

ROYAL COURT  
(Samedi Division) 150.

8th November, 1993.

Before: The Bailiff, assisted by Jurat Myles  
and Jurat Bonn.

Between

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Plaintiff

Defendant

Application by the Defendant for an Order discharging interim Injunctions (1) ousting him from the matrimonial home, and (2) granting interim custody, care and control to the Plaintiff.

Advocate P.C. Harris for the Defendant.  
Advocate Mrs. M.E. Whittaker for the Plaintiff.

JUDGMENT

**THE BAILIFF:** The law in cases involving the obtaining of ouster injunctions is quite clear. Any injunction obtained by presenting an Order of Justice has to be supported by an Affidavit and material non-disclosure in that Affidavit entitles this Court to lift the injunction.

However, not every material non-disclosure will necessarily suffice; the Court has a discretion whether to order the lifting or not, and even if the Court does lift the injunction, it has a further discretion to re-impose it in the same or similar terms.

Furthermore, it is clear from the authorities that if, in the opinion of the Plaintiff, a state of affairs requires putting right by his or her obtaining an injunction, that injunction must be sought within the shortest possible delay.

In this case, the parties had been married for a relatively short time, and they had a child, who was born before the marriage but subsequently was legitimated.

The wife left the home in the summer of 1993 because, she alleged in a petition attached to her Affidavit presented to the Bailiff for signature, the husband had been guilty of cruelty. After she had left, she hoped, through the assistance of her father-in-law, that is to say the grandfather of B and the father of the Defendant, to obtain some other accommodation. It

the event, she was unable to obtain that accommodation, or afford it, and very soon after leaving home, or within a few days, returned B into the physical care of his father.

Thereafter, for some three months, there was an exchange of correspondence. It is said by the wife that the husband's solicitors were dilatory in the matter. Be that as it may, when the time came in October for the wife to be concerned about the future of the matrimonial home, she wrote through her solicitors, on 27th October, setting out a number of requirements concerning the property.

Those matters were not dealt with to her lawyer's satisfaction, and on 3rd November, she applied to the Bailiff, through her solicitor, and obtained an Injunction removing the husband from the home with various ancillary matters attached to that Order, preventing him dealing with the property in a particular way until he provided certain information and thirdly, granting her care and control of B.

So far as the Order requiring certain details to be supplied to her or her solicitors goes, we were told this morning that that matter need not trouble us because for the most part that information had been supplied before the hearing.

We therefore have to decide whether there has been a material non-disclosure in the Plaintiff's Affidavit, when she obtained her Injunction and if so, whether we should lift the Injunction and, of course, we must consider the effect that would have on the day to day care of B.

Since the wife left the matrimonial home and returned B, he has been living there but spending some time sleeping with his grand-parents, that is to say the Defendant's father and mother, and it is clear to us that they have played, and are playing, an important part in his upbringing.

The father works and the wife, the mother, works or was working part-time at the time the Injunction was obtained. Obviously if there have been a number of material omissions then the principle is quite clear: this Court will normally lift an Injunction. But, what concerns us is what would be the immediate effect of that on B.

We cannot overlook the fact that for some three months the arrangements under which B was in the day to day care of his father continued. Although we had produced to us this morning two Affidavits from the nursery care staff, which we have read, we think it too early to reach any firm conclusions because they only saw B for one day - possibly two.

We do not discard those Affidavits, far from it, but we note that, certainly in one of them, B's change of behaviour stemmed not so much from the arrangements that had been made but from the unhappy fact that his parent's marriage had broken down, and that,

we know, is a common experience with small children; they are the ones to suffer in cases of this sort.

So, we had to consider whether there had been, first, a non-disclosure of material facts, and we find that there was such a non disclosure. First, it was not made clear to the Bailiff that the wife had committed adultery, and the circumstances. It is true that there was attached to her Affidavit a copy of her petition in which she sought the discretion of the Court, but that could have been at any time and not necessarily after the marriage. It was impossible for the Bailiff, without going further into it, to know what it was. It was an important non-disclosure.

Secondly, there was the question of her redundancy in paragraph 6. The wording in that paragraph could have led the Bailiff to believe that the wife would, in the very near future if not immediately, be able to devote herself full time to the child, but that is not, we now know, the position: she was going to be dismissed at the end of this month and could leave at any time, but was hoping to obtain a part-time job. It was not clear and it should have been.

Thirdly, there is an allegation in an unusual form, in paragraph 10 of her Affidavit, as to assault and molestation. The words are:

*"I also believe that it would be in the best interests of B for me to have interim care and control and for me to return to the matrimonial home to care for him on a full time basis"*

That is inconsistent with the wife's wanting to obtain part-time job. The Affidavit goes on to say:

*"in surroundings in which he is familiar, without the fear of further assault or molestation".*

In the circumstances of that Affidavit, the Bailiff could have been excused for thinking that that assault or molestation referred to B although it is now accepted by Mr. H that it does not, but rather to the difficulties between the parties. The Bailiff could have been forgiven for thinking that that reference in that context, meant that the child was at risk.

Lastly, there was this question of urgency. We understand there is to be a children's report; but it was not disclosed in the Affidavit to the Bailiff that there was to be such a report, nor that the issue as to who was to have the child was very much a matter concerning both of the parties.

For all these reasons, we think, therefore, that the number of material non-disclosures were sufficient for us to lift the Injunction and we accordingly do so.

That is not the end of the matter. We have to decide whether we should re-impose it.

Had the wife sought the assistance of the Court very soon after she realised that she had to return B to the matrimonial home and therefore into the day to day care of the husband and his parents, we might have hesitated long before leaving matters as they were before the Injunction. But, as it is, the period of three months has meant that during this time B has become accustomed to living at home. It is true he has regressed in his behaviour, but we cannot be sure, without receiving a detailed children's report that that regression is due to anything the husband has done on his side, or whether it is due, as I said earlier, to the stress which afflicts all small children when their parent's marriage breaks up.

In the absence of the children's report we cannot be sure - although we realise that Ben's interests are paramount - that those interests would be advanced by re-imposing the Injunction at this time. Accordingly, we decline to do so.

We hope that the children's report can be prepared expeditiously. It should be possible - and we hope that it will - for the hearing before the Greffier arranged for 21st December, 1993, to be heard more quickly than that. We think it is right that the Greffier, or indeed if it has to be, ourselves, in due course, should have the children's report because ultimately we have to decide what to do in the best interests of Ben. Deciding not to re-impose the injunction has given us considerable difficulty, but we think, for the reasons I have mentioned, that it would not be right at this stage to do so.

Authorities

Hunt -v- Pallister (7th July, 1988) Jersey Unreported; (1987-88) J.L.R. N.13.

de Guelle's Home Bakery -v- Le Nosh (7th March, 1970) Jersey Unreported; (1990) J.L.R. N.16.

Fenten -v- Fenten (25th October, 1990) Jersey Unreported.

Little -v- Brookes (14th February, 1991) Jersey Unreported.

Howard -v- Howard (21st October, 1993) Jersey Unreported.