Neutral Citation Number: [2007] EWHC 2513 (QB)

Case No: HQ/07/922

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/10/2007

Before :

THE HON. MR JUSTICE EADY

- -

Between :

The Assistant Deputy Coroner for Inner West London	**Applicant**
- and -	
Channel 4 Television Corporation	**Respondent**
-and-	
The Ritz Hotel Ltd	**Interested Party**

Jonathan Hough (instructed by **the Solicitor to the Inquests**) for the **Applicant**
Heather Rogers QC and Anthony Hudson (instructed by **Simons Muirhead & Burton**) for the **Respondent**
Thomas de la Mare (instructed by **Barlow Lyde & Gilbert**) for the **Interested Party**

Hearing date: 26 October 2007

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE EADY

The Hon. Mr Justice Eady :

1. This application is made by Scott Baker LJ in his capacity as HM Assistant Deputy Coroner for Inner West London ("the Coroner"). He is currently conducting inquests into the deaths of the late Diana, Princess of Wales, and Mr Dodi Al Fayed in the early hours of 31 August 1997. He seeks a witness summons against Channel 4 Television Corporation under CPR 34.4 to produce documents which he believes will shed light on the circumstances surrounding those deaths. The application was made on behalf of the Coroner by Mr Hough and supported by Mr de la Mare on behalf of an interested party, namely the Ritz Hotel.

2. Ms Rogers QC, appearing on behalf of Channel 4, has carefully set out the extent to which Channel 4 opposes the order. It is right to record that there have been continuing and constructive discussions between the Corporation's lawyers and those representing the Coroner. I was able to make an order on 19 October covering some of the material sought, in respect of which there was no dispute. The issues were further narrowed and on 26 October, after further refinement of the draft order in the course of the day, I was called upon to resolve the outstanding issues. I am grateful to counsel for the clarity of their submissions.

3. Before defining the extent of the dispute, I should refer to the terms of CPR 34.4. This provides the only means whereby the Coroner can obtain documents for the purposes of the inquests. Although the government is contemplating changes to the Coronial jurisdiction, which would include granting the power to obtain documents directly, for the moment a court order is required. CPR 34.4 embodies the jurisdiction of the High Court to issue a witness summons in aid of an inferior court or of a tribunal. Counsel have all referred to the decision of Gross J in *South Tyneside Borough Council v Wickes Building Supplies* [2004] EWHC 2428, where the applicable principles (in the context of witness summonses relating to civil litigation) are summarised to broadly the following effect:

    i) The object is to obtain *specified* documents, and a summons should not be used to obtain disclosure; nor should it be of a "fishing" or speculative nature.

    ii) The production of the documents must be necessary for the fair disposal of the "matter" or to save costs.

    iii) The fact that documents are relevant is not to be decisive.

    iv) The fact that the specified documents may contain confidential information is not an absolute bar to production (although it is plainly a factor which must be taken into account).

4. Subsequently, other decisions have thrown further light on the matter. For example, in *Tajik Plant v Hydro Aluminium AS* [2006] 1 WLR 767 at [29] the degree of specificity was addressed in the Court of Appeal. The documents, or class of documents, must be sufficiently identified to leave no real doubt in the mind of the person to whom the summons is directed. Any doubts as to the adequacy of the description must be resolved in that person's favour.

5. I shall turn to the description in the present case shortly. It has, as I have said, been significantly narrowed in the course of discussions between counsel.

6. Meanwhile, however, I need to focus upon the distinctive nature of a coroner's inquest, which differs in fundamental respects from that of civil litigation of the kind which has been considered in the recent judicial observations to which I have referred. As with disclosure of documents, so with a witness summons directed to third parties, it is possible in the context of civil litigation to define both relevance and (to an extent) "necessity" by reference to the statements of case, where the issues are identified. There is nothing closely comparable in relation to a coroner's inquest, which is inquisitorial in nature. It is appropriate to have in mind the statement of the law contained in the Court of Appeal's judgment in *R v HM Coroner for North Humberside and Scunthorpe, ex parte Jamieson* [1995] QB 1 at p26:

> "(14) It is the duty of the coroner as the public official responsible for the conduct of inquests, whether he is sitting with a jury or without, to ensure that the relevant facts are fully, fairly and fearlessly investigated. He is bound to recognise the acute public concern rightly aroused where deaths occur in custody. He must ensure that the relevant facts are exposed to public scrutiny, particularly if there is evidence of foul play, abuse or inhumanity. He fails in his duty if his investigation is superficial, slipshod or perfunctory. But the responsibility is his. He must set the bounds of the inquiry. He must rule on the procedure to be followed. His decisions, like those of any other judicial officer, must be respected unless and until they are varied or overruled."

7. In the case of the present inquests, the Coroner has clearly "set the bounds of his inquiry", as is well known. He has set them widely and identified some 20 issues for consideration by the jury in due course. Moreover, he has especially in mind the legitimate purpose of allaying, or confirming, rumour and suspicion. This was recognised as an appropriate function of a coroner's inquest in, for example, *R v HM Coroner for Western District of East Sussex, ex parte Homberg* (1994) 158 JP 357, at 380-381. That is a major consideration for this Coroner and it is reflected in a number of issues he has already identified. It is common knowledge that some of the matters the Coroner wishes to explore, as exhaustively as possible, include whether there was any kind of conspiracy to murder or harm the Princess of Wales and/or Mr Al Fayed, and also whether security services were involved in any improper or unlawful activity in connection with the deaths. It goes without saying, not least because there have already been several inquiries into these matters, that any lingering concerns among sections of the public about such matters would only be confirmed or allayed following the most rigorous scrutiny.

8. Likewise with another factor to which the Divisional Court attached importance, in this very case, namely the need to address means by which lessons may be learned for the greater protection of the public in future: *R (on the application of Paul and others) v Deputy Coroner of the Queen's Household and Assistant Deputy Coroner for Surrey* [2007] EWHC 408 (Admin) at [37]-[40]. The particular matter under consideration was addressed at [39]:

> "It is likely that there will be a recurrence of the type of event in which the paparazzi on wheels pursued the Princess and Dodi Al Fayed. It is not only members of the Royal Family and their friends who receive this unwelcome attention; any celebrity is vulnerable. Not only is the safety of the person pursued potentially put at risk but there may well be risk to bystanders. In our view, occurrences such as this are prejudicial to the safety of a section of the public. It is possible that this danger could be prevented by legislation or other means."

I also take into account the issues discussed in *R v Inner West London Coroner, ex parte Dallaglio* [1994] 3 All ER 139, 155, 164.

9. Factors of this kind illustrate, very clearly, why it is that the courts should be wary of trying slavishly to fit a coroner's inquest into the template of civil litigation, merely because it is in that context that the provisions of CPR 34.4 have so far been considered.

10. It may be that the overriding objective of the CPR requires economy and selectivity as to the deployment of even relevant issues and evidence, but that has little direct bearing on the Coroner's declared objective of obtaining an exhaustive picture of what happened on 30 and 31 August 1997, and of the surrounding circumstances, as well as the aftermath. An unduly selective or narrow approach to the evidence may hinder his task of allaying suspicions and/or of making any recommendation for the future.

11. Despite the close attention paid to these events over the years, there are significant gaps in the information available to the Coroner. There is, for example, little evidence, and no photographs, covering the journey between the Ritz and the Alma tunnel. Also, as to two of the paparazzi, none of their photographs has been obtained. Another subject to be addressed is whether a burglary at the premises of a M. Cherruault or a disturbance at the Big Pictures agency might have significance, as showing that someone was trying to get hold of the pictures to conceal what happened or for some other reason.

12. Thus it is that one finds the Coroner's questions tailored to far reaching considerations of this kind. It is not necessary for me to set them all out, but some are of particular relevance:

> "… (iv) Whether the actions of the paparazzi caused or contributed to the collision;
>
> …
>
> (xviii) Whether the British or any other security services had any involvement in the collision;
>
> (xix) Whether there was anything sinister about (i) the Cherruault burglary or (ii) the disturbance at the Big Pictures agency".

13. Some of Ms Rogers' submissions were to the effect that, when considering necessity and proportionality, I should take into account the "antiquity" of these events (to echo the language of Judge LJ in *R (Bright) v Central Criminal Court* [2001] 1 WLR 662, 679, in the context of obtaining access to journalistic material under the Police and Criminal Evidence Act 1984). More particularly, she emphasised that there has been the extensive inquiry in France into the circumstances surrounding the deaths and also that of Lord Stevens, as if to suggest that the Coroner's own investigation needs correspondingly to be less extensive. For the reasons I have already given, however, it may well be that the reverse is true. If, notwithstanding these thorough inquires and the publication of the outcomes, there still remain concerns among the public of the kind I have described, then it may be all the more important for the Coroner to delve even deeper to get to the bottom of these matters.

14. The programme broadcast by Channel 4 on 6 June of this year, amid very considerable publicity and controversial debate, was primarily directed to exploring the role of the photographers on the night in question and to putting their side of the story (in a way which had not been possible before). I was asked to view the programme before the 19 October hearing, which I did together with a debate which followed the original broadcast. On any view, the content of the programme and the claims made for it (not least by reference to the "public interest") go to the heart of the Coroner's inquiry and certainly would seem to bear closely upon the three issues I have cited above. That is why the solicitor to the inquests sought material from Channel 4 very shortly after the broadcast.

15. The Coroner is naturally only too conscious of the need to satisfy the court that the relevant criteria have been fulfilled for obtaining the summons, and also of the importance of source protection and the sensitivity of "journalistic materials" more generally. He has accordingly adjusted his requests as time has gone by, partly in the light of constructive discussions with Channel 4 and partly following the disclosure and assurances he has been given following compliance with the order of 19 October.

16. By the conclusion of this process, there remained three outstanding issues before me. First, the Coroner sought an order to the following effect: that if a witness to one or more of the following relevant events –

    i) events from the arrival of Diana, Princess of Wales, and Dodi Al Fayed at Le Bourget airport on 30 August 1997 up to the departure of the Mercedes driven by Henri Paul ['the Mercedes'] from the Ritz Hotel at approximately 00.20 on 31 August 1997;

    ii) the journey of the Mercedes from the Ritz Hotel to the Alma tunnel;

    iii) the collision/crash of the Mercedes of the Alma tunnel;

    iv) events in the Alma tunnel between the collision/crash and the reopening of the tunnel in the morning of 31 August 1997;

    v) transmission and whereabouts of photographs taken by photo-journalists of the above events in Paris on 30 and 31 August 1997;

> gave his/her account of the event(s) to the Respondent for the purposes of the programme 'Diana, the Witnesses in the Tunnel' ['the programme'], the Respondent should produce to the Applicant a copy of any documents produced or obtained for the programme in so far as it records or contains that account;
>
> save that the above does not include drafts scripts or other documents that merely repeat the same account or summarise the same account in the words of another person;
>
> and save that the above does not include documents already published.

17. Ms Rogers suggests that this is too wide and/or not sufficiently specific within the meaning contemplated by the Court of Appeal in the *Tajik* case. She argues also that it is for the Coroner to demonstrate that it is necessary for him to have such material *in addition* to that which has already been produced. None of this is disputed as a matter of principle. She does not contend in respect of this first category that there is a problem of source protection or confidentiality.

18. Mr de la Mare has had the task of reviewing material already handed over, following my earlier order, which related to interviews with those identified in the programme. He told me (which will be confirmed in evidence) that it has revealed much potentially useful material by way of additional slants on the events or apparent inconsistencies with publicly available evidence. Ms Rogers submits that the Coroner should demonstrate that there will be a similar advantage to be gained from the additional material now sought. In reality, of course, that is impossible because the Coroner does not know what is there. In my judgment, there is every reason to conclude from the subject-matter of the programme that this new material will also be relevant, and that it is necessary for him to have it in order to present the jury with the fullest and fairest account of what took place. No doubt he and the jury could manage with a partial account but, in the particular circumstances of this case, the fullest analysis possible is required.

19. As to the matter of specificity, I consider that in the light of the process of refinement which has taken place the category of documents, as defined above, can leave Channel 4 and its legal team "in no real doubt" as to what is required.

20. There will be inconvenience, as there has already been, but I believe it in the circumstances to be justified.

21. The second category of information to be considered relates to one of the paparazzi who has consented that any documents containing his account be disclosed. He is Serge Benhamou who saw the Mercedes vehicle drive away from the Ritz and followed it. He arrived in the Alma tunnel very shortly after the car crash and took some photographs. It is said on behalf of the Coroner that he is one of the more significant of the paparazzi witnesses. Although Channel 4 does not consent to the order covering this material, no substantive objections are raised and I will order accordingly.

22. The third category of material relates to two specific individuals in respect of whom source protection is an important factor and s.10 of the Contempt of Court Act 1981

comes into play. The witnesses have been referred to as A and B. There is no criticism of Channel 4 for taking steps to protect sources from whom information has been obtained under an express or implied undertaking of confidentiality. Indeed, journalists regard it as positive moral obligation to do so. Courts are also reluctant to intrude into such material, but sometimes are required to do so in the "interests of justice". That phrase has been judicially interpreted fairly broadly: see e.g. *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 at 43 (Lord Bridge) and 54 (Lord Oliver); *Camelot Group plc v Centaur Communications Ltd* [1999] QB 124; *Ashworth Hospital Authority v MGN Ltd* [2001] 1 WLR 515 at [80]-[84], CA, and [2002] 1 WLR 2033 at [40]-[49], HL.

23. There are two internal documents and a journalist's note. Although the evidence of Ms Tomalin, the legal adviser to Channel 4, did not make clear that revelation of this material would necessarily identify the individuals concerned, or that redaction would be ineffective to maintain source protection, Ms Rogers later gave me on instructions an assurance that the material would inevitably, in the view of her clients, lead to identification. I proceed on that basis.

24. Naturally, the authorities have been primarily concerned with "interests of justice" in the context of civil litigation, but here I must be flexible in adapting the principles to the circumstances of an inquest. As I have already made clear, any material subject to obligations of confidentiality is likely to touch upon one or more of the defined issues identified by the Coroner and to assist in giving him and the jury the fullest picture. It represents, so to speak, further pieces of the jigsaw.

25. It is now clear that when courts are called upon to balance competing Convention rights, none should be accorded automatic priority over any other: *Re S (A Child)* [2005] 1 AC 593 at [17]. This "new methodology" was applied in the context of source protection recently, and upheld in the Court of Appeal: *Mersey Care NHS Trust v Ackroyd (No. 2)* [2007] HRLR 19. This is consistent with s.10 of the Contempt of Court Act 1981, although in the past there had been a tendency to speak of a "presumption" in favour of free speech: *Re an Inquiry Under the Company Securities (Insider Dealing) Act 1985* [1988] AC 660, 703 (Lord Griffiths). What is clear is that one cannot determine whether an encroachment upon the confidentiality of a source is necessary and proportionate, in any given case, until the competing interests have been balanced one against the other.

26. I need to balance a number of factors in deciding whether it is right to make the order. On one side is the public interest in the Coroner and jury being enabled to carry out their task with the thoroughness which the circumstances justify. It is necessary to avoid, so far as possible, the opportunity for allegations to be made later that they proceeded on an incomplete or partial account of the evidence, or that there has been a "cover up". On the other side, I have to take into account any chilling effect upon freedom of speech and the obligations of confidentiality undertaken by Channel 4 and the interests of those to whom such an obligation is owed. All these are weighty considerations engaging the public interest. In the particular circumstances of this case, which are unique, it seems to me to be clear that the restrictions on the rights of Channel 4 and those it has interviewed are proportionate to the advantages to be achieved for the transparency of the Coronial process.

27. It is important to remember also how restricted will be the disclosure in this case. The effect of my order will be to reveal the documents concerned to the Coroner, only, in the first instance. He will examine and filter the material paying proper regard to the competing considerations which I have had to take into account. He is obviously fully aware of the policy underlying Article 10 of the European Convention and the sensitivity of journalistic materials. He will only reveal such information as he obtains if it is necessary and proportionate to do so. That will be a similar exercise to the one I am performing, but different, since he will be addressing those factors with a view to wider dissemination of the material (e.g. to the interested parties and/or to the jury).

28. There is every reason to suppose that this staged process will afford appropriate safeguards to all concerned. (There is also in the background the possibility that a decision of the Coroner in this context may be the subject of judicial review.) My attention was drawn in this context to *Re McCaughey (Judicial Review Application)* [2004] NIQB 2 at [11]. This was not about the protection of journalists' sources, but rather was concerned with the possible chilling effect on police participation in criminal investigations if witnesses were subject to criticisms which became public, but it was held that a potentially relevant police report should not be withheld from a coroner. The case is interesting but does not assist greatly. It is clear enough from the general role and function of a coroner that the disclosure will initially be on a very limited basis. Concerns may have to be addressed by him afresh if wider dissemination becomes a possibility.

29. Any such encroachment is regrettable, but I am satisfied that here the Coroner, at least, needs to see the relevant documents in order to assess how far, if at all, they should be revealed more widely.

30. In performing this exercise he will be assessing the relative importance of the various factors, in comparison with each other, and in doing so he will be making a judgment, initially on a confidential basis, on behalf of society as a whole. There is an analogy with the process which a judge undertakes on a public interest immunity application. Ms Rogers has urged simply that "disclosure to a judge is disclosure". That is obviously true but, so far as it goes, the revelations to the Coroner (which is what I am invited to sanction) do not come into conflict with the public policy interest in source protection to such an extent as to be disproportionate to the need for him to be as fully informed as possible about the defined issues.

31. On the evidence before me, which is in the nature of things very limited, it seems to be highly likely that the content of the disputed material will help to complete the picture. That objective justifies going behind the confidentiality, important though it is, attaching to the communications with A and B.

32. These are the reasons for which I made the order, at 4.15pm on Friday 26 October, in respect of all three outstanding categories. There was considerable urgency about the matter because the paparazzi witnesses were due to give evidence the following Monday. It was thus important for the order to come into effect at the earliest possible moment.