FOURTH SUPPLEMENT TO THE
GIBRALTAR GAZETTE L.R. 5/79

No. 1,876 of 17th APRIL, 1980.

LAW REPORTS

Note: These Reports are cited thus --
(1979) Gib. L.R.

BARCLAYS BANK INTERNATIONAL Ltd. v. ATTORNEY GENERAL
Supreme Court (in chambers)
Spry, C.J.
23 October 1979

Practice and procedure (Civil) — whether person affected by order made ex parte may seek declaratory order on it — RSC Ord. 5, r.4; Ord. 32, r.6
Practice and procedure — whether application for injunction in aid of criminal proceedings should be brought as a civil application
Practice and procedure (Civil) — whether applications for supplementary injunctions must each be supported by affidavit
Practice and procedure (Civil)— injunctions in aid of criminal proceedings — whether all persons affected should be made parties
Practice and procedure (Civil) — injunction freezing bank account — whether holder should be served
Practice and procedure (Civil) — whether persons served with injunctions made ex parte should receive also copies of the affidavit which supported the application
Jurisdiction — whether Chief Justice a justice of the peace
Injunction — whether permissible to freeze bank account in anticipation of forfeiture order
Crime — controlled drugs — injunction to freeze money suspected of being proceeds of illegal transactions.
Injunction — whether binding after notice but before service
Police — search warrant — whether general authority to search records of bank permissible

The Attorney General applied ex parte for an injunction to freeze certain bank accounts and for authority for police and revenue officers to search for and seize documents reasonably suspected of relating to dealings in controlled drugs both in relation to named accounts and generally. Barclays Bank International Ltd. was notified of the making of the injunction and later formally served with the order. The bank did not apply to

have the order set aside but did take out an originating summons for a declaratory order regarding what it considered irregularities both of form and substance.

HELD: (i) If the bank had a serious doubt as to the propriety of the order, it was right for it to move the court, and although the court does not ordinarily decide academic or hypothetical questions, the application would be entertained because it involved questions of great public importance.

(ii) An application brought ex parte for an injunction in aid of criminal proceedings should be brought as a civil application.

(iii) Every application for an injunction must be supported by an affidavit but in cases of extreme urgency, an undertaking to file an affidavit will be accepted.

(iv) Where an injunction is sought in aid of criminal proceedings, it is not necessary to make all persons who may be affected by it parties,, and it is undesirable unless they have been or are about to be charged.

(v) Where an injunction operates to freeze a bank account, the holder of the account should be notified immediately and served as soon as possible with the order.

(vi) Every person against whom an order is made ex parte must be served with a copy of the affidavit which supported the application for it, although in exceptional cases the court may give leave for the affidavit to be edited by the exclusion of matter relating to a criminal investigation which does not directly affect the person being served and ought to remain confidential.

(vii) The Chief Justice is ex officio a justice of the peace.

(viii) An order may be made freezing funds which are reasonably believed to be the proceeds of the illegal importation or supply of controlled drugs.

(ix) A person is bound by an injunction restraining him from doing an act from the moment he has credible notice of it.

(x) In exceptional cases, police and revenue officers may be given authority to search the records of any accounts in a bank which are suspected on reasonable grounds of relating to dealings in controlled drugs.

Cases referred to in the order
Malone v. Commissioner of Police of the Metropolis
[1979] 1 All E. R. 256
Gouriet v. Union of Post Office Workers
[1977] 3 All E.R. 70
R. v. Inland Revenue Commissioners, ex p. Rossminster Ltd.
Husson v Husson [1962] 1 W.L.R. 1434.

Originating summons

This was an originating summons for a declaratory order on the propriety of an injunction issued ex parte.

J. E. Triay and P. Caruana for the applicant
C. Finch for the respondent

29 October 1979: The following order was read —

This is an application by Barclays Bank International Ltd., for a declaratory order. It arises out of certain injunctions and search warrants issued by me in proceedings intituled Reg. v. Viñales. Briefly, these were based on an allegation that there had been an operation on an enormous scale for the importation of cannabis into England. It was further alleged that moneys employed in this operation or the profits from it had been credited to bank accounts in Gibraltar and had been switched from one account to another.

Mr Finch, on behalf of the Attorney General, first appeared before me on 20 September 1979, applying for an immediate interim injunction forbidding any dealing with the records of or the funds in a numbered account at Galliano's Bank. He applied also for authority to search that bank for, and to seize and detain, any documents reasonably suspected of relating to unlawful trafficking in drugs or gold. The application was supported by an affidavit. It was heard ex parte and I made the order sought.

I subsequently heard eight further applications in the same matter. I do not think it necessary to go into detail. All these applications were heard at short notice as matters of urgency. None was supported by affidavit. I granted a further five injunctions against dealings with accounts in the names of various people and three warrants for searches at Barclays Bank International Ltd., the Algemene Bank and the Banque de l'Indo-Chine et de Suez. The search warrants were expressed to apply, but were not limited to, certain named accounts.

The first question asked in the originating summons was whether Barclays, as bankers, were either in duty bound to

their customers or otherwise entitled to place before the court any objection of substance or procedure which might affect or be thought to affect their duty to comply strictly with the orders that had been made.

Mr J.E. Triay, who appeared for Barclays, conceded that irregularities in the proceedings would not mean that the orders were nullities, but he submitted that if there were irregularities, it was the duty of Barclays to raise the matter earlier rather than later. The bank was concerned whether failure to do so might not in certain eventualities be held to amount to negligence towards its customers.

Mr Finch readily conceded that it is always open to any person affected by an order of a court made ex parte to raise any grievance or objection either by originating process or in the proceedings already instituted.

The matter is not quite so simple. I accept that a person adversely affected by an order made ex parte is entitled under RSC Ord. 32, r.6, to move the court to set it aside. Here, however, Barclays are not asking for the setting aside of any of the orders I have made. Instead, the bank is asking for a declaratory order deciding certain largely, but not exclusively, procedural questions. The court does not ordinarily decide academic or hypothetical questions. I think, however, that if the bank had serious doubts as to the propriety of the orders made, it was right to move the court. I think Ord. 5, r.4(2) empowers me to entertain the application and I think I should do so because it involves issues of great public importance.

I pass to the second question posed in the originating summons, which was whether certain matters, which were set out in the form of six propositions, affected or diminished the duty on the part of Barclays strictly to comply with the terms of the orders I had made.

The first of these propositions was that the power to grant warrants upon information on oath is conferred upon justices of the peace by s. 18(3) of the Misuse of Drugs Ordinance, 1973, but had been exercised by the Chief Justice ex parte and apparently otherwise than upon sworn testimony.

On the first part of this proposition, Mr Finch submitted that the Chief Justice is ex officio a justice of the peace, since s.22 of the Supreme Court Ordinance gives the court "all the jurisdiction, powers and authorities" of the High Court of Justice in

England and the judges of that court are ex officio justices of the peace (see Halsbury, 3rd Ed. Vol. 25, p.110,para198). Mr Triay conceded this.

On the second part of the proposition, Mr Triay had not been aware that the first application had been supported by affidavit. Mr Finch stated that he had thought of the other applications as a continuing process based on the evidence contained in the affidavit supporting the first application but undertook, if required, to furnish affidavits verifying the facts justifying the extension of the injunctions and warrants to the persons and banks named. In my opinion, every such application should be supported by affidavit or, in cases of extreme urgency, by an undertaking to file an affidavit as soon as possible. I had intended to ask for such undertakings but omitted to do so. Accordingly, the Attorney General is now requested to file affidavits supporting all of the applications for injunctions and search warrants, apart from the first, as soon as practicable.

The second proposition was that orders which seriously affect the rights of privacy and of enjoyment and use of property of the customers of the bank should not be made ex parte in proceedings to which they are not parties. Mr Triay argued that it would be inconceivable in civil proceedings that an injunction should be granted against a person who was not a party, and there was even more need for such a rule in criminal proceedings. He submitted that the Attorney General should only seek an injunction freezing an account where he was satisfied that the moneys in the account belonged to a person who had been guilty of an offence and only on information which would justify laying charges.

I do not think that there is any rule that requires an account holder to be made a party to proceedings of this nature before an injunction can be issued, and I think it undesirable to make a person a party to proceedings relating to pending criminal charges unless he has been or is about to be charged. What is important is that he should receive immediate notice, a subject to which I shall return. Moreover, assuming that injunctions of this nature can be justified, another matter to which I shall return, it is obviously essential for the Attorney General to move quickly and the need for an injunction may become apparent before there is enough evidence to justify charging a particular individual. The essential question at this stage is whether the

moneys in the account are tainted, not whether the holder of the account has been guilty of an offence.

The third proposition is that there is no provision in the Misuse of Drugs Ordinance, 1973, the Criminal Justice Administration Ordinance or any other part of the criminal law that gives specific statutory authority for the granting of injunctions restraining dealings with moneys or choses in action suspected of being related to or connected with the commission of an offence against the Misuse of Drugs Ordinance or authorizing the seizure and detention of any property or chose in action other than drugs and documents. I would mention in passing that it was not argued that there was anything improper about the injunctions so far as they prevented interference with or disposal of the records of the bank relating to specified accounts, clearly a matter of the preservation of evidence.

Mr. Triay said that he was not aware of any authority for or against the grant of injunctions freezing bank accounts in anticipation of criminal proceedings. Mr. Finch was not able to cite any and I knew of none at the time of the hearing. Mr. Triay suggested that the injunctions I granted were analogous to *Mareva* injunctions: with respect. I do not think the comparison serves any useful purpose.

Mr. Triay assumed that the injunctions were granted to preserve funds which might in due course be declared forfeit to the Crown. Mr. Finch, while accepting this as a factor, argued also that the injunctions were necessary for the preservation of evidence. Mr. Triay responded by submitting that the funds in a bank account are not in themselves evidence: the funds may be withdrawn but the evidence remains.

On this issue, I accept Mr. Triay's submissions. Certainly what I had in mind when granting the injunctions was that the funds might in due course be declared forfeit. I would not have frozen the accounts to preserve evidence, because I do not think it necessary for that purpose. It is perhaps unfortunate that the purpose of the injunctions was not made clear in the applications for them or in the orders themselves but, as I have said, they were dealt with as matters of great urgency.

The grant of the applications was an extraordinary measure and one which should, I think, only be taken, if at all, in extra-

ordinary circumstances, because it represented a grave invasion of private rights. But the circumstances here were extraordinary. The offence which is alleged is a very grave one, which carries a maximum penalty, both in Gibraltar and in England, of fourteen years' imprisonment. It was a continuing offence or series of offences on a very large scale: according to the affidavit filed in support of the first application, controlled drugs to a value in excess of £30m had been recovered and I am informed that over £2.5m are known to have come into Gibraltar from an account in an English bank, which is believed to have held the proceeds of illicit sales of controlled drugs.

It is open to the holders of the frozen accounts to apply to the court for the lifting of the injunctions and such applications will be given the highest priority. One such application has already been heard and allowed.

Since this application was argued, I have studied *Malone v. Commissioner of Police of the Metropolis* (1), a case to which neither of counsel referred. It is strong persuasive authority for the proposition that there is no power in the court to deprive a defendant of his property, even for a time, so as to be able later to exercise the power of forfeiture and, a fortiori, if such an order cannot be made against a defendant, it would be even more wrong to make one against a person who has not been charged.

I have considered whether I ought not to ask counsel to address me on the case before I make any order in these proceedings but I have decided that it is unnecessary. The decision was based on the fact that the money in issue was claimed and admitted to be the property of the plaintiff: in these ex parte proceedings, it cannot be assumed that the holders of the bank accounts will claim to be the beneficial owners of the moneys in those accounts. If those moneys are proved to be the proceeds of the illegal importation or supply of controlled drugs, it is quite possible that the defence may be advanced that the holders of the accounts, or some of them, were innocent agents or nominees. The principle underlying *Malone's* case is therefore inapplicable at this stage and in these proceedings.

Before leaving this subject, I should mention a submission by Mr. Triay that the civil law must never be used to avoid the burden of proof on the Crown against the subject imposed by

(1) [1979] 1 All E.R. 256.

the criminal law or to lessen the consequences of the presumption of innocence. As a general proposition, I agree entirely with that submission but, with respect, I think it is irrelevant here. I desire to stress what I have already said, that the making of these interim injunctions does not in itself impute any allegation of criminality on the part of the holders of the bank accounts: it rests on a reasonable and strong suspicion that the funds in those accounts are tainted. The holders are presumed innocent of any offence until the contrary is proved.

It may be convenient to consider here the form of the proceedings, which was argued under the second proposition but is related also to the third. The application for the initial injunction and search warrant was brought as a miscellaneous application, headed "Crown Court Matters" and intituled "Regina v. Ambrosio Viñales". Viñales was a person named in a conspiracy charge brought against fifteen persons in the United Kingdom and it was his bank account that it was sought to freeze. The subsequent applications were similarly headed and treated as part of one proceeding.

In England, it would seem that applications for injunctions in aid of criminal processes are always made to the Chancery Division. Hence a remark by Viscount Dilhorne in *Gouriet v. Union of Post Office Workers* (1) that

> "Instances of applications by Attorneys-General to the civil courts for aid in enforcing the criminal law are few in number and exceptional in character."

In Gibraltar, there is a Supreme Court, which under s.56 of the Constitution is a court of unlimited jurisdiction to hear and determine any civil or criminal proceedings. It consists of one judge, the Chief Justice. It follows that it has no Divisions and it may exercise any of its powers in any proceedings. There is no question of criminal or civil courts.

On the other hand, the Rules of the Supreme Court, 1965, of England were applied to all original civil proceedings in the Supreme Court by r. 8(1) of the Supreme Court Rules, 1979, so that the court enjoys the express power to grant injunctions conferred by Ord. 29, r.1, while an injunction could only be granted in criminal proceedings, in the absence of express statutory authority, by invoking the inherent jurisdiction of the court. As a general principle, the inherent jurisdiction should not be invoked if there is an express power available. I think, therefore, that as a matter of procedure, the application should

(1) [1977] 3 All E.R. 70, at p. 90.

have been treated as a civil one and the parties should have been cited as "Attorney General v. Viñales". The reference to "Crown Court Matters" was in any case inappropriate and should not have been inserted: the Supreme Court follows the practice of the Crown Court in England (Criminal Justice Administration Ordinance, s. 135) but it is not a Crown Court. These are, however, mere procedural irregularities and in no way affect the validity of the orders made.

The fourth proposition related to the search warrants and was that they should have been limited so as not to go beyond the evidence that had been sworn. Mr. Triay submitted that evidence which justified searching one account should not have been used to authorize a general search. This again involves an issue of public importance, because an authority to search a bank is an invasion of the rights not only of the bank itself but also of every customer of the bank. No authority was cited for or against this proposition.

The practical difficulty that faced the investigating officers was that the suspect funds appeared to have been switched from account to account. Whenever one account was searched, it showed links with other accounts, from which or to which moneys had been transferred. Every such link had to be investigated, before it could be known if it was relevant or not. If a separate application had to be made for authority to search each account as each such link was revealed, it would seriously have slowed down the investigation.

I did have in mind the case of *R. v. Inland Revenue Commissioners, ex p. Rossminster Ltd.* (I have available only a short report which appeared in the Law Society's Gazette.) (1) That was a case where a search warrant was issued under s. 20C of the Taxes Management Act 1970, as amended by the Finance Act 1976. The Act gives an extremely wide power of search, whenever there is reasonable ground "for suspecting that an offence involving any form of fraud in connection with, or in relation to tax has been committed." Lord Denning is quoted as saying

> "the trouble was that s. 20C was drawn so widely that in some hands it might be an instrument of oppression. Once great power was granted there was a risk of its being abused so it was the duty of the court to construe a statute in such a way that it encroached

(1) Since reported at [1979] 3 All E.R. 385; the decision has subsequently been reversed, see [1980] 1 All E.R. 80.

> as little as possible on the liberty of the people of England. The warrant was challenged because it did not specify any particular offence. The words were so vague and general that it was exceedingly difficult for the Revenue officers to know what they could and could not take. A general warrant of this kind was so wide that the Revenue officers might seize almost all a man's documents".

The warrant was held to be bad.

In the present case, a specific offence was not alleged but the earlier warrants were limited to documents and records relating to "illegal trafficking in dangerous drugs" and this was corrected to "the illegal importation or supply of controlled drugs" in the last warrant. I think they were sufficiently specific.

The general power of search was not as wide as it might at first seem. The police and revenue officers had no authority to look at the records relating to any account unless they had reasonable grounds for suspecting that they related to drug offences or the proceeds of them. Even so, the warrants were far wider than I would ordinarily grant and were granted only because of the exceptional character of the alleged offence. In the circumstances, I am not persuaded that they went beyond what was justified.

The last two propositions covered substantially the same ground, that Barclays had been required to act on orders otherwise than after service of sealed copies of them. The bank had been notified orally of the orders and had been shown what amounted to drafts of the formal orders. Mr. Triay argued that it was undesirable that a bank should be exposed to criticism for acting without written authority.

I think it is necessary to distinguish here between the injunctions and the warrants. I think the Attorney General was entitled to bring the injunctions to the notice of the bank immediately and I have no doubt that the bank was under a duty to comply with the injunction from the time it had notice of it. In *Husson v. Husson* (1) Lyell, J., said

> "A person cannot be held guilty of contempt in infringing an order of the court of which he knows nothing...An order requiring a person to do an act must

(1) [1962] 1 W.L.R. 1434.

> be served upon him. If it is not served, committal proceedings for breach of the order do not lie. If, however, the order is to restrain the doing of an act, the person restrained may be committed for breach of it if in fact he has notice of it, either by his presence in court when it is made, or by being served with it, or notified of it by telegram or in any other way."

It was, of course, the duty of the Attorney General to serve an office copy of the order on the bank as soon as possible but the bank's duty arose the moment it had credible notice of the making of the order.

I introduced here a point of my own motion. In my opinion, the holders of the accounts frozen should have been notified immediately of the injunctions, so as to save them from the embarrassment of drawing cheques which would have to be dishonoured, and they should have been served, as soon as possible, with office copies of the orders affecting them.

Mr. Triay also argued that Barclays should not only have been served with the formal order but also with the affidavit that supported the application. Mr. Finch sought to resist this, basing his argument on the fact that details of a police investigation are always confidential. I cannot agree. I think that anyone against whom any order is made ex parte must be entitled to know the grounds on which it was made. I would only qualify this by saying that I think the Attorney General might, in an appropriate case, ask that the affidavit supporting an application be edited before it is required to be served on a person affected. The Attorney General, in seeking to persuade the court that an injunction is necessary, may think it proper to disclose the current state of the investigation, including matters not affecting a particular individual. In such circumstances, I think the Attorney General might properly ask leave to exclude such matters from the copy to be served. Subject to this, I think that everyone served with an injunction should also be served with a copy of the affidavit that justified it, so as to know the case he has to answer if he moves to have the injunction lifted.

I was not addressed on the service of the search warrants and I do not know the facts. I shall therefore say nothing on this subject.

To conclude, I think there were irregularities—

(*a*) in that the second and subsequent applications were not supported by affidavit;

(b) in that the proceedings, as civil proceedings, should have been intituled "Attorney General v. Viñales;

(c) in that the holder of each account frozen should have been given notice of the freezing of his account and should have been served with an office copy of the relevant injunction and, subject to any specific order of the court, with a copy of the affidavit which supported the application.

Apart from these points, I am not persuaded that there has been, in all the circumstances and on the information presently before the court, any irregularity in the proceedings and certainly none such as to relieve Barclays in any way of its duty strictly to comply with the orders of the court.

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