**ROYAL COURT.**
**(Samedi Division)**

37.

**11th March, 1993.**

**Before the Bailiff and**
**Jurats Hamon and Rumfitt.**

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| **BETWEEN** | **Werner Cornelius Heinrichs**<br>**William Bernard Pauls**<br>**Victor Melville Seabrook** | **PLAINTIFFS** |
| **AND** | **La Hougue Boete Société Fiduciaire avec Responsabilité Limitée** | **FIRST DEFENDANT** |
| **AND** | **Richard George de Winton Wigley** | **SECOND DEFENDANT** |
| **AND** | **Howard Scholefield** | **THIRD DEFENDANT** |
| **AND** | **John Wadman** | **FOURTH DEFENDANT** |
| **AND** | **Elizabeth Dick,**<br>**Petitioner Plaintiff in Case No. 88DR281 in the District Court and County of Denver, Colorado** | **INTERVENOR** |

(The First Action)

**AND**

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| **BETWEEN** | **Werner Cornelius Heinrichs**<br>**William Bernard Pauls**<br>**Victor Melville Seabrook** | **PLAINTIFFS** |
| **AND** | **Barclays Private Bank and Trust Company, Limited.** | **DEFENDANT** |
| **AND** | **Elizabeth Dick,**<br>**Petitioner Plaintiff in Case No. 88DR281 in the District Court and County of Denver, Colorado** | **INTERVENOR** |

(The Second Action)

Applications of the Intervenor in the First and Second Actions: (a) for an Order discharging or varying, as the Court thinks fit, the injunctions obtained by the Plaintiffs against the Defendants in both Actions; and (b) for an Order that the Plaintiffs pay the costs of the Intervenor in each Action of and incidental to the applications.

**Advocate C.R. de J. Renouf for the Intervenor.**
**Advocate M. St.J. O'Connell for the Plaintiffs.**

**JUDGMENT.**
**(on preliminary point of *viva voce* examination of deponents of Affidavits.)**

**THE BAILIFF:** Rule 6/18(1) of the Royal Court Rules, 1992, is in the following terms:

> ***"Subject to these Rules and to any other enactment relating to evidence, any fact required to be proved at the hearing of any action by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court".***

And Rule 6/18(3) is as follows:

> ***"Where it appears to the Court that any party reasonably desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit".***

Our Rule 6/18(1) is virtually the same (except for a reference to the Civil Evidence Act of 1968 and the Civil Evidence Act of 1972) as Order 38(1) in the R.S.C. (1993 Ed'n), at p.683 which reads:

> ***"Subject to the provisions of these Rules and of the Civil Evidence Act, 1968, and the Civil Evidence Act, 1972, and any other enactment relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses orally and in open court".***

Order 38/1/1 says this:

> ***"<u>Effect of Rule</u>.***
>
> ***This refers to a general rule of the law of evidence but is of limited application as it does not apply to any motion, petition or summons, or any other proceedings except an action commenced by writ and it does not apply"*** (and I stress these words) ***"to any interlocutory proceeding in such an action but only to the trial, though it also applies to trials of issues and questions of fact or law, references, inquiries and assessments of damages".***

Therefore, it seems to me clear that our Rule 6/18(1) relates to the substantive issues to be tried as does Rule 6/18(3). That being so, it is not mandatory, as Mr. O'Connell has suggested, that we order the deponents of the affidavits either to give their evidence orally or to subject themselves to cross-examination, and since it is on very rare occasions that this Court makes such an

Order, we think that we cannot, and should not, depart from that practice.

Accordingly we do not accede to your request, Mr. O'Connell that the witnesses should give their evidence other than by way of their affidavits.

**JUDGMENT.**
**(on applications to raise injunctions.)**

This is an application by the Intervenor in both actions to lift two injunctions imposed by the Plaintiffs on them. The Defendants are under an Order of this Court of 14th January, 1993, to attend before the Viscount to give certain evidence pursuant to Letters of Request issuing from the Colorado Court which this Court examined on 14th January, 1993, when it sat to hear an appeal from the Deputy Greffier's decision to register the Letters of Request and make certain Orders thereunder.

On 30th December, 1992, that is to say subsequent to the Deputy Greffier's Order, the Plaintiffs obtained an injunction in the Second Action which effectively prevented the Defendant in that action from testifying before the Viscount regarding the matters referred to in the injunctions. The two parts of that injunction, which were repeated in the injunction in the First Action, to which I shall refer in a moment, are as follows:

> *"1. Restraining the Defendants, jointly and severally, whether through their employees, agents or howsoever from providing any information or material whatsoever relating to the affairs of the Plaintiffs, or each of them, other than their dealings, if any, with Canon Nominees (Jersey) Limited.*
>
> *2. Restraining the Defendants, jointly and severally, whether through their employees, agents or howsoever from providing any information or material relating to trusts or corporations connected to or associated with the Plaintiffs or any of them whether or not currently administered by the Defendants and of which Mr. John Dick is not a trustee, settlor, beneficiary, shareholder, or director".*

It is to be noticed that the two arms of the injunctions are extremely wide. They are, as was described by counsel for the Intervenor, blanket provisions.

So far as the injunctions in the Second Action are concerned, the Court was informed and accepts that Mr. O'Connell for the Plaintiffs attended upon the Bailiff and after the Bailiff had read the Letters of Request from the Colorado Court, the Order of Justice was amended by the Bailiff's inserting the words *"other than their dealings, if any, with Canon Nominees (Jersey) Limited"* in manuscript.

At the same time, there was produced to the Bailiff some interrogatories prepared for the trial between Mr. and Mrs. Dick which has been taking place in Colorado and which was the reason for the issue of the Letters of Request. However, those interrogatories were produced for the purpose of satisfying the Bailiff that Mrs. Dick was making wild and far ranging accusations

against Mr. Dick and his advisers; but we were informed and accept that that kind of interrogatory is permissible in the United States only at the pre-trial stage, and not during the trial itself and therefore has limited value for the purposes of suggesting that, at the trial itself, those allegations would be persisted with.

It is to be noted that, as regards the second part of the injunctions, the wording is in the present tense and does not include the past, nor does it include any reference to any other commercial dealings with the Plaintiffs whether in the past or the present. It is limited to the matters concerning Mr. Dick as a trustee, settlor, or beneficiary shareholder or director. It does not cover, for example, whether Mr. Dick lent any money, or took any benefit, or anything of that nature from any of the trusts, companies and the like administered by any of the Plaintiffs.

After these general observations on the injunctions themselves, I turn now to consider whether we have to examine in detail the allegations which have been made against Mrs. Dick and Mr. Dick during the case in Colorado which are evidenced by a number of affidavits produced to us. We have looked at affidavits from Mr. Hoffman, who is Mrs. Dick's present attorney, from Mr. Hofer, an accountant, and from Mr. Seabrook, a QC from Canada, on behalf of the Plaintiffs, and at a number of other matters. However, I want to make this general observation: we are not here today to try to assess the commercial transactions, if any, past or present, between the Plaintiffs and the Defendants, or whether the affidavits of Mr. Hoffman are totally correct or otherwise, or whether Mr. Hofer has breached an agreement of confidentiality which was signed in London (to a limited extent that is to say, because it was not totally restrictive) in December, 1989.

That is not to say that the question of confidentiality will not be an important matter when the substantive issues are tried. In fact, it will be vital. But this is an interlocutory matter and therefore the case of Re State of Norway's Application (No. 1) (1989) 1 All ER 745, interesting though it is, and though it will undoubtedly be relied on by Mr. O'Connell in due course, is not of great assistance today in deciding whether the injunctions should be lifted because, quite simply, there is a stay in force already in respect of the judgment of 14th January, 1993, which effectively prevents the Viscount from doing anything.

At the beginning of the application today to lift the injunctions, Mr. O'Connell made an application that either the persons who were in Court who had deposed, i.e. Mr. Hoffman, Mr. Seabrook and Mr. Hofer, should give their evidence orally, and/or should be cross-examined. The Court has given its decision on this point.

The power to order evidence to be given by affidavit is contained in Rule 6/18(1) of the Royal Court Rules, 1992, and it is in very nearly identical terms to Order 38/2 in the White Book.

As regards that Order I find at the bottom of p.642 in paragraph 38/2/6 the following:

> ***"There is a discretion as to ordering cross-examination on affidavits filed in interlocutory applications..."*** (that is so) ***"Cross-examination upon affidavits sworn in applications for interlocutory injunctions is very rare".***

I see no reason why the same restriction should not apply to an application to lift an injunction and indeed Mr. Renouf told us that the question of rarity, that is to say of hearing evidence orally in interlocutory matters, was adverted to by Sir Godfray Le Quesne at the first part of the hearing of the appeal from the Court's Judgment of 14th January, 1993.

The injunction in the First Action, which I shall now consider, was obtained on the eve of the sitting of the Court of Appeal, on 16th February, 1993, but Mr. Seabrook gave an explanation as regards the question of whether it had been planned thus and was therefore a ploy, which we accept.

Mr. Renouf, for the Defendants, did not come to this Court immediately on the granting of the injunction in the Second Action because the number of persons who were likely to be examined before the Viscount were very few, or indeed none because all or most of them had left the employment of Barclays Private Bank and Trust Company Limited and therefore it was something which he did not think affected the Order.

When we come to the question of the injunction in the First Action which, as I say, was taken out on the eve of the hearing of the Court of Appeal, that injunction was obtained from the Lieutenant Bailiff, Mr. Le Cras. There was not disclosed to him a copy of the Act of the Royal Court of 14th January, 1993, which, although it dismissed the appeal from the Deputy Judicial Greffier's Judgment, varied the Letters of Request and imposed some restrictions as to the width of questions that could be asked before the Viscount. In doing so, it grounded itself to some extent on an earlier Judgment of Commissioner Vibert in respect of an earlier but far wider ranging Letter of Request from Mrs. Dick's then advisers in 1989. (Wigley & Ors. -v- Dick [1989] JLR 318).

Mr. O'Connell gave an explanation to show that the failure to bring the terms of the Royal Court's Judgment to the notice of the Lieutenant Bailiff was innocent, but it is clear from Gee and Andrews' "Mareva Injunctions; Law and Practice" at p.53 that even an innocent failure, if it is material, will suffice to set aside the injunction. We accept that there was no ulterior motive in the delay, nor indeed in the failure to bring the attention of Mr. Le Cras to the Judgment.

Mr. O'Connell, by way of explanation, said that he had telephoned to Advocate Le Quesne acting for the Defendants in the First Action and had been told by Mr. Le Quesne (who had been difficult to contact and whom he had not been able to find until after 4th February, 1993) that there had been a hearing and that the Court had dismissed the appeal from the Deputy Greffier's decision. We think it was incumbent upon Mr. O'Connell not to take it secondhand, but to ascertain, which he could have done quite easily from the Judicial Greffe, the actual terms of the Judgment.

The Law is quite clear in this matter; there has to be full and frank disclosure. We do not say there was not frank disclosure; it is a conjunctive not disjunctive obligation and we are satisfied that there was not full disclosure. Had there been, the Law then requires us to satisfy ourselves that that disclosure might have changed the mind of the Judge - even if we put it at the higher requirement: would have changed his mind, we certainly cannot say that it would not. It was very material in our view. It contained a restriction limiting the questions to be asked before the Viscount on matters which were relevant according to the Law of Colorado and a particular Law was cited in the Judgment.

Mr. Renouf quite rightly has pointed out therefore that the scope of the questions had been limited by that restriction. That restriction and the whole of the Judgment, of course, are now under appeal.

If we were satisfied, nevertheless, that the injunctions should remain, what would the position then be? Presumably Mr. Renouf would appeal because without being able to submit the persons mentioned in the Act of the Royal Court of 14th January, 1993, and indeed in the Deputy Greffier's Act and Decision to cross-examination, he could not proceed to question them at all, or only in a very restricted sense.

We think, on a balance of convenience, it would be appropriate, even on that more limited argument, that the question of the injunctions themselves should be dealt with by the Court of Appeal. That indeed was what the Court said to Mr. Renouf when it sat to hear the appeal on February 19th, 1993. Mr. Renouf asked the Court if it was its wish that all the matters, including the question of the injunctions, should be dealt with when the Court resumed later this month, on 18th - 19th March, 1993. The President, Sir Charles Frossard, said that it was.

Therefore it is envisaged that when the Court of Appeal next sits, all these matters which I have just touched on, will be dealt with.

We are satisfied that there was not a full disclosure so far as the injunctions in the First Action are concerned and that there was material non-disclosure which, in our view, would have

affected the mind of the Judge and might have led him not to grant the injunctions. Therefore, the injunctions so far as the First Action is concerned, are raised.

That brings me back to the injunctions in the Second Action; although the same argument of material non-disclosure which applies to the injunctions in the First Action cannot apply, for the reasons I have explained, these injunctions were, as Mr. Renouf rightly pointed out, substantially altered in their effect by the Judgment of the Court of 14th January, 1993, with its inclusion of some restriction on the questions that could be asked of the persons required to answer them before the Viscount, and that meant there was a change of circumstances. We think this change of circumstances entitles us therefore, as in the case of the injunctions in the First Action but for different reasons, to lift the Second Action injunctions as well. It would be illogical to lift the First Action injunctions and to leave the Second Action injunctions in place at the same time. Accordingly, the injunctions in both actions are lifted.

Presumably, we are now going to be asked to give leave to appeal which we grant.

**AUTHORITIES.**
**(on applications to raise injunctions.)**

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Rahman -v- Chase Bank & Ors. (1984) JJ 127, C.of.A.

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Jacques -v- Harrison (1883) 12 QBD 136.

re Harrison's Share under a Settlement; Harrison -v- Harrison & Ors;
re Ropners Settlement Trust: Ropner -v- Ropner & Ors. (1955) 1 All ER 185.

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Re State of Norway's Application (No. 1) (1989) 1 All ER 661.

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IBL Ltd & Ors. -v- Planet Financial and Legal Services Ltd (21st June, 1990) Jersey Unreported.

Ocean Software Ltd -v- Kay & Ors. (1992) 2 All ER 673.

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Gee and Andrews: "Mareva Injunctions; Law and Practice": p.53.

**AUTHORITIES.**
**(on preliminary point.)**

R.S.C. (1993 Ed'n): O.38.

Royal Court Rules, 1992: Rule 6/18(1) and (3).

Normanville-v-Stanning (1853) Ha, App. xx.

re State of Norway's Applications (Nos. 1 & 2) (1989) 1 All ER 745.