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[1988–90 Gib LR 127]

WIMPEY HOMES HOLDINGS LIMITED and J & J GOLF HOLDINGS LIMITED v. JAMES and SUNHOMES INTERNATIONAL (GIBRALTAR) LIMITED

SUPREME COURT (Alcantara, A.J.): January 10th, 1989

Courts—contempt of court—civil contempt—placing reasonable and circumspect advertisement for purpose of obtaining evidence in support of case not contempt—whether advertisement reasonable and circumspect dependent on facts of case

The applicant sought the committal of the respondent for contempt of court.

The respondent, the sole administrator of a construction company, placed an advertisement in an English-language newspaper published in Spain and widely circulated both there and in Gibraltar seeking evidence for a suit against the applicant.

The applicant submitted that (a) contempt of court was not limited to conduct prejudicing the fair trial of actions by influencing the tribunal before which they were being held, but extended to any conduct calculated to hinder litigants in the exercise of their rights; and (b) the advertisement was calculated to interfere with the course of justice in that it had the effect of exerting improper pressure on the applicant to desist from pursuing its rights as a litigant.

The respondent submitted in reply that (a) the standard of proof for committal was high, the proceedings being criminal, and the applicant had not fulfilled it; and (b) while it was true that the scope of contempt of court was not limited to conduct designed to influence a tribunal, authority supported the proposition that the insertion of an advertisement for the purpose of obtaining evidence did not constitute contempt of court.

Held, refusing the application:

The placement of a reasonable and circumspect advertisement for the purpose of obtaining evidence to mount or to defend a case did not generally constitute contempt of court, although much depended on the facts of the case. The advertisement placed by the respondent was within the limits of what was legitimate and did not constitute a contempt of court (paras. 12–13).

Cases cited:

(1) *Att.-Gen.* v. *Times Newsp. Ltd.*, [1974] A.C. 273; [1973] 3 W.L.R. 298;

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[1973] 3 All E.R. 54; (1973), 117 Sol. Jo. 617, *dicta* of Lord Diplock distinguished.
(2) *Brodribb* v. *Brodribb* (1886), 11 P.D. 66; 50 J.P. 407; 55 L.J.P. 47; 56 L.T. 672, referred to.
(3) *Butler* v. *Butler* (1888), 13 P.D. 73; 57 L.J.P. 42; 58 L.T. 563, referred to.
(4) *Plating Co.* v. *Farquharson* (1881), 17 Ch. D. 49; [1881–5] All E.R. Rep. 303; 50 L.J. Ch. 406; 45 J.P. 568; 44 L.T. 389, applied.

I. Marrache and *S.V. Catania* for the applicant;
J.E. Triay, Q.C. and *F.X. Triay* for the respondent.

1 **ALCANTARA, A.J.:** This is an application by Wimpey Homes Holdings Ltd. under the Rules of the Supreme Court, O.52 r.1. It seeks the committal of the respondent, Alan James, for contempt of court and an order for costs against the respondent.

2 The alleged contempt is the publication of an advertisement in the issue of a newspaper published in Spain known as "*SUR in English*" for the period running from November 29th to December 3rd, 1988. It is deposed that the said newspaper "is widely distributed to the English-speaking public along the Costa del Sol and in Gibraltar." The advertisement complained of reads as follows:

"SOL Y PLAYA S.A.

BENA VISTA

For owners of property at Bena Vista, Bena Vista Centro Las Palmeras de Bena Vista.

If you are in any of the following categories concerning the *escritura* of your property on any of the aforementioned developments it is imperative that you immediately write to:

Sol y Playa S.A.
c/o Aboga dos
Passage de la Victoria Edificio Victoria Portal 3, 1A
Estepona, Spain

enclosing relevant documents:

(a) A client who does not have an *escritura*.

(b) A client who has an *escritura* but paid £2,000 sterling to WIMPEY HOMES OR ITS SUBSIDIARY COMPANY for an *escritura*.

(c) A client who is having a house built and received demands from WIMPEY HOMES OR ITS SUBSIDIARY COMPANY for additional payments in excess of your original contract price.

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(d) A client with property charged by WIMPEY HOMES OR ITS SUBSIDIARY COMPANY.

(e) A client who has paid off a charge on your property.

(f) A client who has property as security by Sol y Playa S.A.

(g) Creditors to this date unpaid by Sol y Playa S.A.

Sol y Playa S.A. is doing all in its power to protect your rights under the original contract of sale with WIMPEY and the information requested is needed for this purpose.

BENA VISTA"

3 The grounds on which the applicant relies for committal are stated in the notice of motion thus:

"[T]hat the said advertisement [by] words written [is] calculated to interfere with the course of justice, in that it has the effect of exerting improper pressure upon Wimpey as a litigant to desist from pursuing its legal rights with regards to the allegations made in the statement of claim in the aforementioned action and to settle the action on terms to which it did not wish to otherwise agree."

4 What the applicant is complaining of is interference with the course of justice. In *The Supreme Court Practice 1988*, paras. 52/1/4–52/1/11, the different types of contempt are listed and (para. 52/1/9 at 778) "words written or spoken, calculated to interfere with the course of justice," is listed as a criminal contempt. They are criminal proceedings. I am therefore dealing with criminal contempt and consequently criminal proceedings. Two matters arise from this. One, whether leave should have been sought and obtained under O.52, r.2. The answer is "Yes." The relevant part of O.52, r.1 reads:

"(1) The power of the High Court or Court of Appeal to punish for contempt of court may be exercised by an order of committal.

(2) Where the contempt of court—

(*a*) is committed in connection with—

. . .

(ii) criminal proceedings . . .

Then, subject to paragraph (4), an order of committal may be made only by a Divisional Court of the Queen's Bench Division."

In other words, O.52, r.2, comes into play and leave must be obtained. The "Divisional Court" in Gibraltar is the Supreme Court: see Schedule 1 to the Supreme Court Rules.

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5 When the applicant came before me for leave to serve the present motion outside the jurisdiction, in granting it I brought to its attention the question of leave. I granted leave to serve out of the jurisdiction, but after hearing argument that leave under O.52, r.2 was not necessary, I reserved ruling on the point until the hearing of the motion. On the motion I heard further argument on behalf of the applicant on this point and invited counsel for the respondent to address me on it. Counsel for the respondent has not argued the point as he is more interested in defeating the motion on its merits than on any technicality. Notwithstanding that, I think that I should rule on the matter. I am of the opinion that the present motion is defective because leave has not been obtained. Consequently, it constitutes a ground for refusal.

6 The second point is that, these being criminal proceedings, the standard of proof is very high. In *The Supreme Court Practice 1988*, para. 52/4/4 at 783, we find the following:

> "Committal proceedings raise issues independent of the underlying litigation. Whatever their form, they are not interlocutory in character, and their nature makes them unsuitable to be regarded as interlocutory proceedings for the admission of hearsay evidence . . . The appropriate standard of proof to be applied in committal proceedings is the criminal standard of proof . . ."

7 I have quoted the above because the applicant is asking me to draw the inference that because the respondent, Alan James, is the sole administrator of Sol y Playa S.A., he must necessarily have inserted the advertisement complained of. The applicant would have been in difficulty had not the respondent candidly admitted authorship in his affidavit in reply dated December 15th, 1988. The respondent further explains the reasons for the advertisement at para. 7 of his said affidavit, the relevant part of which states:

> "In view of Wimpey's withholding of the information and papers which belong to Sol y Playa S.A., I was advised by my accountants that the only other manner available to me to obtain the information is to place a public notice in a newspaper which was likely to be circulated amongst the relevant clients."

8 Mr. Marrache for the applicant argues that the publishing of the advertisement was an interference with the course of justice in that it had the effect of exerting improper pressure upon Wimpey. He prays in aid the decision in *Att.-Gen.* v. *Times Newsp. Ltd.* (1). Counsel has quoted a number of passages from that well-known case, "the thalidomide case." One of the passages is from the speech of Lord Diplock, which reads ([1973] 3 All E.R. at 73):

> "[C]ontempt of court in relation to a civil action is not restricted to

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> conduct calculated (whether intentionally or not) to prejudice the fair trial of that action by influencing, in favour of one party or against him, either the tribunal by which the action may be tried or witnesses who may give evidence in it; it extends also to conduct that is calculated to inhibit suitors generally from availing themselves of their constitutional right to have their legal rights and obligations ascertained and enforced in courts of law, by holding up any suitor to public obloquy for doing so or by exposing him to public and prejudicial discussion of the merits or the facts of his case before they have been determined by the court or the action has been otherwise disposed of in due course of law."

9 Mr. Triay for the respondent agrees with the above statement of the law, but argues that the insertion of an advertisement for the purpose of obtaining evidence is not contempt. He cites the case of *Plating Company* v. *Farquharson* (4), the headnote to the report of which in *The Law Reports* reads (17 Ch. D. at 49):

> "An injunction having been granted to restrain the Defendants from infringing a patent for nickel-plating, they gave notice of appeal and published in a newspaper an advertisement inviting the trade to subscribe towards the expenses of the appeal, and also an advertisement offering a reward of £100 to anyone who could produce documentary evidence that nickel plating was done before 1869. The plaintiffs moved to commit the publishers of the newspaper for contempt of court in publishing these advertisements, as being an interference with the course of justice, stating at the same time that they did not press for a committal, but would be satisfied with an expression of regret and an undertaking not to repeat the advertisements:—
>
> HELD, that as all persons in the trade of plating had a common interest in resisting the claims of the plaintiffs, an advertisement asking them to contribute to the expenses of defending the proceedings was open to no objection.
>
> HELD, also, that the advertisement offering a reward for documentary evidence was free from objection."

10 The court will discourage motions to commit where no real case for committal is made, and only an apology and costs are asked for.

11 Mr. Triay, quite rightly, brought to my attention, and distinguished, two further cases on the limits of legitimate advertising for evidence in pending proceedings. They are *Butler* v. *Butler* (3) and *Brodribb* v. *Brodribb* (2).

12 I am satisfied that the advertisement complained of when read by itself, or even in conjunction with the statement of claim in the present

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action, does not exceed the limits of what is legitimate. This case is far removed from *Att.-Gen.* v. *Times Newsp. Ltd.* (1), where a national newspaper mounted a campaign against a drug company in relation to the compensation being offered to deformed children. This case is more akin to the *Plating Co.* case (4). Provided that the advertisement is circumspect and reasonable, I can see nothing wrong in requesting information required either to mount a case or defend it. It will all depend on the circumstances of the case.

13 I have no hesitation in refusing this motion with costs for the respondent.

Application refused.

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