Neutral Citation Number: [2009] EWHC 2788 (QB)

Case No: (None)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 November 2009

Before :

THE HONOURABLE MR JUSTICE EADY

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Between :

MR NOEL MARTIN **Applicant**

- and -

(1) CHANNEL FOUR TELEVISION CORPORATION
(2) CENTURY FILMS LTD
(3) MR ESTEPHAN WAGNER **Respondents**

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Mark Engelman (instructed by **Employment Lawyers**) for the **Applicant**
Jacob Dean (instructed by **Charles Russell LLP**) for the **Respondents**

Hearing date: 28 October 2009

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Judgment

Mr Justice Eady :

1. The Applicant, Mr Noel Martin, seeks an injunction to restrain the Respondents from broadcasting or using in any way a film called "The Finishing Line", which was compiled after extensive filming at his home. The Respondents are Channel Four Television Corporation, Century Films Ltd and Estephan Wagner, who is a young filmmaker.

2. One of the unusual features of this case is that no proceedings have been issued. This is despite the fact that the matter was before the court on 21 August of this year, when Blair J accepted undertakings and referred the matter to a Jury List judge. Thus, so far, no fees have been incurred save for the £40 in respect of the without notice application in August. It is provided by CPR 25.2(2)(b) that

> " … the court may grant an interim remedy before a claim has been made only if–
>
> (i) the matter is urgent; or
>
> (ii) it is otherwise necessary to do so in the interests of justice."

Neither of those conditions is fulfilled and, therefore, it would appear that the court has no jurisdiction in the matter. It is not simply a question of discretion.

3. The Applicant's advisers have had the need for proceedings to be issued drawn to their attention by the solicitors acting on behalf of the Respondents. Despite this, they pressed ahead and obtained an appointment for a hearing without taking the necessary steps to issue proceedings. I can see no good reason for this at all.

4. I have seen what purported to be an order which appeared to record a cross-undertaking as to damages by the Applicant and also an undertaking by him to serve particulars of claim as soon as practicable. This would be standard practice, but the order which bears the court stamp (dated 24 August) makes no reference to either of these undertakings. The document I refer to may be only a draft, therefore. But the fact remains that proceedings and an application should have been issued. A judge would not ordinarily adjourn an *ex parte* application for two to three months without requiring the Respondents to be properly served. Indeed, it is quite apparent from the (draft) order to which I referred earlier that its draftsman was only too aware that proceedings should be issued "as soon as practicable". This is no doubt how the undertaking came to be included in the schedule.

5. The Respondents resist the application on a number of additional grounds. In particular, they have no plans currently to broadcast the film, as has been made clear to the Applicant's advisers. Accordingly, there is no threat or reasonable apprehension that any unlawful conduct is about to take place and thus no ground for granting an interim injunction, whether as a matter of urgency or at all. They have agreed that, if the situation changes for any reason, the Applicant will be given reasonable notice and thus an opportunity to obtain an injunction at that stage should it prove necessary to do so.

6. Furthermore, the Respondents have offered to edit the passages in the film to which the Applicant takes objection and to show the final results to him and/or his advisers for their comments. They take the view that any editing process would require the undertakings given to Blair J on 21 August to be discharged or varied because, at the moment, they are prevented from "using" the footage for any purpose (which would almost certainly include editing).

7. The Third Respondent, Mr Wagner, spent several weeks in the spring of this year filming the Applicant carrying on his day to day life. The reason for his interest was that the Applicant had in 1996 been the victim of a racist attack in Germany, as a result of which he was rendered tetraplegic. Subsequently, he has become well known in certain circles in the context of promoting his charity, the primary object of which is to discourage racism among young people in Germany. He now depends upon 24 hour care.

8. The filming took place with a view to broadcasting the resulting documentary which, on the Respondent's case, took place with the Applicant's full consent. He now denies that consent was given either expressly or by implication.

9. It is alleged on the Applicant's behalf that there is an oral contract between him and the Respondents. Although the alleged terms of the contract have been expressed somewhat differently from time to time, it would appear that a primary contention of the Applicant is that he was to be given effectively editorial control over the content of the film. Although Mr Engelman, on his behalf, takes objection to that formulation, that is a fair summary of his case. At all events, he certainly contends that he would be entitled to veto any of the content to which he took objection.

10. The Third Respondent denies that editorial control was ever ceded to the Applicant. In my experience, any such concession would be so fundamentally contrary to the practices of journalists and documentary makers that it would seem to be quite implausible. On the other hand, there are two witnesses (the Applicant and his carer) who have provided statements to the effect that such an agreement was entered into. That is an issue, therefore, which I cannot at this stage finally resolve.

11. The Applicant's position at the outset of his application seemed to me somewhat ambivalent and I asked for clarification from Mr Engelman as to whether he was seeking to obtain an injunction to prohibit the broadcast of the film, as a whole, in any circumstances; or whether it was his case that it should only be broadcast if the two passages to which he took specific objection were excluded. It seemed to be the latter.

12. I agreed, somewhat reluctantly, to the hearing of this application taking place in private. The basis for this was that it was inevitable that the nature of the two scenes in question would be referred to in open court and that the object of the application would thus be defeated. Nevertheless, for the purposes of this judgment, I believe it is possible for me to refer to those passages in very general terms, so as to avoid any embarrassment to the Applicant or revealing any information which he regards as private and/or confidential. I shall accordingly refer to the two passages as the "hoisting" scene and the "song".

13. On the evidence before me, it is only fair to the Respondents to point out that they have behaved reasonably towards the Applicant and there is no evidence that they have sought to exploit him in any way. It is already in the public domain that the Applicant at one stage threatened to commit suicide if the programme was broadcast. The Respondents had no wish to broadcast the programme unless and until the Applicant's concerns were put to rest. Indeed, there is no present intention to broadcast the material at all, as I have already made clear. No broadcasting company could ever be expected to give an undertaking that material will never be used in the future, in any circumstances, and it was entirely reasonable (and in accordance with general practice in the industry) for an undertaking to be given that the Applicant would be notified if circumstances changed. These points need to be made clear, because on several occasions in the course of his submissions Mr Engelman referred to the Respondents as "threatening" that their programme would be broadcast. There is no such threat.

14. The film was originally contained in the Channel Four broadcasting schedule for 14 August 2009. There is disputed evidence as to whether or not the Second and Third Respondents made attempts to contact the Applicant beforehand, but the fact is that he was shown an advance copy of the film on 11 August. There is again a dispute as to the reaction of the Applicant when he saw the film. One of the Respondents' witnesses, Ms Bailiff, says that the Applicant's first reaction was that he was unhappy about omissions from the film; in particular, there were no details about his charity or about a dispute which he had had with a former carer and with the National Health Service. He also appeared to suggest that he was concerned that the film portrayed him as being too happy and that it might lead to a reduction in NHS funding.

15. By contrast, the Applicant's case is that his primary concern was at the inclusion of the two scenes which I have obliquely identified above.

16. There is no dispute that the Applicant did not sign one of the standard written forms of consent that are regularly used for contributors to documentary programmes. Nor has any film been produced to evidence the Applicant's giving consent orally (as sometimes happens in accordance with published guidelines). As I understand the Respondents' case, therefore, it is put on the footing that the Applicant's consent was signified by his conduct and willing participation, over a considerable period of time, in the filming process. As I have said, on the other hand, whether or not that consent was conditional upon certain requirements as to control or editing of the final version is a matter that I cannot determine on the basis of written evidence alone.

17. It has been made clear to the Applicant's advisers, ever since 13 August of this year, that the film was being taken out of the schedule and that reasonable notice would be given (originally suggested as seven days) of any change of plan.

18. It was against that background that the Applicant's lawyers on 17 August served on the First Respondent a draft order and informed him that an application would be made for an interim injunction on 21 August. It was made clear that the threatened application would only be withdrawn if written undertakings were forthcoming from the First Respondent to the effect that the film would be withdrawn permanently or indefinitely. Furthermore, an undertaking was required that the unedited material would not be used for any purpose. A demand for costs of the order of £6,000 was also made.

19. The First Respondent made clear that there was no basis for an injunction, since there was no intention to broadcast. Moreover, it was also pointed out that the period of notice (at that stage set provisionally at seven days) was negotiable.

20. The Applicant was invited to withdraw the application with no order as to costs. Despite this, the Applicant's advisers for reasons best known to themselves persisted in going ahead and making an application with a view to achieving the permanent withdrawal of the film.

21. On 20 August the formal undertaking was offered not to broadcast the film, or use the footage in any other way, except on 14 days notice. When the matter came before the court, it could not be argued as there was no time. Undertakings were offered by the Respondents in the same terms as had been available to the Applicant the previous day. Costs were reserved.

22. When the order was served on 24 August, it was said on the Applicant's behalf that an application would be served in due course for "the substantive hearing". No such application was subsequently served, although an unissued form N244 was included in the bundle served the day before the hearing. Nor were proceedings issued, as I have already made clear.

23. On 1 September the First Respondent wrote to the Applicant's solicitors stating that it was prepared to edit the hoisting scene and the song and show the re-edited sections of the film to the Applicant (without conceding that he should have editorial control). This was an entirely reasonable stance. Mr Engelman in the course of the hearing complained that the Respondents would wish to substitute material for any passages edited out. This was by no means unreasonable, since the film could hardly be left with blanks in it. There is no basis for suggesting that they were trying to slip in something objectionable, by way of substitution, without giving the Applicant an opportunity to consider that.

24. Despite the reasonable stance taken by the Respondents, on 16 October they were informed that there was going to be a further hearing before the court on 28 October (as indeed took place before me) "on the same *ex parte* with notice basis". Yet, even if the matter could properly be described as urgent in August (which it could not), there was no possible basis to justify to going ahead at the end of October without issuing proceedings and putting the matter on a proper formal basis.

25. Again, it was confirmed that the First Respondent had no plans to broadcast the programme and that if matters were at some stage to change there would be 14 days prior notification to the Applicant's solicitors. Despite this, the application went ahead and the hearing lasted for three and a half hours on 28 October.

26. After the hearing was concluded I received a DVD from the Applicant's solicitors which I was asked to view. I did so. The object was to show that the Applicant asked the Third Respondent if he could see the film and he agreed. This was said to support the Applicant's case that he had a contractual right to do so from the outset. In my view, that is purely neutral on the point, since it is the Respondents' case that they were quite willing to show the Applicant the film. What they have never conceded is that he had a contractual right to control the content or that the filming had been permitted on any such condition.

27. If the other hurdles could be overcome, and the Applicant were able to present a case based on breach of contract and/or infringement of privacy, then there might well be a case for an interim injunction to "hold the ring" while the factual dispute was resolved. I would not be able to form a view as to the Applicant's "likelihood" of success for the purposes of s.12 of the Human Rights Act. Nevertheless, this would fall within one of the exceptions to that test identified by Lord Nicholls in *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 at [22]. That is to say, a temporary injunction could be granted while the court took time to establish the facts.

28. None of this arises, however, because (a) there is no justification for granting an injunction since there is no threat or current intention to publish and (b) there would certainly be no reason to grant such an injunction without the commencement of proceedings. There never was any justification for making the application in the circumstances I have described.

29. The application is for these reasons refused.