Neutral Citation Number: [2005] EWHC 1227 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 16 May 2005

B e f o r e:

HIS HONOUR JUDGE REID QC
(Sitting as a Judge of the High Court)

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VENTURE INVESTMENT PLACEMENT LTD

CLAIMANT

- v -

HALL

DEFENDANT

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(Official Shorthand Writers to the Court)

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PAUL DOWNES (instructed by Gateley Wareing, Birmingham) appeared on behalf of the Claimant

JOHN BALDWIN QC (instructed by McDermott, Will and Emery) appeared on behalf of the Defendant

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JUDGMENT
(As approved by the Court)

1. THE DEPUTY JUDGE: There are two applications before the court: the first is an application by the claimant for interlocutory relief in the form of an injunction to restrain the defendant from referring to, or disclosing, (either verbally or in writing) to any other person, natural or corporate, any discussions which took place during the course of a mediation relating to other proceedings between the parties on 24 May 2004 or contents of documents and so forth, governed by the confidentiality agreement contained in the mediation agreement and consequential relief on that; the second application is an application to strike out the action, on the basis that the claim discloses no cause of action.

2. The background to the case is that there is an action proceeding (at what appears to be a leisurely pace) by which Mr Hall, the defendant in these proceedings, is suing the claimant in these proceedings, Venture Investment, for a variety of matters. In the course of that set of proceedings a mediation took place which, unhappily, was unsuccessful. During the course of the mediation there was a one-to-one meeting between Mr Hall, on the one hand, (and in fact his fiancée was also with him) and Mr Watts, the Chairman of the claimant in these proceedings, on the other hand. There is a dispute as to precisely what was said, and as to the circumstances of that meeting which appears to have lasted a fair amount of time, somewhere between 30 and 50 minutes, so far as the evidence goes. That took place in May of last year.

3. In June of last year Mr Hall, and his fiancée, signed statements making allegations against Mr Watts for the police. The police eventually (and as far as the evidence goes, probably with rather bad grace and feeling it was rather a waste of their time) interviewed Mr Watts briefly and nothing further has been heard from them. The claimant's understanding is that nothing further will be heard. However it is submitted, on behalf of the claimant, that the evidence shows that on (at any rate) three occasions Mr Hall made statements to a Mr Smith and Mr Gold, making allegations as to things that it was said that Mr Watts had threatened to do to the defendant, Mr Hall, and his family.

4. There is nothing in the evidence to suggest that Mr Hall links those allegations, or threats, to the mediation process at all. When Mr Watts was told of it, and his solicitors got in touch with those two people, it appears that the solicitors suggested that this must have arisen, if at all, at the mediation process. Indeed, it is common ground that this was the only occasion when events such as Mr Hall alleges could have occurred. Mr Watts became aware of Mr Hall's supposed allegations at the end of November, and it is only fair to say that Mr Hall stated in a witness statement (of very recent date) that he made no such reports or allegations to either Mr Smith or to anybody else.

5. The next event was that something in the region of a week after becoming aware of what it was reported to him that Mr Hall was saying, Mr Watts took advice from the solicitors advising his company in the main action. There then followed a fairly lengthy delay; that is from 7 December 2004 (when Mr Watts took advice) to 20 January 2005, when a communication came from those solicitors, to the solicitors acting for Mr Hall in the main proceeding, asking whether they should write to Mr Hall direct. That is a period of something over six weeks. That delay is justified by the claimant by saying that it includes the Christmas period; that a team of leading and junior counsel and solicitors had to be got together; and that, in any event, it was all very complicated to decide what should be done about these allegations.

6. After the letter of 20 January 2005, there was a certain amount of to-ing and fro-ing, as to whether or not communication should be made with Mr Hall direct, or with the solicitors, whether Mr Hall was available to give instructions, and the like. Eventually, on 1 February 2005, the claimant sought undertakings from Mr Hall (in broad terms) and indicating that if no undertakings were given, proceedings would be launched. The undertakings sought, incidentally, included a requirement to deliver up a list of everyone to whom communications had been made. The particulars of claim were issued on 11 February, after a certain amount more to-ing and fro-ing. The application for injunction was made the same day and the matter was then listed and comes before me.

7. The claimant says that an injunction should be granted to restrain this breach of confidence. The argument, which is advanced, is (at this interlocutory stage): first of all, I should consider whether or not an injunction is an appropriate remedy at all: and, clearly, it is. Second, I should then go through the well-known tests in American Cyanamid Co v Ethicon Ltd (HL) 2 WLR 316: look and see whether there is a real issue to be tried and look for balance of convenience.

8. The assertions made on behalf of the claimant (so far as that is concerned) are that, in general, "without prejudice" discussions, of any form, are to be protected and are not to be allowed to be brought into the public arena. I was referred, in particular, to Unilever v Proctor & Gamble [2000] WLR 2436, and to the exceptions as to when "without prejudice" negotiations can be put before a court, set out in the judgment of Walker LJ (as he then was) at page 2444. What was said was that, in this instance, the allegations made related to something that took place in the course of a mediation meeting and was, therefore, covered by the banner of "without prejudice", and the only exception that was being sought to be relied on was the unambiguous impropriety exception. Walker LJ said this about that exception:

> "The following are among the most important instances, ie exceptions, for apart from any concluded contract or estoppel, one party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety" (the expression used by Hoffmann LJ in Foster v Friedland, November 10, 1992, CAT 1052). Examples (helpfully collected in Foskett's Law & Practice of Compromise, 4th ed., paragraphs 9-32) are two first- instances decisions, Finch v Wilson (May 8, 1987) and Hawick Jersey International v Caplan (The Times, March 11, 1988). This court has, in Foster v Friedland and Fazil-Alizadeh v Nikbin, 1993 CAT 205, warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion."

9. In this particular case, what we have is (at an interlocutory stage) a serious question to be tried as to what did pass between Mr Watts and Mr Hall in the course of the mediation meeting; and that, in those circumstances, it is not possible for the defendant to rely on that exception to the rule, because, at this stage, there is (putting it at its lowest) a serious

question to be tried as to whether or not there was anything said, or done, which could amount to impropriety.

10. The points that are taken against that fairly simple way of putting the matter are that: firstly, the delay (to which I have already referred) is excessive; secondly, that the allegation made is an allegation of something which could not properly be part of a bona fide mediation process and is not, therefore, covered by it; thirdly, that the evidence as to what was said is too skimpy, in particular, because there is no evidence that what Mr Hall is said to have said to Mr Smith, or Mr Gold or anyone else, was in relation to anything that happened in the mediation; firstly it is said, in any event, there is a need for irreparable damage and that no such irreparable damage can be shown.

11. In general terms there is clearly a serious issue to be tried: first as to what took place between Mr Watts and Mr Hall; secondly, as to what took place between Mr Hall and the two gentlemen to whom he is alleged to have communicated. It does not matter that Mr Hall did not identify to those two gentlemen where it was that the matters, of which he complained, were supposedly said. You cannot escape from the problem of being in breach of confidence merely by failing to identify what your source is, or where you got your information. Mediation proceedings do have to be guarded with great care. The whole point of mediation proceedings is that the parties can be frank and open with each other, and that what is revealed in the course of the mediation proceedings is not to be used for or against either party in the litigation, if mediation proceedings fail. In clause 48, of the document governing the mediation process in the present case, it said as follows:

> "48.1 The ADR process is a bona fide attempt to resolve the disputes between the parties, and consequently the entire process is conducted on a without prejudice basis save for the purposes of enforcing any settlement agreement. All communications, documents and meetings shall be deemed private and confidential. No information arising from the process (including the fact that an ADR Process is to take place or has taken place) shall be disclosed by the parties, or the Neutral to any non-party.
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> 48.2 No statement, document or other information, whether oral or in writing, made in or arising out of the process shall be discoverable or admissible in any other proceedings, whether in a court of law, in arbitration or otherwise howsoever, save that in any statement, document or other information which is otherwise discoverable or admissible shall not become non-admissible merely by virtue of its use in or in connection with the ADR process."

12. In this case if it is properly said that what took place between Mr Watts and Mr Hall was a true part of the mediation process, it was covered by the confidentiality provision and should, therefore, be protected. Whether it is then appropriate to protect it depends on the usual interlocutory injunction provisions, but also depends on a view being taken as to whether what was said and done fell within the ambit of confidentiality.

13. I should at this point (in passing) dispose of a point that was made. That is: there is no confidentiality in this case because the matters involved have been mentioned in open court on at least two previous occasions. That does not seem to me to be a good point. It is, I think, obvious from the fact that neither side has referred to any further publicity arising from those two earlier mentions in open court, that no widespread publication resulted. The fact that there has been some further breach does not seem to me to be a valid reason for refusing an injunction, if the injunction would otherwise serve a useful purpose.

14. Turning now to the question: was this a genuine part of the mediation process? It seems to me that that cannot be a matter, which I resolve at this interlocutory stage. The issue before me is: can it properly be said that the exchange was part of the mediation process on (at any rate) one view of the facts? It seems to me that it can be so said. On the one hand, we have Mr Hall and his fiancée's account of what occurred. On the other hand, we have Mr Watts' account of what occurred. If Mr Watts' account is accepted, then the material about which Mr Hall complains was material about which he cannot properly complain because, although Mr Watts was putting a macho face on it, it was something which could properly fall within the scope of hard bargaining in the course of a mediation. On the other hand, if Mr Hall's account is preferred then, clearly, it did not. That is something for trial and not for determination at this stage.

15. The question then is, is there any reason for granting an injunction starting from the premise that: (1) there is a triable issue as to what was said at the mediation process; (2) there is a triable issue as to whether or not that was within the proper ambit of the mediation process, and so protected; and (3) there is a triable issue as to what Mr Hall, thereafter, said. It is said (as I have indicated) there has been delay and that, in any event, there is no evidence of pecuniary damage.

16. I will return to delay but, so far as evidence of pecuniary damage is concerned, it does not seem to me that that assists the defendant. Because the point about an injunction is, frequently, that it is to protect somebody's right when the infringement of that right will not produce any identifiable, or quantifiable, monetary loss. In a case such as this, where allegations of this sort are made, it seems to me that is precisely the sort of case where damage may be done, rather than that pecuniary loss may be suffered.

17. What then of the delay? This, I think, ties in with the other question which has raised its head and that is: is there any likelihood of repetition? Steps were taken fairly tardily (it has to be said) about the matters complained of. There has been no indication of any knowledge of any repetition. I am asked to infer that there is a likelihood of repetition. On the other hand, I am told that I should look only at the evidence that is before me, which shows only (at best) three instances where there has been a breach.

18. So, what do I have to look at to see whether I feel that, if this injunction were to be refused, Mr Hall would be likely to make further allegations? There is no evidence to support any suggestion that he would be likely to say anything in relation to any other part of the mediation process, but there are indicia which (it seems to me) suggest that he might, in future, think it desirable to reiterate what he has already said: first of all, if he feels that he has won today that may loosen his tongue in a way, in which he may have felt it was not loose while the proceedings were hanging over him; secondly, there is a considerable volume of evidence before me which I looked at (but which was not

referred to in the course of the hearing) which is evidence immaterial to this application but which does seem to me to show, clearly, that Mr Hall is very ready to seek to put into the public domain anything which he thinks may be to the disadvantage, or detriment, of the claimant; more particularly, Mr Watts, who, if not its alter ego, is (at least) its leading light.

19. I am further encouraged in this view by the length of time that it took for any denial to come out, from Mr Hall, as to the truth of the allegations made by those who say that they were spoken to by Mr Hall. I have also looked at the totality of the solicitors' correspondence. It does seem to me that it indicates a readiness to stretch, to the limit, what their client thinks (no doubt on advice) he is entitled to do and say. I bear in mind that an attempt was made to drag these wholly irrelevant matters (irrelevant that is as to the main action) into the main action. All of those lead me to the view that there is a real risk that (unless restrained) Mr Hall may see fit to repeat the allegations he is supposed to have made.

20. What then is the downside? The downside would be: firstly, if the claimant were not good for the money on any cross undertaking. The evidence which has been put in on behalf of the defendant, (the claimant has put no evidence in about means) in an incidental attempt to blacken the name of the claimant, does throw up evidence which suggests the claimant is in a fairly substantial way of business and would be good for a reasonable sum of damages on any cross undertaking. Secondly, there is nothing in the evidence before me which suggests that it might, realistically, be expected that Mr Hall would suffer a penny piece worth of damages if it proved, at trial, that the threats which he alleges were in fact made and that he did not, as he asserts, communicate them; and/or that the threats (if made) were not covered by the blanket of the privilege conveyed by the mediation agreement.

21. There has been a good deal of high sounding stuff, in the course of the submissions to me, about how important this case is and what awful effects it might have on mediations, and things of that sort. It does not seem to me that any of those submissions have had any great contact with reality. It seems to me that this is a case founded in confidence, it is not a case founded in defamation. If it were founded in defamation, then very different questions as to whether an injunction should be granted would arise.

22. Although one would have wished to see the claimant being rather quicker off the mark than, in fact, it was in launching these proceedings, I take the view that the balance of justice is best served by granting interlocutory relief to the claimant; although only in relation to paragraph 1 of the application form and, certainly, not in as wide a form as the application suggests. There is no hint in any of the evidence that Mr Hall has threatened, has disclosed or is likely to disclose, anything arising out of the mediation process, other than in relation to those allegations that he has sought to make arising out of the meeting face-to-face between himself and Mr Watts.

23. I, therefore, take the view that, pending trial of this action or further order, Mr Hall should be restrained from referring to, or disclosing (either verbally or in writing) to any other person (natural or corporate) any part of the discussion which took place, between himself and Mr Watts, in the course of the mediation process on 24 May 2004, or the content of any document produced in consequence of, or arising out of, that

meeting. It was accepted by both sides that there is, implicitly, an exception for the purpose of making any appropriate report to the police and, therefore, the order must include an exception so that (in the unlikely event that the police show any signs of taking any further interest in this matter) Mr Hall is not prevented from responding to any such enquiries as they may make.

24. It follows also from my judgment that the application to strike out fails and will be dismissed.

25. So far as the costs of the claimant's application: I propose to say that they should be the claimant's costs in the cause, because it does seem to me that there is some substance in the point that it is possible it will end up (at the end of the day) with the whole of the claimant's case being blown out of the water on a factual basis.

26. So far as the costs of the strikeout application: those will be the claimant's costs, in any event. That ensures there will not be a taxation until the end of the proceedings. I will, however, make an order on account of costs of £7,500 in relation to the first strikeout application. I am reinforced in making the costs of the claimant's application claimant's costs in the cause, because it is clear that both sides here are well able to fund litigation of this sort (or at least are giving every appearance of being well able to do so) and that the costs, pro rata, that have been incurred in these applications are pretty small beer compared with the costs that have been incurred in all the other parts of the proceedings between them. Although it is not now a popular order, it seems to me that it is the appropriate order in the particular circumstances of the case.