called a meeting of residents and families, and it might be that at that meeting he told them that all the film would be broadcast (without any assurances as to the obscuring of identities) since that is what he seemed to believe would happen. Accordingly, the letters might have been written on a false premise.

The locus of the claimant

12. I have already pointed out that BKM does not rely on any of its own rights in relation to this application. It seems to rely on the rights of its residents. It claims that it is entitled, and indeed obliged, by legislation and by contract to protect the privacy and dignity of its residents. The regulators have not done so (though they have been given little opportunity to consider doing so); nor has the local authority.
13. The BBC accepted, for the purposes of this application, that BKM arguably had locus to make this application (and indeed bring this action) to protect the privacy rights of others, and I have therefore proceeded on the footing that it does have that right. This is not wholly satisfactory. There are elements in the evidence, and elements in the way that the case is put, which indicate that BKM is (understandably) sensitive to its own reputational position, and concerned about the effect on its business. I sometimes got the impression that that was a significant underlying factor to the decision to bring this application. BKM clearly has a potential conflict of interest. Its commercial interests lie in playing down the allegations, and not having them broadcast. The interests of the residents might (I say no more than “might”) lie in having them broadcast in order to improve standards. I think that this might explain why a lot of the emphasis of Miss Heal in submissions was to prevent the broadcast of the programme at all, as opposed to a broadcast which did not render residents identifiable though Miss Heal expressly disclaimed any intention to prevent comment on the running of the home. However, there is a privacy point to be addressed, and BKM is the only person taking it. In the circumstances they must be taken to be entitled to do so. So far as I am concerned, I shall focus on only the privacy rights of the residents, and not be distracted by the private interests of BKM.

The trailer

14. BBC Wales prepared a short trailer for the programme. I have seen it. It was broadcast a number of times. The trailer contains a voice-over, some comments which I take to be voiced by Ms Hemmings explaining that a resident was dumped “like a sack of potatoes”, and a snippet of what seem to be some strong opinions on standards at the home voiced by an expert on care who refers to the absence of dignity and says that “that’s just unacceptable”. It is not clear precisely on what piece of detail she is commenting. The overall tone can, I think, be described as somewhat sensationalised, and suggests very serious failings. The outside of what I take to be part of the home is shown, and there is a brief, extremely fuzzy, shot of what is presumably an interior sitting room. The vague outline of a couple of residents can be vaguely (but only very vaguely) be seen. There is also a 5 second shot which is presumably part of the clandestine filming. It shows the chest, lap and hands of an elderly lady sitting a wheelchair. It is somewhat wobbly, but the impression is clear. No features are shown which would enable a viewer to identify the person, save for her clothing. Nonetheless, she has apparently been identified by a relative (presumably from that clothing and a knowledge that the lady was in the home in question). BKM relies on that sort of identification. Norris J barred the further broadcast of that trailer pending the final determination of this application.

The competing Human Rights Act rights

15. The right to privacy which is relied on is contained in Article 8 of the European Convention on Human Rights, given some force in this jurisdiction by the Human Rights Act 1998. Article 8 reads:

“Article 8:

1. Everyone has a right to respect for his private and family life, his home and his correspondence.
 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.”
16. The BBC does not dispute (at least for the purposes of this action) that the residents in their care home have rights of privacy which are entitled to protection, and that the surreptitious filming, and its broadcast, is capable of infringing those rights. The Article is engaged. The residents have a reasonable expectation of privacy – see *Campbell v MGN* [2004] AC 457. This last part seems to me to be right. The home is the home of the residents, and their need for privacy is reinforced by the fact that their various disabilities mean that they need assistance in activities which for most people are most private, and they have an even greater need for their dignity to be respected. Non-consensual filming is capable of being a very serious infringement of their rights to privacy, whether it merely films them in their home or whether it goes further and intrudes into their disabilities.

17. However, the BBC has its own rights. For these purposes they are contained in Article 10:

“Article 10:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television and cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

18. It also has the benefit of section 12(3) of the Act:

“12(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.”

19. Section 12(4) contains provisions which have to be taken into account in freedom of expression cases:

“12(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.”

20. The parties each relied on a code promulgated by Ofcom and the BBC’s own editorial guidelines.

The operation and interaction of those rights in the present case

21. The competition between the two rights is resolved by a balancing exercise. Lord Steyn explained this in *Re S (A Child)* [2005] 1 AC 593 at para 17:

“First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test.”

22. By the end of their submissions each party was conducting the case on the basis of such an exercise.
23. I therefore have to conduct such an exercise, but with a very firm eye on section 12(3). I have to determine not only how the competition between the rights is to be resolved for present purposes, but also to do so with an eye to determining whether an injunction would be granted to restrain a broadcast at a trial. An injunction should not be granted unless I am satisfied that at a trial it would be likely to be determined (in the sense of more probable than not – see *Cream Holdings v Bannerjee* [2005] 1 AC 253) that the broadcast should not be allowed.
24. Each side relied on guidelines about clandestine filming, both the BBC’s and Ofcom’s. Section 12(4) requires that to be done. Ofcom’s guidelines state:

“Deception – set-ups and wind-up calls

7.14 Broadcasters or programme makers should not normally obtain or seek information, audio, pictures or an agreement to contribute through misrepresentation or deception (deception includes surreptitious filming or recording). However:

- It may be warranted to use material obtained through misrepresentation or deception without consent if it is in the public interest and cannot reasonably be obtained by other means;
- Where there is no adequate public interest justification, for example some unsolicited wind-up calls or entertainment set-ups, consent should be obtained from the individual and/or organisation concerned before the material is broadcast;
- If the individual and/or organisation is/are not identifiable in the programme, then consent for broadcast will not be required....

8.13 Surreptitious filming or recording should only be used where it is warranted. Normally, it will only be warranted if:

- There is prima facie evidence of a story in the public interest; and
- There are reasonable grounds to suspect that further material evidence could be obtained; and
- It is necessary to the credibility and authenticity of the programme.”

25. The BBC has its own guidelines in the form of an editorial policy statement. They state:

“Introduction

Secret Recording is a two stage process: the gathering of secretly recorded material, and as a transmission of the material. Each process could amount to an intrusion and they must be considered and approved separately to ensure any invasion of privacy is justified by a clear public interest.

.....

[Chapter 6]

The BBC must not infringe privacy without good reason wherever in the world it is operating. It is essential in order to exercise our rights of freedom of expression and information that we work within a framework which respects an individual’s privacy and treats them fairly, while investigating and establishing matters which it is in the public interest to reveal. Private behaviour, correspondence and conversation should not be brought into the public domain unless there is a clear public interest. There are also a number of ways in which the law protects privacy in the United Kingdom, including the Human Rights Act 1998.

....

Public Interest

There is no single definition of public interest, it includes but is not confined to:

- Exposing or detecting crime;
- Exposing significantly anti-social behaviour;
- Exposing corruption or injustice;
- Disclosing significant incompetence or negligence;
- Protecting people’s health and safety.

.....

Secret Recording

Secret recording must be justified by a clear public interest. It is a valuable tool for the BBC because it enables the capture of evidence or behaviour that our audiences would otherwise not see or hear. However, secret recordings should normally be a method of last resort – misuse or overuse could discredit or devalue its impact.

The BBC will normally only use secret recordings for the following purposes:

- (a) As an investigative tool to expose issues of public interest where:
 - There is clear existing documentary or other evidence of such behaviour or of an intention to commit an offence.
 - It can be shown that an open approach would be unlikely to succeed.
 - The recording is necessary for evidential purposes.”

26. Miss Heal says that these guidelines are engaged, which they clearly are. She disputes that there ever was a case within those guidelines for secret filming, but there is certainly not a strong case for broadcasting clandestinely obtained footage now, in breach of the privacy rights of the individuals. She relies on what it seems are to be the findings of the reporter, which the filming is presumably intended to support. If one looks at those findings, they do not seem to portray a really serious state of affairs, particularly when put against the background of previous shortcomings noted in the report. Some are explicable in a way which makes them non-culpable or less culpable (for example, the non-use of a hoist was explicable in one case because the elderly person involved was frightened by a hoist). Others were acknowledged as being of significance, but not every lapse from standards is highly significant, or demonstrates lack of fitness. Nor do these lapses, so far as they exist, demonstrate a failure of regulation (the demonstration of which is said to be a central purpose of the programme). The BBC has plenty of other evidence about this home (from the previous inspection reports) and the reporter can give her own evidence. But the seriousness of the allegations, when put in context, is not sufficiently great as to justify the intrusion into the privacy and dignity of the residents that would arise from the broadcast. The ends, she said, must justify the means, and they did not. This is said to be particularly so when none of the residents have consented; and indeed some of their relatives have actually objected to the filming and broadcast. She drew a contrast with the facts of *Lakeside Homes Ltd v BBC*, (unreported, 14th November 2000, available on Westlaw with the reference 2000 WL 1841602). That was a case where filming was over a much more extended period, and some very serious shortcomings were revealed. 4 residents actually consented to the broadcast. Broadcasting was allowed in the public interest. The present case was nothing like that on the facts; no residents consented; and the balance produced a very different result.
27. Miss Heal also invited me to draw inferences from fact that the BBC has not shown the programme to me (or to her client), for which purpose she drew a contrast with the facts of *Leeds City Council v Channel 4 Television Corporation* [2007] FLR 678,

where the judge was given the opportunity of viewing the programme whose making was challenged on privacy grounds. I think that the inference I was invited to draw was that the programme contained material which went too far and was an unjustifiable invasion of privacy.

28. The BBC for its part said it was acting within Ofcom's guidelines and its own editorial policy. The defaults were significant and serious. Revealing them fully and clearly required, or at least justified, clandestine filming in order to make the desired point. Its right to broadcast was within Article 10, and it was in the public interest that it should do so. It, too, relied on *Lakeside*, and said that there were parallels between the facts of that case and the present one, so far as the defaults went. Although a large part of the criticism turned on lifting, that was a serious point in a care home, and the lack of hygiene observed in relation to one carer was also significant. There were also significant complaints about doors to rooms being left open when carers were assisting with private functions. The fact that this particular home, with the history revealed by its inspections, was still doing such things was something that justified disclosure, both in relation to what it said about this home and in relation to what it said about the effectiveness of regulation. So far as the privacy of residents was concerned, that would be protected by the measures referred to above, which would ensure that no resident would be identified or identifiable. Thus public policy was served; privacy was not infringed by the broadcast; and so far as it there had been, or might vestigially still be, infringement, that was outweighed by the public policy in favour of disclosure. Disclosure was plainly justified on the balancing exercise; or if was not plainly justified, nevertheless the home had not succeeded in demonstrating that it would probably get an injunction at trial so section 12(3) meant that I could not and should not grant an injunction restraining the broadcast.

The resolution of the dispute

29. This is an application to restrain the broadcasting of some material that the claimant has not seen, and I have not seen. I can dispose of one of Miss Heal's submissions about that at this stage. I cannot draw any inferences adverse to the BBC about that for at least three reasons. First, I was told, and I accept, that the material is not finalised yet, so to that extent there is nothing yet to see. This is therefore not a case in which it would be right to draw inferences against someone who has withheld some material adverse to its case. Second, it is the usual practice of the media not to disclose material in advance of publication unless it wants to, and the courts have respected that conduct – see e.g. *Re Roddy* [2004] EMLR 127 at paragraph 88. This is doubtless partly as a matter of principle, and partly because an evaluation of the material might require a judge to perform an editorial function, which is not desirable. Third, it is not clear to me what adverse inference could be justifiable. The claimants have brought this application on the factual basis that there will be broadcasting of material which will or might infringe rights to privacy. That is accepted by the BBC for the purposes of the present argument. The justification lies elsewhere, in the balancing exercise, on the assumption that infringing material will be broadcast. I do not see what proper adverse inference about that (or any other inference, come to that) can be drawn from a failure to disclose the material in advance. I certainly cannot draw the inference that the BBC knows that the material will be improperly broadcast. I therefore do not accede to that submission of Miss Heal.

30. I therefore have to embark on the balancing exercise which is referred to in the cases, including those identified above. I do so on the assumption that Article 8 is engaged; the BBC has something to justify. Its justification comes from two principal sources – first, the fact (so far as the broadcast is concerned) the infringement of privacy rights will be removed, or at least ameliorated, by pixilation and other processes that will render the residents unidentifiable; and second, the public interest in the subject matter and the justifiable desire to give effect to that by broadcasting footage of residents and their surroundings.
31. I deal first with the obscuring mechanisms and techniques. Miss Heal has said this case is not about identification. There can be an infringement of privacy rights even if a resident is not identifiable. If there is, for example, a depiction of a resident being assisted in an intimate process (using a commode, to use one example given in at the hearing), that resident's privacy may well be wrongfully interfered with even if the image is completely pixilated or otherwise blurred out. Anyone whose acts are thus depicted would still consider that their privacy has been seriously interfered with if their activities are broadcast, even if their image cannot be discerned at all. So obscuring identities is not a complete answer. The answer, according to Miss Heal, is getting the consent of the residents, and the BBC does not have that.
32. Miss Heal has a limited point. She may well be right about any broadcast of, for example, a resident's use of a commode is a contravention of his or her privacy and dignity rights, however heavily pixilated. On the other hand, there is little if any invasion of privacy if a resident merely sitting in the lounge is shown heavily pixilated (of course the act of filming will probably already have been an invasion, but that is not the immediately relevant point). And in any event, these factors are not automatically determinative of the significance of the invasion of privacy. The circumstances are important. Consent is obviously important, and if present would be determinative. But its absence does not determine the case the other way.
33. Thus it may be that contraventions of the Article 8 rights are not completely removed by taking cinematic steps to obscure the identities of those depicted. That is both for the reason given above, and because (as the trailer broadcast indicated) residents might still be identifiable by those who know them and who know they are in the home, though in many cases if that is the extent of the identification then the privacy infringement may be very slight. However, that does not mean that those means are irrelevant. The level of an invasion of privacy is relevant to the balancing act that I have to perform. An invasion of privacy should not be allowed beyond that which is necessary in the public interest. It is hard to imagine that the public interest would ever justify the un-pixilated broadcasting of an image of a resident using a commode. It might well justify broadcasting a heavily obscured image. Other examples can be given. So one cannot say that any portrayal of the residents will give rise to a sufficiently serious infringement of privacy rights to outweigh any public interest justification coupled with Article 10 rights.
34. So I apply that in the balancing exercise to which I have referred. The real issue between the parties is whether the resort to clandestine filming was justified in the first place, and whether broadcasting its fruits is justified now. Since there is a privacy code (if not two) in place, then those matters have to be justified in the light of those codes as well as in the light of more general legal considerations. Those codes provide, in essence (and reducing them to their most relevant points), that the

use of clandestine techniques and their fruit is not to be lightly undertaken. The matter has to be sufficiently serious to justify it, and it should not be done if there are other means available to achieve the same ends. BKM says those criteria are not fulfilled; the BBC says they are.

35. Doing the best I can on the material available, and bearing in mind that I have only a general description of the areas to which the filming is said to go rather than the film itself, I have come to the conclusion that there are serious factors which can be said to justify or out-balance any infringement of privacy rights. The general areas of standards in care homes, and the ability of a regulator to maintain them, are matters which are firmly in the territory of the public interest (as BKM has itself acknowledged in correspondence). So, potentially, is the manner of running this care home if it is badly run. So the question then becomes whether the matters relied on by the BBC are matters which legitimately raise that public interest in the present case, and if so whether they raise it to such an extent, and in circumstances, which would justify the clandestine filming which involves the home of the residents and the residents themselves. It seems to me to be firmly arguable that they do. It is true that on one view of the facts, what the reporter saw (and may have filmed) might be mainly errors of judgment and isolated incidents which do not reflect a home that is badly run. She was only there for a week. But on another view they might be symptomatic of something wrong with its management. The context is likely to be very important. I bear in mind that there is some short evidence, albeit hearsay, that two experts in the field have said that the faults are significant and serious.
36. I reject Miss Heal's submissions that it is apparent that the BBC did not need to indulge in clandestine filming because there was material in the inspection reports, and Ms Hemmings could have narrated what she saw in the home. In this connection she relied on the codes so far as they provide that clandestine filming is not appropriate if the point can be made as well in other ways. It is not at all clear to me that the point could be made just as well by other means so as to render the clandestine filming unnecessary, and in any event this is probably the sort of consideration that judges, who are not editors or journalists, should not embark on at all, and certainly not on an interim application such as the one before me.
37. So the balancing process produces some weight on each side. At present it seems to me that if the BBC lives up to its word and obscures the identity of residents, the invasion of their privacy from broadcasting is likely to be relatively slight. The greater weight lies on the public interest side of the argument. That would be my assessment on the evidence that I have. That points against granting an injunction. However, the BBC has the additional weight of sections 12(3) and 12(4) on its side of the scales. I must give special weight to free speech, and then should only grant an injunction if I thought it were likely at a trial that publication would be restrained. The burden of the latter point is on the claimant. They have not fulfilled it. I do not think it likely that an injunction would be granted at trial, on the present state of the evidence.
38. However, on the facts of this case I should make it clear what I am not deciding. I am not deciding that any particular form of broadcasting of images would not be an actionable infringement of the privacy rights of the residents in the light of the conduct that the BBC claims to have encountered. I am not saying that the evidence clearly demonstrates that here is a nursing home whose conduct plainly needs to be

exposed. There may well be some real merit in the argument that in its proper context the conduct found demonstrates no more than the sort of shortfall from standards which one suspects can be found in nearly every care home (because of human failings) but which do not demonstrate a general unfitness. The management of the home have tendered explanations which, if true, would remove the sting and real force of some of the complaints. It is fair to BKM to give a couple of examples. The matron of the home has stated that sometimes hoists are not used because they frighten a particular resident. She has also said that one of the residents will not allow her bedroom door to be closed when carers are in the room with her. On any view, this case is nothing like the facts of the *Lakeland* case, and I confess that I was very surprised that the BBC sought to draw that parallel. I also confess that I detected a slightly unattractive whiff of sensationalism in the presentation of some of the BBC's material. However, my decision is based on the deployment of material for Article 10 purposes which it is strongly arguable has been obtained within guidelines, and which it is clearly if not strongly arguable can be properly deployed in the public interest with all proper steps being taken to ensure either that there is no (further) infringement of the residents' Article 8 rights, or no infringement beyond that which can be justified by that public interest. It is, of course, the case that the BBC will have to consider very carefully whether the clandestinely obtained material can be properly deployed in the programme, particularly in the light of the points made during the hearing before me. I am deciding that I will not restrain the broadcast of any material. I am not deciding that that broadcast will be justified or justifiable. That will depend on the ultimate content.

39. Lastly, I add something about the form of the injunction sought. I would not, in any event, have granted an injunction in those terms even if I had been minded to consider any injunction at all. It is far too wide. An injunction barring the whole programme was always out of the question. The most that would be ordered would be an injunction necessary to protect the privacy of the residents. The last three subparagraphs of the injunction would not be necessary for that purpose. I fail to see how rights to privacy would be necessarily infringed by expert or journalistic comment of the kind referred to there. Neither would the injunction contained in paragraph 1(i)(b) be justified. Again, it is far too wide. Again, not all pixilated images would infringe privacy rights, in my view, so even paragraph 1(i)(a) would have its difficulties. However, in the light of my actual decision I do not have to address those difficulties.
40. It is for those reasons that I declined to grant the injunction sought. I understand that the parties have reached an agreement on the general content, if not the precise form, of the order which follows from my decision, but if there remains an area of non-agreement the parties are at liberty to restore the application so that I can rule on it.