

[2013–14 Gib LR 665]

**PICARDO v. SINDICATO COLECTIVO DE
FUNCIONARIOS PUBLICOS MANOS LIMPIAS and
BERNAD REMÓN**

SUPREME COURT (Dudley, C.J.): July 9th, 2014

Civil Procedure—judgments and orders—default judgment—court has discretion not to enter default judgment if could cause injustice, but not required to decide on merits of claim—application for default judgment may arise as consequence of defendant’s failure to file acknowledgement of service

Conflict of Laws—reciprocal enforcement of judgments—enforcement of Gibraltar judgments abroad—no injunction against publication of defamatory statements by defendants out of jurisdiction if unenforceable—preventing publication only in Gibraltar futile if statements on internet— injunction not necessarily enforceable in Spain as EU Council Reg. (EC) No. 44/2001 allows non-enforcement of foreign judgments if contrary to public policy—if no evidence of Spanish courts’ approach to balancing freedom of speech with rights of those defamed, futility of requested injunction makes adjournment pointless

Injunctions—jurisdiction—territorial jurisdiction—discretion to grant injunction against publication of defamatory statements by defendants out of jurisdiction—in exercising discretion, court to require evidence of (a) applicable law and practice in foreign jurisdiction; (b) nature of any proposed proceedings there; (c) whether foreign court likely to enforce injunction; and (d) where relevant, foreign jurisdiction’s approach to freedom of speech

The claimant brought an action against the defendant, claiming damages and injunctive relief for defamation.

The claimant, the Chief Minister of Gibraltar, alleged that the defendants, a Spanish trade union and its general secretary, published on its website defamatory statements suggesting that the claimant had condoned smuggling, drug trafficking and money laundering. The claimant served the claim form on the defendant in November 2013, and no acknowledgment of service was filed.

The claimant sought (a) default judgment for damages and costs; and (b) a permanent injunction preventing the defendants publishing, in Gibraltar, the allegations on the website, submitting that (a) an injunction against a defendant out of the jurisdiction did not exceed the powers of a

Gibraltar court by seeking to superimpose domestic law in other jurisdictions, as the injunction would be restricted to Gibraltar and defamation happened where it was received, not where it was published; and (b) the court should not decline to grant the injunction on the ground of the uncertainty of enforceability alone, as (i) the weight of authority was in favour of courts assuming that their orders would be obeyed and there were many instances where injunctions had been issued against foreign defendants; and (ii) in any event, the injunction could be enforced in Spain under EU Council Regulation (EC) No. 44/2001.

Held, allowing the application in part:

(1) The claimant was entitled to enter judgment for damages and costs. The court had a discretion not to enter a default judgment if doing so could cause injustice, but it was not required to decide on the merits of the claim. The entitlement to apply for judgment by default arose as a consequence of the defendants' failure to file an acknowledgement of service, and the court was satisfied that the conditions for service out of the jurisdiction had been fully complied with and that the injunctive relief sought was an appropriate remedy (paras. 6–7).

(2) The grant of injunctions against defendants out of the jurisdiction was a matter for the court's discretion. The correct approach in exercising that discretion was for the court to require evidence as to (a) the applicable law and practice in the foreign court; (b) the nature of any proposed proceedings to be commenced in the foreign jurisdiction; (c) whether the foreign court would be likely to enforce the injunction; and (d) where the injunction engaged freedom of speech, the foreign jurisdiction's approach to it. Following these principles would allow the discretion to be exercised in a focused, evidence-based way in spite of the tension between the principles that on the one hand, courts assumed that their orders would be obeyed and would not normally refuse an injunction on the basis that it would probably be disobeyed and, on the other, that equity did not act in vain and a court would therefore not grant an injunction it could not enforce (paras. 12–13).

(3) No injunction would be granted here as it would not be possible to enforce it effectively. The injunction would only prevent publication in Gibraltar and, given the nature of the internet, would be futile. It would not necessarily be enforced in Spain, as EU Council Regulation (EC) No. 44/2001 allowed judgments from other jurisdictions not to be enforced when contrary to public policy. The claimant had filed no evidence of the Spanish courts' approach when balancing freedom of speech with the rights of those defamed, and while it was open to the court to adjourn the application and allow such evidence to be filed, the futility of the requested injunctive relief made it pointless to do so (paras. 13–14).

Cases cited:

(1) *Akhmetov v. Serediba*, [2008] All E.R. (D) 38 (Jun), considered.

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- (2) *Barrick Gold Corp. v. Lopehandia* (2004), 71 O.R. (3d) 416; 2004 CanLII 12938 (ON CA), considered.
- (3) *Football Dataco Ltd. v. Smoot Enterprises Ltd.*, [2011] 1 W.L.R. 1978; [2011] F.S.R. 25; [2011] EWHC 973 (Ch), referred to.
- (4) *J (A Child), Re*, [2014] E.M.L.R. 7; [2014] 1 F.L.R. 523; [2014] 2 F.C.R. 284; [2013] Fam. Law 1389; [2013] EWHC 2694 (Fam), applied.
- (5) *Woolcott v. Seeger*, [2010] WASC 19, considered.

Legislation construed:

Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (O.J. 2001, L. 12), art. 34:

“A judgment shall not be recognised . . . if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought . . .”

L. Baglietto, Q.C. and *M. Levy* for the claimant;
The defendants did not appear and were not represented.

1 **DUDLEY, C.J.:** This is an application pursuant to the CPR, Part 12 for default judgment against the defendants.

2 The claimant is and was at all material times the Chief Minister of Gibraltar. The first defendant (“Manos Limpias”) is said to be a trade union incorporated under Spanish law which owns or operates a website, and the second defendant is said to be the Secretary General of Manos Limpias.

3 Essentially, the claim pleaded is to the effect that certain statements published on Manos Limpias’s website meant and were understood to mean that the claimant had condoned smuggling, drug trafficking and money laundering, and that these statements were defamatory of the claimant.

4 By its application, the claimant seeks (a) default judgment for damages in an amount to be assessed; (b) a permanent injunction restraining the defendants and each of them from publishing in Gibraltar the allegations contained in the website, or words to the same or similar effect; and (c) costs.

5 The claimant cannot avail himself of the standard procedure for obtaining default judgment pursuant to CPR, r.12.4(1), but rather has had to proceed by way of a CPR, Part 23 application for two reasons: (i) the defendants have been served outside the jurisdiction on the basis that the court has jurisdiction to determine the claim pursuant to the Judgments Regulation (EU Regulation 44/2001); and (ii) injunctive relief is sought.

6 Although the court has a discretion not to enter default judgment if it has reason to consider that it could cause injustice, in considering the claimant’s application it is not for the court to form a view about the merits of the claim, as the entitlement to apply for judgment in default arises by virtue of the defendants’ failure to file an acknowledgement of service. The court has to be satisfied, however, that the conditions for service out of the jurisdiction have been fully complied with and that the injunctive relief sought is an appropriate remedy (see *Football Dataco Ltd. v. Smoot Enterprises Ltd.* (3))

Service

7 I am satisfied that this court has jurisdiction under art. 5 of the EU Council Regulation (EC) No. 44/2001 (the “Judgments Regulation”), and therefore by virtue of CPR, r.6.33, permission to serve the claim form out of the jurisdiction was not required. The affirmation of Moses Levy evidences that the claim form and requisite accompanying documents were, pursuant to the EU Council Regulation (EC) No. 1393/2007, served upon the defendants by the Spanish authority on November 15th, 2013, with the deemed date of service being November 19th, 2013. It follows that the claimant is entitled to enter judgment for damages and costs.

Injunctive relief

8 The relief sought includes an injunction in the following terms:

“A permanent injunction restraining the defendants and each of them whether by themselves, their servants or agents or otherwise, from publishing or causing to be published in Gibraltar allegations that the claimant has been aiding and abetting smuggling, drug trafficking and money laundering, and has been improperly disregarding legitimate requests for judicial assistance from foreign courts and tribunals, or any other words to the same or similar effect defamatory of the claimant.”

It is apparent that this court has power to grant such relief, but whether such power should be exercised is a matter of discretion.

9 In support of the application for injunctive relief, Mr. Baglietto relies upon *Woolcott v. Seeger* (5), a decision of the Supreme Court of Western Australia in which Le Miere, J. considered an earlier decision of the Supreme Court of New South Wales. Certain passages are instructive ([2010] WASC 19, at paras. 69–74):

“69 In *Macquarie Bank Ltd. v. Berg* [1999] NSWSC 526 an Australian resident sought an interlocutory injunction to restrain a defendant, resident in the United States, from publishing material on a website located outside Australia that it alleged to be defamatory of

its reputation under the law of New South Wales. Simpson, J. held that the court had power to restrain conduct occurring or expected to occur outside the territorial boundaries of the jurisdiction and that whether the power should be exercised is a question of discretion. Her Honour refused to grant the injunction for three reasons. First, it was uncertain that the order could be enforced against the defendant because he was resident outside the jurisdiction. The second and principal reason was that such an injunction would superimpose the law of New South Wales relating to defamation on every other State, Territory and country of the world. The law of defamation in other countries is different from that of New South Wales and it may well be that, according to the law of other countries, the defendant had an unfettered right to publish the material. To make an order interfering with such a right would exceed the proper limits of the use of the injunctive power of the court. The third reason was that the discretion to restrain defamatory publications should be exercised with great caution and only in very clear cases.

70 The third reason stated by Simpson, J. can be immediately put to one side. This case is not concerned with the grant of an interlocutory injunction. The defendant has not sought to justify the defamatory publications or defend them in any way.

71 The grant of an injunction in this case would not exceed the proper powers of this court. Simpson, J. appears to have assumed that the place of the tort in *Macquarie Bank v. Berg* was outside New South Wales. In this case the tort occurred within Western Australia. The place of the tort is where the published material is received, not the place from where it is transmitted. There is no evidence in this case, unlike in *Macquarie Bank v. Berg*, that the website on which the First Publication and the Second Publication were posted is located outside Australia. To the contrary, the relevant website appears to be located in Australia. The email transmissions appear to have been transmitted from within Australia to recipients within Australia.

72 The granting of an injunction may bind the conduct of the defendant outside of the jurisdiction. But that is not a sufficient reason for refusing the injunction. An injunction may be granted in some instances to enforce rights even if the subject matter of the application is external to the jurisdiction. The injunction acts to bind the conscience of the defendant and enables the court to control his activities outside as well as within the jurisdiction. This court is not an inappropriate forum. The plaintiff resides in Western Australia. It is in Western Australia that his reputation has been damaged.

73 This case does not give rise to the same problems of enforceability that the court referred to in *Macquarie Bank v. Berg*. The defendant appears to reside in New South Wales. In any event, I would not decline to grant the injunction on the ground of the uncertainty of enforceability alone. The weight of authority is in favour of courts assuming that their orders will be obeyed and accordingly there are many instances where injunctions have been issued against foreign defendants: see Garnett, *Are Foreign Internet Infringers Beyond the Reach of the Law?* 23 UNSWLJ 105 at 122–124 (2000).

74 In the circumstances of this case, it is appropriate to permanently restrain the defendant from any further or future publication of the defamatory publications complained of, or of publishing any similarly defamatory matter of, and concerning the plaintiff.”

10 In *Barrick Gold Corp. v. Lopehandia* (2), the Court of Appeal of Ontario adopted a similar approach. The basis for the decision is summarized in the headnote to the case in the *Ontario Reports* (71 O.R. (3d) at 419–420)

“The more troubling point respecting the claim for injunctive relief was the *in personam* nature of the remedy, the marginal presence of the defendant in the jurisdiction and concerns about enforceability of such an order. However, courts do in some circumstances permit service of claims outside the jurisdiction seeking to prevent publication in the jurisdiction of libellous material originating outside the jurisdiction, and this was an appropriate case in which to do so. Not only was there a real and substantial connection between the plaintiff and Ontario, but there was a real and substantial connection between the publication of the libel by the defendant and Ontario as well. At least one of the bulletin boards utilized by the defendant was operated in Toronto. The posting of messages on that board constituted at least an act done by the defendant that affected the plaintiff’s reputation, goodwill and personal property in Ontario, and arguably constituted an act done by him in Ontario. The courts in Ontario must have jurisdiction to restrict such conduct. Even if an injunction might only be enforced against the defendant if he entered Ontario personally, the injunction might nonetheless be effective as it would operate to prevent the Internet service provider from continuing to post the defamatory messages on the bulletin board operated in Toronto. Moreover, if the plaintiff were to take an injunction granted in Ontario to British Columbia, he might be successful in having the order enforced against the defendant by the British Columbia courts. A permanent injunction should be granted.”

11 In contrast, in *Akhmetov v. Serediba* (1), following the grant of judgment in default, the English High Court dismissed an application for an injunction restraining continued publication of a defamatory article on the grounds that it would be very difficult if not impossible to enforce. Unfortunately, the case is only reported in the digest but it appears that although the defendant was the owner and publisher of a popular current affairs website in the Ukraine, the publications complained of were in the defendant's website in England and Wales.

12 More recently, in *Re J (A Child)* (4), Sir James Munby, the President of the Family Division, considered the court's jurisdiction and exercise of discretion to grant injunctive relief having effect against foreign internet service providers. That case related to the grant of injunctive relief to restrain publication of information about a child but in my view the principles considered are apposite. Dealing with the question of discretion ([2014] E.M.L.R. 7, at paras. 60–61), Sir James identified the tension between the principle that courts assume that their orders will be obeyed and will not normally refuse an injunction because of likely disobedience, and the principle that equity does not act in vain whereby a court will not grant an injunction which it cannot enforce. Thereafter, he went on to conclude that (*ibid.*, at para. 63)—

“ . . . in relation to discretion, the court will need evidence as to the applicable law and practice in the foreign court, evidence as to the nature of any proposed proceedings to be commenced in the foreign jurisdiction, and evidence as to whether the foreign court would be likely to enforce the injunction . . . Where the injunction, as here, engages freedom of speech, the evidence will also have to detail the foreign jurisdiction's approach to such matters.”

Conclusion

13 I would respectfully adopt the approach urged by Sir James Munby, not least because it allows for a focused, evidence-based approach when exercising a discretion which is torn between the application of two competing principles. For the claimant, reliance is placed upon the ability to enforce an order of this court by registering it in Spain in accordance with the Judgments Regulation. However, there is no ignoring that art. 34 allows for a judgment not to be recognized if it is contrary to public policy in the state in which recognition is sought. Therefore, evidence of the approach taken by the Spanish courts when balancing freedom of speech with the rights of those defamed is required before granting injunctive relief.

14 No such evidence having been provided, it is open to me to adjourn that part of the application so as to allow the claimant to file it. However, it seems to me that this would be a pointless exercise. The order sought

seeks to limit publication in Gibraltar only. In my view such relief ignores the nature of the internet and would be futile as a means of protecting the claimant's reputation. In those circumstances, in the exercise of my discretion the application for injunctive relief is dismissed.

Orders accordingly.
