2 x WM CK 23/6/05

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

LEEDS DISTRICT REGISTRY

Claim No 5C – 00295

BETWEEN

(1) COVANCE LABORATORIES LIMITED
(2) COVANCE LABORATORIES INCORPORATED
(substituted[1] for COVANCE INCORPORATED)

Claimants

and

(1) THE COVANCE CAMPAIGN
(for and on behalf of all its members)
(2) PETA EUROPE LIMITED
(3) PERSONS UNKNOWN

Defendants

JUDGMENT
[To be handed down at Newcastle-upon-Tyne Combined Court Centre at 1400 on Thursday 16 June 2005]

Introduction

[1] The substituted second claimant ('CL USA') is a pharmaceutical company which carries on business in the United States of America. In the course of that business CL USA carries out tests on monkeys in its Primate Toxicology Department. A woman who regarded experimentation on primates as unethical obtained employment with CL USA in that Department, where she surreptitiously filmed the treatment of monkeys. CL USA asserts that she thereby acted in breach both of her express contractual obligations to the company and the duty of confidentiality which she owed

[1] From the use of the word 'substituted' it is not to be inferred that there has been a substitution of one party for another pursuant to CPR 19.2(4): how the circumstances in which Covance Laboratories Incorporated became a party are to be characterised, and the consequences of Covance Incorporated having sued in the first place, are matters which may have to be debated after this judgment has been handed down.

to it as her employer. The extensive film material shot by her was condensed into a video recording ('the video') of some 28 minutes duration. The second defendant ('PETA Europe') is an English company, the object of which is to campaign in the field of animal protection. PETA Europe has come into possession of copies of the video. On 18 May 2005, the holding company of CL USA obtained, at a hearing without notice to PETA Europe and the other defendants, an injunction to prevent publication of the video. On 27 May and 10 June 2005, I heard submissions on the application of CL USA for the continuation of the injunction until trial. This is my judgment on that application.

[2] What I have said in the last paragraph is an over-simplified and no doubt bland summary of a matter which gives rise to strong feelings as to the ethical issues involved. This judgment is not in any sense an expression of opinion on those issues. It is, rather, a ruling on a number of points of law on which I have had extensive written and oral submissions from Mr Paul Chaisty QC who appeared for CL USA and from Mr Desmond Browne QC and Mr Jacob Dean who represented PETA Europe. I am grateful to all counsel for the clarity of these submissions, which has made my task a good deal easier than it might otherwise have been.

Dramatis personae

[3] I can best lead the reader into the facts of the case by introducing the companies and individuals who figure in the story.

[4] The original second claimant, Covance Incorporated, is a company registered under the laws of the State of Delaware. The first claimant ('CL England') is a company registered in England and is a subsidiary of Covance Incorporated. CL England operates a laboratory at Harrogate, North Yorkshire. CL USA is also a subsidiary of Covance Incorporated and is, as I understand matters, likewise a Delaware registered company. The Primate Toxicology Department of CL USA is at Vienna in the State of Virginia.

[5] People for the Ethical Treatment of Animals ('PETA USA') is a charitable organisation based in the United States. PETA USA has more than 850,000 members and supporters and it is the largest animal rights organisation in the world. PETA Europe is an English limited liability company. It is based in London and is a separate legal entity from PETA USA and from other organisations bearing the PETA name in continental Europe. PETA Europe is, however, clearly affiliated to PETA USA, and one member of the board of PETA USA also sits on the board of PETA Europe. PETA Europe has some 84,000 members and supporters. According to the written evidence of Andrew Butler, a campaign coordinator at PETA Europe,

> "[i]t is dedicated to establishing and protecting the rights of all animals through peaceful and legal means. To that end, PETA Europe focuses its attention on the four areas in which the largest numbers of animals suffer the most intensely for the longest periods of time – factory farms, laboratories, the fur trade, and the entertainment industry. PETA Europe's core function is to publicise animal protection issues through public education, cruelty

investigations, research, animal rescues, special events, celebrity involvement, and demonstrations. PETA Europe prides itself on being a non-violent organisation and does not encourage or incite illegal activity."

[6] The second defendant ('the Covance Campaign') was joined in the proceedings on the basis that it is a loose affiliation of individuals who operate a website called www.covancecampaign.com, on which was advertised a demonstration in Harrogate to which I shall be referring in the course of this judgment. The third defendants were joined, consistently with the order made by Grigson J in *University of Oxford v Broughton and others*,[2] as persons who for the purpose of campaigning against the claimants have the video in their possession or control and have notice of the terms of the injunction.

Narrative

[7] In April 2004 Lisa Leitten entered the employment of CL USA as a Study Technician I in the Primate Toxicology Department. On 12 April 2004 Ms Leitten signed an employee agreement, which included the following clauses:

> "Confidentiality: I acknowledge that Covance has and will continue to receive trade secrets or information which has been created, discovered, developed by or become known to Covance, or in which property rights have been or will be conveyed by Covance (collectively, 'information'). This information includes: (1) sales, costs, customers, employment, products, services, apparatus, equipment, processes, formulae and marketing information; (2) the organization, business or finances of Covance, and (3) any information that I know Covance would like to treat as confidential for any purpose. At all times during and after my employment with Covance, I will not, directly or through others, disclose or communicate any information to any competitor or other third party, or use or refer to any information for any purpose, other than for the benefit of Covance...
>
> Records, Documents and Equipment: Except in performing my responsibilities at Covance, I will not make any copies or other reproductions, recordings, abstracts or summaries of any material of any kind belonging to or held by Covance, including any information. I understand that I have no rights in any of these materials, even if produced by me. I have not and will not remove any of these materials without Covance's written consent. Upon termination of my employment with Covance or upon Covance's request, I will turn over to Covance all these materials in my possession. I shall also return all equipment belonging to Covance which is in my possession, including any fax machine, portable phone and pager...
>
> I understand that... this agreement will be governed by and construed in accordance with the law of the State of New Jersey without regard to its laws on conflict of laws...."

[2] [2004] EWHC 2543 (QB).

[8] Ms Leitten was a member of PETA USA. She had carried out two earlier undercover assignments for the organisation. The first was over a period of 9 months starting in May 2002 at a laboratory in Missouri where research was being carried out for the pet food industry. Ms Leitten's second assignment lasted for 6 months starting in July 2003 and was at a wildlife refuge in Texas at which, it had been alleged, tigers and monkeys were being ill-treated. It is said on behalf of CL USA that, in order to obtain her post in the Primate Toxicology Department, Ms Leitten falsified her c.v. and stated that, during the periods when she had been infiltrating other companies on behalf of PETA USA, she had been caring for a sick member of her family and in consequence had been out of work. The allegation has the ring of truth because clearly, had Ms Leitten told CL USA what she had in fact been doing in 2002 and 2003, CL USA would not have employed her in 2004.

[9] Ms Leitten remained at CL USA for some 11 months. Whilst she was there, she made detailed written records of the systems and procedures used by CL USA in the laboratories of the Primate Toxicology Department and filmed those procedures. The material assembled by Ms Leitten was then analysed by lawyers, veterinary scientists and others within PETA USA. These persons concluded that CL USA was committing serious and chronic breaches of both federal and state legislation. The allegations against CL USA were compiled in three separate documents: a complaint made to the United States Department of Agriculture on 16 May 2005, alleging violations of the federal Animal Welfare Act (this document runs to 272 pages); a complaint made to the United States Food and Drug Administration on 17 May 2005, alleging breaches of the federal Food, Drug and Cosmetic Act; and a complaint made to the commonwealth's attorney of the State of Virginia, also on 17 May 2005, alleging violations of the cruelty to animals statute of the State. Each complaint was accompanied by a copy of the video. The complaint to the Department of Agriculture was supported by written observations on the video by Nedim C. Buyukmihci, Emeritus Professor of Veterinary Medicine at the Davis campus of the University of California.

[10] Mr Butler states in his evidence that, until 9 May 2005, PETA Europe had no involvement with, or knowledge of, the undercover operation which had been conducted by Ms Leitten. On or about that day Mr Butler received a copy of the video and was informed by representatives of PETA USA that they intended to hold a press conference at which they would disclose the existence of Ms Leitten's investigation, the fact that the investigation had (as matters are viewed by PETA USA) revealed abhorrent and unlawful cruelty by employees of CL USA, and the substance of the complaints which would be made in the United States, with supporting evidence, including the video. Mr Butler took no steps to publicise any of this information until such time as it had been made public in the United States.

[11] At 1215 on Sunday 15 May 2005 the Covance Campaign issued a press release, announcing a demonstration at 1100 on Wednesday 18 May outside the Harrogate laboratories of CL England. Although the press release stated that "[i]t is vitally important that a lot of pressure is put on Covance this week", there was no specific reference to impending events on the other side of the Atlantic.

[12] At 1100 EST (which is GMT minus 5 hours) on Tuesday 17 May PETA USA held a press conference in Washington DC, at which it disclosed the matters

mentioned in paragraph [10]. The first that any of the companies in the Covance group heard about what was to occur was in a telephone call to the group's communications office from a CNN reporter about 20 minutes before the press conference was scheduled to start.

[13] Between 1600 and 1800 on 17 May 2005 PETA Europe sent a press release, the video, and a copy of the letter to the United States Department of Agriculture to several news organisations in England and to animal rights groups. From 1800 on the same day the video could be viewed on PETA websites throughout the world, including England. At 1809 PETA Europe issued a further press release, announcing the demonstration in Harrogate on the following day. This press release stated that the demonstration would last from 1100 to 1900 and that at the demonstration there would be shown undercover footage showing "multiple violations of American animal welfare act."

[14] At 0017 on Wednesday 18 May 2005 CNN posted on its website an article about the allegations relating to the treatment of animals at the laboratories in Vienna, Virginia. This article included a still photograph taken from the video. On the same day the websites of various other news organisations carried reports about the allegations, and at least some of these websites included links which would enable viewers to watch the video on the website of PETA USA.

[15] The demonstration in Harrogate took place as scheduled between 1100 and about 1830 on 18 May 2005. The police were in attendance. There was one arrest, of a boy aged 15 who has (it is said) been abusive to members of the staff of CL England on previous occasions. It is said that one demonstrator attempted to cause damage to cars belonging to staff. Subject to these exceptions (or possible exceptions, as nothing has yet been established in relation to them), the demonstration passed off peacefully. As part of the demonstration the video was shown, and three copies were distributed, two to individual protestors and one to a journalist from PA TV, which is the broadcasting arm of the Press Association.

[16] At about 1600 on 18 May 2005 I heard an application by Covance Incorporated, which was made without notice, for injunctive relief. At the end of the hearing I granted an injunction until 27 May or further order in the meantime. The effect of the order was to prohibit the defendants from using or disclosing, or attempting to use or disclose, "any Film Material (as defined in Schedule 2 to this Order)." The definition covered video footage of Covance Incorporated premises in Vienna, Virginia, and/or of its operations there which had been recorded or photographed without its consent. There were further orders relating to the removal of Film Material from websites under the control of the defendants, the preservation of Film Material, and the provision of information by affidavit.

[17] I am satisfied that PETA Europe has complied in substance with all the orders made by me on 18 May 2005.

[18] The matter came back to court on 27 May 2005. The application had been allocated a three-hour hearing on the basis of a time estimate which had been given to the court. In the event, the submissions which were advanced on behalf both of CL USA and of PETA Europe were such that they could not possibly be accommodated

within the estimate. The hearing occupied the whole of the court day on 27 May, and it was then clear that a further full day would be required. On 27 May I made an order substituting Covance USA as a claimant in place of Covance Incorporated. The earliest date which was available for the resumed hearing was 10 June. Over the adjournment the injunction originally granted was continued in a modified form.

Proceedings in the United States

[19] Both CL USA and PETA Europe have put before the court material which relates to the enforceability or otherwise in the United States of an obligation of confidentiality arising out of Ms Leitten's activities.

[20] In his second witness statement, Mr Anthony Cork, the managing director of CL England, said:

> "Whilst the availability of an injunction in the US is affected by the constitutional right of free speech, the claimants have received advice that injunctive relief is available. A copy of a confirmatory letter to this effect from an independent firm of US attorneys is attached."

Whatever advice has been received by Covance Incorporated or by CL USA, the document attached to Mr Cork's witness statement is in no sense "confirmatory" of the stated position. It is not an opinion as to the law, but is rather in the nature of written submissions which might be placed before a court: indeed the document begins "[t]he following legal argument provides legal support for an injunction against Lisa Leitten." I cannot accept the explanation offered on behalf of CL USA, that this is a matter of form rather than substance.

[22] In her first witness statement, Ms Harriet Campbell, who is one of the solicitors engaged on this case on behalf of PETA Europe, says that her firm "has sought the opinion of" a New Jersey law firm on various issues of United States law which are potentially relevant to the case. The document exhibited by Ms Campbell is, in substance as well as in form, a legal opinion. The writer concludes that an injunction to restrain Ms Leitten from publishing the video

> "would constitute a prior restraint on expression under United States law and would, in all likelihood, not be enforced here because of the First Amendment to the United States Constitution."

[23] On 3 June 2003 a Bill of Complaint for Injunctive Relief was filed by CL USA against PETA USA and Ms Leitten in the Circuit Court for Fairfax County, Virginia. The relief sought includes delivery up of the video, an injunction to restrain further publication of the video, and an order prohibiting PETA USA from making future attempts to infiltrate CL USA. The causes of action relied upon are: against Ms Leitten, breach of contract, breach of duty of loyalty and fiduciary duty, and fraud; against PETA USA, intentional interference with contract; and, against both defendants, conspiracy to injure another in business.

[24] In his fifth witness statement, which was made on 9 June 2005 (the day before the adjourned hearing before me), Mr Cork stated that CL USA would on 9 June file in the Circuit Court for Fairfax County a motion for a preliminary injunction, pending trial on the merits, against PETA USA and Ms Leitten. In his sixth witness statement, which was made on 10 June 2005, Mr Cork stated that CL USA had the previous night filed, or was about to file, in the same court a motion for a temporary restraining order. I understand from counsel that this motion came before the Virginia court on 14 June. PETA US then raised an objection on conflict of interest grounds to the attorneys acting for CL USA. The judge accepted that there was an arguable conflict of interest point, adjourned the application for a temporary restraining order to 28 June, but imposed no order in the meantime.

Particulars of claim in this action

[25] Particulars of claim in this action were served on or about 2 June 2005. In this pleading it is asserted that PETA Europe received film material "knowing that it was secret, confidential and private to" CL USA, and that PETA Europe knew (or have in any event known since 18 or 19 May) that the material was taken and compiled by Lisa Leitten in breach of her obligations as an employee. In consequence of these matters it is said that PETA Europe is under an obligation of confidence to CL USA in respect of the film material and is not entitled to publish it without the consent of CL USA.

[26] There is a further pleaded allegation which has not been touched upon in the course of the hearing before me. This is that disclosure and distribution of the film material by the Covance Campaign and PETA Europe has been effected with the intention of injuring and causing economic harm to both claimants by unlawful means.

[27] Damage is alleged to have been suffered by the claimants, but the loss is not at present particularised. The relief sought includes orders against disclosure of the film material to third parties and for delivery up of material, and an award of damages.

[28] By agreement of CL USA, the time of PETA Europe for service of a defence was extended to 14 days after delivery of this judgment.

The video

[29] A verbal description of the video is bound to be an unsatisfactory substitute for watching it. There are, however, two fairly short documents in the court papers which go some way towards making up for the non-availability of the video to anyone reading this judgment.

[30] The first of these documents is a 4 page guide to the video which has been produced by PETA USA. This is a purely factual document, which contains a short summary of each scene which can be watched on the video. The guide is reproduced

as Appendix A to this judgment. It has not been suggested on behalf of Covance USA that the guide is inaccurate. So far as I can tell from my own viewing of the video, the guide fairly accurately summarises what can be seen on the video.

[31] The second document is one to which I have already referred, a letter of 12 May 2005 which contains the observations on the video of Professor Buyukmihci. This letter is reproduced as Appendix B to this judgment. Professor Buyukmihci, who says that he is a veterinarian with over 32 years experience, seems to me to express his views in a dispassionate and restrained manner.

[32] In the course of his submissions, Mr Browne described the video as "horrendous", a word which Mr Chaisty in his reply characterised as "emotive" and "subjective." Mr Browne's rhetoric may owe something to forensic licence but, having watched the video, I am unable to say that his language is far short of the mark. I would myself regard the description "highly disturbing" as fitting the video precisely. I take just two aspects of what can be seen, the rough manner in which animals are handled and the bleakness of the surroundings in which they are kept. These are matters which, even to a viewer with no particular interest in animal welfare, at least cry out for explanation.

Interim injunctions: the law

[33] An injunction which would prevent further publication of the video would interfere with the right to freedom of expression which is a right guaranteed by article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Section 12 of the Human Rights Act 1998 is, so far as material, in these terms:

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

[34] The key provision is that contained in section 12(3) and I will look at it in more detail in a moment. As to section 12(4), Mr Browne submitted, and I did not understand Mr Chaisty to dispute, that the video was journalistic material, thus making consideration of questions of public domain and public interest mandatory. Irrespective of section 12(4) these issues would have had to be taken into account in any event, so the precise classification of the video as being journalistic or otherwise is not a matter of significance.

[35] The general effect of section 12(3) is obvious. It sets the hurdle which must be crossed by the party who seeks an interim injunction to restrain publication at a level higher than that at which it stands in the ordinary run of cases in which interim relief is sought. In this area it is not sufficient for the applicant to make good his case on the familiar principles which were established in *American Cyanamid Co v Ethicon Ltd.*[3] But, although the general effect of section 12(3) is plain, the reader who came fresh to the section would focus and, I think, inevitably linger over the phrase "likely to establish that publication should not be allowed." How is likelihood, as related to ultimate success at trial, to be measured?

[36] Fortunately this question has now been answered by the House of Lords. In *Cream Holdings Ltd v Banerjee*[4] Lord Nicholls of Birkenhead, in a speech with which the other law lords concurred, has provided judges at first instance with the necessary guidance:

> "Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid, standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

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[3] [1975] AC 396, particularly at pp.407, 408.
[4] [2005] 1 AC 253, para. 22.

[37] One other case is of importance for present purposes, namely, the decision of the Court of Appeal in *A v B plc*.[5] That case had to do with the publication of the alleged extra-marital relationships of a professional footballer. It therefore involved to a marked degree, as the present case does not, the interface (and potential conflict) between the article 10 right to freedom of expression and the article 8 right to respect for private and family life. Nonetheless, several of the guidelines for judges at first instance, laid down by Lord Woolf CJ, who delivered the judgment of the court, are highly relevant to a case such as the present:[6]

> "(v) The fact that under section 12(4) the court is required to have particular regard to whether it would be in the public interest for the material to be published does not mean that the court is justified in interfering with the freedom of the press where there is no identifiable special public interest in any particular material being published. Such an approach would turn section 12(4) upside down. Regardless of the quality of the material which it is intended to publish prima facie the court should not interfere with its publication. Any interference with publication must be justified...
>
> (vii)... [I]n the majority of cases the question of whether there is an interest capable of being the subject of a claim for privacy should not be allowed to be the subject of detailed argument...
>
> (viii) The same is true in cases in which the public interest in publication is relied on to oppose the grant of an injunction. We have already made clear that even where there is no public interest in a particular publication interference with freedom of expression has to be justified. However the existence of a public interest in publication strengthens the case for not granting an injunction. Again in the majority of situations whether the public interest is involved or not will be obvious. Judges should therefore be reluctant in the difficult borderline cases to become involved in detailed argument as to whether the public interest is involved. In a borderline case the application will usually be capable of being resolved without deciding whether there is a public interest in publication. In any event, the citation of authority is unlikely to be helpful. The circumstances in any particular case under consideration can vary so much that a judgment in one case is unlikely to be decisive in another case, though it may be illustrative of an approach...
>
> (x)... [T]he fact that the information is obtained as a result of unlawful activities does not mean that its publication should necessarily be restrained by injunction on the grounds of breach of confidence: see *Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd* 185 ALR 1. Dependent on the nature of the unlawful activity there may be other remedies. On the other hand, the fact that unlawful means have been used to obtain the information could well be a compelling factor when it comes to exercising discretion."

[38] I make no apology for the length of the citations in the two preceding paragraphs. At times during the hearing it seemed to me as though I were being invited to conduct

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[5] [2003] QB 195.
[6] [2003] QB 195, para. 11.

a trial on voluminous written evidence, much of which arrived on my desk less than an hour before the hearing was resumed on 10 June 2005. There was extensive citation of authority, particularly on behalf of CL USA. As to the evidence, it is clearly impossible to reach a just conclusion in the absence of cross-examination. As to authority, there is, in my judgment, limited assistance to be derived from cases which pre-date the Human Rights Act 1998. Certainly, when one comes to areas of inquiry such as public interest, decisions are of necessity fact-sensitive and not likely to be more than (adopting Lord Woolf's phrase) "illustrative of an approach." It seems to me that a judge who is called upon to permit or prohibit publication on an interim basis should not go far wrong if he adheres to two basic principles. He should bear in mind at the beginning Lord Nicholls' exegesis of the phrase "likely to establish that publication should not be allowed." Thereafter, as he deals with the particular facts before him, holds in mind Lord Woolf's guidelines. That is the approach which I will endeavour to adopt in the remainder of this judgment.

Decision

Preliminary observations

[39] There are not, in my judgment, any particular features in this case which should divert me from adopting the general approach prescribed by Lord Nicholls in *Cream Holdings Ltd v Banerjee*.[7] In other words, I should grant an interim injunction only if it seems to me that CL USA will probably succeed in obtaining a permanent injunction at the trial. At the same time, it seems to me, I must bear in mind that, if an interim injunction is refused, "the cat will be out of the bag" and it is unlikely that any remedy which CL USA might obtain at a trial many months hence would be likely to be of any practical value. This consideration must, it seems to me, temper the fair wind which I might otherwise be prepared at this stage to afford to potential defences raised on behalf of PETA Europe.

[40] I think that it is also just to keep in mind that the springboard for this litigation is the conduct of Ms Leitten. This is not a case of a "whistleblower" accidentally coming upon some wrongdoing in the course of her employment. Nor is Ms Leitten simply a person who is in breach of the contract which she made with her employer. On the evidence which is before the court, she has behaved in a thoroughly dishonest manner, not least by obtaining her job with CL USA by a false statement about her supposed lack of employment in 2002-2004. The injunction is sought to mitigate the consequences to CL USA of Ms Leitten's conduct.

[41] Notwithstanding these considerations, I find myself unable to say that I regard CL USA as likely to succeed at trial. On the contrary, the case of CL USA is, in my judgment, one which is beset with difficulties which are so numerous and (as to some of those difficulties) apparently insuperable as to make failure at trial a strong probability. If that be right, there can be no question of the court's protecting the position of CL USA by the grant of interim relief. Further, there is one matter which would not arise at a trial but is highly relevant on an interim application, namely, the

[7] [2005] 1 AC 253.

argument based on *Bonnard v Perryman*.[8] This provides a freestanding and, to my mind, highly persuasive argument against the grant of relief.

[42] Before looking at the merits of the case, I have one further preliminary observation. This has to do with the limited target at which the application which is before the court is aimed. CL USA seeks to restrain publication of the video, but not of verbal descriptions by Ms Leitten or others of what may be seen on the video, nor of stills taken from the video. If such descriptions or stills are confidential, they must, given their origin, be confidential to the same extent as the video itself. The apparent willingness of CL USA to allow this other material to be published, unchecked by restraining orders whether in this country or in the United States, is a matter which will inevitably bear on my view of the application which is before this court.

The analogy with Bonnard v Perryman

[43] Under the well established rule in *Bonnard v Perryman,*[9] an interim injunction to restrain publication pending the trial of an action for defamation will not be granted where the defendant intends to plead justification. Under modern authorities to which I will refer, this rule has been applied by analogy to actions which are based on breach of confidentiality in which the essence of the claimant's case is that publication is damaging to its reputation. Both the cases to which I am about to refer arose out of the activities of persons who, like Ms Leitten, obtained employment with a view to "undercover" filming of activities at their employer's premises.

[44] In *Service Corporation International Plc v Channel Four Television Corporation*[10] the owners of funeral homes sought to prevent the showing on television of a programme which disclosed disrespectful treatment of the bodies of dead persons at one of their homes. The action was brought for alleged breach of confidence, trespass, and infringement of copyright. The action had originally been framed in defamation. In refusing to grant an interim injunction Lightman J said this:[11]

> "The reason that defamation is not and cannot be invoked is because no interlocutory injunction could be granted on this ground in view of the defendants' plain and obvious intention to plead to any such claim the defence of justification. The invocation of other causes of action is necessary if there is to be any arguable claim to an interlocutory injunction. The rule prohibiting the grant of an injunction where the claim is in defamation does not extend to claims based on other causes of action despite the fact that a claim in defamation might also have been brought, but if the claim based on some other cause of action is in reality a claim brought to protect the plaintiffs' reputation and the reliance on the other cause of action is merely a device to circumvent the rule, the overriding need to protect freedom of speech requires that the same rule be applied."

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[8] [1891] 2 Ch 269.
[9] [1891] 2 Ch 269.
[10] [1999] EMLR 83.
[11] *Ibid.* at pp. 89,90.

[45] In *Tillery Valley Foods v Channel Four Television*[12] the business of the claimant was that of producing and distributing chilled frozen meals, including meals to NHS hospitals. The programme which the claimant wanted to keep off the television screens raised concerns about food hygiene in its factory. Mann J refused an interim injunction, primarily on the basis that he was not satisfied that the information in the film had the necessary characteristic of confidentiality. Towards the end of his judgment, Mann J said this:[13]

> "The truth of the matter is that this case is not about confidentiality at all. So far as Tillery has a claim it will be a claim based on the fact (if it be a fact) that the reporting is inaccurate and contains falsehoods. If and insofar as the reporting turns out to be accurate (as to which I can, of course, say nothing) then it cannot have a legitimate complaint in law. If it is inaccurate it will have a claim for the damage caused by that falsehood. In other words this is really a defamation action in disguise. It is not surprising that it cannot be squashed into the law of confidence. And, even if it could, since the reality would still be that of a defamation action with parallel claims based on other wrongs, it would have been appropriate to apply the rule in *Bonnard v Perryman* to any claim for an interlocutory injunction."

[46] It is not suggested that Ms Leitten has disclosed anything in the nature of a trade secret, such as a business plan, or pricing policy, or formulae for drugs which are being developed, or the results of tests on primates. What she has filmed is nothing more than day-to-day activities in the laboratories of CL USA. If one goes to the evidence which has been filed on behalf of CL USA, one finds that it is focused on two issues, a fear that distribution of the video will increase the risk of unlawful activity against CL England, its staff and property; and damage to reputation. But it is difficult to see, given the availability to protesters of other material relating to the Covance companies, how the distribution of a single film is likely to have the additional, inflammatory effect which Mr Cork says that he fears. In my judgment, what lies at the heart of this application is the desire of CL USA to protect the reputation of the group of which it forms part. The point was made good by Mr Browne in the course of his oral submissions, in which he undertook a close analysis of the material which had been placed before the court on behalf of CL USA.[14] To take just one example, the written argument of the lawyers who were engaged in the United States complains that Ms Leitten and PETA USA are involved in "nothing less than an attempt to impair the goodwill, business reputation or good name of Covance", refers to "disparaging images", and concludes that "[e]ach day the video is allowed to play on PETAS's website, Covance is unfairly portrayed to the public and its customers."

[47] There is an absence from the particulars of claim and from the other material placed before the court of any allegation of specific financial loss which has been, or is likely to be, caused to CL USA by the publication or distribution of the video by PETA Europe. Indeed, it is hard to see how anyone could identify loss occasioned by

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[12] [2004] EWHC 1075 (Ch).
[13] [2004] EWHC 1075 (Ch), para. 21.
[14] The references are to be found in Mr Browne's Note for Oral Submissions, para. 2.3.

the video, publication of which is sought to be restrained, which would not also be occasioned by text and photographs, where there is no attempt to restrain publication.

[48] It has not been suggested on behalf of CI. USA that the video does not show operations being carried out at the Primate Toxicology Department. Indeed, since the commencement of this action, CI. USA has issued a statement in which it regrets one aspect of the conduct of its employees which can be seen in the video, namely, swearing at the animals. Accordingly, the case for an injunction is weaker than in an action for defamation where justification is to be the defence for, in the present case, it appears that truth will not be in issue at all.

[49] On this ground alone I would have refused to grant an interim injunction. But matters do not end here.

The nature of the information which is sought to be protected

[50] In *A v B plc*[15] Lord Woolf CJ said, in a passage to which I have already referred, that "in the majority of cases the question of whether there is an interest capable of being the subject of a claim for privacy should not be allowed to be the subject of detailed argument." The same must, in my judgment, apply to the question whether information has the necessary quality of confidentiality. This question not infrequently raises difficult questions of law, which are simply not appropriate for detailed investigation at the hearing of an application for interim relief.

[51] The authority chiefly relied upon by Mr Chaisty in support of the proposition that the video is confidential material was the recent decision of the Court of Appeal in *Douglas v Hello Limited*[16] which itself proceeded from, and developed, principles which had been laid down by Megarry J in *Coco v A. N. Clark (Engineers)Ltd.*[17] Mr Browne's main authorities were the decision of the High Court of Australia in *Australian Broadcasting Corporation v Lenah Games Meats Pty Ltd*[18]and the decision of Mann J in *Tillery Valley Foods v Channel Four Television.*[19] As I have already indicated, I do not regard the present occasion as one on which I should embark on an elaborate examination of the authorities: were I to do them full justice, this judgment would be much longer and its delivery would have been delayed well beyond 16 June 2005. I do, however, make the following observations.

[52] Mr Chaisty relied heavily on that part of the judgment in *Douglas v Hello Limited*[20] in which the Court of Appeal dealt with the special considerations which apply to photographs. In my judgment, that does nothing to strengthen the position of CI. USA in this case. As appears from the relevant part of the judgment, the court was considering photography in the context of an individual's privacy, starting from the undeniable fact that "as a means of invading privacy, a photograph is particularly

[15] [2003] QB 195, para. 11(vii), cited at para. [37] above.
[16] [2005] EWCA Civ 595.
[17] [1969] RPC 41.
[18] [2001] HCA 63.
[19] [2004] EWHC 1075 (Ch).
[20] [2005] EWCA Civ 595, paras. 84-91.

intrusive." The case which is before me is far removed from those which dealt (for example) with a celebrity going to a brothel or another celebrity leaving a drug rehabilitation clinic. Further, as I have already mentioned, no objection has been taken by CL USA to the publication of stills from the video.

[53] It is, in my judgment, at least doubtful whether the video is caught by any of the three categories of information specified in the confidentiality clause which Ms Leitten signed.[21] The most hopeful of these, from the point of view of CL USA, is the third, "any information that I know Covance would like to treat as confidential for any purpose." But that is, as Mr Browne pointed out, a somewhat loose phrase on which to found a claim for breach of contract. If one then goes on to ask whether, contract apart, the information in the video is of its nature confidential, one enters the debate on the authorities to which I referred in paragraph [51]. It is impossible to say that the issue is one on which CL USA is bound to succeed at trial. Nevertheless, for the purposes of this judgment, bearing in mind the considerations which I mentioned in paragraphs [39] and [40], I am prepared to assume in favour of CL USA that confidentiality would more probably than not be established. But even if one makes that assumption, the effect of doing so is far outweighed by matters on which it is possible, on the material and in the time available, to reach definite conclusions. I refer to the defences of public interest and public domain.

Public interest

[54] It is has long been established that the fact that disclosure would be in the public interest is an answer to a claim for an injunction to restrain the publication of confidential information.[22] The public interest in publication is a matter which the court is now directed to take into account by section 12(4)(a)(ii) of the Human Rights Act 1998. In my judgment, this is a case in which the public interest defence has an unusually strong chance of success at trial. Accordingly, at this stage of the proceedings, it must tell heavily against CL USA in its efforts to show likelihood of success, as it is required to do by section 12(3) of the Human Rights Act 19998.

[55] The point is almost so obvious as not to require much by way of spelling it out. CL USA is part of a global group of companies which develops and markets pharmaceutical products. As is well known the testing of products on animals in laboratories is a common (and, it may well be, necessary) part of the work done by pharmaceutical manufacturers. In my judgment, concern that laboratory animals should be treated with basic decency and with the minimum pain consistent with the procedures to which they are subjected is a matter of legitimate interest to substantial sections of the public. I refer to persons who are particularly concerned with the welfare of animals; and (this is probably by far the larger group) to those who, given a choice of drugs, would prefer to use drugs produced by a manufacturer who treated laboratory animals in the way which I have just mentioned rather than a manufacturer whose treatment of animals was abusive. Put in terms which are more specific to this case, there is a legitimate public interest in seeing material which may enable people to reach a view as to where, on the spectrum of treatment, CL USA is to be found.

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[21] See para. [7] above.

[22] *Lion Laboratories Ltd v Evans* [1985] QB 526.

[56] The fact that serious allegations of breaches of federal and state law has been made against CL USA also supports the public interest defence. It is not, in my judgment, an answer to say that everything can be left to the regulatory authorities.

[57] Mr Chaisty referred to the case of *Francome v Mirror Group Newspapers*,[23] in which the newspaper had tapped the telephone of a well-known jockey. It was prohibited from publishing the fruits of its activity, which consisted of allegations that he had broken various Jockey Club rules and had possibly committed criminal offences. Mr Chaisty pointed to the well-known passage in the judgment of Sir John Donaldson MR:

> "[Newspapers] are particularly vulnerable to the error of confusing the public interest with their own interest. Usually, these interests march hand in hand, but not always. In the instant case, pending trial, it is difficult to see what public interest would be served by publishing the contents of the tapes which would not equally be served by giving them to the police or the Jockey Club. Any wider publication could only serve the interests of the Daily Mirror."

The facts which are before me are, in my judgment, a long way removed from those of *Francome*. First, the defendant had committed a criminal offence by tapping the jockey's telephone and would commit a further offence by publishing the contents of the tapes. This played a significant part in the decision of the court. There is no corresponding allegation of criminal misconduct against PETA Europe in this case. Second, the nature of the public interest asserted here (see paragraph [55]) is far removed from that unsuccessfully advanced in *Francome*. One should perhaps not use the word "tittle-tattle", but one should keep in mind the difference between matters knowledge of which would be in the public interest, and matters about which members of the public might be interested to know. *Francome* was a case in the latter category: this, in my judgment, is a case in the former category.

Correcting a false impression

[58] In *Woodward v Hutchins*[24] Lord Denning MR said:

> "If a group of this kind [pop stars] seek publicity which is to their advantage, it seems to me that they cannot complain if a servant or employee of theirs afterwards discloses the truth about them. If the image which they fostered was not a true image, it is in the public interest that it should be corrected. In these cases of confidential information it is a matter of balancing the public interest in maintaining the confidence against the public interest in knowing the truth... In this case the balance comes down in favour of the truth being told, even if it should involve some breach of confidential information. As there should be 'truth in advertising', so there should be truth in publicity. The public should not be misled. So it seems to me that the breach of confidential information is not a ground for granting an injunction."

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[23] [1984] 2 All ER 408, particularly at pp. 412, 413.
[24] [1977] 1 WLR 760 at pp. 763, 764.

[59] Covance Incorporated's website contains a statement which reads, in part, as follows:

> "**Animal Welfare Statement**
>
> **Covance Code of Respect for Animals in Research and Development**
>
> ... As one of the world's leading providers of preclinical drug development services and other services to advance safety, we accept both the legal and the moral obligation to be a leader in assuring that animals in our care are treated in accordance with all applicable rules and with high standards of respect and compassion. In addition to law and ethics, this obligation is scientifically important because failure to meet these rules and standards can undermine the validity of scientific research. Toward that end, all of us at Covance will follow these principles:
>
> 1. **We will treat animals in our care with respect**. We honor the contribution that animals in our care make to lifesaving advances and will treat these animals with the respect that they deserve.
>
> 2. **We will strictly follow all applicable laws and regulations for animal treatment**...
>
> 4. **We will minimize animal discomfort**...
>
> 5. **We will take steps to ensure that our employees and processes meet these standards**...."

[60] Whether CL USA has been in breach of federal or state legislation is a matter which has still to be determined in the United States. I leave that question to one side. Nonetheless, a comparison of what is said in the statement from which I have quoted and what may be seen in the video (and read, at length, in Ms Leitten's written record of her time at the Primate Toxicology Department) is a comparison between two different worlds. The case is caught squarely by what was said by Lord Denning in *Woodward v Hutchins*.[25] If, as seems highly likely on the evidence so far available, the group of which CL USA forms part has fostered a misleading impression, PETA Europe is entitled to correct it publicly.

Public domain

[61] It is said on behalf of PETA Europe that the court would not at trial, and should not now, prohibit publication of the video, because it has become so generally and easily susceptible of access that it is to be regarded as in the public domain.

[62] There has been some argument on the facts. The argument was concentrated on the number and nature of the websites on which the video has been or still is available on the internet. CL USA has been anxious to minimise the number of such sites and

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[25] [1977] 1 WLR 760 at pp. 763, 764.

to relegate most of them to the category of "special interest" (i.e. related to animal welfare) sites. PETA Europe has sought to maximise the number and to draw the attention of the court to distribution of the video to the media generally. I do not find it necessary to enter into the finer points of this controversy. On any view, the video is widely available. It can be accessed on the website of PETA USA, and has by now been there for over three weeks. Nothing ordered by this court would have the effect of getting the video removed from that website. Further, the video can be accessed on many other sites which, although of the special interest variety, are unrelated to PETA USA or PETA Europe. Certainly at one stage (I am not sure of the position at the time of writing this judgment) the video could be accessed on the CNN website. In short, it is possible for anyone who reads about Ms Leitten's investigation and the fact that she compiled the video, and who has access to the internet, to view the video simply by typing a few words into his or her search facility.

[63] The more difficult question is not this factual one, but as to the effect which publicity of the kind which I have mentioned should have on the decision of a court to grant or refuse an interim injunction.

[64] Mr Chaisty relied heavily on the decision of the majority of the Court of Appeal in *Schering Chemicals Ltd v Falkman Ltd,*[26] and to the discussion of that case which is to be found in the speech of Lord Oliver of Aylmerton in the "Spycatcher" case.[27] Lord Oliver said:

> "In so far as the majority judgments suggest that, apart from direct obligation or complicity in the breach of a direct obligation, information in the public domain can be the subject matter of a claim for breach of confidence, I would, for my part, prefer the powerful dissenting judgment of Lord Denning MR. Again, I accept that the confidant who has himself made public the information confided to him cannot rely upon the publicity which he himself has generated so as to destroy the confidentiality. That must apply to anyone who knowingly aids or abets him in his unauthorised disclosure."

The distinction, in Mr Chaisty's submission, is between those who have breached a confidence, or who can be regarded as being associated with the confidence-breakers, and those who have come by the confidential information without being in any way involved in the original wrongful disclosure. Persons in the latter class are "innocents" (Mr Chaisty's own word) to whom the public domain defence may well be available; that defence is not open to persons in the former class.

[65] In my judgment, the suggested distinction is not one which can be maintained in 2005, at any rate in the circumstances which obtain in the present case. Both *Schering* and "Spycatcher" were decided before the Convention right to freedom of expression had become part of our domestic law. As the video is journalistic in nature, the court is required by section 12(4)(a)(i) of the Human Rights Act 1998 to have regard to the extent to which the video is available to the public. Both the cases to which Mr Chaisty referred were decided before the age of the internet. In general, the court abstains from making orders which are likely to turn out to be futile. Prohibiting

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[26] [1982] QB 1.

[27] *Attorney-General v Guardian Newspapers Ltd* [1987] 1 WLR 1248 at p.1319.

disclosure of the video by PETA Europe could only have a minimal effect on the ability of those who want to view the video to do so. There may well be cases in which, notwithstanding that confidential material can be accessed on the internet, it will be appropriate to restrain a party from publishing the material: for example, where there is something morally reprehensible about the circumstances in which he has come by the material, or where he stands to make money from publication. This is not such a case.

[66] Further, even if Mr Chaisty's distinction between classes of possessors of information is a valid one, there would, I think, be difficulty in placing PETA Europe in the guilty category. Of course, the organisation is on the same side as Ms Leitten and PETA USA, but there is absolutely no reason to disbelieve Mr Butler's evidence as to PETA Europe's and his own lack of involvement in, or knowledge of, the surveillance operation which was being carried out in Virginia.

[67] In my judgment, the public domain defence has a good prospect of success at trial. That is a matter which I am bound to take into account in considering whether or not to grant interim relief.

The legal position in the United States

[68] In this case a New Jersey company is seeking to restrain the publication by an English company of a video compiled in the United States by an American who is a former employee of the New Jersey company. On such information about the legal position in the United States as is before the court, it is doubtful whether an American court would grant an injunction, even against the former employee. This factor, which is only a small one by comparison with others which I have considered at some length, makes me reluctant to grant the relief which is sought in England.

Summary

[69] The arguments against the grant of an interim injunction are cumulative and, in my judgment, overwhelming. Accordingly, the application by CL USA against PETA Europe must be dismissed.

Conclusion

[70] No relief is at this stage sought against the third defendants. The application for an injunction was made against the Covance Campaign as well as against PETA Europe. Mr Chaisty accepted that, if CL USA failed against PETA Europe, it must also fail against the Covance Campaign. It follows that the application against the Covance Campaign must be dismissed.

[71] In the time which has been available to write this judgment, I have not been able to deal with all the matters which were canvassed in submissions. There are two which I should specifically mention. First, an attempt has been made on behalf of CL USA to place PETA Europe in the same league as those "animal rights" organisations which engage in violence to, and harassment of, persons, and in criminal damage to

property. Nothing which I have read or heard in the course of the hearing has caused me to suspect that PETA Europe is anything other than a campaigning body, which restricts itself to propaganda and peaceful protest. Second, it was said on the other side that, at the without notice hearing on 18 May, those representing CL USA were in default of the duty owed to the court of giving full and accurate disclosure of all matters which might be relevant to the decision to grant or refuse interim relief. I do not think that there was any default which was either serious or deliberate. Any slips that were made are explicable by reference to urgency with which the lawyers (perhaps mistakenly) believed that the matter should be brought before the court.

Peter Langan
Judge

16 June 2005

APPENDIX A

[Insert the text of the 4 page summary of the video referred to in paragraph [30]]

APPENDIX B

[Insert the text of Professor Buyukmihci's letter referred to in paragraph [31]]