Case No: HC04C01555

Neutral Citation Number: [2004] EWHC 1075 (Ch.)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11th May 2004

Before :

THE HONOURABLE MR JUSTICE MANN

- -

Between :

Tillery Valley Foods	**Claimant**
- and -	
(1) Channel Four Television	**Defendants**
(2) Shine Limited	

- -
- -

Andrew Caldecott Q.C. and Manuel Barca (instructed by **Addleshaw Goddard**) for the Claimant
Adrienne Page Q.C. and Matthew Nicklin (instructed by **Farrer & Co**) for the Defendants

Hearing dates : 10th May 2004

- -

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.

.....
Mr Justice Mann

Mr Justice Mann:

Introduction

1. This judgment gives reasons for my decision, which I announced yesterday evening at the end of argument, to dismiss the application of the claimant for injunctive relief.

2. The application before me is a without notice application, attended by both sides, for an order restraining the broadcast of a television programme, scheduled for broadcasting on Thursday 13th May 2004, unless certain conditions are met. In the written application before me the relief sought is an injunction restraining the defendants from broadcasting the programme "without giving the Claimant a fair and reasonable opportunity to view footage and material removed from their premises, and any test information derived therefrom and relevant protocol and to respond, because such broadcast would otherwise constitute an unjustifiable breach of confidence and/or misuse of private information". As developed before me the application became more limited. First, the claim based on misuse of private information (or privacy) was not pursued – the matter was based on confidentiality only. Second, the material that was sought became more limited than the broad description in the written action. I will, so far as necessary, indicate what was sought below. Mr Caldecott, QC, who appeared for the claimant, described the claim that he made as "novel". Miss Page QC, for the defendants, described it as "ambitious". In my view it is both.

The facts

3. The claimant ("Tillery") is a substantial company whose business is the development, production and distribution of chilled frozen meals to the healthcare and public sector markets. It is part of the large Sodexho Group which is based in France. It has a number of contracts for the supply of food to NHS hospitals. One only has to state those facts for it to be apparent that food hygiene is of paramount importance to the business and its customers.

4. The first defendant ("Four") is the well-known broadcasting company. The second defendant ("Shine") is a film production company which was contracted by Four to make the programme in question. The programme is a piece of investigatory TV journalism into certain of the production practices at the factory of Tillery at Gwent. Between 25th September 2003 and 28th November 2003 a Mr Fernando Lucena was employed there. He was not a normal employee. He was in fact a journalist who was apparently seeking to report on practices and events that were inconsistent with proper food hygiene. He was dismissed when he was observed inserting a probe into food, and subsequent investigations revealed his real intent. It appears that while he was there he engaged in covert filming, and there now exist some 60 to 65 hours of film of some of what he saw when he was there. Some of this film will apparently form part of a programme on Thursday night in Four's "Despatches" serious and will apparently support allegations of bad practice on the part of Tillery. Correspondence between the parties and their solicitors has produced an indication as to the sort of practices that will be alleged, and they include employees routinely sneezing and coughing over food, employees (including managers and supervisors) eating on the production line and improper re-heating procedures. In addition, it will apparently be said that swabs taken from certain areas reveal higher levels of e-coli bacteria than would be consistent

with a proper level of hygiene (though it will not be said that the e-coli strains found are those that are damaging to human health).

5. These allegations are serious for a company that supplies food to public bodies and hospitals. As a result of some advance publicity given to the programme, certain customers have already contacted Tillery seeking reassurance, and in one case suggesting one customer might be reconsidering taking food from Tillery. It is entirely plausible to suppose that the broadcast might, if it contains the allegations that are currently foreshadowed, have a serious effect on the business of Tillery. In addition, Tillery are concerned about the psychological effect it might have on patients, and friends and relatives of patients, who might be worried about the safety of patient food. The allegation about e-coli is apparently particularly concerning because it is said to be an emotive issue, and the Radio Times has already misrepresented the allegation by making the presence of the bacteria sound more threatening than it necessarily is.

6. All this causes Tillery great concern. It does not accept the truth of any of the allegations. If and insofar as they turn out to be untrue they could be the subject of a defamation action. The defendants have made it clear that they intend to justify all the allegations, so in line with the principles *Bonnard v Perryman* [1891] 2 Ch 269 – where a defendant to a defamation action intends to plead justification it will only be in exceptional cases that an interim injunction will be granted to restrain publication – it is not open to Tillery to seek an interim injunction restraining the broadcast. Nonetheless, Tillery are concerned to take steps in advance to remove or limit the damage that might be done by the programme in its currently anticipated form. It is not content to sue in defamation after the event. So Mr Caldecott took a different line. He argued his case in the law of confidentiality.

The basis of the claim

7. Mr Caldecott's target was not to restrain the broadcast simplicter. He argued that it ought to be restrained until his client had been given an informed right of reply. I stress the word "informed" because his clients have already been offered certain forms of response. They have, for example, been offered a sight of part of the material to be transmitted (that part not being identified) on condition that Tillery submits to an immediate interview (after a short period for consideration and reflection). However, Tillery say that they cannot make a proper response because they do not have sufficient information to enable them to do so. I can illustrate this by some examples. The allegations about the potentially significant levels of e-coli are apparently based on swabs taken by Mr Lucena. Tillery say their own swabs are (essentially) clear. They believe that Lucena's swabs may be affected by a number of factors, including the area over which the swab was taken, the method of taking and analysing the swab (the protocol) and whether it was kept sufficiently cool between taking and analysis. They do not know which (if any) of those or other factors may have affected the result, and thus they cannot respond to the allegation without further information. That information would include a sight of the film which was taken of the swabbing procedure. Again, allegations of lack of hygiene are made against unspecified individuals. Tillery say they cannot deal with those allegations without knowing who those individuals are, and fairness requires that they see material which enables them to identify them. Tillery does not ask for a sight of the whole of the unused filmed material; nor does it even seek a preview of the entire programme. It seeks to see the

material which relates to the principal allegations (whether that material is to form part of the final programme or not) so that it can inform itself of the material before it exercises the right to respond that it says it should have. Broadcasting the programme should be restrained until that material is provided.

8. The route by which Mr Caldecott seeks to get there is via the law of confidentiality. He says that activities of Mr Lucena amount to a breach of duties of trust and confidence and that the film that he took, which is now under the control of Four, amounts to confidential information. That gets him over the threshold necessary to invoke the law of confidentiality. Four, and so far as necessary Shine, received and hold the information knowing that it is confidential and so can be restrained from using it. Mr Caldecott acknowledges that public interest can justify the publication of confidential information, and further acknowledges that public interest would justify the publication of the allegations made in this case. However, he says that deciding whether and to what extent use can be made of confidential information in the public interest is a balancing exercise. The court has to balance the interest of the owner of the information in not having his information published, and the public interest in preserving confidence, against such public interest as there is in the publication in question. Part of the balancing exercise can and should involve giving the owner in the position of Tillery a right of reply, which in turn involves a consideration of the extent to which it would be fair to require the disclosure of information so that the opportunity to reply (or respond) is effective and not nugatory. Putting the matter another way, the confidentiality affects the conscience of Four and Shine, and conscionability requires that they afford an informed right of response before they can be allowed to use it. A publication without a proper right to, and opportunity for, a reply would not in fact be in the public interest. While conceding that this analysis is novel (and it certainly is), Mr Caldecott points out that that is not a bar to the development of the law in this way – all new rights were a fortiori novel once (*Malone v Metropolitan Police Commissioner* [1979] Ch 344 at 372D-E, per Megarry V-C).

The law and my conclusions

9. This is an application for an interim injunction, so section 12(3) of the Human Rights Act 1998 applies. The relevant parts of section 12 are as follows:

> **Freedom of expression**
> 12. (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.
> (2) .....
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material) to:
> (a) the extent to which-
> (i) the material has, or is about to, become available to the public; or

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

(b) any relevant privacy code.

Section 12(3), in saying that I must be satisfied that the applicant is likely to establish that the publication should not be allowed, means that I cannot grant an injunction unless there is "a real prospect of success, convincingly established" – per Simon Brown LJ in *Cream Holdings Ltd v Bannerjee* [2003] Ch 650 at para 12. "… the judge will have to be satisfied that there is no obvious reason why the claim should not succeed" – *ibid*, per Arden LJ at para 121.

10. I am afraid that I am nowhere near satisfied in that manner. Indeed, if I am satisfied of anything I am satisfied that at a trial Tillery would clearly fail because the ingredients of the cause of action are not there.

11. I start with the subject matter of the alleged confidentiality. It is at the heart of Mr Caldecott's submissions that Four and Shine have come into possession of confidential information and propose to disclose it. I cannot see how that is the case. In any claim for misuse of confidential information the claimant has to establish that there is information with the relevant quality of confidentiality – information which is, by virtue of its nature, capable of being confidential in the circumstances. Mr Caldecott treated it as self-evident that where an employee films his workplace, working activities and workmates as comprehensively as it is to be inferred Mr Lucena filmed, it is inevitably going to have the quality of confidential information. I am afraid I do not think it is self-evident at all. It might be, given certain circumstances, but there has to be something more than an employee filming in the workplace to produce that effect. In the Australian authority of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 the High Court of Australia held that the activities of a company which processed possum meat for export ("what the processing of possums looks,and sounds like" – para 32) were not such as to attract the quality of being confidential for the purpose of the law protecting confidentiality. The same applies here. The developing law of privacy may have some bearing, but Mr Caldecott has disclaimed reliance on that are of the law and has expressly confined himself to confidentiality.

12. As well as his reliance on what he says is self-evident, Mr Caldecott also relies on the terms of the contract into which Mr Lucena entered when he entered into his employment. Clause 15 of that contract reads:

"15 Confidentiality

You may not disclose figuresor other information about the company's or client's business to anyone outside the company which may injure or cause loss to the company or customer. In the event of a request for information from the press or for information likely to be of interest to the press, the request must be referred to your managing director.

Any information regarding any supplier's business must also be treated confidentially."

13. Mr Caldecott says that this term creates confidentiality if it would otherwise not exist. I disagree. It is a contractual bar on disclosure applying to all information. It does not depend on the information's being confidential. Nor does it vest all information with the character of confidentiality where it would not otherwise have it – it certainly does not do so expressly, and in my view it does not do it implicitly either.

14. Accordingly, the cornerstone of any action to restrain the misuse of confidential information, namely the existence of information with a confidential quality, has simply not been laid. Mr Caldecott emphasised that this particular employee had abused his trust. That may be so (though the notion was not fully explored before me, and the words are slightly dangerous ones to bandy around without a proper analysis), but even if he did that does not create confidentiality in information conveyed by the employee.

15. Even if Mr Caldecott had succeeded in getting over the hurdle of establishing that the information had the necessary confidential characteristic, he would run into difficulties at the next one. Confidentiality in information will not be protected if public interest requires disclosure, whether to the media or to others – see Lord Goff in *A-G v Guardian Newspapers (No 2)* [1990] 1 AC 109 at 292. In this case Mr Caldecott expressly conceded that there was a public interest in the disclosure of what Mr Lucena found. If the reasoning had stopped there then that would have been an end of the application because that would justify the broadcast of the programme and there would be no basis in stopping it. However, Mr Caldecott did not stop there. He said the law of confidentiality allowed only that use which was conscionable. Because the public interest should not allow a broadcast without a fair opportunity to reply (at least in the circumstances of this case), it would be unconscionable to publish, or broadcast, without giving that opportunity; and a <u>fair</u> opportunity requires the disclosure of material as referred to above. Hence he was entitled to an injunction to restrain publication until his clients were given that opportunity and that material. That was not an injunction restraining the broadcasting; it was at most one postponing the broadcasting, and maybe not even that if (as he said was likely) the information could be obtained and imparted before Thursday.

16. This way of putting the matter has no support in authority whatsoever. The confidentiality cases refer to confidential information, the interest in restraining disclosure and the possibility of a public interest in disclosure. There is absolutely no suggestion that the last of those factors is somehow qualified by the need to give the owner of the information a right to respond or reply in appropriate cases. That is not in the least bit surprising. Such a right would have no part to play in the law of confidentiality. What is the owner of the information to reply or respond to? The information is in these cases true and accurate information, so there is nothing that calls for a response. Contrast a libel action – a claimant may well wish to be able to reply to try to put the record straight (though he does not have any <u>right</u> to do so, notwithstanding the fact that a failure to give him an opportunity may, in some cases, deprive a defendant of a defence of qualified privilege - see *Reynolds v Times Newspapers* [2003] 2 AC 127). That sort of claim has no place in a claim for breach of confidentiality.

17. In support of his submissions Mr Caldecott relied on the broadcasting code currently applied by OFCOM – it is in fact the old ITC code. Paragraph 2.7 provides

> "2.7 – Opportunity to take part.
>
> Where a programme alleges wrongdoing or incompetence, or contains a damaging critique of any individual or organisation, those concerned should normally be offered an opportunity to take part or otherwise comment on the allegations …"

That, however, does not help him. The Code is a code of practice, not an embodiment of law. Its purpose is to give guidance and lay down the conduct that the regulator expects. The regulator has sanctions at its disposal, but the important point is that it is the regulator, not the courts, that enforce the Code. It should also be pointed out that the Code does not give the regulator a right of prior restraint. Complaints can only be made after the event. To rely on this as creating a new qualification on the public interest which can be enforced by the courts, and enforced by them before publication, is misconceived.

18. Accordingly, there is no right of reply which is somehow part of the fulfilment of the public interest. In fact, that juxtaposition shows part of the fallacy of the argument. It is the individual who has an interest in replying; but how can an individual interest like that be part of the fulfilment of the <u>public</u> interest in disclosure? If it existed it would be a qualification of the public interest, not a fulfilment of it. If it were to be effective then it would have to be the law that there could only be publication of the confidential material if, alongside it, there were the claimant's views of the matter. That is such a striking qualification that one would expect to see it reflected in some authority or some expression of principle if it existed; but one sees neither. I confess that I also foresee serious workability problems in it, too, but I do not think I need to go into those.

19. Accordingly there is no right of reply available to Tillery, so there is no ancillary right to see material allegedly necessary for a worthwhile right of reply. That means that I need not go into the question of the practical difficulties that would exist in any given case in ascertaining what information is and is not necessary, though I would observe that I think that those practical difficulties may well be such as to render the idea unworkable again.

20. I therefore hold that Tillery does not have any real likelihood at all of being able to maintain a claim for an injunction at the trial based on abuse of confidential information and I decline to grant the injunction sought, even in its modified form. This conclusion, and my reasoning makes it unnecessary for me to go on to consider other bases on which the claim was made and resisted. I heard submissions on the extent to which the courts will uphold the right of free speech conferred by the Human Rights Act and will not grant injunctions to restrain publication in advance. Thus in *Cream* at para 47 Simon Brown LJ said:

> > "It is clear that prior restraints are viewed as pernicious and that, to be upheld as justifiable, their use will have to be viewed as appropriate, proportionate, and absolutely necessary."

This reasoning goes to remedies rather than rights, and I have dealt with the matter at the level of rights. I do not need to go into these submissions fully in the light of my reasoning. However, if I were wrong in my reasoning thus far then I would rely on those statements to decline to grant the relief sought. Even if the right of reply were debatable, it would not justify the prior restraint sought in this case. Again, I note that the OFCOM Code does not permit prior restraints. It operates after the event.

21. The truth of this 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, as was held by Lightman J in *Service Corporation International plc v Channel Four Television* [1999] EMLR 83 at p 89:

> "The plaintiffs claim that they are entitled to this relief on three grounds and I must consider each in turn. But before I do so I should consider the cause of action which is now disclaimed, and which was the initial basis of complaint, namely defamation. 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: see *Microdata v Rivendale* [1991] FSR 681 and *Gulf Oil v Page* [1987] 1 Ch 327 at 334. I have great difficulty in seeing the three alternative claims made in this case as other than attempts to circumvent the rule and to seek protection for the plaintiffs' reputation."

Conclusion

22. I shall therefore dismiss this application.