Cambridge Law Journal, **62(2)**, July 2003, pp. 241–278
Printed in Great Britain

THE
CAMBRIDGE LAW JOURNAL

VOLUME 62, PART 2 JULY 2003

CASE AND COMMENT

THIRD PARTIES AND THE REACH OF INJUNCTIONS

Two recent decisions have considered the extent to which injunctions might indirectly impose restrictions upon third parties. The issue was most famously (and controversially) explored by the House of Lords in the Spycatcher case (*Attorney General* v. *Times Newspapers Ltd.* [1992] 1 A.C. 191), where it was held that a third party would be guilty of contempt if he deliberately did an act that undermined the purpose for which the injunction had been imposed in the first place; and this, notwithstanding that the injunction was not directly binding, could have a significantly inhibiting impact upon freedom of expression.

In *Attorney General* v. *Punch Ltd.* [2003] 2 W.L.R. 49, the Attorney General obtained an injunction against David Shayler, the former MI5 officer, and Associated Newspapers, restraining publication of information relating to the security services pending a breach of confidence action being brought against Shayler. A proviso permitted publication of material that had been consented to by the Attorney General. The editors and publishers of *Punch*, knowing of the existence and terms of the order and without the consent of the Attorney, nevertheless published the material, the editor taking the view that the material so published was not harmful to the public interest. Silber J. at first instance held that this amounted to an intentional contempt, but the Court of Appeal (Lords Phillips M.R. and Longmore L.J., Simon Brown L.J. dissenting) upheld the appeal. The House of Lords restored the original decision. There is no doubt that this result will be a disappointment to the press in the Human Rights Act era, since

they will have hoped that reference to Article 10 and its guarantees of freedom of the press might have tilted the balance away from the *Spycatcher* holdings in favour of freedom of speech.

The differences between the House and the Court of Appeal were relatively narrow. The members of that Court had identified the purpose of the judge in granting the injunction in the first place rather differently. According to Lord Phillips (with whom Simon Brown L.J. agreed on this aspect of the case), it was "to prevent the disclosure of any matter that *arguably risked* harming the national interest". Longmore L.J. took the line that the judge's purpose had been to prevent the publication of any information derived from Mr. Shayler not already in the public domain. As to the mens rea, however, both agreed that the Attorney General had not laid the foundation to show (in the view of Lord Phillips) that the editor knew that publication would interfere with the administration of justice. Longmore L.J. reasoned slightly differently. Since the editor might have thought that the purpose of the order was to restrain only material dangerous to national security, and since the editor might have believed that he had no intention to publish any such information, the requisite mental element was not established.

The House of Lords took a simpler view. Generally, the purpose of a court in issuing an interlocutory injunction is the preservation of the rights of the parties pending the final determination of the issues between them, and this was not to be confused with the purpose (be it the Attorney General's as in this case, or more generally) of the party seeking the injunction. It is a contempt where a third person knowingly does something that undermines the court's purpose to hold the ring pending final determination. Where, therefore, the substantial issue between the parties is whether or not it would be a breach of confidence to publish particular material, and the court grants an injunction prohibiting publication for the time being, it is a contempt for a third party to make the information public. It is not necessary to explore the often difficult question of why it was that the injunction was sought in the first place. Where, therefore, an editor publishes material which he knows the court was determined to treat as confidential pending the hearing, both the actus reus and the mens rea have been established.

The point in *Jockey Club* v. *Buffham* [2003] Q.B. 462 was allied to this. It concerned the question whether the *Spycatcher* decision was confined in its reach to temporary injunctions, or alternatively applied to final orders also. One might have supposed that the answer to this question was that it applied to the subversion of any

court order properly made, but Gray J. somewhat surprisingly held otherwise. As the House of Lords affirmed in *Punch* (still however to be decided in the House of Lords when Gray J. was obliged to give judgment), the purpose of a *Spycatcher* order was to preserve the status quo pending trial. Once the trial was over, therefore, there was nothing upon which the order could bite, and there could be no contempt if a third party did what a litigant had been forbidden to do. In principle, therefore, publication would not be restrained on the grounds that it is a contempt of court for a third person to make public what one of the litigants was obliged to treat as confidential.

This would appear at first sight to give subsequent publishers carte blanche, but it may be doubted whether it does so. Although Gray J. does not spell them out, there must be some important practical limitations on the entitlement to publish that such a decision impliedly entails. It could not apply, for example, to the *contra mundum* injunctions forbidding the identification of the killers of James Bulger of the kind made in *Venables* v. *News Group Newspapers* [2001] Fam. 430. Furthermore, if the parties were restrained by a permanent injunction (or undertaking, which is in the context the same thing), a third party would need to be very careful to avoid any conduct giving rise to the inference that it was behaving in a way that assisted one of the parties to act in breach of the injunction, since this would be aiding and abetting the party to commit a contempt. And if the purpose of the injunction was to preserve confidence, then a later publication by a third party might be a breach in exactly the same way as the original publication. A publisher who sought to reproduce the samizdat photographs that were the subject of the litigation in *Douglas* v. *Hello*! [2001] Q.B. 967, for example, could still be restrained in his own right from publishing (or mulcted in damages were he foolish enough to burst into print without prior warning to the happy couple).

Buffham is important for a further reason. The confidential information in question consisted of documents extracted by the former security director of the Jockey Club when he left his employment with them. These clearly were confidential, and the court had restrained their publication on that basis. These proceedings were in essence an application by a third party, the BBC, to vary the terms of the order/injunction in such a way as to enable them to use the material in a programme being made about the ability of the Jockey Club to police racing; allegations were to be made about race fixing and corruption. It is a well established principle that the public interest can defeat a claim to confidentiality, and the question was whether it did so here. Gray J.

came to the conclusion that it did. The public interest in the integrity of racing was such that the public were entitled to know about reservations and concerns over the ability of the Jockey Club to preserve the integrity of the racing industry.

A final word about the proviso permitting publication on the say-so of the Attorney General. In the Court of Appeal in *Punch*, Lord Phillips had been critical of the arrangement for giving permission to publish, taking the view that it subjected the press to the censorship of the Attorney General (as he had said on a previous occasion, in *Attorney General* v. *Times Newspapers Ltd.* [2001] 1 W.L.R. 885) and an interference with the European Convention right of freedom to publish. Lord Hope deals with the point most fully. Whatever arrangements are put in place for permitting the Attorney to vet the material prior to publication, he considered, must make it plain on their face that the last word does not rest with the Attorney but with the courts.

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PROCEDURAL JUSTICE IN ADMINISTRATIVE PROCEEDINGS AND ARTICLE 6(1) OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

THE applicability to administrative decision-making of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (which requires that the determination of a person's "civil rights" should be by an "independent and impartial tribunal") is somewhat vexed. First, it is often uncertain when an administrative decision determines "civil rights". And, secondly, since non-compliance at first instance may be cured where the person aggrieved has access to a court of "full jurisdiction", it is important but often uncertain to know what "full jurisdiction" is in the circumstances. The full tale is told in (2001) 60 C.L.J. 449 (Forsyth) and in Wade and Forsyth, *Administrative Law*, 8th edn. (2000) at pp. 441–444. Those unfamiliar with these technical issues should read a standard account before turning to *Runa Begum* v. *Tower Hamlets London Borough Council (First Secretary of State Intervening)* [2003] UKHL 5, [2003] 2 W.L.R. 388 (H.L.).

What had happened was that Runa Begum became homeless and the Tower Hamlets London Borough Council accepted that it had a duty under Part VII of the Housing Act 1996 to secure accommodation for her. But Runa Begum rejected the accommodation offered as unsuitable and requested a review of the