1986/34
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Royal Court (Inferior Number)

Before: Mr. V.A. Tomes, Deputy Bailiff
Jurat the Hon. J.A.G. Coutanche
Jurat J.J. Orchard

Between: **Michael Quentin Walters and others** Plaintiffs

And: **Andrew Hill Bingham** Defendant
(first action)

And
Between: **Andrew Hill Bingham** Plaintiff

And: **Michael Quentin Walters and others** Defendants
(second action)

Advocate A.R. Binnington for Mr. Bingham

Advocate M.H. Clapham for Mr. Walters and others

The Plaintiffs in the first action and Defendants in the second action are twenty-nine partners in the firm of Theodore Goddard, practising as Solicitors of the Supreme Court of England and Wales from 16, St. Martins-le-Grand, in the City of London, England, ("the U.K. partnership") and from Osprey House, 5, Old Street, St. Helier, Jersey ("the Jersey partnership"). At all material times the Defendant in the first action and Plaintiff in the second action was also a partner in both the U.K. partnership and the Jersey partnership.

The Order of Justice of the Plaintiffs in the first action, signed by the learned Bailiff on the 18th July, 1986, contained injunctions in the following form:-

"(A) That service of this present Order of Justice shall operate as an immediate interim injunction restraining the Defendant from doing (whether by himself or by his servants or agents or any of them or otherwise howsoever) the following acts or any of them, that is to say:

(i) publishing in any newspaper or periodical or in any other publication

any statement or assertion to the effect that the Jersey partnership of Theodore Goddard has been dissolved or otherwise relating to an alleged determination of the said partnership except a statement to the effect that the Defendant has ceased to be a member of such a partnership;

(ii) making to any client or member of the public other than the Defendant's legal advisers any such statement or assertion as aforesaid;

PROVIDED ALWAYS that the Defendant is to be at liberty to send to clients of the firm a circular letter in the following terms:-

"Andrew Bingham has ceased to be a partner in Theodore Goddard and is now practising on his own account. He may be contacted at 22, Park Crescent, London W.1. Telephone 01-637-8857"".

The prayer of the Order of Justice of the 18th July, 1986, seeks, inter alia, Orders:

(1) (i) that the Plaintiffs and the Defendant were until the 9th July, 1986, carrying on the business of English Solicitors in partnership in Jersey and;

(ii) that the Defendant ceased to be a partner in the Jersey partnership on the 9th July, 1986.

(2) that the immediate interim injunctions become permanent.

The prayer of the Order of Justice of the Plaintiff in the second action and Defendant in the first action, signed by the Deputy Bailiff on the 25th July, 1986, seeks, inter alia:-

(i) a declaration that the Jersey partnership was dissolved on the 8th July, 1986;

(ii) an order that the affairs of the Jersey partnership be wound up;

(iii) an order that all necessary accounts and enquiries be taken and made, that is to say:

(a) an account of the Jersey partnership debts and liabilities at the 8th July, 1986,

(b) an account of all receipts and payments, dealings and transactions of the Defendants in respect of the Jersey partnership business from the 8th July, 1986, and

(c) an enquiry as to what has become of the property and assets of the Jersey partnership business since the 8th July, 1986.

(iv) the grant of an injunction restraining the Defendants and each of them from representing that the Jersey partnership continues without the Plaintiff as a partner either:

(1) by means of the deletion of the Plaintiff's name from the notepaper of the Jersey partnership or otherwise howsoever; or

(2) representing that the Jersey partnership continues in any other form.

When he signed the Order of Justice of the 25th July, 1986, the Deputy Bailiff declined to grant, and deleted from the Order of Justice, an immediate interim injunction in the terms of the permanent injunction sought by the Plaintiff.

This matter comes before the Court on an application by the Defendant in the first action and Plaintiff in the second action ("Mr. Bingham") asking the Court to lift the interim injunctions in the Order of Justice of the Plaintiffs in the first action and Defendants in the second action ("Theodore Goddard") of the 18th July, 1986, signed by the Bailiff, relating to the cessation of Mr. Bingham's partnership in the Jersey partnership and a further application, inter partes, by Mr. Bingham, for interim injunctions in the terms disallowed by the Deputy Bailiff in the Order of Justice signed by him on the 25th July, 1986, relating to the deletion of Mr. Bingham's name from the list of partners of the Jersey partnership.

The Court heard arguments throughout Thursday, 7th August, 1986, (when Advocate L.J. Wheeler appeared for Mr. Clapham to represent Theodore Goddard) and again on Monday the 15th September, 1986, at the conclusion of which the Court gave the following decision:-

"Dealing first with general aspects relating to both Orders of Justice, we are satisfied that there is a serious question to be tried.

The tendency with regard to interlocutory injunctions is to avoid trying the same question twice - in a case such as this it would be very easy to fall into that trap. The Plaintiffs in the first Order of Justice rely upon the expulsion of the Defendant from the U.K. partnership as being conclusive because, they say, it is a fundamental term of the Jersey partnership that a partner ceases to be a member of that partnership when he ceases to be a member of the U.K. partnership. On the other hand, the Plaintiff in the second Order of Justice relies upon his claim that the Jersey partnership was a partnership at will which he effectively dissolved and that his explusion or otherwise from the U.K. partnership has nothing whatever to do with the Jersey partnership.

The Court cannot avoid taking a preliminary view on these matters but only to the extent that the Court must be satisfied that there is a serious question to be tried and the need for the Court to give serious attention to any doubt that it has whether

the existence of the right which either party is asserting is not sufficient to prevent the Court from granting an interlocutory injunction.

We have had to have regard to the degree of hardship in each case if the injunctions sought are either maintained or granted.

The Court has also considered the balance of convenience and the nature of the injury which the respective Defendants, on the one hand, would suffer if the injunctions were maintained or granted and they should ultimately turn out to be right and that which the respective Plaintiffs, on the other hand, might sustain if the injunctions were discharged or refused and they should ultimately turn out to be right. The Court has also applied the rule that the burden of proof that the inconvenience which the Plaintiff will suffer by the discharge or refusal of the injunction is greater than that which the Defendant will suffer if it is maintained or discharged lies on the Plaintiff in each case.

Applying all those principles and dealing now with the first Order of Justice the injunctions contained in the Order of Justice will continue but we order that the Plaintiffs, jointly and severally, give an undertaking in damages to the Defendant as a condition of the Court maintaining the injunctions and note that that undertaking was in fact given by Counsel on their behalf this morning. We do not at this moment say whether the injunctions in the first Order of Justice are maintained or whether they are lifted and new identical injunctions are granted but we shall deal with that aspect in a fuller written judgment later because it may help practitioners in the future.

Turning now to the second Order of Justice we consider that the injunctions sought might be a great hardship on the Defendants and might put an end to the Theodore Goddard practice in Jersey. In our opinion the Plaintiff in the second Order of Justice is not able to show that injunctions are necessary to protect him from irreparable injury; damages would be a sufficient remedy. However, we order the Defendants to keep an account of the Jersey partnership from the 8th July, 1986, to the date of final judgment as a condition of our refusal of the interim injunctions

sought by the Plaintiff, which application is accordingly refused.

Costs will be costs in the cause".

The present judgment is restricted, therefore, to the question, which was argued very fully, whether the injunctions in the first Order of Justice are maintained or whether they were defective and therefore lifted and identical injunctions granted in their stead.

The main thrust of Mr. Binnington's submissions was that the Order of Justice of the 18th July, 1986, was obtained without the submission of an affidavit in support and that, by reason of the absence of an affidavit, there was a failure to make the full and frank disclosure required in order to obtain an immediate interim injunction ex parte.

It is necessary for us to make some reference to the facts. By communications from Mr. Bingham to some of the partners in Theodore Goddard, dated the 4th July, 1986, Mr. Bingham purported to give notice of dissolution of the U.K partnership and on the 8th July, 1986, gave or purported to give, similar notice of the dissolution of the Jersey partnership. The Order of Justice averred that the notices of dissolution had no validity, that by notice of the 9th July, 1986, Mr. Bingham was expelled from the U.K partnership, and that it was a fundamental term of the Jersey partnership that a partner ceased to be a member of that partnership when he ceased to be a member of the U.K partnership.

The Order of Justice of the 18th July, 1986, further recited that by Order of the High Court of Justice (Chancery Division) on the 9th July, 1986, Theodore Goddard obtained immediate interim injunctions against Mr. Bingham restraining him from:

(a) publishing in any newspaper or periodical or in any other publication any statement or assertion to the effect that the partnership of Theodore Goddard had been dissolved or otherwise relating to an alleged determination of the said partnership, except a statement to the effect

that Mr. Bingham had ceased to be a member of the partnership; and

(b) making to any client or member of the public other than Mr. Bingham's legal advisers any such statement or assertion.

And that such Order was made in anticipation of Theodore Goddard forthwith issuing a Writ of Summons claiming, inter alia, declarations confirming the existence and terms of the U.K. partnership and the validity of the Notice of Explusion.

The Order of Justice further recited that at a hearing in the Chancery Division of the High Court of Justice on the 11th July, 1986, by which time Theodore Goddard's intended action had been commenced, the interim injunctions were discharged upon Mr. Bingham giving undertakings in the same terms subject to a proviso that he be at liberty to send to clients of the firm a circular letter in the following terms:-

"Andrew Bingham has ceased to be a partner in Theodore Goddard and is now practising on his own account. He may be contacted at 22, Park Crescent, London W.1. Telephone 01-637-8857".

It will be seen, therefore, that the interim injunctions granted by the learned Bailiff were in terms identical to both the Order of the High Court and the undertakings given by Mr. Bingham with the addition of the proviso referred to. Undoubtedly, they were granted because of a further averment contained in the Order of Justice that Mr. Bingham had written to three banks in Jersey and one in Guernsey stating that the partnership of Theodore Goddard was in dissolution, a fact not in dispute.

Mr. Bingham's contentions are that there is a significant difference between the criteria governing the U.K. partnership and those governing the Jersey partnership; that the Jersey partnership is a partnership at will without any express terms; that a partner does not cease to be a member of the Jersey partnership when he ceases to be a member of the U.K. partnership; that the U.K. and Jersey partnerships are entirely

separate partnerships; that whereas Theodore Goddard are able to point to a draft parnership deed relating to the U.K. partnership and served a notice of election to re-form the partnership and purchase the assets, no deed, draft or otherwise, exists to govern the Jersey partnership and, therefore, no right exists to elect to acquire or re-form the Jersey partnership or to use the name of the Jersey partnership.

Of course, these are all matters to be decided at the trial of the action but the complaint is of the failure to make a full and frank disclosure to the learned Bailiff at the time of the grant of the ex parte immediate interim injunctions which, it is claimed, would have led the Bailiff to disallow the injunctions.

Both Counsel sought to rely on the decision of Johnson Matthey Bankers Limited -v- Arya Holdings Limited, (22nd November, 1985 - as yet unreported) which was an application to discharge peremptorily an interlocutory injunction granted on the signing of an Order of Justice. In that case two affidavits had been produced in support of the injunction.

The Court said this:-

"Now it is said by the Defendant who is applying to have certain interlocutory injunctions which were imposed by me at the time, removed, as I say peremptorily, that the Court today should not look at the merits of the case but lift the injunctions at once because there has not been the necessary requirements, as I understand it of the English law which for our purposes we are prepared to adopt, a necessarily full and frank disclosure of everything that was material. Not material in the sense that it was believed to be material by Mr. Harper but in the sense that it actually was material..... The test, as I understand it, is whether in applying to the Court for an interlocutory injunction the person (in our jurisdiction the Bailiff or the Deputy Bailiff) that is, the judge, was deceived, or any matters were withheld from him which if they had been known to him would have caused him not to grant the injunction sought".

It is relevant to note that of the three matters raised in that case one had been covered by the affidavit but the other two were not "..... of sufficient materiality such that they would have influenced myself had they been made known to me to the extent that I would have refused to have granted the injunction and therefore we are not satisfied that the burden - and it is on the applicant, ... has been discharged ...."

The procedural aspects relating to interim injunctions in England are dealt with in the "White Book" - Supreme Court Practice 1985, Order 29 at page 454, rule 1(1) and (2), as follows:-

"29/1 1-(1) An application for the grant of an injunction may be made by any party to a cause or matter before or after the trial of the cause or matter, whether or not a claim for the injunction was included in that party's writ, originating summons, counterclaim or third party notice, as the case may be.

(2) Where the applicant is the Plaintiff and the case is one of urgency such application may be made ex parte on affidavit but, except as aforesaid, such application must be made by motion or summons".

Section 37(1) and (2) of the Supreme Court Act 1981, replacing the Supreme Court of Judicature (Consolidation) Act 1925 section 45, provides that the High Court may by order grant an injunction in all cases in which it appears to the Court to be just and convenient to do so and that any such order may be made either unconditionally or on such terms and conditions as the Court thinks just. It is incontrovertible that the Royal Court, at common law, has an identical power or inherent jurisdiction and has exercised it over many years.

There follows at paragraphs 29/1/2 of the White Book the general principles to be followed in deciding whether or not to grant an interim injunction, including those established by the leading case of American Cyanamid Co. -v- Ethicon Limited (1975)1 All ER 504 H.L. We applied those principles in coming to our decision on the merits in

the instant case.

The injunction in Johnson Matthey Bankers Limited -v- Arya Holdings Limited was a Mareva type injunction and the history, the principles to be applied and the extent and limitations of that injunction are set out in the White Book at paragraphs 29/1/5 to 29/1/8 inclusive. The guidelines suggested by the Court of Appeal in Third Chandris Corporation -v- UnimarineS.A. (1979) 2 All ER 972, and repeated in Johnson Matthey Bankers Limited -v- Arya Holdings Limited, include:

(1) The Plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know.

(2) The Plaintiff should give particulars of his claims against the Defendant, stating the grounds of his claims and the amount thereof and fairly stating the points made against it by the Defendant .....

(5) The Plaintiff must give an undertaking in damages in case he fails in his claim or the injunction turns out to be unjustified...."

But the injunction in the instant case is not a Mareva type injunction - to restrain the Defendant from defeating justice by removing or disposing out of the jurisdiction his assets within the jurisdiction or by concealing them here. Nevertheless, full and frank disclosure remains a necessary ingredient in England. Paragraph 29/1/13 of the White Book states that: "..... All the facts must be laid before the Court and nothing suppressed (see R. -v- Kensington Income Tax Commissioners (1917) 1 K.B. 486, p.504, C.A.) otherwise the order may be set aside without regard to the merits (Boya -v- Gill (1891) 64 L.T. 824)". And at paragraph 29/1/17: "An undertaking by the Plaintiff as to damages ought to be given on every interlocutory injunction, though not where the order is in the nature of a final order (Fenner -v- Wilson (1893) 2 Ch. 656)...." And at paragraph 29/1/22: "Dissolving injunction - If on hearing of a motion by a Plaintiff for an injunction, or, in the alternative, to continue an interim injunction already obtained ex parte, it appears that the interim order was irregularly obtained by

suppression of facts, the Court may discharge the ex parte order without any cross notice of motion for that purpose by the Defendant; though it may grant the injunction asked for (Boyce -v- Gill).

In R. -v- Kensington Income Tax Commissioners the headnote reads:-

"If on the argument showing cause against a rule nisi the Court comes to the conclusion that the rule was granted upon an affidavit which was not candid and did not fairly state the facts, but stated them in such a way as to mislead and deceive the Court, there is power inherent in the Court, in order to protect itself and prevent an abuse of its process, to discharge the rule nisi and refuse to proceed further with the examination of the merits..... The Divisional Court, without dealing with the merits of the case, discharged the rule on the ground that the applicant had suppressed or misrepresented the facts material to her application. On appeal: - Held, that the rule of the Court requiring uberrima fides on the part of an applicant for an ex parte injunction applied equally in the case of an application for a rule nisi for a writ of prohibition. Held, therefore (affirming the decision of the Divisional Court) that, there having been a suppression of material facts by the applicant in her affidavit, the Court would refuse a writ of prohibition without going into the merits of the case".

That the judges adopted a robust view is clear from several extracts from the judgments:-

Lord Cozens-Hardy M.R at page 504:-

"The authorities in the books are so strong and so numerous that I only propose to mention one which has been referred to here, a case of high authority, Dalglish -v- Jarvie, which was decided by Lord Langdale and Rolfe B. The head-note, which I think states the rule quite accurately, is this: "It is the duty of a 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 there is an observation in the course of the argument by Lord Langdale: "It is quite clear that every fact must be stated, or, even if there is evidence enough to sustain the injunction, it will be dissolved." That is to say he would decide upon the merits, but said that if an applicant does not act with uberrima fides and put every material fact before the Court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but that he must come again on a fresh application. Then there is a passage in Lord Langdale's judgment which is referred to in the head-note. It is this: "There is, therefore, a question of law, whether having regard to the facts thus appearing, the Plaintiffs are entitled to the protection they ask; and there is also a question of practice, whether the facts stated in the answer being material to the determination of the question, and being within the knowledge of the Plaintiffs by whom the case was brought forward, and who obtained an ex parte injunction upon their own statement, whether the omission of the statement of these facts in the bill does not constitute a reason why the ex parte injunction so obtained should be dissolved." They held that the injunction ought not to be granted although there might be materials apart from this question upon which the injunction might have been granted. Rolfe B. says this: "I have nothing to add to what Lord Langdale has said upon the general merits of the case; but upon one point it seems to me proper to add this much, namely, that the application for a special injunction is very much governed by the same principles which govern insurances, matters which are said to require the utmost degree of good faith, 'uberrima fides'. 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 anything 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 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". That is merely one and perhaps rather a weighty authority in favour of the general proposition which I think has been established, that on an ex parte

application uberrima fides is required, and unless that can be established, if there is anything like deception practised on the Court, the Court ought not to go into the merits of the case, but simply say "We will not listen to your application because of what you have done." "

Warrington L.J. at page 509 said this:

"It is perfectly well settled that a person who makes an ex parte application to the Court - that is to say, in the absence of the person who will be affected by that which the Court is asked to do - is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make the fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it."

And Scrutton L.J. at page 519 said this:-

"I express no final opinion, but it may be that the result of this is that the applicant has no further remedy. In the case of Reg. -v- Bodmin Corporation (1894) 1 Q.B. 552, Day J. said: "As I read the authorities, it has always been held, whenever this objection has been taken, and the attention of the Courts has been called to the point, that no second application for a prerogative writ will be granted when the first application has been discharged. There are many authorities which support this contention; but I think, apart from authority, that it is a most convenient view to take of the jurisdiction of the Court in such matters. It is a view which has commended itself to many judges who have acted upon it, and it commends itself to me. It is no doubt extremely convenient that no second application for a high prerogative writ should be allowed after a first application has been refused. Such a writ is an extraordinary remedy, and persons seeking it may very reasonably be required not to apply for it unless they have sufficient cause for doing so. They must come prepared with full and sufficient materials to support their application, and if those materials are incomplete, I think it is quite right that they should not be allowed to come again."

It may be that the result of our decision is that the applicant loses her remedy. If so, she has only herself and her legal advisers to thank for it."

In Thermax Limited -v- Schott Industrial Glass Limited (1981) Fleet Street Reports 289, there was no deliberate failure to disclose but merely an error of judgment. However, the Court was dealing with an Anton Piller order which, like a Mareva injunction, is a special case. The headnote reads as follows:-

" The Plaintiffs, fearing that the Defendants were infringing their registered design for a circuit for a heated glass panel and that they would suppress evidence of such infringement, obtained an Anton Piller order. The evidence before the judge indicated that the Defendant company was being run by three ex-directors of the Plaintiffs and against whom the Plaintiffs had already commenced separate proceedings for breach of confidence. The Defendant company was in fact a member of a group of companies controlled by the Carl Zeiss Foundation. Further, in correspondence between the Plaintiffs and Defendants' solicitors relating to the earlier action, the Plaintiffs had sought and been refused inspection of the Defendants' premises. Neither of these two matters were before the judge. The Defendants applied to have the mandatory part of the Anton Piller order (order to give discovery and permit inspection) set aside.

Held, setting aside the mandatory part of the order, that on an ex parte application the party seeking relief must make full disclosure to the Court of all matters within his knowledge and that if he fails to do so, even where that failure was an error of judgment only and not deliberate, the order must be discharged without investigating its merits."

At page 294, Browne-Wilkinson J, says this:

"On the application to vary or discharge Woolf J.'s order Mr. Young, for the Defendants, has two main lines of argument. First he submits that there are material facts which were known to the Plaintiffs at the time that they made their original ex parte application to Woolf J. but which were not put before him. Therefore, it is submitted, the Court should, without going into the merits of the matter at all, discharge the order made ex parte on inadequate facts. Secondly, Mr. Young submits that on the facts as they are now disclosed by the evidence sworn by the Defendants, the order should not have been made and should now be discharged.

I have heard argument only on the first of those 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, 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 (already cited). Then on page 505 he quotes Baron Rolfe (already cited). So the principle is not limited to cases where there is a deliberate intention to mislead the Court but extends to cases where material facts have not been disclosed, even innocently."

In Bank Mellat -v- Mohammed Ebrahim Nikpour (1982) C.L.R. 158 (C.A.) the Court of Appeal in dismissing the Plaintiffs' appeal against the discharge of a Mareva injunction, and the refusal to grant a new Mareva injunction in its place, held that (i) applicants for Mareva injunctions should make full and frank disclosure of all matters including any defences which they anticipated might be relied upon by the Defendant; and (ii) if a Mareva injunction were improperly obtained the Court would not grant a new Mareva injunction in its place even though the Plaintiffs had subsequently rectified matters, because the Plaintiffs should be deprived of any advantage which they had obtained by the previous, wrongly obtained injunction.

Robert Goff, J. had discharged the original Mareva injunction because there had not been full and proper disclosure at the original hearing. He refused to grant a new Mareva injunction because it was impossible to judge what would have happened to the money if the original Mareva injunction had not been granted. The Plaintiffs appealed. Lord Denning, M.R., explained the facts and the history of the case and then said:

"I would like to repeat what has been said on many occasions. When an ex parte application is made for a Mareva injunction, it is of the first importance that the Plaintiff should make full and frank disclosure of all material facts. He ought to state the nature of the case and his cause of action. Equally, in fairness to the Defendant, the Plaintiff ought to disclose, so far as he is able, any defence which the Defendant has indicated in correspondence or elsewhere. It is only if such information is put fairly before the Court that a Mareva injunction can properly be granted...."

Robert Goff, J. had felt that more inquiries should have been made before applying for a Mareva injunction. The Plaintiffs had challenged the Judge's reasoning, saying that the non-disclosure was innocent and that there was no fraud or deception or anything like that. They had relied on cases of service out of the jurisdiction including The 'Hida Maru' (1981) 2 Lloyds Law Rep. 510, and suggested that although initially there may not have been full and frank disclosure, that could be rectified later. Lord Denning accepted this argument only to the extent that:

"There may sometimes be a slip or mistake - in the application for a Mareva injunction - which can be rectified later. It is not for every omission that the injunction will be automatically discharged. A locus penitentiæ may sometimes be afforded; but not in this particular case. It is quite clear that the Plaintiffs themselves had the greatest difficulty in showing what their cause of action was. At first, they did not show any cause of action. Next they claimed that the monies had been loaned to Mr. Nikpour. Finally, they said against Mr. Nikpour that he had wrongly credited the sums to his account. It seems to me that, in all the circumstances, the judge was quite entitled to say that the injunction was not properly obtained: and that it was not a case where the Plaintiffs should be given any locus penitentiæ to come in."

Donaldson, L.J., said that it was so well enshrined in the law that no injunction obtained ex parte should stand if it had been obtained in circumstances in which there had been a breach of the duty to make the fullest and frankest disclosure (a principle of great antiquity) that it was difficult to find authority for the proposition; it was trite law. Happily the Court had been referred to the dictum of Warrington L.J. in R. -v- Kensington Income Tax Commissioners at p.509 (already cited). The Plaintiffs had

submitted that that rule should not be applied because the true rule was based on the cases relating to service out of the jurisdiction and that non-disclosure was not a ground for discharging an injunction unless the non-disclosure was deliberate or the non-disclosure, if corrected at the time when the application for relief was made, would have led to that relief being denied. He went on:

"It may be possible to extract that application of the general rule in the case of service out of the jurisdiction, but it has never been so applied in relation to injunctions. The distinction is, I think, quite simply this ..... In the case of obtaining leave to serve out of the jurisdiction, if (the Plaintiff) had been entitled to that relief anyway, he obtains no advantage in serving out earlier save in a wholly exceptional case. Equally the Defendant suffers no disadvantage. It is quite different with an injunctive order which fetters the discretion of the Defendant to deal with his own property over a period. That confers tremendous advantage on the Plaintiff who has been granted the order, and imposes a tremendous disadvantage on the Defendant - the disadvantage of being fettered in dealing with your own property."

The Mareva injunction was, in effect, together with the Anton Piller order, one of the law's two 'nuclear' weapons. If access to such a weapon was obtained without the fullest and frankest disclosure it should be revoked.

Of course, as we have already observed, the instant case does not deal with either a Mareva injunction or an Anton Piller order and, therefore, it does not deal with one of the law's two 'nuclear' weapons.

However, in Yardley and Co. Ltd., and others -v- Higson and others (1984) Fleet Street Reports 304 C.A., the Court of Appeal decided that non-disclosure of a material fact on a first application for an injunction was not fatal to the grant of equitable relief on a subsequent occasion when the fact was before the Court.

The headnote reads as follows:-

"This action concerned toilet soap marketed by the Plaintiffs under the style "Yardley of London English Lavender" in a distinctive package bearing a design. The Defendants, who were importers, threatened to import from the U.S.A. large quantities of toilet soap similarly packaged in the U.S.A. under the Plaintiffs' licence.

Hearing of this, the Plaintiffs sought and obtained ex parte relief in an action based on passing off and copyright infringement. They adduced evidence from their managing director that the soap of U.S. manufacture was of inferior quality principally in that the packaging of such soap allowed the scent to evaporate.

A short while after this injunction had been granted, the Defendants discovered that the Plaintiffs were themselves manufacturing and selling in England a toilet soap packaged in just the same manner as that manufactured in the U.S.A and that a sample which they purchased in London had deteriorated because of poor wrapping. No mention had hitherto been made of this fact in the Plaintiffs' evidence.

When the matter again came before the Court, the Plaintiffs' managing director made a further affidavit offering an explanation for what had happened. At this further hearing the Plaintiffs again moved the Court ex parte in the Defendants' presence and obtained relief in a more limited form than what they had previously obtained.

The Defendant appealed arguing that because the Plaintiffs had failed to disclose a material fact to the judge who granted them the first injunction, they should not be entitled to further equitable relief.

Held, dismissing the appeal, (1) there being an arguable case and the balance of convenience being strongly in favour of the Plaintiffs, the limited injunction should continue.

(2) that there had been a non-disclosure of a material fact before the first judge. This did not itself prevent the grant of further relief at a subsequent application when that fact was fully before the Court."

At page 309 Lawton, L.J. said this:-

"I do not find it necessary to go into the law about this matter in any way, because it is clear that in cases of injunctions, even if there has to be a discharge of one injunction because there has not been proper disclosure, that does not prevent a further application for an injunction being made."

In Boyce -v- Gill (already cited) the head note shows that there: "was a motion by the Plaintiffs for an injunction, or in the alternative to continue an interim order already obtained ex parte. The interim order was irregularly obtained on suppression of material facts. No cross notice of motion to discharge the interim order was held by the Defendant. The Court held that the Court may discharge an ex parte order without a formal notice of motion to discharge being given by the Defendant. The Court on the evidence granted an injunction in the terms of the interim order, but discharged the interim order, the Plaintiffs to pay the costs of it in any event. The injunction restrained the Defendant, the Plaintiff's contractors, from excavating or obstructing, or suffering to be excavated or obstructed, a certain right of way.

At page 825, Kekewich J. said this:-

"As to the first point, the Plaintiffs have a right to use the way, and that right is being interfered with; secondly, there is no new agreement. Therefore, there must be an injunction until trial or further order in the terms of the interim order. A much more important question is a question of practice. It is this: In the first place, did the Plaintiffs disclose all the facts they ought to have disclosed at the time they applied for the interim order; did they omit to disclose anything which the Court ought to have known? If so, what is the consequence, and what ought now to be done? The Plaintiffs now apply for an injunction on two grounds: one, interference with property; two, breach of agreement. In the first instance they applied ex parte only on the second ground, namely breach of agreement. Their only affidavit in support of the ex parte motion rests entirely on breach of agreement ..... What the Court would have done if all the facts had been known I cannot say ..... but possibly the Court would have come to a different conclusion and said that the interim order was not necessary

..... But according to my view, on ex parte motions the Court should be in a position to weigh all matters which might influence it, so as to decide whether it is a case to give notice of motion rather than that an injunction should be granted. At best the Court runs the risk of making an order which may do harm and the undertaking in damages given by a Plaintiff is not satisfactory. It is of the utmost importance that the Court should be able to rely upon the statement of Counsel, and the affidavits. It is of the utmost importance that there should be a full disclosure of the facts ..... Counsel for the Defendant says, let the interim order go. In my opinion not so; if the interim order was improperly made it should be discharged..... Here the interim order was improperly obtained and must be discharged with costs in an ordinary case; but here I am making an order in the Plaintiff's favour. The order will be:- Discharge interim order, Plaintiffs to pay the costs thereof in any event; injunction granted until trial or further order in the terms of the interim order; .....".

It appears to us that the only conclusions to be drawn from those directly conflicting authorities that were cited to us and to which we have referred at some length are that where there has not been full and frank disclosure and thus the injunction has been improperly obtained, it will be discharged; that the Court can and probably should refuse to grant a new injunction in order to mark its disapproval and, so-to-speak, punish the Plaintiff, and in special cases, such as Mareva injunctions and Anton Piller orders, this will almost inevitably be the result; but that the Court does have the power, in the exercise of its discretion, to discharge the improperly obtained order and grant a new injunction in the same terms.

But is the situation in Jersey so refined? We do not think so. The ancient form of injunction was achieved by means of an "arrêt" or "saisie conservatoire". For example in Allix -v- Allix et. cie (1885) 210 Ex 230 we find an "arrêt fait sur un naivre par le co-propriétaire afin d'empêcher l'autre co-propriétaire de le faire naviguer jusqu'à vuidance d'un procès pendant entre-eux" (equivalent of a Mareva type injunction to prevent the asset being removed from the jurisdiction pending trial of the action). The "arrêt entre mains" was the means of detaining and preserving assets in the hands of third parties.

Horman -v- de Vida et cie (1890) 214 Ex 201 was an action by the principal heir against the widower and executor of the deceased wife and mother for the replacement of "propres aliénés". Because of the law terms it was not possible immediately to bring an action for "remplacement" before the Cour d'Heritage which alone had jurisdiction. Therefore, the Plaintiff obtained an Order of Justice containing an immediate "saisi-arrêt provisoire" on the moveable assets of the deceased, namely 48 shares in the Jersey Gas Light Company, and an injunction on the President of the Company to prevent the transfer of the shares in any manner whatsoever, pending the bringing of process before the Héritage Division. The record of the action, where the Cour du Samedi confirmed the "saisie-arrêt provisoire" to remain in force until judgment by the Cour d'Héritage, subject to certain conditions such as the early bringing-on of the action before that Court, contains no reference to any affidavit or undertaking as to damages and we are sure there were none.

A class of cases in which injunctions were granted ex parte were actions for "Séparation de Biens". Two early cases are recorded in the Table des Decisions 1894-1900 at pages 158 and 159:-

"4° Injonction - Remontrance demandant séparation de biens et injonction au mari de faire cesser l'exploitation d'un immeuble appartenant à la femme - Signification ordonnée, injonction étant faite de faire cesser ladite exploitation, jusqu'à ce que la Cour se soit prononcée sur la Remontrance. Ex parte Vincent (1897) 218 Ex 476.

6° Injonction - Sur la présentation de la Remontrance, ordonné qu'injonction soit faite au mari de ne pas se départir des effets mobiliers réclamés par la femme suivant Inventaire jusqu'à jugement de la Cour - Inventaire merché. Ex parte le Boutillier (1899) 219 Ex 522".

It is necessary to remind ourselves that the "Remontrance" (rendered obsolete by the Royal Court rules) was a petition signed by the "Remontrant" or petitioner and presented ex parte to the Court. The Court ordered that it be served on the Defendant and that he be convened to appear on a future date. Where, therefore, an injunction

was granted upon presentation of the "Remontrance", it was granted ex parte, on the basis of the signed petition and the verbal submissions of Counsel, without affidavit and without any undertaking in damages. It is also to be noted that a "Séparation de Biens" was not a matrimonial proceeding but one dealing exclusively with the assets of the parties.

In Taylor -v- Fennell, his wife (1937) 239 Ex 366, 369, the husband presented a "Remontrance" against his wife claiming the care and control of their minor child. The Court, in ordering service, granted an immediate interim injunction to prevent the removal of the child from the Island "avant que la Cour ne se soit prononcée". There was no affidavit. There was, at that time, no matrimonial causes division of the Court. Mr. Clapham drew our attention to the case of Wheeler -v- Eggleton, his wife, (1955) 249 Ex 266, 386, in which the Court ordered that a "remonstrance" be served and, at the same time, granted an injunction restraining the defendant from permitting the children whose care and control were sought from leaving the Bailiwick without the prior permission of the Court. Again, there was no affidavit. Subsequently, injunctions have been granted in very many matrimonial causes although the current practice is that the Bailiff requires an affidavit to be sworn in all applications for "ouster" injunctions.

Sayer -v- Flinn (1947) 243 Ex 167 is an interesting case:

The action was commenced by Order of Justice and came before the Court for confirmation of the Order, a medical certificate was produced to certify the Defendant's inability to attend. Upon the Plaintiff taking oath in Court that the facts set out in the Order of Justice were true, the Court, ex parte, granted permission to the Plaintiff to effect a "saisie-arrêt conservatoire" upon the more apparent goods of the Defendant and an injunction restraining the Defendant from selling or otherwise disposing of such goods to any person whomsoever, pending the final decision of the Court on the action. The "saisie-arrêt" was not sought in the Order of Justice but there was reason to believe that the Defendant was disposing of his assets.

Mr. Clapham also drew to our attention a number of cases recorded in the Table des Décisions 1964-1978 as follows:-

"Breach of covenant in restraint of trade. Immediate interim injunction continued by Court. Sydney James Productions Ltd. -v- Wells (1964) 255 Ex 119.

Breach of convenant in restraint of trade. Immediate interim injunction continued by Court but subsequently modified. Rayson Marine Limited -v- Le Bourgeois (1969) 257 Ex 368.

Nuisance. Immediate interim injunction granted to restrain building operations. Injunction raised by consent on conditions. La Tour Hotel Ltd. -v- Cristin (1968) 257 Ex 77.

Immediate injunction against disposal of shares. Injunction raised. Marshall -v- Hare (1972) 260 Ex 195.

Immediate injunction against canvassing former employer's customers confirmed. Fire Engineering Ltd. -v- Carter (1976) 263 Ex 445.

Immediate injunction restraining Defendant from operating bank account. Declaration by Court that the monies credited to the said account are the property of the Plaintiff. Régie des Postes -v- Luciani (1974) 262 Ex 31.

Immediate injunction restraining Defendant from operating bank accounts confirmed. Banks ordered to pay to Plaintiff the monies in the said accounts. Royal Bank of Scotland -v- Williams (1974) 262 Ex 64.

Immediate interim injunction. Injunction varied by Court. Action stayed. Interim injunction to remain in force, but may be varied with consent of Plaintiff, which consent shall not be unreasonably withheld. Plaintiff ordered to pay £100,000 to Judicial Greffier within 28 days, failing which Defendants may apply for injunction to be raised. Leave to appeal against order for payment refused. Order varied. Time for

payment extended. Jamboree Holdings Ltd. -v- Southwinds Investments Ltd. (1976) 263 Ex 299, 301, 360.

Passing off. Immediate injunction. Agreed judgment. Allied Publishing Co. Ltd. -v- St. Richard's Press Ltd. (1972) 260 Ex 306.

Immediate interim injunction restraining Defendants from operating bank accounts modified when action placed on pending list. Cubin -v- Christlieb. (1976) 263 Ex 103.

Immediate interim injunction ordered to remain in force until £20,000 paid into a joint account in the names of the advocates of the parties. Windsor -v- Furnishing Services Ltd. (1976) 263 Ex 327.

Court refuses to confirm immediate interim injunction against disposal of vessel or dismissal of vessel's master. Smith -v- Taylor. (1978) 265 Ex 291."

We have examined all these cases. We are, as far as is possible, satisfied that in none of them was an affidavit required prior to signature of the Order of Justice, nor was an undertaking in damages obtained, although it does seem that at the inter partes stage in Jamboree Holdings Ltd. -v- Southwinds Investments Ltd. monies were ordered to be paid into Court to secure any damages that might result from a continuation of the injunction.

On the 5th August, 1982, the Court sat to consider applications by Barry Shelton and Anthony Shelton for an order raising certain interim injunctions in force by virtue of the service on them of one Order of Justice at the instance of the Viscount and of one Order of Justice at the instance of John Henry Appleby. The injunctions restrained the Defendants from disposing of assets, transferring title or charging or otherwise impairing the value of assets. The Deputy Bailiff delivered the Court's judgment and, inter alia, said this:-

"When an Order of Justice is presented to the Bailiff or myself seeking an injunction of this nature, which is really a "saisie conservatoire", which is well known to the Court, it is customary in some cases, but not in all, depending on the circumstances, to require the allegations in the Order of Justice to be substantiated by affidavits. Obviously, in the case of the Viscount we do not do so as he is a senior official of this Court. In the case of individual litigants again, that entirely depends on what is alleged in the Order of Justice. But when two Defendants against whom an Order of Justice has been served come to this Court to lift the injunctions then it is essential - and I cannot stress it too strongly - that those applications be supported by sworn affidavits. Otherwise it is imposing on Counsel a very difficult burden. He has to submit to the Court what his instructions are, as his client tells them to him, but that client himself has not deposed to them. We think that it is an unsatisfactory state of affairs. Therefore, as a practice direction the Court is going to rule that it will not consider in future applications to lift injunctions unless those applications are supported by affidavits."

In Trasco International Aktiengesellschaft -v- R.M. Marketing Limited (29.10.1986 - as yet unpublished), a case heard subsequent to the hearing of the instant case, the Court, dealing with an application to raise an interim Mareva type injunction relied on Johnson Mathey Bankers Ltd. -v- Arya Holdings Limited and cited the following extract:-

"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."

The Court then set out the guidelines from Third Chandris Corporation -v- Unimarine S.A. which we have already recited, and cited other authorities including Thermax Limited -v- Schott Industrial Glass Limited and continued:-

"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 guidelines set out above. If he does not do so, and if material matters are withheld, then the order cannot stand and must be discharged.....

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 have a number of comments to make. Firstly the Trasco International case (supra) must be regarded as restricted to Mareva type injunctions - ".... the exercise of the extraordinary jurisdiction." Secondly, the Court does not appear to have given consideration to the question whether it might discharge the interim injunction but go on to re-grant an interim injunction in the same terms. Thirdly, the judgment of the Court in the Shelton case (supra) was not brought to the attention of the Court in either the Johnson Mathey -v- Arya case or the Trasco International -v- R.M. Marketing Limited case.

In Compagnie Francaise d'Entreprises Metalliques -v- Sogex International Limited, second Defendant, 86/93. (7 May, 1986, unreported) the Court for convenience, applied the principles set out in Johnson Mathey Bankers Ltd. -v- Arya Holdings Ltd. and lifted injunctions imposed upon the second Defendant. The judgment states that:-

"The Court is satisfied that there was a failure to make a full and frank disclosure or to give particulars of the points made against the claims - the learned Bailiff was not informed of the proper law of the main contract or of the sub-contract and was not informed of the arbitration clauses in both those contracts - nor was the

learned Bailiff informed of the existence of the proceedings in France and the 'saisie conservatoire' there nor was he given any grounds for the belief that the second Defendant has assets within this jurisdiction; indeed the Court is satisfied that the Plaintiff was relying on suspicion or hope rather than on a justified belief. The Court is satisfied that the learned Bailiff, if all relevant factors had been made known to him, would not have granted the injunctions."

But Cie. Frse. d'Entreprises Ltd. -v- Sogex International Ltd. again concerned a Mareva type injunction and the Shelton case (supra) was again not drawn to the attention of the Court. The matters not before the learned Bailiff when he granted the injunction were so profound that the Court was entitled to take the view that there was an element of 'bad faith' and that, in possession of the facts, he would not have granted the injunctions. In particular, the Court, if asked, "might well have been receptive to an application to stay the proceedings pending arbitration."

In the instant case, Mr. Clapham argued that this was a Jersey procedural matter and not an English one; that in Jersey an affidavit or draft affidavit is not a pre-condition of an ex parte order; that no rule of Court or practice direction exists; and that, had an affidavit been required it would be so obvious a requirement that the learned Bailiff would have asked for one. Mr. Clapham told us that time was of the essence, that the Order of Justice was prepared, together with an affidavit to obtain leave to serve out of the jurisdiction, that he attended personally upon the learned Bailiff, that he took with him the affidavit of Mr. Walters in the English proceedings and many other papers, that the Bailiff studied the Order of Justice, enquired as to the difficulty of service, was informed of the affidavit and of Mr. Bingham's representation by Mr. Binnington, was satisfied by the order of the High Court, and signed the Order of Justice. Mr. Clapham had on many occasions obtained injunctions without affidavit in the past and argued that it would be absurd for Theodore Goddard to be penalised now because the Bailiff did not ask for an affidavit; that in Jersey an injunction can be granted without an affidavit; and, therefore, that non-disclosure at the time was entirely immaterial and that the Order of Justice does not have to disclose the defence or the points made against the Plaintiff's claim because it is a part of the adversarial process followed in Jersey.

We must say that, in our opinion, far too much reliance has been placed upon Johnson Mathey Bankers Ltd. -v- Arya Holdings Ltd. The Deputy Bailiff referred there to the "..... necessary requirements of the English law which for our purposes we are prepared to adopt". (The underlining is ours). What the Court found in the Johnson Mathey case was that even adopting the English principles for the purposes of that case the interim injunctions would stand. But the same Deputy Bailiff, in the Shelton case had said ".... it is customary in some cases, but not in all, depending on the circumstances, to require the allegations in the Order of Justice to be substantiated by affidavits".

In our opinion, under the common law, the Bailiff and the Deputy Bailiff have an absolute discretion, when signing an Order of Justice, whether or not to grant an immediate interim injunction. Under the Shelton case it may be that there is now a practice direction that the Court will not consider applications to lift injunctions unless those applications are supported by affidavits, although we doubt the propriety of practice directions being issued by the Inferior Number in unreported judgments. In our opinion there is an urgent need for Rules of Court and/or practice directions of the Superior Number of the Royal Court to govern the issue of interim or interlocutory injunctions. But we refrain from issuing any.

We find that the learned Bailiff had an absolute discretion, under the common law of Jersey, whether or not to grant the injunction in question. It may be that as a result of the decisions in Johnson Mathey Bankers Ltd. -v- Arya Holdings Limited and, in particular, Trasco International Aktiengesellschaft -v- R.M. Marketing Ltd., that a special régime now exists with regard to Mareva type injunctions but these are to be distinguished from interim or interlocutory injunctions at large. The custom has grown up, in recent years, whereunder the Bailiff or Deputy Bailiff, in order to protect themselves and prevent an abuse of their powers, have in the words of the Deputy Bailiff in the Shelton case (supra) ".... in some cases, but not in all, depending on the circumstances, to require the allegations in the Order of Justice to be substantiated by affidavits". That is a practice within their discretion and is not, in our opinion, a rule of law.

Accordingly, in the instant case, the injunctions in the first Order of Justice are maintained.

The burden of showing that the learned Bailiff would, on the merits, have refused to grant the injunction is on the applicant. As our decision of the 7th August, 1986, shows, Mr. Bingham failed to satisfy us of this. We do not propose to review all the affidavits that were before us but we were satisfied, having taken all the content of all the affidavits into account and, in particular, that of Mr. Robert Derek Fox in relation to the use of the name Theodore Goddard, that the interim injunctions should continue until trial of the action and thereafter until final judgment.

If we had felt constrained to dissolve the injunctions in the Order of Justice of the 18th July, 1986, on the ground that they had been improperly obtained, then, applying Yardley & Co. Ltd. and others -v- Higson and others and Boyce -v- Gill, and the exercise of what we believe to be our inherent jurisdiction, we would have imposed new and identical injunctions.

Finally, we might say that it is clearly desirable that Rules of Court and/or Practice Directions of the Superior Number should be enacted to govern the issue of all interlocutory or interim injunctions on ex parte applications. Despite our findings in the instant case, we consider it desirable that every application for such injunctions (other than in matrimonial causes which are dealt with separately) should be supported by affidavit not merely confirming the truth of the contents of the Order of Justice but containing a full and frank disclosure of all material matters, particulars of the claim and the grounds thereof, and fairly stating the points made against by the Defendant; and that in every such case the Order of Justice should contain an undertaking in damages.