89/23

ROYAL COURT

15th May, 1989

Before: Commissioner F.C. Hamon and
Jurats Coutanche and Bonn

Between:	**Janette Wood**	Plaintiff
And:	**The Establishment Committee of the States of Jersey**	Defendant

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Summons by defendant seeking 1) the lifting of injunctions granted to plaintiff by Order of Justice dated the 18th April, 1989 and 2) the striking out of the plaintiff's Order of Justice on the basis that it discloses no reasonable cause of action.

Advocate C.E. Whelan for the Committee
Advocate J. St. J. O'Connell for the Plaintiff.

JUDGMENT

1. The Background Facts

The Plaintiff in this action is employed as the Senior Cashier in the States' Housing Department. She has been an employee in the Housing Department for some eight years. She is a civil servant.

The allegations made against the Plaintiff are serious. It must be stressed that they are allegations and this Court takes no view on whether they are justified allegations.

On the 5th January 1989, the Housing Department was moving office from Axminster House to Hilgrove House. The Plaintiff was away ill. Certain cheques were found in her desk during the course of the move. It appeared to those to whom the matter was referred that the Plaintiff has obtained cash through the staff cashing facilities. The cashier's paying-in sheets showed that £70 had been paid on one cheque dated the 16th November, 1988, and £150 had been paid out on the other cheque dated the 18th November, 1988. Further investigation revealed that the cheques had been withdrawn from the bundle which should have been sent for banking. Meetings were arranged and cancelled, telephone calls were made and not returned and letters sent and not replied to. It was only on the 18th January, 1989, that an interview was able to take place between the Chief Internal Auditor, the Finance Manager and the Chief Executive Officer. During the course of that interview the Plaintiff gave certain explanations, and further discrepancies came to light. The Plaintiff was told that she should return home on sick leave. When she returned to full health she would be suspended on full pay.

On the 20th January, 1989, further cheques signed by the Plaintiff made payable to the Treasurer of the States were found: two in her desk and four in her personal purse.

The conclusion drawn by the Defendant in this action is that the Plaintiff was obtaining cash from Housing Department funds against personal cheques and had retrieved those cheques from the Banking System thereby postponing their preparation. This delay enabled her to arrange her personal affairs. As we have said these are allegations.

The Defendant, as the Plaintiff's employer, decided to hold a Disciplinary Hearing. The first hearing was set for Friday 10th March, 1989, but was cancelled as the Plaintiff's Advocate was not in the Island. There is some uncertainty in our minds as to the dates proposed for the adjourned Hearing and whether there were further adjournments but it certainly appears that a Hearing was due on the 19th April, 1989. It was prevented by an Order of Justice obtained by the Plaintiff. That Order of Justice briefly sets out the facts.

At paragraph 2 it says this:

"The plaintiff is currently suspended from duty on full pay as a result of

certain criminal investigations in relation to her conduct at the Housing Department, which investigations have resulted in a charge of theft and a charge of criminally and fraudulently falsifying entries in the accounts of the Housing Department. The Plaintiff has not yet been presented before the Police Court of this Island in connection with the said charges and will enter a plea of not guilty to both of them at the appropriate time."

It pleads that the Hearing will contravene rules of natural justice in that it may prejudice a fair hearing of the criminal proceedings, it contends that the Hearing will offend the principle "Le Criminal tient le civil en etat" and it claims that holding the Hearing in advance of the criminal proceedings is 'ultra vires' the Defendant.

The immediate interim injunction so obtained had the effect of:

"(i) restraining the Defendant whether through its President, Chief Officer, agents, servants, employees or otherwise from convening any form of Disciplinary or other hearing in relation to the matters dealt with in this Order of Justice, until such time as criminal proceedings have reached a conclusion.

(ii) restraining the Defendant whether through its President, Chief Officer, agents, servants, employees or otherwise from making any finding of fact and/or decision based on information in its possession in relation to the matters detailed in this Order of Justice, until such time as the said criminal proceedings have reached a conclusion.

2. The Present Proceedings.

The Defendant in this action applies today by summons to raise the injunctions and to have the Order of Justice struck out on two alternative grounds: that it discloses no reasonable cause of action or is otherwise an abuse of the process of the Court.

3. The Defendant objects on grounds of material non-disclosure at the time of the Plaintiff's application.

It is well understood that in ex parte proceedings the obligations on the party making the application is absolute. Not only is the party under a duty not to mislead the Court in any way by making untrue statements but, because the other side is not represented, he must disclose all matters within his knowledge which are material to the proceedings in hand and which tend to favour the absent party.

An indication of the feeling of this Court was expressed by the Deputy Bailiff in Walters & Others v. Bingham (1985 - 1986) JLR 349 at 466 where he said:

"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 it by the defendant; and that in every such case the Order of Justice should contain an undertaking in damages."

That was of course obiter and Mr. O'Connell referred us to an earlier passage -

"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. As a result of 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 Matthey Bankers Ltd. v. Arya Holdings Ltd, and, in particular, Trasco Intl. A.G. v. R.M. Mktg. Ltd., that a special regime 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 "...in some cases, but not in all, depending on the circumstances, (required) 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 August 7th, 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 July 18th, 1986, on the ground that they had been improperly obtained, then, applying Yardley & Co. Ltd. v. Higson (20) and Boyce v. Gill (4) and in the exercise of what we believe to be our inherent jurisdiction, we would have imposed new and identical injunctions."

Whether or not an affidavit is necessary is irrelevant to the present case. There was an affidavit. If the Defendant wishes to have the injunction set aside he must, in the decision of Walters v. Bingham show, first that there had in fact been a material non-disclosure and secondly, that the injunction would not have been granted if all the facts had been made known at the time when the Order of Justice was signed.

With this principle in mind Advocate Whelan proceeds to attack the Order of Justice and the Affidavit in support.

He condemns paragraph 2 as being totally untrue.

He further condemns the short affidavit sworn by the Plaintiff in support of the Order of Justice. In particular he relates paragraph 3 to paragraph 2 of the Order of Justice.

Paragraph 3 reads:-

"It has not been made clear to me why the Disciplinary Hearing cannot be stayed pending the conclusion of the criminal proceedings. It is my understanding that it is customary for States employees to be suspended on full pay when criminal charges are brought against them until such time as the criminal matters have been resolved".

Advocate Whelan says that this contention is not sustainable. In consequence he says there was not a proper disclosure of a very material fact. His argument turns on the correspondence in the Plaintiff's hands. That correspondence made it clear that the proposed Hearing was totally unconnected with the criminal proceedings. The Plaintiff had received a letter from the States Personnel Department dated the 27th January, 1989, part of which reads as follows:-

"It has been confirmed that at the very least you borrowed, without authorisation, sums of money from public funds by taking advantage of your role as Senior Cashier at the Housing Department. You have been informed

by your Chief Officer, in a letter dated the 19th January 1989, that you are not to return to work until he specifically requests you to do so and that should your present sick leave end prior to that time you are suspended on full pay. You have further been informed that this is done in order that a full investigation can be completed and that circumstances are such that the States of Jersey Police have had to be informed."

Had the matter stopped there the Defendant might have been in some difficulty. The Plaintiff is suspicious as to who is going to complete the "full investigation... "Matters become much clearer if we read further letters that the Plaintiff received.

Two are very much in point. On the 28th February, 1989, the Employee Relations Manager wrote this:-

"I am left now with no option but to suspend you without pay with effect from 1st March, 1989 pending the outcome of a Disciplinary Hearing which I will now set up. I will write to advise you of the date, time and venue of the Hearing".

and on the 8th March this:-

"A Disciplinary Hearing was set up for 12.00 noon, Friday 10th March, 1989, at which the allegations made against you were to be considered. The allegation is that you used your position as Chief Cashier at the Housing Department, without authority, to borrow public monies by cashing cheques which you subsequently intercepted and delayed in being presented until such time as you chose. This allegation is regarded as an act of gross misconduct for which an employee is liable to be dismissed without notice for the first offence."

The Defendant submits that any doubt whatsoever is finally put to rest in a letter from the Chief Executive Officer to Mr. O'Connell date the 10th April, 1989. The relevant part of that letter reads as follows:-

"The case to be considered by the Disciplinary Board will not relate to the charges of theft and false accounting which are the subject of criminal charges. The case to be considered by the Board is as follows:-

1. Miss Wood is employed as the Senior Cashier in the Housing Department.
2. The Senior Cashier in the Housing Department is responsible for receiving, checking, reconciling and banking all monies due to that department.
3. Miss Wood has admitted to the States' Chief Internal Auditor and to one of his assistants that between June and November 1988 she had

been cashing cheques with the Housing Department Cashiers but when they came through to her for banking she had not banked them. She had explained that she would obtain the cash to replace cheques by cashing a further cheque, normally at the month end, to buy some time as she knew that the bank would not honour the original cheque if it were presented. She also admitted to replacing cheques with cheques. Miss Wood made a similar admission to my Employee Relations Manager.

4. This unauthorised borrowing from public funds is clearly a most serious breach of trust and as such puts her in breach of her contract of employment. Our formal position is that, at Common Law, we owe Miss Wood nothing from the day upon which she admitted the actions which constituted a breach of trust and placed her in breach of contract of employment i.e, the 13th February 1989. Any payments made since that date are completely without prejudice to that position."

The omission of that letter from the facts that were before the Deputy Bailiff when taken with the statements which we have given above from the Order of Justice and its supporting affidavit were fatal to the application.

Not so, says Advocate O'Connell. He had to obtain his injunctions very late in the day under very considerable time restraints. The Defendant had refused any further adjournment of the proposed Disciplinary Hearing which was set for Wednesday 19th April, 1989. He obtained his injunction late on Tuesday 18th April, 1989. His mind was concentrated on the paragraph in the letter of the 27th January, 1989. That his suspicions were well grounded is shown by the affidavit sworn by the Housing Officer (one of two affidavits in support of the present application). In that affidavit Mr. Pinel said (at paragraph 6): "That the question whether or not the Plaintiffs admitted conduct is to be categorised as dishonest or even criminal is of no immediate relevance to me". The statement attached to the affidavit is no more or less than the statement that he had made to the Police for the purpose of the criminal proceedings. That as a statement of fact may well be so, but Mr. Pinel's affidavit was made on 25th April, 1989, and the injunctions were obtained on the 18th April, 1989. Whilst Mr Pinel's affidavit and its supporting statement may help to further the grounds of complaint that is beside the point. We do not consider that a full disclosure was made to the Deputy Bailiff. Whether or not the information contained in the letter of the 10th April, 1989, would have affected his decision we do not know. We can only say that he should have had an opportunity to consider it. Indeed on the 11th April, 1989, a further statement was made to the Plaintiff:-

"The allegation is that you used your position as Chief Cashier at the Housing Department, without authority, to borrow public monies by cashing cheques which you subsequently intercepted and delayed in being presented until such time as you chose. This allegation is regarded as an act of gross misconduct for which an employee is liable to be dismissed without notice for the first offence."

Constraints of time cannot, in our view, be called in aid in this matter. Advocate O'Connell had a clear obligation to the Court and to his opposite number who was not present at the hearing before the Deputy Bailiff by the very nature of the application. There are, however, important matters raised before us on this application. One of these, which we deal with later, is the fact that two of the four officers who will sit on the Disciplinary Hearing may be principal witnesses in the criminal trial. If that had been pleaded in the Order of Justice it might well have been sufficient in itself to move the Deputy Bailiff to grant the injunctions. It might well be that there is sufficient matter in the Order of Justice even with the total exclusion of the offending paragraph 2 to have enabled the Deputy Bailiff to grant the injunctions. The flaw then is perhaps not entirely fatal because if we have regard to Walters v. Bingham at page 459 the Deputy Bailiff said:

"It appears to us that the only conclusions to be drawn from those directly conflicting authorities which 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."

We can see that, in the majority of cases, finding that an interim order was improperly obtained would eventually lead to it being discharged. We must say that we do not for one moment believe that Advocate O'Connell was deliberately misleading the Court; he was concentrating at very short notice on a particular and important aspect of the case. No breath of criticism is voiced by this Court against him. Given time he might well have reached the same decision as us. This is an exceptional case. We do not wish by the decision that we are about to make to encourage the indolent or to give any motivation to those who will appear in future ex parte applications to be other than absolutely fair handed and disciplined in their obligations to their absent opponents. The Court expects full disclosure to be made, just as the Court expects counsel to give it all relevant legal authority even if that authority is harmful to the case that they are

making. It is not the case of accepting an explanation from counsel - we have had to examine the circumstances surrounding the application with great care. It is because of the matters raised in this application which are of some constitutional importance that we are going to exercise our inherent jurisdiction (as decided in Walters v. Bingham) to discharge the injunctions and immediately to impose new and identical injunctions.

4. Does the Order of Justice disclose a cause of action?

The Defendant's argument on this point can be summarised in this way. Advocate Whelan says that an injunction is not a cause of action but a remedy.

As David Bean says in his work Injunctions (4th Edition) "provided that the applicant has a substantive cause of action, the court's discretion to grant or refuse an injunction is almost unlimited". This remedy is only to be granted in support of and ancillary to a cause of action. For this reason he argues that the Plaintiff has no cause of action; there are, he says, no substantive proceedings. In support of his contention he cites Abbot Industries Incorporate v. Warner (1985 - 86 JLR 375) where the Deputy Bailiff said at page 376.

> "The defendants seek a discharge of the injunctions, and effectively a dismissal of the action on the ground that no substantive cause of action is alleged, and that an injunction cannot stand alone, but must be linked to substantive relief. We are satisfied that in order to obtain an interim injunction the plaintiff has to allege a clear and unequivocal substantive claim to the moneys sought to be injuncted. Unlike many of the cases cited to us, the question raised here is not a jurisdictional one, because this court has jurisdiction where the first defendant was served in Jersey, and the second defendant is a Jersey registered company. The only question is whether the action can proceed where the only claim is for an interim injunction and there is no substantive claim. We are satisfied, on the authorities submitted to us, that a "Mareva" type injunction, as this is, is completely ancillary to a claim. An injunction can be granted only in support of a legal or equitable right pursued with the jurisdiction of this Court.
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> In Siskina v. Distos Cia. Naviera S.A. (1) which is of considerable persuasive authority, Lord Diplock said this (1977) 3 All E.R. at 824):
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> 'A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependant (sic) on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment

by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may out include a final injunction.'

In this action, the injunction is not sought pending an action in this court. At the hearing on Friday last, Mr. Dorey claimed that the present action was ancillary to an existing cause of action in the New Yorks courts. When yesterday it became clear, on the authorities, that there must be an existing cause of action in Jersey, he shifted ground and claimed that the protection of the plaintiff's alleged proprietary interest in the moneys in question is itself a substantive cause of action. We cannot accept that argument. The injunction is the protection. But the injunction cannot itself be the substantive cause of action. This court has a broad discretionary jurisdiction to grant injunctions, but there must be limites, and we accept that there is one overriding requirement: the applicant must have a cause of action in law entitling him to substantive relief. An injunction is not a cause of action (like a tort or breach of contract) but a remedy (like damages)."

The facts of that case of course differ from the present case. The Court there was dealing with Mareva injunctions which are granted to prevent a defendant from removing assets from the jurisdiction or from disposing or dealing with them within the jurisdiction in such a way as to frustrate execution brought or to be brought by the plaintiff. The Abbot Industries case was exceptional in any event. It involved a question of whether there was a cause of action in Jersey when proceedings had not yet been brought in New York. The purpose of obtaining the injunction was that it was intended to seek to enforce any eventual and favourable New York court judgment in this Court to demand repayment of the previously enjoined monies. We can see that with that scenario the action was doomed to failure. We can see a clear distinction between that case and the present case.

Because Advocate Whelan cited to us the case of American Cyanamid Co. -v- Ethicon Limited (1975) AC 396 we can best record the important principles in that case by reciting a passage from the White Book where a succinct summary is set out. It is found under 29 at page 472.

"Order 29/1/2 General principles - The usual purpose of an interlocutory injunction is to preserve the 'status quo' until the rights of the parties have been determined in the action. The injunction will almost always be negative in form, to restrain the defendant from doing some act. Very exceptionally it may be mandatory, requiring an act to be done; see para 29/1/5. A cross undertaking from the plaintiff to be answerable in damages if the injunction proves to have been wrongly granted is almost always required; see para 29/1/12.

The principle to be applied in applications for interlocutory injunctions have been authoritatively explained by Lord Diplock in American Cyanamid Co. v. Ethicon Ltd. (1975) A.C. 396; (1975) All E.R. 504 H.L. They may be summarised as follows:

(1) The plaintiff must establish that he has a good arguable claim to the right he seeks to protect;

(2) The Court must not attempt to decide this claim on the affidavits; it is enough if the plaintiff shows that there is a serious question to be tried.

(3) If the plaintiff satisfies these tests, the grant or refusal of an injunction is a for matter the exercise of the court's discretion on the balance of convenience.

These principles are less rigorous than those which were previously applied, and which required higher proof from the plaintiff. They thus increase the court's jurisdiction to grant relief. But whether this relaxation greatly affects the result is more doubtful; the balance of convenience may often be tipped in favour of the party who seems to have the better case; see, e.g. American Cyanamid Co. supra, p. 409; Manchester Corporation v. Connolly (1970) Ch. 420 (1970) 1 All E.R. 961. This consideration may be of particular importance in cases, such as passing-off actions, where the interlocutory proceedings may be practically decisive; see, for contrasting examples, Alfred Dunhill Ltd. v. Sunoptic S.A. (1979) F.S.R. 337 and Newsweek Inc. v. British Broadcasting Corporation (1977) R.P.C. 441 where the strength or weakness of the parties cases turned the day."

Bean on Injunctions puts it this way -

"The decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd (1975) AC 396 clarified, or (in the opinion of some practitioners) revolutionised, the approach of the courts to interlocutory applications inter partes for prohibitory injunctions. The guidelines laid down by Lord Diplock are regarded as the leading source of law on the subject, although, as the Court of Appeal point out in Carne v Global Natural Resources plc (1984) 1 All ER 225 they are based on the proposition that there will be a trial on the merits at a later stage when the rights of the parties will be determined: and in reality this only happens in a very small percentage of cases.

The guidelines may be conveniently discussed under the following headings:

(a) a serious question to be tried:

(b) inadequacy of damages:

(c) the balance of convenience:

(d) special cases.

Advocate O'Connel appeared to us to be reluctant to meet this argument head-on but nonetheless we are quite unable to hold that there is no substainable cause of action

set out in the Order of Justice. If we summarise the facts in it we can see that there is no substance in the criticism. There is an employer who wishes to discipline an employee. A Disciplinary Hearing has been arranged. A criminal prosecution has been instigated. The Plaintiff wishes to protect her defence (whatever if may be) until the criminal trial. She does not wish to disclose what might be a weak but acceptable defence. She may wish to preserve her absolute right under the law to remain silent. She invokes the maxim "le criminal tient le civil en etat". She calls in aid the great principle of Natural Justice. She even argues that to hold a Disciplinary Hearing in advance of the criminal prceedings is ultra vires the Defendant. Without in any way attempting to test the merits of these several arguments at this stage of the judgment we have no doubt that a cause of action sufficient to support an injunction is shown in the Order of Justice.

5. If we allow the Disciplinary Hearing to proceed will we prejudice the Criminal Trial?

We now come to the very quintessence of the matter before us. The Plaintiff argues that because of the Civil Service Administration (General)(Jersey) Rules, 1949, the Defendant cannot dismiss the Plaintiff except on grounds set out therein.

The Rules (called Orders under the Law) were made in pursuance of the Civil Service Administration (Jersey) Law, 1948, the headnote of which reads:-

> "A LAW to provide for the constitution of a Civil Service Board to administer certain matters connected with the civil service of the Island and to provide for the making of rules in relation to the matters aforesaid, sanctioned by Order of His Majesty in Council of the 2nd June, 1948".

Advocate O'Connell told us that there was no power to dismiss a Civil Servant summarily under these Rules. He asked us to examine the causes for dismissal in Part IV of the Rules under the heading 'Rules for conduct of Staff:-

There are three -

"Rule 10 (1) No officer shall demand or receive a fee or reward of any kind in respect of any assistance or information given to the public on official matters either within or outside the place of employment, or obtain any material advantage or benefit by reason of his official relations with the public.

(2) Any officer infringing this Rule shall be liable to dismissal.

Rule 13 (1) No officer shall, without the consent of the Committee of the States concerned, make public in any newspaper or periodical or otherwise any official communication or information which may have come to his knowledge in his official capacity.

(2) Any officer infringing this Rule shall be liable to dismissal.

Rule 20 Any officer convicted of an offence of such a nature as to indicate that his continued employment would be prejudicial to the interests of the civil service, shall be liable to dismissal."

Advocate Whelan counters this argument by saying that the Rules are not a complete code and were never intended to be. In any event the legislature does not intend changes in the common law unless it expressly says so. He referred us to the English case of Harris & Shepherd v. Courage (Eastern) Limited (1982) 1 RLR 509 where the Court of Appeal held according to the headnote as follows:-

> "The majority of the Employment Appeal Tribunal had not erred in holding that the respondents had acted reasonably in dismissing the appellants on grounds of suspected theft prior to their criminal trial, notwithstanding that the employees had been advised not to give evidence before the trial for the purposes of the company's internal disciplinary proceedings and had therefore not been heard.
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> The Appeal Tribunal majority had correctly held that although it is essential that the employer should afford the employee the opportunity of giving his explanation and he should be made to realise that the employer is contemplating dismissal, there is no hard and fast rule that, once a man has been charged, an employer cannot dismiss him for an alleged theft if the employee is advised to say nothing until the trial in the criminal proceedings so that, if the employee chooses not to give a statement at that stage, the reasonable employer is entitled to consider whether the material he has is sufficiently indicative of guilt to justify dismissal without waiting.
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> On the evidence, the present case was one where the evidence was not only sufficiently indicative but strongly indicative of the employees' guilt. Therefore, the fact that the appellants, apparently on advice, did not give evidence should not have inhibited the employers from making up their minds. They were fully entitled to act as they did."

It does seem strange to us that a Civil Servant employee could not be dismissed - even summarily dismissed - if the circumstances justified it. We say this despite the careful affidavit of the Chairman of the Staff of the Jersey Civil Service Council. This affidavit was handed to us during the hearing and we accepted it. We cannot help noting that some of the material facts set out concerning rights of Appeal and rights to Arbitration were hotly disputed by Advocate Whelan. We are not saying that dismissal in this case is justified. We take no view. We only say that we cannot see how the argument of the Plaintiff can be sustained in this regard. It would seem to us very unusual, to say the least, if a Civil Servant were physically to assault his Head of Department without justification and then to be able to claim that he was not liable to instant dismissal. We can see no reason to distinguish the case of Sinclair v. Neighbour (1966) 2QB 279 on the basis that this is not a master and servant relationship. In that case Davies LJ said:-

> "With the greatest respect to the judge, I think that he fell into error in

attaching too much weight to the label and not enough to the facts. The facts were established. The fact that the manager took the money from his employer's till behind his back knowing that the employer would not consent was established; and it seems to me that it does not really matter very much whether that justifies the label "dishonest" or not. The judge ought to have gone on to consider whether even if falling short of dishonesty the manager's conduct was nevertheless conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between master and servant, such as would render the servant unfit for continuance in the master's employment and give the master the right to discharge him immediately.

In my judgment, on the facts of this case the manager's conduct clearly fell within that latter category; and I have no doubt at all that the employer was, therefore, entitled to dismiss him.

I would merely add something on another point made by Mr. Bruce for the employer. The judge, as I have said, came to the conclusion that the manager's conduct was quite reprehensible and that, had the judge been the master in similar circumstances, he would himself have dismissed the manager instantly. Nevertheless, the judge, having come to the conclusion that he did, went on to hold that the manager was entitled to £88, which was four weeks' wages, in lieu of notice, plus commission for the appropriate period. It does seem to me to throw a most tremendous burden on an employer, who finds that his servant has been guilty of "reprehensible, foolish, improper, misguided conduct," that he must either leave him in office for whatever is the appropriate period of notice, when ex concessis he is unfit for the office, or alternatively, give him wages in lieu of notice, and, semble, pay somebody else to do the job. That would seem, in the circumstances of this case, to be a wholly unreasonable position for the master to be forced into. I agree that the appeal succeeds."

We find those words entirely apposite.

We have of course considered the extract from Chitty on Contracts 25 Ed. p.37 which reads:-

"The right to be heard on dismissal from public employment. Certain employees whose employment is in some sense public employment or involves the tenure of an office are entitled to the application of the principles of natural justice before they can dismissed. The category of employees so entitled is not yet clearly defind but seems to include employees who are holders of a tenured office or whose employment takes place under the authority and regulation of a statute or other constituent instrument giving it a public nature. Where the employee has this protection, remedies of a public law nature may be available to

invalidate a dismissal not carried out in accordance with the principles of natural justice."

We have also considered the helpful passage from Malloch v. Aberdeen Corporation (1971) 1 WLR 1578 where Lord Wilberforce (for this is a judgment of the House of Lords) said at page 1586:-

"In Ridge v. Balwin (1964) A.C. 40 Lord Reid developed the point in an illuminating way. Cases of dismissal, he said, at p. 65. appear to fall into three classes. First, there are pure master and servant cases - these are governed by the law of contract and there is no right to be heard.

"But this kind of case can resemble dimissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them."

Secondly, there are cases where an office is held at pleasure (I shall return to this category). And, thirdly, there is the case where a man cannot be dismissed unless there is something against him - in this he has a right to be heard.

On the other hand, there are some cases where the distinction has been lost sight of, and where the mere allocation of the label - master and servant - has been thought decisive against an administrative law remedy.

One such, which I refer to because it may be thought to have some relevance here, is Vidyodaya University Council v. Silva (1965) 1 W.L.R. 77, concerned with a university professor, who was dismissed without a hearing. He succeeded before the Supreme Court of Ceylon in obtaining an order for certiorari to quash the decision of the University, but that judgment was set aside by the Privy Council on the ground that the relation was that of master and servant to which the remedy of certiorari had no application. It would not be necessary or appropriate to disagree with the procedural or even the factual basis on which this decision rests: but I must confess that I could not follow it in this country in so far as it involves a denial of any remedy of administrative law to analogous employments. Statutory provisions similar to those on which the employment rested would tend to show, to my mind, in England or in Scotland, that it was one of a sufficiently public character, or one partaking sufficiently of the nature of an office, to attract appropriate remedies of administrative law."

Even on a cursory reading of the papers the Defendant does appear to us to have gone some considerable way to applying the rules of Natural Justice. The Plaintiff has been given an opportunity to explain herself and now she is offered the further opportunity, should she so wish, to give a satisfactory explanation for conduct which, on

the face of it, is unacceptable and is thought by the Defendant to be unacceptable.

If we want to reach the very stuff of the argument between the parties we have only to turn to a case upon which both parties relied in support of their respective contentions. It is Rv BBC ex parte Lavalle 1982 (1CR99) QBD. The whole judgment is particularly useful but it is these passages to which we would particularly refer:-

"If an employee makes an application to a domestic tribunal to adjourn its proceedings until after the conclusion of criminal proceedings on the basis that the continuation of the disciplinary proceedings would prejudice criminal proceedings, that application should be sympathetically considered by the tribunal. If it comes to the conclusion that the employee will suffer real prejudice if the domestic proceedings continue, then unless there is good reason for not doing so, the disciplinary proceedings should be adjourned. However, if the disciplinary tribunal does not adjourn in such circumstances should the court intervene, and if so, in what circumstances?

Although I was not referred to any case dealing with disciplinary tribunals, I was referred to two authorities which I regard as providing very considerable assistance, both as to what the attitude of disciplinary tribunals should be and what the attitude of the courts should be. The first was Jefferson v. Bhetcha (1979) 1 W.L.R. 898. That case concerned the possible conflict between civil and criminal proceedings in the courts. The passage in Megaw L.J.'s judgment, which I find of particular assistance, reads, at p. 904:

"The reason given by Forbes J. for granting the adjournment of the Order 14 application or the stay of the action (whichever it may have been) appears from the notes of judgment. Having referred to Wonder Heat Pty. Ltd v. Bishop (1960) V.R. 489, the judge went on: 'Like the Australian judge, I take the view that if there be a good defence there is no harm in producing it. But that is not the law. The defendant is entitled to keep silent. That seems to me to be fundamental and that right is not to be eroded by a side wind.'

"As I understand it, the judge based his decision on the view that there is an established principle of law that, if criminal proceedings are pending against a defendant in respect of the same subject matter, he, the defendant, is entitled to be excused from taking in the civil action any procedural step, which step would, in the ordinary way, be necessary or desirable for him to take in furtherance of his defence in the civil action, if that step would, or might, have the result of disclosing, in whole or in part, what his defence is, or is likely to be, in the criminal proceedings. Mr.

Owen in this court submitted that that is the general rule which ought to be followed. He did not, as I understand it, submit that it was an invariable or inflexible rule which would deprive the court of any discretion if the matters which I have mentioned were established. With the view, if it were put forward, that this is an established principle of law, I would respectfully but firmly disagree. There is no such principle of law. There is no authority which begins to support it, other than, to a limited extent, Wonder Heat Pty. Ltd. v. Bishop (1960) V.R. 489 which with great respect, I should not be prepared to follow, if indeed it does purport to lay down such a principle. I do not think that it does.

"I should be prepared to accept that the court which is competent to control the proceedings in the civil action, whether it be a master, a judge, or this court, would have a discretion, under section 41 of the Supreme Court of Judicature (Consolidation) Act 1925, to stay the proceedings, if it appeared to the court that justice - the balancing of justice between the parties - so required, having regard to the concurrent criminal proceedings, and taking into account the principle, which applies in the criminal proceeding itself, of what is sometimes referred to as the 'right of silence' and the reason why that right, under the law as it stands, is a right of a defendant in criminal proceedings. But in the civil court it would be a matter of discretion, and not of right. There is, I say again, in my judgment, no principle of law that a plaintiff in a civil action is to be debarred from pursuing that action in accordance with the normal rules for the conduct of civil actions merely because so to do would, or might, result in the defendant, if he wished to defend the action, having to disclose, by an affidavit under Order 14, or in the pleading of his defence, or by way of discovery or otherwise, what his defence is or may be, in whole or in part, with the result that he might be giving an indication of what his defence was likely to be in the contemporaneous criminal proceedings. The protection which is at present given to one facing a criminal charge - the so-called 'right of silence' -does not extend to give the defendant as a matter of right the same protection in contemporaneous civil proceedings."

That passage was of course the basis of Mr. O'Connell's argument on this aspect.

Both counsel went on to rely heavily on a passage further on in the judgment -and I will read further than Advocate O'Connell did. The passage starts at page 114 where the trial judge is drawing from an earlier judgment of Megaw LJ in the case of Jeferson v.

Bhetch (1979) 1WRR898. I read from letter H -

"Of course, one factor to be taken into account, and it may well be a very important factor, is whether there is a real danger of the causing of injustice in the criminal proceedings. There may be cases - no doubt there are - where that discretion should be exercised. In my view it would be wrong and undesirable to attempt to define in the abstract what are the relevant factors. By way of example, a relevant factor telling favour of a defendant might well be the fact the civil action, or some step in it, would be likely to obtain such publicity as might sensibly be expected to reach, and to influence, persons who would or might be jurors in criminal proceedings. It may be that, if the criminal proceedings were likely to be heard in a very short time (such as was the fact in the Wonder Heat case in the Victoria Supreme Court) it would be fair and sensible to postpone the hearing of the civil action. It might be that it could be shown, or inferred, that there was some real - not merely notional - danger that the disclosure of the defence in the civil action would, or might, lead to a potential miscarriage of justice in the criminal proceedings, by, for example, enabling prosecution witnesses to prepare a fabrication of evidence or by leading to interference with witnesses or in some other way."

Everything which Megaw L.J. said in regard to civil proceedings, it seems to me, can be applied to disciplinary proceedings.

The other case from which I obtained assistance is Harris (Ipswich) Ltd v Harrison (1978) I.C.R. 1256. In that case Phillips J. gave the judgment of the appeal tribunal. He said, at p. 1259:

"He submits that Carr v. Alexander Russell Ltd (1975) I.R.L.R. 49, upon which the industrial tribunal relied, similarly applied the wrong test, and that this error was followed in the Court of Session when that decision was approved; (1976) I.R.L.R. 220. We do not accept this criticism of Carr v. Alexander Russell Ltd.,which seems to us to be accordance with the general law as it has been applied in England and Wales and in Scotland, and as it is now approved in the Court of Appeal and possibly in the Court of Session. However, upon one point in the judgment in that case, we take a somewhat different view. In that case, both in the industrial tribunal and in the Court of Session, it is suggested to be improper after an employee has been arrested and charged with a criminal offence alleged to have been committed in the course of his employment, for the employer to seek to question him when the matter of dismissal is under consideration. While we

can see that there are practical difficulties, and that care is necessary to do nothing to prejudice the subsequent trial, we do not think that there is anything in the law of England and Wales to prevent an employer in such circumstances before dismissing an employee from discussing the matter with the employee or his representative; indeed, it seems to us that it is proper to do so. What needs to be discussed is not so much the alleged offence as the action which the employer is proposing to take.

"It is often difficult for an employer to know what is best to do in a case of this kind, particularly where the employee elects to go for trial. Unfortunately it may be many months before the trial takes place, and it is often impratical for the employer to wait until the trial takes place before making some decision as to the future of the employee so far as his employment is concerned. At first sight those not familiar with the problem tend to say that it is wrong to dismiss the employee until his guilt has been established. Further experience shows that this is impractical. In the first place, quite apart from guilt, involvement in the alleged criminal offence often involves a serious breach of duty or discipline. The cashier charged with a till offence, guilty or not, is often undoubtedly in breach of company rules in the way in which the till has been operated. The employee who removes goods from the premises, guilty or not, is often in breach of company rules in taking his employer's goods from the premises without express permission; and it is irrelevant to that matter that a jury may be in doubt whether he intended to steal them. Such examples could be multiplied. What it is right to do will depend on the exact circumstances, including the employer's disciplinary code. Sometimes it may be right to dismiss the employee, sometimes to retain him, sometimes to suspend him on full pay, and sometimes to suspend him without pay. The size of the employer's business, the nature of that business and the number of employees are also relevant factors. It is impossible to lay down any hard and fast rule. It is all a matter for the judgment of the industrial tribunal".

In the above passage from his judgment, Phillips J. was dealing with the matter in the context of whether or not dismissal was unfair. However, his approach strongly suggests that there should be no automatic intervention by the court. Bearing in mind that if the court does not intervene, the employee still has the choice whether to co-operate with the disciplinary proceedings or not, and the employee will still be entitled to contend that his dismissal was wrongful or unfair in the subsequent proceedings before the court or an industrial tribunal, it seems to me that while the court must have jurisdiction to intervene to prevent a serious injustice occurring, it will only do so in very clear cases in which the

applicant can show that there is a real danger and not merely a notional danger that there would be a miscarriage of justice in the criminal proceedings if the court did not intervene."

In dismissing the application Woolf J. made certain comments which sound to us particularly applicable in the present facts before. He said at page 117:

"Furthermore, approaching the matter in the way indicated by Megaw L.J. and Phillips J. I have considerable reservations as to whether or not there was any risk of a real injustice to the applicant in this case. The proceedings before Mr. Singer were to be in private. The applicant had already on February 2 given a version of events which was presumably substantially true. Although a witness from the B.B.C. was to be an important witness at the criminal trial, it is fanciful to suggest that he would fabricate his evidence to incriminate the applicant in some dishonest manner. Finally, the matters which are going to have to be proved in the criminal proceedings are much more extensive than those in disciplinary proceedings. In disciplinary proceedings the removal of the tapes to where they were found would be sufficient to establish a disciplinary offence in the contention of the B.B.C."

If the Plaintiff is to succeed she will need to demonstrate a real danger of injustice being caused by reason of the Disciplinary Hearing preceeding the criminal proceedings. Advocate Whelan reminded us of a letter that he sent to Advocate O'Connell on 25th April, 1989. That undertaking was in these terms:-

"I write to offer you the Defendant's undertaking that no publicity would be given to any disciplinary proceeding taken by it against your client, the Plaintiff. In particular the outcome of those proceedings would not be revealed to any party other than Committees of the States, and then only on a "need to know basis".

Advocate O'Connell replied in a closely argued letter on the 27th April, 1989. He repeated his fears on the prejudice point. His final paragraph sums up the matter:

"Finally, even assuming that there is absolute confidentially as to the outcome, there is always the risk that it will be disclosed at the trial, either deliberately by the prosecution, or inadvertently by some other means. Even if the Crown were to offer an undertaking not to adduce evidence of the outcome of the hearing, there is no conceivable way that all prosecution witnesses could be bound to refrain from mentioning it".

We were told that the Disciplinary Hearing would be in private, no note would be taken of the proceedings and that, coupled with the terms of the undertaking, would be more than sufficient to allay any fears that the Plaintiff might have.

Advocates O'Connell reminded us that no man may be a judge in his own cause. He drew the analogy in the fact that three members of the proposed Hearing are to be principal witnesses for the prosecution. We feel that we cannot follow the logic of that

argument. We would not wish to stretch the meaning of the rule out longer. We have however more sympathy when it is said that however solemn the undertaking and however careful the restraints, in a small Island such as this, publicity is inevitable. It might be a remote case but the very possibility that a member of the Jury (if the matter comes to an Assize trial) might get to know of the Hearing and, one might add, its possible consequences - is sufficient caveat to make the court extremely wary of lifting the injunction.

We were asked to keep in the forefront of our minds the judgment of Woolf J. that we have dealt with above.

We have to consider for a moment the proceedings before the Disciplinary Hearing are to be classified.

In Saed v. Inner London Education Authority 1985 (1CR) 637 Popplewell J. said at page 645:

> "in my judgment proceedings before a disciplinary tribunal are neither civil proceedings nor criminal proceedings within Section 45 (of the Offences against the Person Act 1861)".

We have some sympathy with Advocate O'Connell's argument. We must however come back to the letter of the 10th April, 1989:

> "The case to be considered by the Disciplinary Board will not relate to the charges of theft and false accounting which are the subject of criminal charges".

And again the letter of the 11th April, 1989, which refers to:-

> "this allegation (which) is regarded as an act of gross misconduct".

If the Plaintiff chooses to say nothing at the Hearing the choice is hers but that perhaps is a totally unrealistic choice. She does appear on the face of it to have given some conflicting explanations to various of her employers at different times. The very fact that cheques were discovered in her desk and her private purse does in our view call for an explanation. It does not seem to us that in requesting the explanation the Hearing is prejudging the criminal trial because it should not need to examine the matter in such exhaustive depth as a criminal trial demands. The apparent discrepancies between the accounts and the entries made by the Plaintiff have been discovered, the Defendant would say fortuitously discovered. If the Plaintiff were not to give a satisfactory explanation then the consequences vis-a-vis her employer might well be inevitable. That is not a question that we need to labour. We can only say that we are satisfied that there is nothing to prevent the Disciplinary Hearing from taking place by reason of prejudice to the Plaintiff. If the Hearing were to be founded on the precise matters upon which the

Plaintiff stands charged we might well have hesitated. But the two matters are separate and dissimilar. Admissions of irregularity have been made by the Plaintiff to the States Chief Internal Auditor and to one of his assistants. Those admissions alone are sufficient to justify a Disciplinary Hearing. The matter does not however end there.

6. 'Le Criminel tient le civil en etat.'

Maxims are at best dangerous. In Lissenden v. CAV Bosch Ltd (1940) 1 All ER 425 at page 441 Lord Wright said:-

> " I am induced here to quote the language of Lord Esher M.R. in Yarmouth v. France at page 63: "I detest the attempt to fetter the law by maxims. They are almost invariably misleading; they are for the most part, so large and general in their language that they always include something which really is not intended to be included in them".

Fortunately we are moving away from a time in Jersey when maxims were held in sacred awe and almost regarded as if they were a rule of law to be followed slavishly at all times.

We are most fortunate to have had this maxim examined in recent times by this Court in the very closely argued judgment of Hickman v. Hickman (8th July, 1988, unreported).

Advocate O'Connell placed before us a passage from Le Gros "Traite du Droit Contumier de l'Ile de Jersey" where the learned author says at page 426:-

> "Si l'on permettait à l'action civile de suivre son cours indépendamment de l'action criminelle, la décision de la cour civile pourrait exercer une influence morale sur les juges ou les jurés appelés à se prononcer sur l'action criminelle et faire pencher la balance pour ou contre l'accusé v. Le Geyt. Tome 1. p. 95."

It will be recalled that Le Gros has with great diligence gathered together in one chapter his "Recueil de Maximes."

Advocate Whelan counters with a definition of "action civile" from the French English Dictionary of Legal Words and Phrases (1948) edited by A.W. Dalrymple as follows:

> ' "action civile": civil action for damages accruing to an injured person from an offence committed by another".'

The defendant's argument, it will be recalled, has always been that on the one hand there is the question of a criminal trial involving dishonestly or connotations of criminality; on the other is the question of a disciplinary hearing arising under a contract of service where apparent irregularities have come to light, if, as the Deputy Bailiff said in Hickman v. Hickman "it is the decision" of the criminal proceedings that must take precedence there is nothing which prevents the hearing from appreciating the nature of the matters before it. Those matters seem to us to be totally dissimilar from matters

that are likely to concern the court at trial. Maxims at best (and we respectfully adopt the sentiments of Lord Wright in this matter), are indications of what the law is likely to be; they are not to be adhered to rigidly as though they had the force of law. The allegation made by the Plaintiff that the Disciplinary Hearing will be making a finding of fact using the same or similar evidence as may be adduced at the criminal trial is reading too much into the exchange of correspondence that was before the court. As we understand the purpose of the Disciplinary Hearing it is to establish whether the Defendant is justified in dismissing the Plaintiff for apparent and admitted irregularities. I should not need to go further than that. Whether or not Mr. Chambers and Mr. Pinel should be on the Disciplinary Hearing is not a question that we are prepared to answer. We will say that we are drawn ineluctably to the conclusion that even at the present stage of the proceedings the Defendant has complied with the rules of natural justice. We therefore have no hesitation in raising the injunctions. We should say in passing that we do not think it necessary having reached this stage to consider the balance of convenience point and we leave the questions raised under that heading "à la table". On the raising of the injunction the whole action falls away. It was in our view not only supported by the injunctions obtained but is not sustainable for the reasons which we have adumbrated.

The action did raise the question of whether the Defendant was acting ultra vires. We have dealt with that aspect as well as the reliance on natural justice. Because those points were properly raised, we are not minded to give full indemnity costs but only taxed costs.

We must express our thanks to both counsel for the way that this case has been presented.

We need to be addressed by Advocate Whelan on his request for an inquiry into damages.

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