

ATTORNEY GENERAL v. VINALES (No. 2)

Supreme Court (in chambers)

Spry, C.J.

23 November 1979

*Practice and procedure (Civil) — application for injunction — whether Attorney General should be required to give undertaking in damages*

*Crown — application for injunction by — whether undertaking in damages should be required*

*injunction — whether undertaking in damages should be required of the Attorney General*

This was a further application for the lifting of an ex parte injunction (see *Attorney General v. Viñales* (1979) 115 L.R. 65). It is reported only as regards a submission that if the injunction were to be maintained, the Attorney General should be required to give an undertaking in damages.

HELD: The matter was analogous to a law enforcement proceeding and in the circumstances the Attorney General would not be required to give an undertaking in damages.

Case referred to in the order

*F. Hoffman-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* [1975] A.C. 295

Summons

This was an application by summons for the discharge of an interim ex parte injunction.

L.W. Triay and J.J. Neish for the applicant

C. Finch for the Attorney General

26 November 1979: The following order was read —

This is another application arising out of the injunctions I granted in this matter on the application of the Attorney General freezing certain bank accounts and preserving certain records.

[After dealing with preliminary matters, the order continues]

Mr Triay began his main argument by submitting that the court had no power to grant the injunctions. He argued eloquently

and forcefully, but he advanced no arguments and cited no authorities that I had not already considered on an application made by Sir Joshua Hassan Q.C., on behalf of Edward Mario Victory, Edward L. Victory and Dorothy A. Aleman. I am not persuaded that I should abandon the conclusions I reached in the order I gave on 5 November 1979. I am fully aware that my decision is not backed by any direct authority and that there are authorities, to which I accord the greatest respect, which are persuasive to the opposite effect. But I am faced with a problem that does not appear to have been considered in any reported case. I rely now on the reasons I gave in rejecting Sir Joshua's application and I do not propose to repeat them. I will only add, in relation to *Malone's* case, that in extending the common law, if that is what I did, my purpose was not primarily to aid the implementation of a modern statute (the Misuse of Drugs Ordinance, 1973) but to apply a common law principle of respectable antiquity, that is, that a criminal shall not profit by his crime.

[The Chief Justice then considered a submission regarding the sufficiency of the evidence.]

Next, Mr Triay asked that if the injunction were to be maintained, it should be only on the basis of the Attorney General giving an undertaking in damages. Mr Finch opposed this, arguing that the Crown is not asked to give such an undertaking when it applies for an injunction. Neither of counsel cited any authority.

The power to grant injunctions is contained in s.22 of the Supreme Court Ordinance, which gives this court all the jurisdiction and powers of the High Court in England, and those, of course, include the jurisdiction conferred on that court by s.45 of the Supreme Court of Judicature (Consolidation) Act 1925. In England there was, prior to 1947, a general rule that when the Crown sought an injunction, it was not asked to give the undertaking in damages that is almost automatic in actions between subjects. That was changed by the Crown Proceedings Act, 1948, of which the local equivalent is the Crown Proceedings Ordinance, s.14 (1) of the latter corresponding with s. 21 (1) of the former.

The leading authority on the present position is *F. Hoffman-La Roche & Co. A.G. v. Secretary of State for Trade and Industry* (1), I think it may be summarized as follows: where the Crown applies for an injunction to enforce or protect its proprietary or contractual rights, it should be put upon the same terms as a subject as

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(1) [1975] A.C. 295.

respects the undertaking; where, however, it seeks an injunction to restrain a subject from breaking the law, that is to say to protect the *jus publicum*, an undertaking should not be required as a matter of course but the propriety of such a requirement should be considered in all the circumstances of the case. The present case is certainly not one where the Crown is seeking to enforce or protect a proprietary or contractual right. It is not strictly a law enforcement proceeding, although much nearer that category. I think, therefore, that the decision whether or not to require an undertaking must depend on all the circumstances.

An undertaking should, I think, only be required where a right, at the least a moral right, to compensation would necessarily follow success in the proceedings. It is impossible to foresee the outcome of these matters. It is not a simple matter of one side or the other proving substantially successful. It is not inconceivable that the funds in issue might be proved conclusively to be the proceeds of an offence against the Misuse of Drugs Ordinance, 1973, without any person being convicted. In such an event there could be forfeiture but no court would award more than nominal, if any, damages. If, however, the Attorney General had given an undertaking he would have to honour it. That shows, in my opinion, that this is not a case for an undertaking.

This may seem harsh but it is analogous to the position of a man who has been charged with a serious offence and deprived of his liberty but who is ultimately acquitted, he has no right to compensation. I see no reason, however, why the possible loss should not be mitigated. The moneys on current account might be transferred to a deposit account, with the injunction extended to cover that account. In present circumstances, they would earn useful interest. I would be prepared to entertain an informal application to amend the injunction if this were sought.

I was at first concerned lest hardship should result from this injunction but Mr Triay assured me that this is not the case. He said that this application is being brought partly as a matter of principle and partly because the applicants wish to be free to use their funds to their best advantage.