IN THE SUPREME COURT
OF TURKS AND CAICOS ISLANDS

Case Number: CL 142/09

BETWEEN

CEM KINAY AND OTHERS

Applicants

AND

THE EDITORS OF THE TURKS AND CAICOS WEEKLY NEWS AND OTHERS

Respondents

Case Number: CL 143/09

BETWEEN

MARIO HOFFMANN

Applicant

AND

THE EDITORS OF THE TURKS AND CAICOS WEEKLY NEWS AND OTHERS

Respondents

S Wilson for Kinay et al
C Griffiths QC with A Misick for Hoffmann
M Allan for first respondent
G Chapman for the fourth respondent

Hearing: 21 July 2009
Decision: 21 July 2009
Written reasons:23 July 2009

Reasons for Decision

[1] On 18 June 2009, in the principal action, I ordered that any passages in the final report of the Commission of Inquiry which were adverse to the present applicant, Dr Kinay, were to be deleted. The respondents to that action have appealed the order. A similar application on behalf of Mr Hoffmann was rejected by this Court but he has filed notice of appeal against that decision. A stay of my order in respect of his case was granted preventing release of similar references to him. Subsequently another application was filed by a Mr Jak Civre in which I understand the Attorney General has given an undertaking that no reference adverse to him would be included in the report pending the result of the two appeals.

[2] The appeals are listed for hearing in the week commencing 27 July 2009.

[3] On Saturday, 18 July 2009, the Governor and/or the Commissioner released a copy of the final report on the Commission website with all such passages deleted. However, it was soon discovered that it was possible to remove the deletion with relative ease and little specialist knowledge and, as a result, download an unedited copy of the full report. The evidence was that some, at least, of the various media outlets in Turks and Caicos were aware of this. After the report had been on the Commission website for approximately three hours, it was removed.

[4] Following an urgent ex parte application that afternoon and evening on behalf of both Dr Kinay and Mr Hoffmann, I ordered an interim injunction restraining eleven named media organisations in the jurisdiction from publishing in legible or audible form or in any form which may be edited, copied and viewed any redacted part of the report.

[5] The injunction was returnable on Monday, 20 July 2009, when officers of some of the defendants appeared. At that hearing I granted leave to the applicants to add a further defendant, a representative of which had attended court that day, and also extended the terms of the original injunction to include directly or indirectly inciting or encouraging others to publish the same parts of the report and to use their best endeavours to prevent similar publication by others.

[6] At that hearing it was apparent that the unredacted report was already being circulated on the internet beyond the defendants and possibly also beyond their effective control. I extended the injunction on the ground that the redacted parts were undoubtedly confidential and any disclosure of them was a breach of the court orders made and undertakings given to protect the applicants pending further court proceedings. The Court is conscious of the fact that any publication on the internet would rapidly destroy that confidentiality. Equally the Court acknowledges the right of the media to publish material in the public interest but that does not give any more right than that of the public at large. In the present case the material was clearly not intended to be published and any such publication was also clearly a breach of a court order.

[7] As I have stated, it was already apparent that there had been a significant dissemination of the redacted parts of the report beyond the purview of the defendants and, as the internet was the principal medium for that dissemination, I gave leave to apply to vary or remove the order on 24 hours notice.

[8] The following day, two of the defendants sought to have the injunction lifted. Counsel for the applicants took what was clearly the proper stand for their clients of neither supporting nor opposing the lifting of the injunction. The applicants' position was and will remain that these were confidential passages and they were improperly released through no fault of their own. As long as that confidentiality can be effectively protected it should be but, in the realities of the situation here, the confidentiality had either already gone or was about to go.

[9] I lifted the injunction I had ordered on 18 July 2009 (as extended on 20 July 2009) and stated I would give brief written reasons for my decision. I now do so.

]10] The test for the Court on 21 July 2009 was to determine whether the continuation of the restriction could be practical or effective. In the very short time available, the defendants filed brief affidavit evidence which included the statement that the unredacted report had been freely circulating on websites within and outside this Court's jurisdiction. There was reference to 30,000 copies having been downloaded from one site alone. Such numbers could not strictly be accurately assessed or proved in the time available but they were of such proportions that, with the rapid multiplication of information which is commonplace on the internet, it was clear it was already widely distributed. Plainly, if the disclosures could reach such numbers in the limited time since the report had been withdrawn from the Commission website, it was probably a matter of hours rather than days before the distribution would be such that, rightly or wrongly, effective protection must be impossible.

[11] The balance the Court has to consider is between the competing claims of confidentiality and the right of the media to report the material disclosed. As counsel pointed out, once the publication reached the stage it had then reached, the true effect of the Order was to prevent the defendants from commenting on and reporting, in the country to which it is most relevant, something which is already public knowledge here and the subject of comment abroad.

[12] Numerous cases have re-emphasised the artificiality of maintaining the injunction in such circumstances. In the "Spycatcher" case, *Attorney General v Guardian Newspapers (No 2)* [1990] 1 AC 109,289, Lord Goff pointed out the absurdity of such an artificial situation:

> "It seems to me to be an absurd state of affairs that copies of the book … should now be widely circulating in this country, and at the same time other sales of the book should be restrained. To me this simply does not make sense. I do not see why those who succeed in obtaining a

copy of the book in the present circumstances should be able to read it, while others should not be able to do so simply by obtaining a copy from their local bookshop or library. In my opinion, artificially to restrict the readership of a widely accessible book in this way is unacceptable: if the information in the book is in the public domain and many people in this country are already able to read it, I do not see why anybody else in this country who wants to read it should be prevented from doing so."

[13] Sedley LJ summarised the principle:

"In general, however, once information is in the public domain, it will no longer be confidential or entitled to the protection of the law of confidence, though this may not always be true." *Douglas v Hello Ltd (No 3)* [2005] EWCA (Civ) 595;

[14] In the recent case of *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB), Eady J pointed out that the extent to which material is truly in the public domain must depend on the facts of the case and continued:

"... if someone wished to search on the Internet for the content of the edited footage, there are various ways to access it notwithstanding any order the Court may choose to make imposing limits on the content of the ... website. The Court should guard against slipping into playing the role of King Canute. Even though an order may be desirable for the protection of privacy, and may be made in accordance with the principles currently being applied by the courts, there may come a point where it would simply serve no useful purpose and would merely be characterised, in the traditional terminology, as a brutum fulmen. It is inappropriate for the Court to make vain gestures"

[15] The Court has been advised that an urgent inquiry is being conducted to ascertain how this most unfortunate situation could have arisen. The applicants were entitled to feel confident that, as long as court proceedings were pending and unresolved, this information would be protected. Many may wish to deny them that protection but, until it has been finally decided by the courts, it should be a certain shield providing a protection to which the applicants were legitimately entitled. It may be that the conclusion of those proceedings would have seen the legitimate release of the redacted material but that was a matter for the determination of the courts and, until it was decided, the material remained confidential.

[16] Now, however, the information has been released and is already widely available. Confidentiality has been lost and can never be recovered. I am satisfied that, the point has already been reached where any prolongation of this Order would serve no useful purpose in the protection of the rights of the applicants. The only real and practical effect of continuing the order would be to restrict the media from commenting on something which is clearly in the public domain here and abroad and on which, in consequence, they have every right to report.

[17] It is for those reasons that I lifted the injunction. I also reserved costs.

23 July 2009

Gordon Ward
Chief Justice