[1991–92 Gib LR 189]

JENSEN and FEDUCH HOLDINGS LIMITED v. GRAU GONZALEZ

SUPREME COURT (Alcantara, A.J.): December 12th, 1991

Injunctions—Mareva injunction—non-disclosure—trial of non-disclosure issue—allegation of material non-disclosure to be heard on application to discharge, not at trial of substantive claim

Injunctions—Mareva injunction—non-disclosure—failure to disclose that (a) proposed defendant is abroad, requiring leave for service out of jurisdiction, and (b) outstanding contractual debt owed by plaintiff to defendant, are non-disclosures of material facts

The applicant applied for the discharge of a *Mareva* injunction.

The defendant acted for the first plaintiff (in the name of the second plaintiff company) in the purchase of land in Spain. The plaintiffs claimed that the defendant had unlawfully retained a large sum that had been forwarded to him as one of the instalments for the purchase. The moneys were deposited with a Gibraltar bank. The plaintiffs obtained a *Mareva* injunction against the defendant in respect of the sum, on the basis that a breach of trust or fraudulent conversion had occurred, together with an order for discovery against the bank.

The defendant applied to set aside the injunction on the ground that the plaintiffs had not made full and frank disclosure of the material facts.

He submitted that (a) he was not resident, domiciled or present within Gibraltar, and the plaintiffs had not indicated this to the court in their affidavit in support of the application, or sought leave to issue and serve a writ out of the jurisdiction, even though they had undertaken to serve a writ forthwith; (b) leave to do so might not be granted by the court, since the plaintiffs' claim had no connection with Gibraltar; (c) the second plaintiff's directors had not authorized the initiation of proceedings against the defendant; and (d) under a series of agreements between the parties, to which the plaintiffs had not referred in their application, the first plaintiff was indebted to him as his agent, working on a commission basis, for a sum equal to the payment he had received.

The plaintiff submitted in reply that the application should be dismissed, since the issue of whether there had been full disclosure should not be determined by an *inter partes* hearing of the application to discharge the injunction, but instead at the trial of the substantive issue in the proceedings.

Held, discharging the injunction:

(1) The proper time for the court to determine whether full and frank disclosure had been made by the applicant of the material facts was the hearing of the respondent's application to discharge the injunction, not at the trial of the action (paras. 13–14).

(2) The court was satisfied that the plaintiffs' non-disclosure of two material facts was sufficient to justify the discharge of the injunction. First, they had failed to indicate that the proposed defendant was a foreign defendant and had not honoured their undertaking to serve a writ on him forthwith, which would require leave. Secondly, the plaintiffs had not referred in their supporting affidavit to the agreements dealing with the arrangements for payment of the defendant on a commission basis. The first plaintiff had been indebted to the defendant at the time the payment was made. The matter of how the alleged misunderstanding as to the purpose of the payment came about would be examined at the trial of the claim. There were no grounds for issuing a new injunction or continuing the existing one, and it would be discharged (paras. 15–16).

Cases cited:

(1) *Brink's-MAT Ltd.* v. *Elcombe*, [1988] 1 W.L.R. 1350; [1988] 3 All E.R. 188, applied.
(2) *Dormeuil Frères S.A.* v. *Nicolian Intl. (Textiles) Ltd.*, [1988] 3 All E.R. 197, *dicta* of Browne-Wilkinson, V.-C. not followed.
(3) *Intexport Services Ltd.* v. *Ginata*, Supreme Ct., Cause No. 1991–I–290, November 29th, 1991, referred to.
(4) *R.* v. *Att.-Gen.*, *ex p. Glenshaw*, 1991–92 Gib LR 163, referred to.
(5) *R.* v. *Kensington Income Tax Commrs.*, *ex p. Princess Edmond De Polignac*, [1917] 1 K.B. 486; (1916), 86 L.J.K.B. 257, applied.

B. Marrache for the plaintiffs;
J.J. Neish for the defendant.

1 **ALCANTARA, A.J.:** This is an application by the defendant to discharge an *ex parte Mareva* injunction granted by this court on November 8th, 1991, at the instance of the plaintiffs, on the grounds that the court was misled by the absence of full and frank disclosure by the plaintiffs. The *ex parte Mareva* injunction was granted by my brother, Kneller, C.J., on the strength of an affidavit in support by Mr. B. Marrache dated November 6th, 1991. The injunction was limited to Pta. 20m., and was coupled with an order for discovery (in so far as the present application is concerned) against ABN-AMRO Bank in Gibraltar.

2 Mr. Neish, counsel for the defendant, complained that in the aforesaid affidavit certain matters were suppressed, namely:

(a) the defendant was not resident, domiciled or present within the jurisdiction;

(b) the first-named plaintiff was indebted to the defendant.

In so far as (a) is concerned, there is nowhere in the affidavit any indication that the intended defendant is a foreign defendant. This would have been made clear if the plaintiffs, at the time of the *Mareva*, had asked for leave to issue and serve a writ out of the jurisdiction under O.11. This was not done. In fact, although the plaintiff undertook to issue and serve a writ forthwith, he took, and has taken, no steps to obtain leave. Mr. Neish argued that leave might not even be granted, as the plaintiffs' claim has no connection with Gibraltar.

3 Counsel also pointed out that, although in the affidavit it is said that the first plaintiff is the beneficial owner of all the shares in the second plaintiff company, it had never authorized the present proceedings. There is exhibited to the affidavit on behalf of the defendant a letter dated November 13th, 1991 from Messrs. Nunez & Co. to the defendant's solicitors, stating: "We are instructed to confirm to you that Jyske Bank (Gibraltar) Nominees Ltd., as sole directors of Feduch Holdings Ltd., have given no instructions for proceedings to be initiated."

4 In relation to (b), the complaint by the defendant is that he is described as a partner in para. 4 of Mr. Marrache's affidavit, whereas he was in fact an agent working on a commission basis. This would have been made obvious to the court if three agreements between the first plaintiff and the defendant, dated respectively April 27th, 1990, March 12th, 1991 and September 12th, 1991, had been brought to the attention of the court. The defendant's real complaint is not so much that they were not exhibited, but that they were not even mentioned in the affidavit. In an affidavit in reply on behalf of the plaintiff it is stated that the plaintiff was not aware of the existence of the agreements dated April 27th, 1990 and March 12th, 1991. This notwithstanding the fact that the agreement dated September 12th, 1991, signed by the plaintiff, contains the following statement: "In full and final settlement of the credit which Pedro Grau has in accordance with the existing agreements dated 27.4.90 and 12.3.91 and all claims which Pedro Grau may have against Mr. Ove Jensen."

5 On that date, the plaintiff was indebted to the defendant in the sum of DKr. 800,000. On March 12th, 1991, the indebtedness, as per the agreement, was about Pta. 64m., and the plaintiff had to pay Pta. 18m. to the defendant before June 1st, 1991, by transfer to the Banco Atlantico, Estepona. On April 27th, 1990, the defendant's debt was the same as that of March 12th, 1991, except that the method of payment was different.

6 The first plaintiff's case is that the defendant acted for him, in the name of the second plaintiff, in the purchase of three properties in Puerto

Sol, Estepona, Spain, for a total of Pta. 100m. This amount had to be paid in six instalments of varying amounts and on different dates. The instalments would be paid in Spain by the defendant with money supplied by the first plaintiff, transferred to the Banco Atlantico in Estepona, where the second plaintiff and the defendant had each an account. The fifth instalment in respect of the purchase of the three properties, by rare coincidence, was of Pta. 18m., payable on May 20th, 1991.

7 On May 23rd, 1991, the first plaintiff transferred to the defendant at Banco Atlantico the equivalent of Pta. 18m. The first plaintiff says that this was done at the request of the defendant. The defendant admits receiving Pta. 18m. but says that this is the amount that was due to him under the agreement with the first plaintiff dated March 12th, 1991. Once the defendant received the Pta. 18m. he took steps to have them sent or taken to Gibraltar and deposited in the ABN-AMRO Bank (where I am told they still are).

8 On or about the end of October 1991, the first plaintiff found out that the fifth instalment of money in respect of the three properties in Puerto Sol had not been paid by the defendant: hence the application for a *Mareva* on the ground of breach of trust or fraud.

9 There is one aspect of this matter which I have difficulty in understanding. The first plaintiff knew or must have known that between May 20th, 1991 and June 1st, 1991, he had to provide or send to the defendant two transfers of Pta. 18m., one to pay the fifth instalment and the other to pay the defendant under the agreement of March 12th, 1991. He only transferred one set of Pta. 18m. The same can be said for the defendant. He knew that although he had to be paid Pta. 18m., he also had to pay the fifth instalment of the Puerto Sol properties. When he only received Pta. 18m., one would have expected him to query the transfer with the first plaintiff. He did nothing of the kind; he must have assumed that it was for himself.

10 But that is not the end of the matter. On September 12th, 1991 the first plaintiff and the defendant entered into a new agreement, which they both signed and in which they both declared that "we have no claims against each other," knowing full well that one set of Pta. 18m. had not been sent or received. The defendant could have said: "I have not paid the fifth instalment," and the first plaintiff could have said: "I did not pay you the Pta. 18m. which become due before June 1st, 1991." When this case comes to trial, if it does, light will be shed on what I consider at the present moment to be a mystery.

11 Now, as to the law, there are two leading cases on the question of full and frank disclosure. The first is *R.* v. *Kensington Income Tax Commrs., ex p. Princess Edmond De Polignac* (5), which laid down the proposition

that an *ex parte* order will be discharged if it was obtained without full and frank disclosure. The above proposition has been applied in two recent cases by this court: *R.* v. *Att.-Gen.*, *ex p. Glenshaw* (4) and *Intexport Services Ltd.* v. *Ginata* (3).

12 The other leading case is *Brink's-MAT Ltd.* v. *Elcombe* (1). The headnote to that case in *The All England Law Reports* reads ([1988] 3 All E.R. at 188–189):

> "A person applying ex parte for a Mareva injunction is under a duty not only to make a full and fair disclosure of all material facts known to him but also to make proper inquiries for any relevant additional facts before making the application, since not only facts known to the applicant but also any additional facts which he would have known if he had made proper inquiries will determine whether there has been material non-disclosure. The extent of the inquiries which will be deemed to be proper will depend on all the circumstances of the case, including the nature of the applicant's case when making the application and the probable effect of the order on the defendant. Whether a fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of that fact to the issue to be decided by the judge on the application. The fact that the non-disclosure was innocent, in the sense that it was not known to the applicant or that its relevance was not perceived, is an important, but not decisive, consideration in deciding whether to order an immediate discharge. However, the court has a discretion, notwithstanding proof of material non-disclosure which justifies the immediate discharge of an ex parte order, to continue the order or to make a new order on terms . . ."

The principles of *Ex p. Princess Edmond de Polignac* (5) were approved and applied by the Court of Appeal in that case.

13 Mr. Marrache, for the plaintiffs, seeks to rely on *Dormeuil Frères S.A.* v. *Nicolian Intl. (Textiles) Ltd.* (2) for the proposition that on an *inter partes* hearing to discharge a *Mareva* injunction the court should not, except in an exceptional case, examine whether there has been full disclosure or not. The headnote to that case in *The All England Law Reports* reads ([1988] 3 All E.R. at 197):

> "The appropriate time for the court to hear and determine an application by the defendant to discharge an Anton Piller order on the ground that it was obtained as the result of material non-disclosure by the plaintiff is at the trial rather than during the interlocutory stage of the proceedings, because the order usually having been executed the only effect of the non-disclosure will be to

> affect the plaintiff's liability under his cross-undertaking in damages and interlocutory proceedings are not the appropriate time for the court to hear evidence and determine allegations of what has happened in the past. *Similar considerations apply in the case of an ex parte Mareva injunction* . . ." [Emphasis supplied.]

I have emphasized the last sentence to bring out that it was *per incuriam*. The case was concerned with an *Anton Piller* order, not with a *Mareva simpliciter*.

14 Secondly, this was the view of the single judge, Browne-Wilkinson, V.-C., which, incidentally, runs counter to what was decided in the *Princess Edmond de Polignac* case (5) and in the *Brink's-MAT* case (1). With all due respect, I do not agree with the learned judge when he said ([1988] 3 All E.R. at 201) that "similar considerations apply in the case of an ex parte Mareva injunction." Whilst reserving the question of whether the *Dormeuil* case has been rightly decided for another occasion, I will not follow the guidance of the learned judge in so far as a *Mareva simpliciter* is concerned. I prefer the two Court of Appeal decisions referred to above.

15 Finally, I have come to the conclusion that there was material non-disclosure of a grave nature in two vital matters. The learned judge should have been appraised that the proposed defendant was a foreign defendant. This, coupled with the breach of undertaking to serve the writ forthwith is sufficient in itself to discharge the injunction. To the above can be added, either jointly or separately, the non-disclosure of the agreements between the first plaintiff and the defendant. Not only were the agreements not exhibited but were not even mentioned in the affidavit in support of the injunction. Nor was the fact that the first plaintiff was, in fact, indebted to the defendant, although he still had time to pay.

16 The facts not disclosed are of sufficient materiality to justify an immediate discharge. There are no grounds which would justify this court in either issuing a new injunction or continuing the order. The *Mareva* injunction will be discharged with costs.

Order accordingly.