

ROYAL COURT

27th April, 1989

Before: Commissioner F.C. Hamon and
Jurats Coutanche and Le Ruez

Before:	Victor Hanby Associates Limited	Plaintiff
And:	John Hyde Oliver	Defendant
And:	Victor John Belton Hanby	Third Party

Summons by the defendant seeking (1) to discharge or vary the injunction imposed on him by virtue of the service of the Order of Justice in the above action, and (2) an order for full indemnity costs. A consent order relating to the injunction having been agreed prior to the hearing, the Court sat to determine only the defendant's application for an order for full indemnity costs.

Advocate J.G.P. Wheeler for the plaintiff and the third party.
Advocate N.F. Journeaux for the defendant.

JUDGMENT

COMMISSIONER HAMON: By a summons dated the 18th April the defendant in this action summoned the plaintiff and the third party to appear before this Court today to show cause why the interim injunction set out in paragraph b(ii) of the prayer of the plaintiff's Order of Justice should not be discharged and lifted. In default of the said interim injunction not being discharged or lifted, cause was to be shown why the said interim injunction should not be amended by adding to it the following words: "provided always that the defendant may contact, communicate and deal with all past, present and future customers, clients, or business contacts of the plaintiff. The third party, or the plaintiff should not pay the cost of and incidental to this application on a full indemnity basis".

In the event the only matter that came before us for decision was the question of costs. The defendant applied for his costs on a full indemnity basis. The third party rested à la sagesse de la Cour'. The plaintiff resisted the application and asked that costs be awarded in the cause.

The facts can briefly be described as follows. The plaintiff carries on a computer consultancy business. The defendant and the third party entered into some form of partnership whereby the third party would use his business skills and the defendant his technical skills and whereby computer programmes would be written and sold to suitable outlets.

Possibly in July, 1987, a security system was written by the defendant for a well-known bank. This system came to be known as the "Stamp System". The allegation made by the plaintiff in its Order of Justice and before the third party was joined in the action was that the defendant wrote this system as an independent contractor. By reason of a joint venture agreement between the plaintiff and the defendant the plaintiff, who it was alleged held both copyright and title to the Stamp System, had sold it to the bank. There was a subsequent maintenance agreement.

The plaintiff kept computer software relative to the Stamp System and other important documents and information in its offices at 18 Esplanade.

It is alleged that on the 19th August, 1988, the defendant entered those offices and covertly removed the software and documents. The plaintiff feared their loss and took out an Anton Pillar Order to search the defendant's home and to locate and remove what we shall call the "Stamp System documents" from there.

There was at the same time an immediate interim injunction granted. It was in these terms:

- "1. Restraining the defendant whether by himself his servants or agents or howsoever from destroying, dealing with, charging or otherwise disposing of any documents relating to the Stamp System.
2. Restraining the defendant from interfering whether by himself his servants or agents or howsoever with the business of the plaintiff".

The Viscount's officers met with what can best be described as a 'stubborn resistance' to the Court's Order. As a result the Court ordered that the defendant be detained in custody to purge his contempt. After three days the defendant apologised to the Court and some of the Stamp System documents were placed in the hands of the Viscount.

As the pleadings grew, so apparently did the anger of the defendant and on the 29th December, 1988, very serious allegations of perjury and falsehood against the third party were made to the Attorney General. The Attorney General's reply is summed up in one sentence of his letter:

"The alleged falsehoods in the Hanby affidavit turn upon questions of evidence which will be the subject of proof in the substantive proceedings".

The defendant submitted that costs were at the discretion of the Court which has full power to determine by whom and to what extent the costs are to be paid. To that of course we need only to add the caveat that any discretion must be exercised judicially and in accordance with reason and justice.

I do not need to set out the relevant passages in Halsbury and The White Book on these matters. They are already too well rehearsed to need repeating.

The defendant supported his application for costs with two affidavits, one sworn by the defendant and the other sworn by Advocate Journeaux himself. We can see nothing wrong in counsel swearing an affidavit in this way. It is unusual but perhaps is one of the anomalies caused by a fused profession.

Advocate Journeaux asked us to award costs on a full indemnity basis. He said that the foundation upon which his submission rested was his letter of the 6th February, 1989. Because of the importance that he attached to this letter we will set it out in full:

"Dear Advocate Wheeler,

I note that whereas the Plaintiff Company in this action was originally alleging sole ownership of the computer programme with our client merely as an independent contractor, the position has now been accepted by both your clients to the effect that Mr. Oliver and Mr. Hanby were partners. In the circumstances I trust that you will agree that the injunction set out in paragraph B(ii) on page 5 of your Client's Order of Justice is no longer appropriate.

I am instructed there have been very serious non-disclosures in the Affidavit filed in support of your client's application for an interlocutory injunction and as a result I have been obliged to write to the Attorney General in the terms of my letter of the 29th December, 1988, a copy of which is enclosed. I enclose a copy of the Attorney General's reply to me dated the 6th January, 1989.

I have advised our client that he could obtain an Order from the Court to lift that part of the injunction to which I refer above.

In the circumstances I will be grateful to receive from you a letter addressed to the Judicial Greffier to be countersigned by myself to implement the above request. Unless I receive your letter to

implement this arrangement by the close of business on Friday 10th February, 1989, I will issue a Summons to seek an Order in the terms above requested. I also reserve the right to draw this letter to the attention of the Court when the question of costs is considered.

I trust that such an application will not be necessary and look forward to receiving your early response to this letter".

There are two factors arising from this letter, one patent and one latent. Firstly the argument that the Bailiff was misled. Secondly that despite a request on the 6th February that the injunction be withdrawn "sur le champ" it was not until the parties had virtually reached the steps of the Court that the matter was settled.

Advocate Journeaux further contended that because of the very long delay and because there was a great deal of unnecessary correspondence the plaintiff and the third party have given the Court an opportunity to find those exceptional circumstances that are necessary for an award of costs on a full indemnity basis.

On the first point we are satisfied that much still remains to be argued before a decision (which may very well involve a question of damages) can be made.

It does appear to us that the purpose of the ex parte injunction and the search order were to preserve the Stamp System documents.

We have carefully considered both the affidavits. We sympathise with Mr. Journeaux's argument but we are not satisfied on the somewhat sparse evidence before us that the case was not stated fully and fairly to the Bailiff.

The injury threatened was the possible destruction of the Stamp System documents and the fears that the plaintiff had in that regard were in our view reinforced by the defendant's unreasonable behaviour towards the Viscount's officers.

The question of delay is more troublesome. When Advocate Journeaux wrote on the 6th February, he clearly felt that because one partner is as entitled as another to communicate and deal with former customers and business contacts of a partnership, there was then no need to continue the injunction. It was in his mind clear that the concession that the defendant and the third party were partners made the injunction necessary.

We have considered the correspondence. After anxious consideration we are satisfied with Advocate Wheeler's explanation that it was only when he received the affidavit of the defendant on the 24th February and read paragraph 6 of it that he was able to agree the matter. Paragraph 6 of that affidavit reads as follows (this is the affidavit of John Hyde Oliver the defendant):

"It may be that the plaintiff company has other business and so far as I am aware it has not always acted exclusively as the agent of Mr. Hanby and myself. Presumably it has other business dealings that are quite separate. I have no interest in that aspect of the plaintiff's business and I have been advised that as a matter of law any interference with that part of the plaintiff's business which is not related to my former partnership with Mr. Hanby would in any event be wrong and might constitute a tort. In that event I cannot see the need for the plaintiff to enjoy protection in relation to that part of the business which I have no intention of being involved with and which bears no relation to the subject matter of the dispute".

We are not prepared to depart from the line of Jersey authorities on full indemnity costs. All these cases were examined by us in the course of counsel's address. We do not need to set out their facts. We would however just say this, Advocate Wheeler relied heavily on Vose -v- Barr (1966) 2 All ER 226 and to draw an analogy between the facts of that case where omitting to disclose a medical report (upon the disclosure of which the case was immediately settled) until shortly before the day fixed for the trial was held to be something which could debar a party from his costs. He argued that he had consistently sought to understand the defendant's reasoning which only became clear to him on reading the defendant's affidavit.

Advocate Journeaux distinguished Vose -v- Barr on the basis that the information - in that case the medical report - was highly material in the action. In the present case, the information sought by Advocate Wheeler really amounted to asking what his client's intentions were once the injunction had been lifted. In deference to the importance attached by Advocate Wheeler to the case we must say that we do not feel that Vose and Barr really assists us one way or the other except to confirm our wide discretion and to remind us that our wide discretion is only to be used judicially. It certainly does not deter us from a clear decision which is to order that costs in this matter shall be costs in the cause.

Authorities referred to:

The Supreme Court Practice (The White Book) (1988 edition) Vol. 1 at pp. 945-964.

Halsbury's Laws of England (1982 edition) Vol. 37 at pp. 547-561.

Vose -v- Barr (1966) 2 All ER 226.

Bean on "Injunctions".

Johnson Matthey Bankers Ltd. -v- Arya Holdings Limited and National Westminster Bank PLC (1985-86) JLR 208.

Walters and twenty-eight others -v- Bingham (1985-86) JLR 439.

Jones -v- Jones (1985-86) JLR 40.

Mitchell & Dido - Unreported Jersey Judgment No. 69 of 1987.