ROYAL COURT

(Samedi Division) 34A.

7th March, 1990

Before: The Bailiff, and
Jurats Le Boutillier and Hamon

Between:	De Guelle's Home Bakery Limited	Plaintiff
And:	Le Nosh Limited	First Defendant
And:	Simon Knapp	Second Defendant

Defendants' applications, inter alia,
to raise interim injunctions and for
an inquiry as to damages.

Advocate R.J. Michel for the plaintiff,
Advocate P.C. Sinel for the defendant applicants.

JUDGMENT

BAILIFF: The plaintiff in this case carries on the business of a bakery and supplies a number of local retail outlets with its products. One of its customers was the first defendant which contracted to purchase a number of sandwiches, so we understand, to conduct the business of a sandwich bar from premises at 27 The Parade in St. Helier.

This contract (there is some doubt as to when it was actually entered into) was certainly in force in 1989, but during the first few months of 1989 the accounts (which we were told were submitted not by being posted but by being put monthly into one of the deliveries to the first defendant) were not accepted by the first defendant and a number of reconciliation accounts had to be prepared by it and returned to the plaintiff with a cheque for the corrected balance. None of those reconciliation accounts were challenged.

Nevertheless the plaintiff company had an account against the first defendant which it said was not paid and as a result it issued a summons on a simple billet for £6,091.99 returnable on the 21st July, 1989. There were some discussions following that summons with the second defendant on behalf of the first defendant with a member of the staff of the plaintiff's lawyers.

The upshot was, however, that on the 25th August, 1989, the summons was withdrawn and the costs were ordered to be in the cause, strange to say, the cause which had arisen by the issue on that day of an Order of Justice. The Order of Justice by the plaintiff was obtained upon filing an affidavit by the managing director of the plaintiff, Mr. Peter Basil De Guelle. I will come back to that in a moment.

There were a number of preliminary proceedings by way of summonses and counter summonses but on the 8th February, 1990, the defendants sought to lift the injunctions that had been obtained in the Order of Justice. The Court refused to do so, principally on the ground that it was not supplied with an affidavit, and it gave leave to the plaintiff to amend its Order of Justice. The Order of Justice was amended on the 14th February, 1990, and in that amended Order of Justice the second defendant, Mr. Simon Knapp, was no longer a defendant.

We have sat today, therefore, to consider whether the injunction which I am now going to turn to in the Order of Justice should be raised, but the issue goes a little further than that. The summons taken out on the 26th February and amended from the summons which

was before the Court on the 8th February, being a fresh summons in fact, asks five things and I now read it:

"1. The injunctions obtained by the Plaintiff on the 25th August, 1989, should not be dissolved.

2. An inquiry as to damages should not be ordered in relation to damages suffered by the First and/or Second Defendants.

3. The action against the Second Defendant should not be dismissed.

4. The Second Defendant should not be awarded his costs of and incidental to this action on a full indemnity basis.

5. The Plaintiff should not be condemned to pay the costs of and incidental to this summons on a full indemnity basis".

The injunctions which were obtained in the original Order of Justice were of twofold operation. Firstly, and at that stage of course there were two defendants, the first defendant was restrained in an interim injunction ....."itself, its respective directors, officers, servants or agents or otherwise howsoever from removing or causing or permitting to be removed out of the jurisdiction of this Court any of the assets, money or goods of the First Defendant within the jurisdiction or from disposing or changing or diminishing or in any other way howsoever dealing with any of the respective assets, money or goods of the First Defendant within the jurisdiction or otherwise within the normal course of business".

There was a second injunction upon the second defendant which it is not necessary for me to read in detail because he is no longer before the Court except for the purposes of the question of his costs.

Today, Mr. Sinel for the first defendant, Le Nosh Limited, has submitted that the affidavit of Mr. De Guelle to which I have referred did not make full and frank disclosure of certain material facts. I therefore now turn to the affidavit itself. In paragraph 1 he merely

avers that he is the Managing Director of the Plaintiff. In paragraph 2 he deposes that the contents of the affidavit are within his own personal knowledge ....."save where the context to the contrary appears in which event they are true to the best of my knowledge information and belief". He then refers the Order of Justice which he, in paragraph 4, deposes "that the contents of the draft Order of Justice are true to the best of my knowledge information and belief".

In paragraph 5 he then refers to the summons which I have mentioned and in fact in paragraph 6 changes the sum sought from the summons figure of £6,091.99 to £6,919.65. In fact it is now considerably less and looking at the amended Order of Justice we are informed, in fact, by Mr. Michel that the amount is now £5,784.79. But that is not of vital importance at the moment. What is important is that in paragraph 6 of the affidavit the Plaintiff avers that the figure of £6,919.65 is a true and correct statement of the First Defendant's (Le Nosh Limited) indebtedness to the Plaintiff. That is not correct. Having looked at the invoices, we are satisfied there were a number of material errors in respect of those invoices. It is not necessary for us to go through them in detail, but it was information which was within the knowledge of the Plaintiff itself; the figure was wrong. It was not so wrong, I suppose, as to mislead the Court in issuing the injunction because it was still a substantial figure that was claimed, but the figures were wrong and they were sworn to as being correct and they were not. So there was an important error there, I put it in that way.

However, we then come to paragraph 7 which is as folows:

"THAT with regard to paragraph 9 of the draft Order of Justice" (which relates to the ownership of the company) ....." I would confirm that at all times the Second Defendant has held himself out as being the beneficial owner of the First Defendant and that all of the Plaintiff's dealings with the First Defendant have been with or through the Second Defendant. In this respect I aver that all cheques received in settlement of the Plaintiff's account were in the personal name of the Second Defendant. Furthermore, I aver that in a letter dated the 17th July, 1989, to

the Plaintiff's legal advisers and signed by the Second Defendant, the First Defendant is referred to as "my Company". I am also advised by the Plaintiff's legal advisers that having carried out a company search upon the First Defendant, the company records show the Second Defendant as having signed the initial subscribers form on or about the 5th February, 1987. The other signature on the said form is that of one Mrs. Judith Bayford, who is the lady with whom the Second Defendant resides at the property known as "Tediscot", Longfield Avenue, St. Brelade.

Now, it is true that, looking at the early cheques issued by Le Nosh Limited, might give the impression that the second defendant, Mr. Knapp, was running the company, so to speak, alternatively with his own business in his own name, but that was all cleared up certainly by the Spring of 1989 when the bank put an overstamp on it, it was quite clear that in fact it was the company with which the plaintiff was dealing.

Then we come of course to the question of the search in the Company Register. What exactly went wrong we are unable to say. We think that what the staff of the plaintiff's advisers looked at was not the Register, because the Register does not show what is claimed at all in paragraph 7. The Register in fact shows that at the time of the incorporation there were three employees of a firm of accountants who were the initial subscribers to the company. No doubt they held their shares on trust with blank transfers, but the information as sworn to in paragraph 7 is erroneous. We think, however, that what the lawyers or their staff had looked at was in fact the company returns, which might well have shown that the two directors of the company were Mr. Knapp and Mrs. Bayford, but that is not the position, that is not what is in paragraph 7.

In paragraph 8 the words appear as follows:-

"THAT in all the circumstances I aver and verily believe that the Second Defendant is the beneficial owner of the First Defendant".

That is related to paragraph 7.

Paragraph 9:-

"THAT I aver and verily believe that it is the Second Defendant's intention to sell the First Defendant and/or to dispose or remove from the jurisdiction of this Court the proceeds of sale or its assets and this so as to avoid or defeat the claims of the Plaintiff".

We have looked at the bank accounts of the first defendant and it is quite clear to us that it was in funds. Secondly, the allegation that the second defendant should in fact be one of the defendants in this action has been withdrawn by the amended Order of Justice and we cannot find that any of the reasons advanced today which were not deposed to I hasten to add in the affidavit, were sufficient to reach the conclusion that Mr. Knapp and/or his company using a neutral term, would not meet his obligations or indeed was intending to dispose or remove from the jurisdiction of the Court the proceeds of sale or its assets.

We were told and Mr. Knapp deposed in his affidavit that in fact what happened was that another company, a third party, was interested in acquiring part of Le Nosh's business and that information was made available to the plaintiff company, which through Mr. De Guelle, expressed interest in acquiring the whole of Le Nosh's business for a sum greater than the other offer by the third party by some £20,000. None of that was disclosed to the Court and it should have been.

The inference to be drawn from paragraph 9, if you couple it with paragraphs 7 and 8, is that the company was a shell company operated as a front for Mr. Knapp that there was a fear that he would strip the company and there would be no redress for the plaintiff. That is not the position and it was not the position and it was known to Mr. De Guelle at the time that that was not the position.

Looking at the information in the affidavit and looking at the papers it could not have been a true impression. We must of course make allowances that Mr. De Guelle is a busy baker and is not a man of business. Even so, there are too many inaccuracies in the affidavit which in our opinion makes it unsafe and indeed unfair to the defendant for it to have been acted upon as the Court acted upon it having it in front of it.

So, we have come to the conclusion that that affidavit is inaccurate in a number of material respects. Therefore there was non-disclosure. It is not very helpful to decide whether it was innocent or otherwise. We think it was innocent in the sense that there was no intention to mislead, but the wording and the facts, if taken together, might well have misled the Court in a material sense and I put it no higher than that.

Looking at the Law on the matter, we were referred to a number of Jersey cases, but the two principal ones were in fact in 1986 and we are indebted to Mr. Sinel for drawing our attention to a later English case and of course we have been following the English cases in the two Jersey cases, so it is right to continue the way in which the law is changing in this particular aspect in the United Kingdom. The first case to which we were referred is that of Behbehani and others -v- Salem and others (1989) 2 All ER 143. In that judgment Woolf, LJ has this to say on p.146 and I am going to read the whole passage because it is important and it is a passage to which we have had the closest regard in coming to our decision. I read from letter g:

> "The law with regard to the non-disclosure of material matters on an application for an ex parte injunction has now been clearly stated in a series of cases. In the course of helpful arguments by counsel for both the defendants and the plaintiffs, we were referred to the most helpful authorities. However, for the purposes of this appeal, I need do no more than refer to the decision of this court in Brink's-MAT Ltd v Elcombe [1988] 3 All ER 188, [1988] 1 WLR 1350, when on 12 June 1987 this court allowed an appeal from Alliott J. It is not necessary to go into the facts of the Brink's-MAT case. It suffices if I refer to the

following passages in the judgments of the court, starting with the judgment of Ralph Gibson LJ where he said ([1988] 3 All ER 188 at 192-193, [1988] 1 WLR 1350 at 1356-1357):

> 'In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following. (i) The duty of the applicant is to make "a full and fair disclosure of all the material facts": see R v Kensington Income Tax Comrs, ex p Princess Edmond de Polignac [1917] 1 KB 486 at 514 per Scrutton LJ. (ii) The material facts are those which it is material for the judge to know in dealing with the application as made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see the Kensington Income Tax Comrs case [1917] 1 KB 486 at 504 per Lord Cozens-Hardy MR, citing Dalglish v Jarvie (1850) 2 Mac & G 231 at 238, 42 ER 89 at 92, and Thermax Ltd v Schott Industrial Glass Ltd [1981] FSR 289 per Browne-Wilkinson J. (iii) The applicant must make proper inquiries before making the application: see Bank Mellat v Nikpour [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries'."

And I stop there for a moment. That clearly relates to the ownership of the company and the financial position of the company and the exact position of Mr. Knapp.

> '(iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant: see, for example, the examination by Scott J of the possible effect of

an Anton Piller order in Columbia Picture Industries Inc v Robinson [1986] 3 All ER 338, [1987] Ch 38, and (c) the degree of legitimate urgency and the time available for the making of inquiries: see Bank Mellat v Nikpour [1985] FSR 87 at 92-93 per Slade LJ. (v) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains ... an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty ...": see Bank Mellat v Nikpour (at 91) per Donaldson LJ, citing Warrington LJ in the Kensington Income Tax Comrs case. (vi) Whether the fact not dislcosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to the issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented. (vii) Finally "it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded": see Bank Mellat v Nikpour [1985] FSR 87 at 90 per Lord Denning MR. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms: "... when the whole of the facts, including that of the original non-disclosure, are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed." (See Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party) [1988] 3 All ER 178 at 183, [1988] 1 WLR 1337 at 1343-1344 per Glidewell LJ.)'

Now, it seems to us, looking at this matter in the round, that what went wrong at the beginning was the linking of the second defendant, Mr. Knapp, with the first defendant. If that error had not been made, it is quite possible for an Order of Justice with an injunction might have been sought, but it is equally possible that the same effect could have been obtained by a the simple issue of an Ordre Provisoire. It is impossible to say. But we think that is where the mistakes started to arise. It was an important mistake and could have potentially difficult consequences.

The next point on the law which we have to look at is whether, if we were to lift the injunction we should, as requested by Mr. Sinel, order an inquiry as to damages. As to that, he referred us to a second case, Ali & Fahd Shobokshi Group Ltd -v- Moneim and others (1989) 2 All ER 404. The passage to which I wish to refer is on p.414 at letter c. The learned judge is referring to an earlier case of Dormeuil Frères SA v Nicolian International (Textiles) Ltd [1988] 3 All ER 197.

> "Thus the question arises whether, in the light of this most recent decision, I should have left the complaint of non-disclosure to be dealt with after trial with the defendant then confined to seeking damages for non-disclosure (see [1988] 3 All ER 197 at 200-201, [1988] 1 WLR 1362 at 1370). I do not think that would have been the right course. I say that in reliance on the words of Robert Goff J as quoted in the Bank Mellat case [1985] FSR 87 at 89. Those words appear to have been approved of by all the Lords Justices in the Court of Appeal. Thus Donaldson LJ said (at 92).
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> > 'I think that the learned judge was abundantly right, and the furthest he could conceivably have gone would have been to consider granting a Mareva injunction upon the basis of the latest version of the plaintiff's claim, but to suspend its operation for a period so that the advantage of the previous, wrongly obtained, Mareva injunction would become spent before the new injunction came into effect. I do not know as a practical matter that that would have been the right

way of granting relief to the plaintiffs, and we certainly have not been asked to make such an order.'

See also Slade LJ's judgment in the Bank Mellat case (at 93). There are some further words of Sir John Donaldson MR in Eastglen International Corp v Monpare SA (1986) 137 NLJ 56 quoted by Glidewell LJ in the Lloyds Bowmaker case [1988] 3 All ER 178 at 183, [1988] 1 WLR 1337 at 1343:

'I stand by everything I said in the Bank Mellat case about the importance of full and frank disclosure, and I would support any policy of the courts which was designed to buttress that by declining to give anybody any advantage from a failure to comply with that obligation. I would go further and say that it is no answer that if full and frank disclosure had been made you might have arrived at the same answer and obtained the same benefit. This is the most important duty of all in the context of ex parte applications.'

So, as I see it, it would not be right to require a defendant to wait until after trial to seek damages for non-disclosure. On the contrary, a defendant should be at liberty to require the discharge of an ex parte Mareva order (without its immediate reimposition) as soon as he can show non-disclosure of a substantial kind. The considerations which lead me to this view are (a) if non-disclosure (when ex parte) is sought to be repaired during an inter partes hearing it is unfair to keep the order in being without any interval of time because to do that is to prejudice the defendant (see the words of Robert Goff J). The parties should be restored to the position they were in prior to the ex parte application, i e when no Mareva injunction was in force. No doubt this means that a defendant will have the opportunity of making away with his assets but that is due to the plaintiff's failure properly to make his initial application. (b) Damages for non-disclosure awarded after trial may be an entirely inadequate remedy for a defendant who has to suffer the oppression of a Mareva order up to trial."

As to that of course, this is not quite the position here because on the 17th January, 1990, but not earlier the defendant, that is to say Le Nosh, paid in to the Greffier the figure of £3,574.04 which the company says is the amount of its indebtedness to the plaintiff. It is not prepared to pay that amount to the plaintiff because it says that the amount of damages which it can and should recover from the plaintiff would greatly exceed that amount and if it were to pay it to the plaintiff company then it would in fact not see its money back. I make no comment as to that, it is a statement which is being put forward as a reason. But I make no comment to rule upon that today at all.

The matter therefore leaves a sum, if my arithmetic is right, of £2,210.75 still claimed in addition of course to the money paid in, from the sole defendant now. As I say having regard to the fact that Mr. Michel has not asked us to reimpose the Mareva injunction today, merely has opposed the lifting of it, and his full and frank admission that there had been manifest errors in the calculation of the final account due, he said, and we have no reason to doubt it, to the inability of the plaintiff company to get their moneys' worth out of the computer, which in fact obviously has not helped the plaintiff, but the fact is it is their computer, it is their staff that runs it and they must be responsible. We have therefore come to the conclusion that the summons should be granted in the following sense.

The injunctions will be lifted which were imposed on the 25th August. Secondly, there will be an inquiry as to damages in relation to the damages suffered by the first and the former second defendant. Thirdly, I do not think it necessary for us to say that the action against the second defendant should not be dismissed by the action of the plaintiff himself he is removed. But if it will help him, Mr. Sinel, it will be dismissed. As regards the costs we order that the second defendant shall have his taxed costs incidental to this action and the plaintiff will pay the taxed costs of the summons.

Authorities cited:

Trasco International Aktiengesellschaft -v- R.M. Marketing Limited and others (1986) Jersey Unreported 1986/30.

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

Abbot Industries Incorporated -v- Warner & ors (1986) JLR 375.

Behbehani and others -v- Salem and others (1989) 2 All ER 143.

Ali & Fahd Shobolski Group Ltd -v- Moniem and others (1989) 2 All ER 404.

Rules of the Supreme Court Order 29/1/14.

The White Book (1988 Ed.) Vol. 1 p.477.