29/10/86

IN THE ROYAL COURT OF JERSEY

Before : Mr. Commissioner P.R. Le Cras,
Jurat M.G. Lucas
Jurat P.F. Misson

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| | TRASCO INTERNATIONAL AKTIENGESELLISCHAFT | PLAINTIFF |
| AND | R M MARKETING LIMITED | DEFENDANT |
| AND | COLIN ALEXANDER HARRIS and ANDREW DAVID DENZIL CRICHTON together carrying on business under the style and name of Harris, Crichton & Co. | FIRST PARTY CITED |
| AND | THE HONGKONG AND SHANGHAI BANKING CORPORATION | SECOND PARTY CITED |

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Advocate R.J. Renouf for the Plaintiff

Advocate R.J. Michel for the Defendant

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These proceedings were commenced by Order of Justice dated 23rd July 1986. The Order of Justice contained an immediate interim injunction which effectively arrested the assets of the Defendant within the jurisdiction save insofar as these assets exceed D.M.2,019,968 or the Sterling equivalent.

The case was placed on the list on the 1st August 1986 when the injunction was maintained and the action placed on the pending list. The parties cited were discharged until further notice, and, as yet, have not been reconvened, so that they have not appeared in the hearings before us.

Following a previous summons (for discovery and security for costs) which does not concern us, the Defendant issued a further summons seeking an order striking out the Order of Justice or, as it was put to us, in the alternative seeking to raise the interim injunction.

We may say at once, that, quite properly in our view Counsel for the Defendant abandoned the first ground, so that the hearing of the applicatic proceeded on the second ground, that is, that the injunction should be raised.



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The Order of Justice claims that the Plaintiff is incorporated according to the laws of Switzerland and is, and was, trading in association with the German and English companies of that group. The Defendant is a limited liability company registered in Jersey whose affairs, it is claimed, are administered by the first party cited.

The Order of Justice further recites as follows:-

"3. The Trasco Group is and was at all material times engaged in the specialist conversion and sale of high quality prestige marque motor vehicles;

6. On the 7th day of January, 1986 a meeting took place at the offices of Trasco International PLC at 63-65 Park Lane, Mayfair, London between Mr. John Lashmar (hereinafter referred to as "Mr Lashmar") who is an authorised representative of the Trasco Group of Companies and Mr Paul Rogers (hereinafter referred to as "Mr Rogers") at which meeting an agreement (hereinafter referred to as "the General Agreement") was made orally between Mr Lashmar and Mr Rogers whereunder, inter alia, the Plaintiff Company retained and employed the Defendant Company as its agent and sole representative in Japan for a period of one year with effect from the 7th day of January, 1986 to obtain orders for the sale of the products of the Trasco Group of Companies (hereinafter referred to as "Trasco Products") in that country.

7. The General Agreement was confirmed in writing by Mr Lashmar and Mr Rogers on the 7th day of January, 1986.

8. It was an express or in the alternative an implied term of the General Agreement that the Defendant Company would at all times perform its obligations thereunder with due diligence and expedition.

9. Pursuant to the General Agreement the Defendant Company has procured for and on behalf of the Plaintiff Company certain contracts (hereinafter referred to as "the Contracts") for the sale and supply of Trasco products with a Japanese company known as Daishin Trading Co Limited (hereinafter referred to as "Daishin") which contracts have an aggregate value of five million two hundred and sixty seven thousand nine hundred and thirty six Deutsche Marks (DM5,267,936.00).

10. It was an express or in the alternative an implied term of the General Agreement and/or of the Contracts that:-

(a) a deposit equivalent to one half of the aggregate value of the contracts would be remitted by the Defendant Company for and on behalf of Daishin to the Plaintiff Company immediately the Contracts were confirmed by the Plaintiff Company; and

(b) the remainder of the aggregate value of the Contracts would be remitted by the Defendant Company for and on behalf of Daishin to the Plaintiff Company within 14 days of completion of the Contracts.

11. As at the date hereof the Plaintiff Company has only received amounts aggregating One million two hundred and twenty eight thousand Deutsche Marks (DM1,228,000.00) from the Defendant Company and/or Daishin in respect of the Contracts and there remains due to the Plaintiff Company an amount of Two million nineteen thousand nine hundred and sixty eight Deutsche Marks (DM2,019,968.00) representing deposits due under the Contracts and/or in respect of Trasco Products delivered to Daishin pursuant to the Contracts.

12. Daishin has paid to the Defendant Company at its bank account at the Jersey Branch of The Hongkong and Shanghai Banking Corporation (hereinafter called the "Second Party Cited") and/or its bank accounts elsewhere certain monies due to the Plaintiff Company as aforesaid but in breach of the Agreement as aforesaid the Defendant Company has neglected and/or wilfully refused to account for or to pay the same unto the Plaintiff Company.

13. In the premises the Defendant is in breach of the General Agreement and/or the Contracts in that it has persistently refused or neglected to take all reasonable and proper steps to render to the Plaintiff Company a true and full account of monies received by it from Daishin and to pay the said monies to the Plaintiff Company.

15. The Plaintiff fears that unless restrained by injunction the Defendant may seek to remove its assets from the jurisdiction and this to the prejudice of the Defendant."

The Order of Justice was accompanied, as is now the practice in this Court, by an Affidavit sworn by Mr. J.S. Lashmar the Managing Director of the English Company of the group which stated:-

"2. Trasco International Limited trades in association with the following companies (hereinafter referred to collectively as "the Trasco Group of Companies"):-

a) the German registered company known as Trasco Export GmbH of Bremen, West Germany;

b) the Swiss registered company known as Trasco International A.G. of Steinhausen, Switzerland (hereinafter referred to as "the Plaintiff Company"); and

3. I have read the draft Order of Justice (a copy whereof is attached hereto and marked "J.L.1.") and the statements contained in paragraphs 1 to 15 thereof are true to the best of my knowledge, information and belief."

At the hearing before us a lengthy Affidavit was produced to the Court by Counsel for the Defendant sworn by Mr. P.M. Rogers, who claimed to be a director of the Defendant, containing, inter alia, an Affidavit sworn by Mr. D. Noguchi who stated that he was the President and shareholder of Daishin. We should add in passing that we understand that the translation from the Japanese which was produced to us is acceptable to the parties. For its part, the Plaintiff produced two Affidavits from Mr. J.P. Ackermann, the President of Trasco GmbH and a further Affidavit from Mr. Lashmar. In addition, a number of invoices, letters and other documents were produced, as well as, at a late stage, the statement of claim in proceedings in the High Court of Justice in England between Trasco International Plc (as successor to Trasco London Ltd.) and Messrs. R. Walls, P. Rogers and S. Metcalfe.

Counsel for the Defendant, that is, the applicant in this summons, put his case for the raising of the injunction on several grounds.



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First, he said, that in order to obtain an injunction in the first place it was for the Plaintiff to shew a good arguable case.

Second, he submitted that the Bailiff was induced to sign the Order of Justice by an Affidavit which at best contains the bare bones; that there is no detail in the Order of Justice and that the Order of Justice should have contained full detailed factual statements. If there is, he said, a non disclosure of material facts, then it is impossible for the Judge to weigh them in order effectively to exercise his discretion. His contention here is that the apparent strength or weakness of the case should be put to the Court, and that this is not the case where, he claims, the Affidavits now shew different causes of action which were not put before the Court when the injuction was granted.

Third, that there must be full and frank disclosure of all matters within the Plaintiff's knowledge which are material for the Judge to know including any matters adverse to his, the Plaintiff's, case.

Finally, he submitted, the Court in considering his application should carry itself back to the 25th July 1986 and consider the paper work presented then.

In reply, Counsel for the Plaintiff, resisting the application, claimed that the Order of Justice sets out the claim adequately and that the statements therein may be bald but are not defective and do not contain material omissions. He says that the Plaintiff has produced in summary form the material facts on which it relies, which, in brief, are as follows:-

(1) that there was an agency agreement.

(2) that there was an obligation to remit monies to the Plaintiff

(3) that the Defendant has received monies payable to the Plaintiff

(4) that the Defendant has refused to pay the Plaintiff the monies due to it

(5) the amount of the claim is given (and that there is now evidence regarding it)

He claimed that the Defendant had been unable to cite any material



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omission which may have been made and that it was unnecessary to disclose the evidence to the Bailiff when the injunction was obtained; and, furthermore, that such disclosure was not the practice of this Court, nor was it necessary because the evidence - a considerable amount as we have said - did not reveal any additional material, as it was merely an arithmetical exercise. There was nothing, he submitted of which the Defendants were not aware and they were not taken by surprise. The detailed evidence the Court had heard (on affidavit) are not material facts to be pleaded but subordinate facts which are a means towards the proof of the material facts pleaded. The Order of Justice tells the Defendant all it needs to know, as further details are available by way of particulars and discovery; and that the brief Affidavit followed the practice. The test, he said, is that the Plaintiff must disclose only the heads in the Order of Justice. Furthermore the Court must look at the evidence now produced to see whether any omissions are made which are material, as otherwise the Court cannot decide whether all material matters have been disclosed which should have been disclosed. It was not necessary he submitted to set out the evidence which is now before the Court; and that the evidence strengthens his client's case is no reason for discharging the injunction. He further submitted that even where there are material non disclosures the Court has a discretion to retain the order which was granted. As to the fear that the Defendant will remove assets from the jurisdiction he submitted that paragraph 15 was a usual clause, that there was no practice direction relating thereto and that the Defendant had monies in a jurisdiction in which it did not usually trade. Finally, he said, there was no evidence that the Bailiff was misled and nothing so crucial as to affect his judgement or to harm the Defendant.

Both Counsel made substantial submissions as to whether material facts had or had not been sufficiently disclosed when the injunction was granted and whether the further Affidavits before the Court affected those facts as originally disclosed.

It is clear that the Royal Court has jurisdiction to impose an injunction of the present nature. Counsel for the Applicant cited Allix c. Allix (1885) 210 ex 230, 243, Sayers v. Flinn (1947) 243 ex 167 and Watson c. Le Chanu (1951) 247 ex 128, but it is not in our view necessary to look so far: for the Court has held in Johnson Matthey Bankers Ltd v. Arya Holdings Ltd. (1985, Nov. 22, unreported) that:

> "We have applied the English principles when we come to consider interlocutory injunctions which of course you have rightly said Mr. Dessain are distinguishable from a "saisie conservatoire" but that is used in different circumstances where there is a "somme liquide" - that is one easily ascertainable and so on but not in the present circumstances, we have in fact adapted the Mareva injunction principle to our own jurisdiction."

Further it will be recalled that in Third Chandris Corp. v. Unimarine S.A. (1979) 1 W.L.R. 122, Lord Denning M.R. stated @ 135:-

> "It is just four years ago now since we introduced here the procedure known as Mareva injunctions. All the other legal systems of the World have a similar procedure. It is called in the Civil law saisie conservatoire. It ..... has proved extremely beneficial."

This being the case, we propose to follow the principles as they were set out in Johnson Matthey v. Arya (supra). As that judgement is still unpublished, we propose to set out the guidelines (as found in 4 Halsbury 37 para 362, or, for that matter in the Rules of the Supreme Court, O. 29/1/16). They are as follows, and derive from the Third Chandris action (supra):-

> "The guidelines to be observed on an application for a Mareva injunction are (1) the plaintiff must make full and frank disclosure of all matters in his knowledge which are material for the judge to know; (2) he must give particulars of his claims against the defendant, stating the ground of his claim and its amount, and fairly stating the points made against it; (3) he must give some grounds for believing that the defendant has assets within the jurisdiction; (4) he must give some grounds for believing, beyond the mere fact that the defendant is abroad, that there is a risk of the assets being removed before the judgement or the arbitral award is satisfied; and (5) he must give an undertaking as to damages."

In Johnson Matthey v. Arya (supra) the Court held that the burden of shewing that matters of sufficient materiality were not laid before the Court falls, in an application to discharge it upon the applicant. In that case it will be recalled that the Court was satisfied that paragraphs 1 and 2 of the guidelines had been sufficiently met so that the Judge was neither deceived, nor were any matters withheld from him



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which if made known to him would have caused him not to grant the injunction sought.

In the present case however we have first to decide whether on the information given, it was possible for the Judge to exercise a discretion.

On this point we were referred to Johnson Matthey Bankers Ltd. v. A.J. Shamji and others (1986, May 1 unreported) where an order of the Judicial Greffier was set aside on the grounds that he did not have sufficient information for him adequately to direct his mind judicially to it.

Counsel cited two further passages in connection with his submission:-

The first was from Thermax Ltd. v. Schott Industrial Glass Ltd. (1981) Fleet Street reports 289 @ 294 -

> "I have heard argument only on the first of these contentions, though I have read all the evidence sworn on the motions. The principle invoked by Mr. Young is that set out by the Court of Appeal in R. v. The General Commissioners of Income Tax for Kensington (1917) 1 K.B. 486 that a party seeking relief ex parte must make full disclosure to the court of all matters within his knowledge, and if he fails to do so the order will be discharged without investigating the merits. That case was concerned with a tax matter: the point in issue was not directly concerned with an ex parte application for an injunction. The Court of Appeal held that the same principles applied. It is clear the Court of Appeal took the view that in that case facts had been deliberately and intentionally concealed from the court by the person making the ex parte application. However, the principle as laid down appears to go wider than that. Lord Cozens-Hardy in the course of giving his judgment, at pages 504 and 505, quotes with approval the headnote in Dalglish v. Jarvie, which reads:
> "It is the duty of the party asking for an injunction to bring under the notice of the court all facts material to the determination of his right to that injunction, and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward."
> Then on page 505 he quotes Baron Rolfe, after equating the principle to that which governs insurance (that is to say the requirement of uberrima fides), as saying:
> "In cases of insurance a party is required not only to state all matters within his knowledge, which he believes to be material to the question of the insurance, but all which in point of fact are so. If he conceals any thing that he knows to be material it is a fraud; but besides that, if he conceals anything that may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. So here, if the party applying for a special injunction abstains from stating facts which the court thinks



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are most material to enable it to form its judgment, he disentitles himself to that relief which he asks the court to grant. I think, therefore, that the injunction must fall to the ground."

The second was a passage from Colman, "The Practice & Procedure of the Commercial Court" (1983 edition)

> ".....the result of those two judgements is that in order to obtain a Mareva injunction the plaintiff has to go beyond showing that there is an arguable case and has to satisfy the Court that he has a case of a certain strength. Obviously it is impossible to lay down any precise rule as to what sort of strength of case will justify the granting of the injunction; but I apprehend that the learned judge who hears the matter ..... is not only entitled, but is bound, to address his mind to the question of the strength of the plaintiff's case, and that in doing so he is entitled to take into account such materials as are put before him, by way of documentary evidence or otherwise, as will give an indication as to whether what the plaintiff has is merely an arguable case or is something which can be described as a 'good arguable case'".

The position in our view is perfectly clear. When an application is made for the exercise of this extraordinary jurisdiction of the Court, the Plaintiff has to comply with the guide lines set out above. If he does not do so, and if material matters are withheld, then the order cannot stand and must be discharged. This seems clear to us from the Thermax case (supra), followed on this point by Nourse J. in Gallery Cosmetics Ltd. & anr v. Number 1 (1981) Fleet Street reports 556.

The remedy requested is a discretionary one, and in order to exercise it effectively the Court must have the necessary information before it. It is in our view not enough for the Defendant not to be taken by surprise, nor can the Court subsequently cure an order on the production of further evidence at a later stage. The information has to be there at the outset, and has to meet the guidelines. The Court is exercising a discretion and must be properly informed: it is not merely a rubber stamp. In our view, to hold otherwise would lead to a dangerous and pernicious practice where injunctions might be obtained without proper consideration in the hope perhaps of future justification.

We should say at once that in our view Counsel for the Defendant has satisfied us that the Court did not have sufficient information before it when the injunction was signed in order properly to exercise

its discretion. The only information before the Court when the injunction was imposed was that contained in the Order of Justice. In our view this gives the barest outline of the case, and, to say the least, the Affidavit adds little to it. In passing we ought perhaps to add that there seems little point in producing an Affidavit in such a form. It was only when the further lengthy and detailed Affidavits of Mr. Lashmar and Mr. Ackermann were produced that the Court was able to comprehend the claim of the Plaintiff, and, from the Defendant's Affidavits the points made against it: and the fact that Counsel (for the Plaintiff) found it necessary to produce them to explain his client's claim only serves to confirm our view that the information before the Court at the outset was totally insufficient.

We do not come to any view as to how the Court might have exercised its discretion had it had the present Affidavits before it, nor do we think it necessary to discuss the facts claimed by the parties as disclosed therein: what we do find is that the guidelines which have been clearly set out in previous litigation were not complied with in that there was insufficient information before the Court for it properly to exercise its discretion. The injunction is therefore lifted.