6 pages.

ROYAL COURT
(Samedi Division)

109.

13th June, 1995

Before: Sir Peter Crill, K.B.E., Commissioner,
Jurats Coutanche and Potter

Between:	Barclays Bank Plc.	Plaintiff.
And	Geoffrey Thorpe and Richard Thorpe	First Defendants.
And	Chase Manhattan Bank NA	Second Defendant.

Application by the First Defendants for an Order varying the terms of the interim injunctions, contained in the Order of Justice, dated 10th April, 1992, to permit each of the First Defendants to receive from moneys held by the Second Defendant, reasonable living expenses at the rate of £300 per week and legal expenses incurred and to be incurred in defending the action.

Advocate J.P. Speck for the First Defendants.
Advocate M. St.J. O'Connell for the Plaintiff.

JUDGMENT

THE COMMISSIONER: This is an application by the First Defendants to vary interim injunctions in an Order of Justice signed by the Bailiff on 10th April, 1992, so that each should receive from the moneys held by the Second Defendant, Chase Manhattan Bank NA, reasonable expenses at the rate of £300 per week, or at such other rate as the Court thinks fit; and secondly, so that their legal expenses incurred to date, and to be incurred, in defending the action should be paid from the moneys held by the Second Defendant. They also ask that the Plaintiff be ordered to pay the costs of and incidental to the application on a full indemnity basis.

The Order of Justice which, as I have said, was signed on 10th April, 1992, claims that there is in Jersey, in an account with the Second Defendant, moneys which properly belong to the Plaintiff, Barclays Bank Plc. Although the Plaintiff gave its usual undertaking in the Order of Justice it did not ask the Bailiff to include the provision for living expenses and/or the legal costs of the Defendants.

This was deliberate, as Mr. O'Connell had told the Court, because in his submission what was being sought was a *saisie conservatoire,* and not the ordinary form of *Mareva* injunction in which the moneys enjoined - against which the Plantiffs had a claim - belonged to the Defendant. This was a case, Mr. O'Connell submitted, where the Plaintiff had a proprietary interest in the enjoined funds held by with the Second Defendant and thus it was not appropriate for him to have included provisions for the costs of legal defence and for the living expenses of the Defendants.

The application is supported by an affidavit from the second of the First Defendants, Richard, but no affidavit has been submitted by Geoffrey. We were given an explanation that, unfortunately, he is in custody in Spain awaiting extradition and that in spite of every effort having been made by his Counsel and his advisers in England and Spain it has not been possible to produce an affidavit.

We are proceeding, therefore, to deal with Richard's application because if that fails then Geoffrey's will fail likewise. Only if Richard Thorpe's application succeeds would it be necessary for us to turn to the question of whether we are prepared to overlook the absence of an affidavit which is normally required, I stress, in such applications, under the particular circumstances of this case.

The background these proceedings is set out in the Order of Justice and in an affidavit of a bank employee, Mr. John Anthony Allsop, at the time when it was obtained.

The facts may be briefly stated: the Plaintiff lent money to the Defendants, secured on a property in England, for reasons into which it is not necessary for the Court to go. The Defendants were unable to repay the money, and they handed over the keys of the property, according to the claim of the Plaintiff, but, due to the fall in property values generally, the equity in the property was insufficient to meet the loan. Accordingly there was a balance outstanding but it is not in respect of that balance alone that the claim is made. The claim is based on the balance due, but Barclays Bank say that the money held by the Second Defendant is in fact the Bank's money; it is not the First Defendants' money against which the Bank have a claim for the balance of the loan. They say this for a number of reasons.

First, both Defendants were charged with criminal conspiracy to defraud the Plaintiffs and although no evidence was offered against Geoffrey, Richard was convicted and, more than that, a Compensation Order was made on 6th January, 1995, in the sum of £95,000. Secondly, Mr. O'Connell invites us to look at the sequence of events. He says that the affidavit of Richard suggests there that he and his brother had been trading lawfully making profits in the ordinary way and that it was from those profits that they opened the account in Jersey at the Chase Manhattan Bank. In fact the money was sent here on 1st April, 1992; the brothers were arrested on 2nd April, 1992, and the

present proceedings were commenced on 10th April, 1992. Mr. O'Connell says that if, indeed, the moneys held here derived from legitimate trading why did the First Defendants make no attempt to repay their debt to Barclays. Their failure to do so, in effect, showed some bad faith. He accused them of being fraudsters trying to remove their money from the jurisdiction just in time. We make no finding on these suggestions but they certainly support the view that the money belonged to Barclays in the sense they were claiming it out of a proprietary claim. Mr. O'Connell accepts that if the *Mareva* injunction or *ordre conservatoire* had been obtained against moneys which belonged to the Defendants he would not seek to oppose the present application for a variation of the Order. But, as I have said he asks the Court to find that these proceedings arise out of a proprietary claim. Barclays had been defrauded of their own money and accordingly the ordinary principles applying to allowances for legal defence and living expenses - which Mr. O'Connell does not dispute govern a *Mareva* injunction - ought not to apply. Mr. O'Connell also draws attention to the fact that in the correspondence there is inadequate explanation of the sources of this money, and finally he says that if, at the end of the day, the Plaintiff succeeds and the fund has been significantly reduced by some £40,000 or £50,000, which are the figures one is discussing if one were to grant the application in respect of both Defendants, there would be no chance of recovering such a sum.

By way of authorities we were cited by both parties the case of Sundt Wrigley & Company Ltd. -v- Wrigley & Ors. (23rd June, 1993) Unreported Judgment of the Court of Appeal of England. In that judgment are to be found two important passages to which the Court has had careful regard. I now cite from the speech of Mann M. R. at page 9 of the judgment.

> ***"In the Mareva case, since the money is the defendant's subject to his demonstrating that he has no other assets with which to fund the litigation, the ordinary rule is that he should have resort to the frozen funds in order to finance his defence. In the proprietary case, however, the judgment is a more difficult one because in the plaintiff's contention the money on which the defendant wishes to rely to finance his litigation is not the defendant's money at all but represents money which is held on trust for the plaintiff."***

Even more - I interpolate here - if it is money which is alleged by the Plaintiffs to have been sent to Jersey as part of the proceeds of a fraud against the Plaintiff. I now continue to read from the judgment:

> ***"That, of course, gives rise to an obvious risk of injustice if the plaintiff, successful at the end of the day, finds that his own money has been used to finance an unsuccessful defence."***

And, I will interpolate further to say: if t[illegible] money has been used to support the Defendants financially by way of living expenses.

> *"As these authorities make plain, a careful and anxious judgment has to be made in a case where a proprietary claim is advanced by the plaintiff as to whether the injustice of permitting the use of the funds by the defendant is out-weighed by the possible injustice to the defendant if he is denied the opportunity of advancing what may of course turn out to be a successful defence.*
>
> *The question which really arises is, as I think was accepted in argument in this Court, the following: is there so great a risk of injustice to the defendant if he is not represented as to justify recourse to enjoined funds which may be shown to be the plaintiff's funds held by the defendant as trustee or constructive trustee?"*

Now, that is the end of that passage but I think I should pause here to distinguish between the English method of assisting people with legal aid and our own system. The two are quite distinct and the Court is quite satisfied that even if we were not to grant the application that would not deprive the Defendants of legal aid in order to present their case when the substantive action is heard.

There is a further passage in Lord Mann's speech on page 19 of the judgment, from which I now read:

> *"In the exceptional case where a proprietary claim is made to enjoined funds and the plaintiff is able within the reasonable confines of an interlocutory hearing to demonstrate a strong probability that the proprietary claim is well-founded then that may properly affect the Court's decision whether the defendant should be free to draw on those funds to finance his defence. Given the Court's traditional tendency to protect the integrity of a trust fund that is a fact which in such circumstances need not, and indeed probably should not, be ignored."*

We have also had cited to us Rule 29/1/25 of the R.S.C. (1995 Ed'n) dealing with the Defendants' living and other expenses, in which distinction is drawn between the ordinary *Mareva* injunction and the Wrigley type of case which I have just cited. Half way down the paragraph, the Rule states:

> *"A distinction must be drawn between the ordinary Mareva jurisdiction and the much older Chancery jurisdiction to preserve a trust fund of which beneficial ownership was claimed. In the latter case, albeit rare that it can be so demonstrated satisfactorily at an interlocutory stage, there will be prejudice to a successful claimant in financing the defence; accordingly a judgment has to be made as to whether the injustice of permitting the use of*

...nds by a defendant is outweighed by possible injustice in denying him an opportunity to raise a defence."

That is a comment on the Wrigley case itself.

We are satisfied that there is a strong probability of the claim being found to be a proprietary claim and we do not think that depriving the Defendants of the order for which they are now applying by summons, would be so wrong that we ought to grant the application. We have weighed whether by doing so the interests of justice would in fact be unbalanced, so to speak, in respect of the First Defendants. We do not find that that would be the case. As I have said the Jersey provisions for legal aid are totally different from those in England and we are satisfied that the First Defendants would continue to be represented, as they now are, on legal aid and we cannot find that the interests of justice require that we should, in effect, finance their further legal representation out of what is effectively the trust fund or proprietary trust fund.

We then come to the other point which was touched on in the Representation of Bank America Trust Company (Jersey) Ltd & Anor. (11th January, 1995) Jersey Unreported, where the Court referred to a polluted source as being a reason why they should not grant an application in that particular case.

We are satisfied that a strong case has been made out by the Plaintiff that the money in Jersey has come from a polluted source and this Court does not feel inclined to assist the Defendants to draw from that source here in Jersey, either in respect of the defence which, as I say, they will not in any event be prevented from putting forward nor, indeed, in respect of living expenses, and accordingly the applications are refused.

Authorities

R.S.C. (1995 Ed'n) 0.29/1/25.

A.C. Mauger & Son (Sunwin) Ltd -v- V. Hugo Management, Ltd (1989) JLR 295-307.

Cooley -v- Wood (7th October 1991) Jersey Unreported.

Iraqi Ministry of Defence & Ors -v- Arcepey Shipping Company (The Angel Bell) (1980) 1 All ER 480-7.

P.C.W. (Underwriting Agencies) -v- Dixon & Anor (1983) 2 All ER 158-166.

Law Society -v- Shanks (1988) 1 FLR 504-507.

Sundty Wrigley & Company Ltd -v- Wrigley & Ors (23rd June, 1993) Unreported Judgment of Court of Appeal of England.

In re Representation of Bank America Trust Company (Jersey) Ltd & Anor (11th January, 1995) Jersey Unreported.