



ROYAL COURT.

98.

18th July, 1991.

Before Commissioner Hamon and Jurats Myles and Le Ruez

BETWEEN Nicholas Le Quesne Blampied PLAINTIFF

and Arthur Francis Thomas
 and Lucienne Beatrice Thomas
 (née Le Luarn) DEFENDANTS

Evidence - interlocutory application - defendants' application to discharge mandatory injunction - application supported by affidavit sworn by a defendant - plaintiff alleges that affidavit is perjured and seeks leave to call witnesses to give viva voce evidence at interlocutory hearing to establish perjury - whether plaintiff entitled to call witnesses.

Mandatory injunction - exceptional form of relief - circumstances in which such relief will be granted.

Advocate R. A. Falle for the plaintiff
Advocate P. C. Sinel for the defendants

Commissioner Hamon:

This summons asks for mandatory injunctions imposed by virtue of an Order of Justice dated the 14th June, 1991, and served upon the defendants on the same day to be discharged and for costs on a full indemnity basis.

We allowed an amendment by Mr. Sinel of his summons which had transposed the plaintiff for the defendants.

This matter had originally come before the Samedi Division of this Court on the 21st June 1991, which is the normal Friday afternoon

Court. The learned Bailiff adjourned the case to another day and ordered that the effect of the mandatory injunctions be stayed pending this hearing.

As is regrettably becoming more common in this Court we had only had the full file of papers delivered to us this morning some minutes before the Court sat. This was unfortunate as the matters were of some complexity.

The matter in dispute concerns a private roadway which enters on to La Grande Route des Genêts. The private roadway in question to which the defendants claim title is the only access by the plaintiff to the main road. It is alleged in the Order of Justice that on or about Thursday the 23rd May, 1991, the defendants' (without giving the plaintiff any notice) commenced building works on the private roadway by demolishing a boundary wall and taking up part of the tarmacadamised surface of the private roadway over a uniform width of approximately three feet six inches co-extensive with the property which the defendants now claim. On the next day, the 24th of May, the defendants laid foundations for a new wall in the private roadway and this would have had the effect (if the plaintiff's contention is correct) to enclose a portion of the roadway (over which the plaintiff claims rights) within the defendants' garden.

On the same day the plaintiff and his Advocate attended on the site and made remonstrations about the work that was being carried out. A formal letter was written on that day protesting the continuation of the work and threatening action to restrain it if it should continue.

Notwithstanding this the defendants, through their builders, caused a wall to be constructed along the foundations over which exception had been taken and that wall is now substantially built.

True to his word the plaintiff commenced an action by way of Order of Justice and that Order of Justice contained immediate interim and mandatory injunctions. We will set them out in extenso:

- "(a) restraining the defendants or one of them from carrying out any further or other works on the said roadway save as is hereinafter provided;

- (b) ordering the defendants or one of them to remove the wall referred to in this Order of Justice which the defendants servants or agents have constructed as aforesaid;
- (c) ordering the defendants or one of them to restore or cause to be restored the said roadway to its original state and condition; and
- (d) restraining the defendants or one of them from constructing or causing to be obstructed the free use and enjoyment of the said roadway; the whole pending determination by the Court of the matter set out in the First Order of Justice and the defendants' answer thereto"

It should perhaps be pointed out that the First Order of Justice is not the Order of Justice which obtained the injunction but a separate Order of Justice brought by Mr. & Mrs. Thomas (as plaintiffs) against Mr. Blampied (as defendant).

The First Order of Justice to which we have referred sought a declaration by Mr. & Mrs. Thomas that Mr. Blampied had no right of access or any other rights whatsoever in regards to the roadway owned by Mr. & Mrs. Thomas. On reading the Court file it becomes apparent that an answer and a reply have been filed and further and better particulars have been requested and answered and the action must now be virtually ready for trial. It is important for us to note that the actions have not been merged.

The matter for decision by the Court this morning should have been a comparatively simple one. As is stated by the learned author of Bean on Injunctions (3rd Edition) at page 29 "an interlocutory application for a mandatory injunction is a very exceptional form of relief (Canadian Pacific Railway-v-Gaud [1949] 2 KB 239 at 249); the courts will not normally compel a defendant to do so serious a thing as to undo what he has done except after a full hearing (Abbott (1862) 6 LT852)". The learned author goes on to say in the same paragraph "the case must be 'unusually sharp and clear' (Shephard Holmes Ltd-v-Sandham [1971] Ch 340), and the Court must feel a high degree of assurance that at the trial a similar injunction would probably be granted. If there is doubt about this the interlocutory application

must fail (Hounslow London Borough Council -v- Twickenham Garden Developments Ltd [1971] Ch 233)."

In the present case (without prejudging any decisions we might have made) it seemed abundantly clear to us by way of example that if an ambulance which previously would have had an easy access to properties from Le Grande Route des Genêts along the private roadway was now barred by the fact that the private roadway had been made too narrow we would have had no hesitation in saying that those circumstances gave us the right in law to enforce the injunction and to order the wall to be taken down.

The hearing should have taken a comparatively short time but a complication was raised by Mr. Falle who informed us very emphatically that in his view the affidavit which had been filed by Mr. Sinel on his clients' behalf in support of raising the injunction contained statements which were clearly perjured. We felt that was a very serious allegation indeed and took the view (still in some difficulty because we had not fully read the file of papers that were before us) that it little beholds anyone to come to Court with a tainted document in support of an application to discharge a mandatory injunction. The matter was further complicated by the fact that quite unknown to Advocate Sinel and to his obvious surprise a witness billet had been filed by Mr. Falle which showed that he intended to call four witnesses, including the plaintiff. Mr. Sinel quite properly raised an objection as to what these witnesses were going to say and pointed out that he had been taken by surprise.

At this stage we called for an adjournment and asked the parties to come back at half past two in order to address us on the principal issue as to whether witnesses could (or should) be heard in interlocutory proceedings of this nature.

We were assured by Mr. Falle that the purpose of calling the witnesses was to establish without a shadow of doubt that perjury had been committed. We made the observation that if in fact we were satisfied completely that perjury had been committed then it might well be that we would not be able to progress the matter any further and we would refer the papers to the Attorney General for his ruling.

Mr. Sinel drew our attention to Order 38 Rule 2/3 of the Rules of the Supreme Court Practice which contained this comment "there is a discretion as to ordering cross examination on affidavits filed on interlocutory applications. Cross-examination upon affidavits sworn in applications for interlocutory injunctions is very rare. It was ordered, by consent, in The Barclay Hotel Co. Ltd-v-Barclay International (Mayfair) Ltd [1971] F.S.R. 300". Mr. Sinel also cited in his helpful list of authorities the case of Foster-v-States of Jersey Harbours and Airport Committee and Michael Ross Lanyon (unreported judgment 5th April 1989). That case seems to help us in one way only where the learned Bailiff at page 4 said "It seems to me if there is an allegation of harassment by Mr. Foster against certain people at the Airport, obviously that fact is going to be strenuously denied and equally strenuously put forward respectively by the plaintiff and defendant and it seems to me in those sort of cases that that kind of evidence should best be heard in open Court."

There is a foot note to Order 38/2/3 of the Rules of Supreme Court at page 624 which says "Where there is a question of motive or of good faith of the deponent the Court ought not to be asked to act without cross-examination see Re. Smith and Fawcett (1942) Ch.304, C.A."

There were no authorities cited to us as to whether viva voce evidence could be given by calling evidence to support the cross-examination of the deponent's evidence.

However the problem arose when we understood from Mr. Falle that such perjury as he alleged lay within the affidavit of Arthur Francis Thomas (the first named defendant) who swore his affidavit on the 21st June, 1991.

The matters to which he took exception are contained within these paragraphs of the affidavit.

"3. That we purchased the land on which the path and wall form a part on the 1st December, 1967.

The said path was originally boarded by a fence constructed of chicken wire and concrete posts, and gave a width to the path of approximately ten feet.

4. That in or about March 1974, after the plaintiff had allegedly purchased the roadway in question, we agreed to allow the path to be made wider for the convenience of our neighbours. A road widening scheme for the Route des Genêts was in progress and we allowed the Public Building Works Department to take over part of our land, including a part of the land where our path meets the main road, and at the same time when those works took place we constructed a block wall approximately three feet back from where the fence had originally been.
5. That at no time did the plaintiff make any allegation that he had rights in the land in question, and all dealings with the Public Building and Works Department were held with us.
6. That we have recently applied for permission to build a house on the plot of land situated behind the wall, and have encountered difficulties in view, inter alia, of the small size of the land in question. Accordingly, we decided to restore the plot to its original size, and instructed builders to move the wall back to where the original fence was situated.
7. That the wall was in fact reconstructed a little further back from where the original fence was, and access and egress from the path is still possible without danger or difficulty."

We were asked to determine whether or not perjury has been committed. To do so we were going to hear Jean Frances Arthur who is a conveyancing clerk in the employment of the plaintiff's advocates with a particular knowledge of historical matters relating to the topography of Jersey. Her affidavit runs to fifteen paragraphs and has a substantial number of exhibits attached to it including old maps and extracts from the public registry of contacts.

The second witness was to be Stephen Andrew Buchanan a barrister at law employed as a legal assistant at Bois Labesse who carried out a search at the Planning Department of various plans but was unable to take a copy of them and was only able to prepare a rough sketch but he

also had photographs which formed part of the bundle and which show the property in 1971 or 1972.

Mr. Falle had subpoenaed to appear a Mr. D. E. Le Quesne who was in fact the architect of the defendants.

It really requires us to go no further than this because at this point it became pellucidly clear that if we were to continue any further in this matter we were going to have to go deeply into matters which should properly concern the trial judge in the first action and which might have lead us to reach a conclusion with which the trial Court might not have agreed. (This would mean reaching a decision in the second action on the same facts as the first action - not merged -and ready for trial).

In the circumstances we decided that we would not allow Mr. Falle to call the evidence that he required.

We indicated to counsel that we had made this decision and that we would give a written judgment as quickly as we possibly could. We invited Counsel to consider whether they wished to appeal and we pointed out that our judgment would include an order whereby we would hold over the matter of costs again for decision by the trial judge when the facts would become clear (on trial) as to whether or not the affidavit to which Mr. Falle took such strong objection was in fact perjured or not.

Mr. Falle informed us that he wished to appeal against our decision and Mr. Sinel immediately informed us that he wished to appeal against our decision on costs.

At this point we had no alternative but to stay the further proceedings until the matter of the appeals could be disposed of.

Leave was granted to both counsel to appeal and in the circumstances we continue the order of the Samedi Division of the 21st June, 1991, where that Court stayed the effect of the mandatory injunctions but such stay to continue until the determination of the action brought by the defendants in this action against the plaintiff in this action (the First Order of Justice edition) which action is presently on the pending list.

Authorities.

The Supreme Court Practice (1985) Order 38/8/4-19/3 and 38/14 - 19/4

The Supreme Court Practice (1991) Orders 29/1/11, 29/1/23 and 38/2/3

Forster-v-Harbours and Airport and Mr. Michael R. Lanyon (5th April, 1980) Jersey Unreported.

American Cyanamid-v-Ethicon [1975] All ER 504 at pages 510 & 511

Iain S Goldstein and K. H. P. Wilkinson: Commercial Litigation : Pre-emptive remedies: pages 79-96: Part G: American Cynamid an analysis.

Royal Court Rules, 1982 (as amended): Rule 6/18.

De Guelle's Home Bakery Ltd-v-Le Nosh Ltd & anor (8th February, 1990) Jersey Unreported.

4 Halsbury 17: Evidence:Paras 309, 310 & 311.

Bean on Injunctions (3rd Edition) pages 29 and 30