

ROYAL COURT
(Samedi Division)

12th January, 1995

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Before: F.C. Hamon, Esq., Commissioner,
and Jurats Bonn and Rumfitt

<u>Between:</u>	T.S. Engineering, Ltd	<u>Plaintiff</u>
<u>And:</u>	Raymond David Bisson	<u>Defendant</u>

Application by the Defendant for an Order raising the *Ordre Provisoire* on his boat.

Advocate M. St. J. O'Connell for the Defendant/Applicant.
Advocate D.M.C. Sowden for the Plaintiff.

JUDGMENT

THE COMMISSIONER: The 'Fleur de France' is a Jersey registered fishing boat with a gross tonnage of 61.08 tons. She is owned by Raymond David Bisson, who is also her skipper. She has a crew of three. Mr. Bisson first registered the 'Fleur de France' in 1987. There are three mortgages registered against the vessel. The first is in favour of Midland Bank plc, the second is in favour of the States of Jersey and the third in favour of a company called Ross Alcedo Co. Ltd. of Union House, Union Street, St. Helier. The registered mortgages total some £100,000 and the boat is insured for £275,000.

In July, 1994, the 'Fleur de France' was fishing off Grimsby when she broke down. She had to be towed into Grimsby. There was in that port a company called the Jubilee Fishing Co. Ltd. That company operates as fish salesmen and fishing vessel agents. We shall call it "Jubilee". Jubilee had, apparently, acted as agent for Mr. Bisson some two years previously. It was discovered that the boat's crankshaft was broken. Mr. Bisson had already commissioned what he described in his affidavit as a "replacement secondhand engine" through his engineer, Monsieur Piero Plaud who is based in Granville. Jubilee introduced Mr. Bisson to T.S. Engineering Ltd, a firm which has offices not only in Grimsby but

in South Humberside, Bristol, Cumbermould and Rochester. It has been established for over forty years but was taken over some twelve years ago. With the decline in the fishing industry it has diversified but still allocates some 30% of its business into maintaining fishing vessels. We heard from Mr. Barry Merrison, a director of that company, who had travelled to Jersey for this hearing.

The circumstances were unusual. Normally we would have heard evidence on affidavit but counsel had, when the case was adjourned to today from its appearance on the Friday afternoon "cause" list, apparently been told by that Samedi Court to call witnesses. We find that surprising but in the event we allowed Mr. Merrison to give his evidence, and Mr. Bisson's counsel, on instructions, put Mr. Bisson in the witness box so that he could in turn be cross-examined on his affidavit sworn on 6th January.

Mr. Merrison was adamant that Jubilee was the agent of Mr. Bisson and had no connection with his company, T.S. Engineering.

Jubilee consulted with T.S. Engineering and advised that the work of removing the old engine and fitting its replacement would cost approximately £4,000. A ten day period was given for carrying out the work. Mr. Merrison told us that when he saw the replacement engine it "looked as though it had come from the scrapyard". He offered to inspect it. His offer was declined. That of course is a matter of evidence. It will no doubt be one of the many matters that will be hotly disputed if the matter comes to trial. We do not in any way wish to enter into the minutiae of the dispute. If the matter comes to trial there will no doubt be experts called who will detail the cause and effect of the difficulties that historically then occurred. The engine was installed "end on" in the same way that the engine had been taken out. It had turned over satisfactorily when a manual test had been made before installation. What followed thereafter, is a sequence of problems, some of which were undoubtedly caused by soot and carbon deposits having fallen into the cylinders.

The final bill of £4,320 for the initial work was billed on 27th July, 1994. The details of that account were "to remove damaged engine from vessel, refit your supply used engine on your instructions, as per our quotation, £4,320.00". That bill was paid, except for £20.

Problems continued to present themselves. New parts had to be fitted. At one stage the engine had to be lifted out and examined. A consulting engineer was called in by T.S. Engineering who prepared a detailed report dated 15th August, 1994. This extra work to make the 'Fleur de France' seaworthy caused delay and more expense. It was only on 10th September that 'Fleur de France' left Grimsby to fish for crabs in the North Sea. The 'Fleur de France' made some seven trips in and out of Grimsby

5 after that time. Mr. Bisson eventually and finally left Grimsby on 24th November to sail south to fish in the Dover Straits. The total cost of the extra work was £15,687.52. This is the bill of T.S. Engineering. There may be further monies owed to Jubilee but that company is not a party to this action.

10 We heard evidence as to how Mr. Bisson had dealt with T.S. Engineering, as to whether he had complained at any time, as to the fact that he had apparently consulted with a firm of solicitors in Grimsby to action T.S. Engineering for lost earnings and how, if at all, that action (not yet launched) was proceeding under its Legal Aid application. We heard allegations that Mr. Bisson had fled his obligations when he sailed from Grimsby for the final time, how the action came to Jersey and how the parties had dealt with one another pre-action when 'Fleur de France' came to Jersey. These are matters which may concern the trial court in due course. The matter that we have to decide is one concerning the form that the action has taken.

20 We have no doubt that both Mr. Bisson and Mr. Merrison have given their evidence to us fully, fairly and frankly. There are areas of conflict but these are not for us to resolve at this hearing. As we have said, we express surprise that *viva voce* evidence has been necessary at all and counsel limited their cross-examination to matters which would assist us to decide the preliminary question as to whether the form of arrest can be confirmed.

30 On 28th December, 1994, the learned Bailiff signed an *Ordre Provisoire* or distraint upon the movable property of Mr. Bisson at the instance of T.S. Engineering. We need to deal with certain matters.

35 1. Mr. Bisson is Jersey born. His boat is registered in Jersey. He is not *fondé en héritage* but he has Jersey born parents and a sibling in the Island. He is divorced. He lives in rented accommodation in Jersey when not on his boat and he has a six year old son whom he helps to maintain. His registered creditors are based in Jersey.

40 2. The 'Fleur de France' is Mr. Bisson's sole source of income. It is his livelihood. From his fishing he funds his mortgages, his insurance, and the hire purchase commitment on his equipment.

45 3. The 'Fleur de France' has, from its arrest by the Viscount on 28th December, 1994, had its fuel supply cut off. If the engine is not run for several hours a week then considerable damage may be caused to it.

50 4. The Plaintiff has accepted that it has no wish to deprive Mr. Bisson from earning his livelihood but seeks an acceptable form of security before allowing any *arrêt* to be removed. The proposal

made to the Defendant on 9th January was that a) the sums of £15,687.52 and £6,582.14 (the sum alleged to be due to Jubilee, Mr. Bisson's agent) be paid into Court or b) that a charge be taken against the 'Fleur de France' in the names of T.S. Engineering and Jubilee, such charges to be supported by undertakings that, if the claims are unsuccessful, the charges will be cancelled.

The Ordre Provisoire.

It is given to any creditor who is unsatisfied to distrain upon his debtor's movable property. There are two ways of effecting a distraint: by *Ordre de Justice* or by *Ordre Provisoire* (we do not need to deal with the case where judgment is given with permission to sell in satisfaction of a judgment debt).

The *Ordre Provisoire* is issued to the creditor on an *ex parte* application and authorises the creditor to cause the Viscount to distrain upon the assets of the debtor. It may also, in certain circumstances, cause the Viscount to arrest the person of the debtor. The distraint, once provisionally effected, must be confirmed by the Royal Court (or the Petty Debts Court). Until the *arrêt* has been confirmed the Viscount has no power to sell the goods. We can look at the *Ordre Provisoire* in many lights but we can see that its effect in this instance is no more nor less than the obtaining of a swingeing interim injunction.

How was it obtained?

On 28th December, 1994, the learned Bailiff was presented with a letter which we shall set out in full:

"The Bailiff,
Bailiff's Chambers,
Royal Court House,
Royal Square,
ST. HELIER,
Jersey, C.I.

Sir,

I act on behalf of T.S. Engineering Limited who are based in Grimsby, South Humberside, England.

I enclose copies of invoices raised by my clients for repairs carried out to a vessel known as "Fleur de France". The invoice is addressed to Jubilee Fishing Company Limited who I am instructed are the local fishing agents for the vessel's registered owner a Mr. Raymond David Bisson of 5, The Magnolias, Regent Road, St. Helier, Jersey.

5 The vessel is registered as J.86, and despite repeated
verbal requests for payment, the account still remains
outstanding and the vessel is no longer in the Grimsby
area. However, my client has been made aware that the
vessel has been fishing in Jersey waters over the
Christmas period, and is presently moored close to the
Yacht Club. My client company would therefore request
10 that you issue an *Ordre Provisoire* in order that the
vessel be arrested, failing which, it will inevitably
leave this jurisdiction without payment of the monies due
of £15,687.52.

15 I have the honour to be,
Sir,
Your obedient servant.

DANIELLE CUBITT SOWDEN".

20 Attached to that letter is the standard form which empowers
T.S. Engineering to "effect a distraint and, where appropriate, to
sequester all the movable property" of Mr. Bisson "including all
movable property in the possession of the debtor in order to
25 permit the same to be applied towards the payment of such sums as
may be found to be properly due to the creditor". The amount, as
we have said, claimed was £15,687.52 and the Order is to be
executed by the Viscount.

30 As we have seen the enforcement of the Order had the most
drastic consequences for the Defendant. The procedure, we were
told by counsel for the Plaintiff, is so well tried that we should
not in any way attempt to criticise the methods used. Despite
that caution we will now proceed to do so.

35 In Walters & Ors. -v- Bingham (1985-86) JLR 439 the learned
Deputy Bailiff said this:

40 "In the instant case, Mr. Clapham argued that this was a
Jersey procedural matter and not an English one; that in
Jersey an affidavit or draft affidavit is not a pre-
condition of an *ex parte* order; that no rule of court or
practice direction exists; and that, had an affidavit been
45 required it would be so obvious a requirement that the
learned Bailiff would have asked for one. Mr. Clapham
told us that time was of the essence, that the Order of
Justice was prepared, together with an affidavit to obtain
leave to serve out of the jurisdiction, that he attended
personally upon the learned Bailiff, that he took with him
50 the affidavit of Mr. Walters in the English proceedings
and many other papers, that the Bailiff studied the Order
of Justice, enquired as to the difficulty of service, was
informed of the affidavit and of Mr. Bingham's

5 representation by Mr. Binnington, was satisfied by the
order of the High Court, and signed the Order of Justice.
Mr. Clapham had on many occasions obtained injunctions
without affidavit in the past and argued that it would be
absurd for Theodore Goddard to be penalised now because
10 the Bailiff did not ask for an affidavit; that in Jersey
an injunction can be granted without an affidavit; and,
therefore, that non-disclosure at the time was entirely
immaterial and that the Order of Justice does not have to
disclose the defence or the points made against the
15 plaintiff's claim because it is part of the adversarial
process followed in Jersey".

And then the case goes on in this way:

15 "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
20 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
25 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.

30 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".

35 Everything that is said there we would now repeat in as
strong terms as we can in regard to whether or not affidavits
should be required when one is obtaining an *Ordre Provisoire* with
consequences such as we have seen in this case, because it seems
to us that this was a case crying out for an affidavit. It should
40 have been explained to the learned Bailiff why it was not
sufficient to proceed by way of simple summons (if an Order of
Justice was not considered appropriate). It should have been
pointed out to the learned Bailiff that £4,300 had been paid on
the first invoice dated 27th July, 1994; this would undoubtedly
45 have raised in the learned Bailiff's mind that there was some
dispute in the account. In our view the words requesting the
arrest of the vessel "failing which it will inevitably leave this
jurisdiction" begs the question as to whether the 'Fleur de
France' was likely to return. In our view the *Ordre Provisoire* is
50 an unusual procedure which may well, in certain circumstances, be
justified and appropriate to an insular jurisdiction, but for that
very reason, in our view, it should not be invoked lightly.

We examined, in no great detail, the Loi (1813) concernant le Paiement de Lettres de Change and the Loi (1862) sur les saisies en vertu d'Ordres Provisoires. Provision is made in those laws for a form of simple affidavit to be made when there is to be a saisie but, for many years, and particularly where there is a danger of a debtor leaving the Island the practice has been for the form followed in the present case to be observed.

We find it difficult to see how what is technically a Mareva injunction can be obtained in such an arbitrary manner however hallowed the practice may have become. In any event we have some observations as to whether an *Ordre Provisoire* can be used for anything other than the summary recovery of a liquidated sum. This account is now clearly contested.

There is, however, one further matter to which we need to refer. We asked counsel to address us on it. In his work "Manuscrits sur la Constitution, les Lois et les Usages de Jersey" (1846): Vol 2: Chapitre III: Des Exécutions sur les Meubles, Le Geyt says this:

"Il y a des meubles plus ou moins privilégiés, selon qu'ils sont plus ou moins nécessaires aux débiteurs, ou selon la nature de la dette".

Then he talks about the first regard. The second regard is this:

"Le second égard est que les outils ou instruments d'un métier, état ou vocation ne doivent pas être saisis, s'il y a d'autres meubles; encore ne le doivent ils pas être, s'ils sont absolument nécessaires pour la subsistance d'un débiteur".

And then he goes on to say at p.11 of this work, talking about a case on 10th July, 1602:

"...par charité M. le Gouverneur exhorte Jacques Pipon de restituer, par voye de prest, à Jean Guillaume sa vache qu'il avoit exécutée pour dette. Cette exhortation a produit l'usage dont je viens de parler, et qui n'est plus contesté. Je ne pense pourtant pas, que, s'il n'y avoit point d'autres meubles, une telle vache ne peut être saisie pour assurance des deniers dont elle auroit été achetée, ni qu'une affectation ou négligence visible du créancier ou des sergens en la saisie d'un meuble nécessaire, pendant qu'on en peut facilement trouver d'autres, peust être soufferte, selon le principe que nous avons posé d'abord: que les exécutions se doivent faire avec prudence et charité".

In the light of those comments we find it difficult to see how a fishing boat, which is the sole means of survival of a professional fisherman, can, in the circumstances of the common law, be distrained upon at all. The claim is for £15,687. There is held up and deteriorating a valuable fishing boat with substantial equity in it. We have an undertaking from Mr. Bisson, through his counsel, that he will return to Jersey with his boat if and when the case comes up to hearing.

In the circumstances of this particular case and without wishing to generalise we lift the distraint. We will place the case on the pending list. However, we need from Mr. O'Connell certain undertakings. We need an undertaking from Mr. Bisson that he will allow Mr. O'Connell to accept service of these matters on his behalf and that he will leave with Mr. O'Connell - should he quit the jurisdiction to go fishing - sufficient means of communication.

We also need an undertaking from Mr. Bisson and if we do not get it we will so order, that for one year from this date, he will not sell, gift, transfer, dispose of, charge, or further mortgage the 'Fleur de France' without further Order of the Court.

[The undertaking was given in open Court by the Defendant]

Authorities

Walters & Ors. -v- Bingham (1985-86) JLR 439.

Field Aircraft Services (Exeter) Ltd -v- Kenton Utilities and
Developments (1987-88) JLR 78.

Loi (1813) concernant le Paiement de Lettres de Change.

Loi (1862) sur les saisies en vertu d'Ordres Provisoires.

Le Geyt: "Manuscripts sur la Constitution, les Lois et les Usages
de Jersey" (1846): Vol 2: Chapitre III: Des Exécutions sur
les Meubles.