8 pages

COURT OF APPEAL

14th January, 1997. 3.

Before: Sir Godfray Le Quesne, Q.C., (President)
J.P.C. Sumption, Esq., Q.C., and
M.G. Clarke, Esq., Q.C.

Between:	Richard Hughes	Plaintiff
And:	Vail Blygh Clewley	Defendant
And:	Registrar of British Ships for St. Helier	Party Cited

Appeal by the Defendant from the Order of the Royal Court (Samedi Division) on 25th January, 1996, whereby the Court:

A. dismissed the Defendant's applications for orders that:

1. the Plaintiff should pay the Defendant damages for the wrongful imposition of the injunctions contained in the Orders of Justice dated 10th December, 1991, and 7th December, 1992, alternatively, that there should be an inquiry into such damages;

2. the Defendant should be granted further or other relief; and

3. the Plaintiff should pay the costs of and incidental to the application on a full indemnity basis;

B. directed that the Defendant pay the costs of the Plaintiff of and incidental to the applications;

C. adjudged that it had no power to imply any undertaking in damages against the Plaintiff in favour of the Defendant; and

D. adjudged that the Defendant had no claim for damages against the Plaintiff on the ground that the Plaintiff, under either Order of Justice, had wrongly invoked the process of the Court.

Advocate P. Landick for the Defendant.
Advocate N.F. Journeaux for the Plaintiff.

JUDGMENT

SUMPTION JA: This appeal arises out of an application by the Defendant, Mr. Clewley, for an enquiry into the damages suffered by him as a result of the making of an order under Section 30 of the Merchant Shipping Act 1894 at the instance of the Plaintiff. Section 30 empowers any court having civil jurisdiction in a port of registry under the Act to prohibit at the instance of any "interested person" any dealing with a registered vessel for a specified period. Its main purpose is to enable Court the to protect or give effect to some proprietary or other interest of the applicant in a British-registered ship. It is not a means of obtaining security for a mere personal claim McPhail -v- Hamilton (1878) 5 R 1017, 120-1 (Lord Shand). Mr. Clewley contends that the order should not have been made and that he has suffered damages in consequence of it which the Plaintiff ought to pay.

The background is unusual and complicated, but it is fair to say that not all the complications matter.

In 1991, Mr. Hughes was the owner of the yacht "Siben", which was registered in the St. Helier registry in the name of a company controlled by him called Whistling Wild Yachts Ltd. The parties have throughout proceeded on the basis that the company was the nominee of Mr. Hughes, who was the beneficial owner of the yacht. In August, 1991, Mr. Hughes entered into a written agreement with Mr. Clewley by which he agreed to exchange his yacht, a De Lorean car and sum of money for a villa and a discothèque in Portugal said to belong to Mr. Clewley. It is now common ground that although the document did not record the fact, it was also a term of the agreement that Mr. Clewley should transfer a business called Villas Rouges, which supplied call-girls to businessmen visiting Portugal.

Shortly after the agreement was made, Mr. Hughes concluded that he had been misled by Mr. Clewley. In particular he said that he had been misled about the takings of the discothèque, which were much smaller than he had been led to believe, and about the title to the land on which it was situated, which turned out not to belong to Mr. Clewley at all. Mainly as a result of these two problems, the venture proved to be a disaster for Mr. Hughes, who was unable to operate the discothèque business and eventually surrendered the property on which it was situated to the true owner. On 5th November, 1991, he began an action in the High Court in London claiming damages for breach of contract and negligent misrepresentation. At this stage Mr. Hughes had caused Whistling Wild Yachts to execute a bill of sale transferring the yacht to Mr. Clewley, but the instrument had not been delivered to the Registrar of British Ships and the company was still registered as the owner. So, on 10th December, 1991, those representing Mr. Hughes in Jersey obtained *ex parte* from the Royal Court an order under Section 30. The order, which was initially made for a period of a year, had the effect of preventing Mr. Clewley from registering any title derived from the bill of sale and accordingly from disposing of any interest in the yacht. On 7th December, 1992, the order was renewed *ex parte* for a further year. It is clear from the affidavit sworn in support of the applications, both in 1991 and 1992, that the order was sought in order to secure Mr. Hughes' claim for damages in the English High Court action. Indeed, Mr. Hughes was not at this stage asserting any other interest. On neither occasion was any express undertaking in damages proffered or recorded in the order.

On 2nd March, 1993, Mr. Clewley applied to the Royal Court (Samedi Division) to set aside the order. The grounds of his application were set out in an affidavit dated 19th February, 1993. They were that Mr. Hughes had obtained the order without disclosing certain matters; that there had been no undertaking in damages; that Mr. Hughes had been dilatory in pursuing his claim in England; and that Mr. Hughes had no arguable claim. I need not go into any of these various complaints. It may be that they were not pursued, but what is clear is that they were not dealt with by the Royal Court. Mr. Clewley's application succeeded before them on a different ground apparently raised by Mr. Clewley later, namely that Mr. Hughes had no interest in the yacht beyond a personal claim against Mr. Clewley which he might wish to enforce by execution against it. The Royal Court agreed with this submission and set aside the order. However, it gave leave to appeal and maintained the order pending appeal.

After a number of mishaps which I need not describe, Mr. Hughes eventually served his Statement of Claim in the High Court action in June, 1993, about a month after the decision of the Royal Court. It alleged that Mr. Clewley's representations had been made fraudulently and claimed, apparently for the first time, to rescind the contract. In November, 1993, the appeal from the Royal Court's decision had not yet been heard, and the Section 30 order was extended by consent until it was. This happened in January, 1994. The Court of Appeal allowed the appeal and restored the order. They did so on the ground that Mr. Hughes was now claiming to have rescinded the agreement. If he was entitled to rescind it, property in the yacht would revest in him, thereby justifying his claim to relief under Section 30 of the Act. The Court of Appeal were not, of course, deciding that Mr. Hughes was entitled to rescind, but only that he had an arguable case which justified giving interlocutory relief under Section 30, pending the decision of the High Court in London. Mr. Clewley did not seek to maintain the judgment of the Royal Court on the ground of the various non-disclosures and irregularities alleged in his affidavit of 19th February, 1993.

A further extension of the order was made by consent in November, 1995.

On 5th September, 1996, Mr. Justice Clarke gave judgment in the High Court action. In summary, he found that Mr. Clewley had fraudulently induced Mr. Hughes to enter into the agreement of August, 1991. He found that Mr. Clewley had represented that he had title to the land on which the discothèque was located, whereas in fact the land still belonged to the person from whom Mr. Clewley had agreed to buy it. He had not yet been paid and had retained title. ***"There is in my judgment no doubt"***, Mr. Justice Clarke held, ***"that Mr. Hughes would not have entered into the contract in the absence of such representations, because (however naive he was in many respects) the one thing about which he was concerned from the outset was that he should receive the discothèque free and clear".*** The Judge also found that Mr. Clewley had overstated the takings of the discothèque by a substantial margin. ***"Mr. Hughes"***, he said, ***"was in my judgment induced to enter into the contract in reliance on that representation. As both parties knew, he had no ready money on which to live. He was or would be relying on whatever he could earn from the discothèque".*** In both respects, Mr. Clewley was well aware of the true position.

When Mr. Justice Clarke came to the relief to be granted, he had to deal with arguments advanced by Mr. Clewley based on the fact that one of the assets, the subject of the exchange agreement, was a call-girl business. Mr. Clewley argued that the contract was illegal. Mr. Justice Clarke accepted that the contract was illegal. He held that the illegal nature of the Villas Rouges business was a bar to rescission because on a rescission that business would revest in Mr. Clewley. ***"I do not think*** [he said] ***that a Court of Equity should make an order which could in principle have the effect of transferring an illegal business from one party to another".*** He also considered that rescission was barred because of the impossibility of effecting even approximate restitution of the property exchanged. Instead he awarded Mr. Hughes damages representing the difference in value between what he had given under the agreement and what he had received. Mr. Justice Clarke did not accept that the illegality of the contract was any bar to an award of damages because Mr. Hughes did not have to plead or rely on the illegality in order to obtain that relief. The Judge recorded that Mr. Clewley had tried to amend his pleadings to allege that the contract was illegal for an additional reason, namely that the value of the land in Portugal was understated to avoid Portuguese tax. But that application had failed, because it was raised too late in the day and would involve other persons such as the lawyers involved in Portugal. He therefore made no findings about them. So the upshot was that Mr. Hughes succeeded in the action, but that he obtained only personal relief against Mr. Clewley and not a proprietary interest in the yacht.

On 20th November, 1995, the Royal Court rescinded the Section 30 order made in Mr. Hughes' favour at his own request, in order to enable the yacht to be sold by way of execution in England.

On 25th January, 1996, it heard Mr. Clewley's application for an enquiry as to damages. The skeleton argument suggests that he advanced two arguments in support of his application. The first was that Mr. Hughes had been able to justify the Section 30 order in the Court of Appeal in January, 1994, only on the ground that he had a claim to rescind the agreement, and that claim had been rejected by Mr. Justice Clarke. The second was that Mr. Hughes had failed to disclose in his *ex parte* affidavits leading to the making of the order the fact that it was a term of the agreement of August, 1991, that he should acquire the illegal Villas Rouges business.

The Royal Court rejected Mr. Clewley's application for an enquiry as to damages. They held that Mr. Hughes had given no undertaking in damages, either express or implied, and that Mr. Clewley could not therefore recover any damages unless Mr. Hughes' proceedings in Jersey were a wrongful abuse of process. They then went on to hold that Mr. Hughes' proceedings were not wrongful on either of the two bases advanced by Mr. Clewley. As far as the first point was concerned (his failure to establish a proprietary interest), they considered that Mr. Hughes had established his interest before the Court of Appeal in 1994 on the basis that he was claiming to rescind, and that the decision of the High Court in England in 1995 refusing to allow rescission did not ***"vitiate retrospectively"*** that interest. The critical point, as they saw it, was that ***"at the end of the day, Mr. Hughes was successful in his action against Mr. Clewley".*** As far as the second point is concerned (the illegality of the Villas Rouges business), the Royal

Court held that Mr. Clewley was at least as heavily involved in the Villas Rouges business as Mr. Hughes and could have drawn the matter to the attention of the Court himself had he wished to. In fact, until a late stage he was as much interested as Mr. Hughes was in keeping this aspect of the transaction away from the light of day.

At the hearing before us a very large number of arguments was deployed in Mr. Landick's skeleton argument, including those canvassed before the Royal Court and a number of others raised now for the first time. In particular, Mr. Landick wished to argue that the renewal of the order in December, 1992, and subsequently was vitiated by the failure of Mr. Hughes to serve it on Mr. Clewley, and by the fact that the application was made *ex parte* with no sufficient justification. He also wished to contend that the agreement of August, 1991, was illegal for the additional reason which he had tried unsuccessfully to add to his pleadings in the English action but for which leave had been refused. Some of these points were to be supported by further evidence which he sought leave to adduce. If that leave had been granted, there would have been an application on behalf of Mr. Hughes for leave to adduce his own evidence in response.

I think that the questions before us, in spite of the range of arguments directed to them, can be answered by reference to a small number of points of principle, none of which are touched by Mr. Clewley's further arguments or his proposed further evidence.

The starting point is that the parties to this appeal are bound by the decision of the High Court in England. The issues of both fact and law which Mr. Justice Clarke decided are now *chose jugée* or *res judicata*, and we are neither entitled nor inclined to reopen them. Nor, quite apart from the doctrine of *res judicata*, can the litigants before us be allowed to use these proceedings to mount a collateral attack on the judgment of the High Court in England to which they have submitted their dispute.

Most of Mr. Landick's submissions to this Court have consisted in attacks on the manner in which the Section 30 order was originally obtained and then, at various stages, extended. I do not think that these are relevant at this stage of these proceedings, and some of them would not have been relevant at any stage. My reasons are as follows:

1. Where an application is made to set aside an order made *ex parte*, it is plainly relevant to point out that it has been irregularly obtained, for example by non-disclosure or some other procedural irregularity. Depending on the gravity of the irregularity and the consequences of doing so, the Court may set the order aside and may order an enquiry as to damages. If it sets it aside, it may or may not do so on a basis which will permit a further application to be made for the same interlocutory relief on a proper basis. The position is rather different where the application is made after the trial for an award of damages arising from the fact that it has been made. On such an application, as it seems to me, the decisive questions are (a) whether the outcome of the dispute justifies the order made at an interlocutory stage, and (b) if not, whether the facts found disclose reasons why as a matter of discretion an enquiry as to damages should nevertheless be refused. Mr. Landick realistically acknowledged that if Mr. Hughes had succeeded in the

High Court in his claim to rescind the agreement, he would not have been in a position to claim an enquiry as to damages on the ground that the order had been irregularly obtained. His real argument, in my view, is based on the fact that Mr. Hughes failed to establish his right to rescind in the English action, and not on the interlocutory history of this action.

2. It follows that Mr. Clewley's proper course if he thought that the Section 30 order had been irregularly obtained was to apply to set it aside at an earlier stage. He did in fact apply to set it aside on 2nd March, 1993. His grounds then did not include the points which he seeks to take now. It did not include non-disclosure of the nature of the Villas Rouges business, nor the alleged non-service of the first order or the absence of prior notice of the application. Even the irregularities which he did raise in his affidavit in support of the application were not pursued.

3. The non-disclosure of the immorality of the Villas Rouges business was in any event irrelevant at the time when the Section 30 order was first obtained and when it was extended *ex parte* in December, 1992. The reason is at that stage only damages were being claimed. Mr. Justice Clarke has held that the immorality of the Villas Rouges business was not a bar to the recovery of damages. The same would have been true of any other illegality on which Mr. Hughes did not have to rely to make out his case, such as the alleged fraud on the Portuguese tax authorities which Mr. Landick desired to raise before us.

4. The nature of the Villas Rouges business was relevant (according to Mr. Justice Clarke's judgment) to the claim for rescission. But the first occasions after Mr. Hughes purported to rescind on which the point might have been raised were the hearing before the Royal Court of the second application to extend the order in November, 1993, and the hearing before the Court of Appeal in January, 1994. On both occasions Mr. Clewley was in as good a position to raise the point as Mr. Hughes was. Yet on the first occasion he consented to the extension, and on the second he did not rely on the point. The Royal Court in deciding the present application inferred that this was deliberate. I think that they were entitled to do so.

5. These being, as I see it, insurmountable objections to Mr. Landick's existing complaints of procedural irregularity, they are equally insurmountable objections to his proposed further complaints to which precisely the same considerations apply.

I therefore turn to the next question, which is whether the Royal Court's judgment was justified by the conclusions of Mr. Justice Clarke. In my view, it was. In the ordinary course the enforcement of the undertaking will follow as a matter of course if the judgment at trial discloses that the interlocutory order was unjustified by the merits of the case as found by the judge. Mr. Clewley's difficulty in the present case is that whether or not the High Court judgment vindicates Mr. Hughes' application for a Section 30 order, it discloses overwhelming reasons why as a matter of discretion he should not recover damages. As the Bailiff pointed out in the Royal Court, Mr. Hughes has succeeded in his action, albeit that the relief which he received was personal and

not proprietary. This would not necessarily have been a decisive factor if Mr. Clewley had been merely negligent or in breach of his contract. But it has been held against him that he fraudulently brought about the very transaction which gave rise to the transfer of the yacht to Mr. Clewley and therefore to the Jersey proceedings designed to stop him disposing of an interest in it to third parties. Whatever mistakes were made by Mr. Hughes in pursuing his proceedings in Jersey were committed in the attempt to extricate himself from a situation in which Mr. Clewley had dishonestly placed him.

It follows that unless Mr. Hughes acted unreasonably in applying for a Section 30 order in Jersey, the proceedings here must be regarded as resulting from Mr. Clewley's own conduct. Mr. Hughes did not in my judgment act unreasonably in pursuing a proprietary remedy, even though he has in the event failed to obtain it. He always had an arguable case for rescission. It is true that he did not rely on it until about the time when he served his Statement of Claim in the English action, some eighteen months after he had first obtained the Section 30 order *ex parte*. That shows that Mr. Hughes misconceived the law at the time of his first two applications, but it does not make his conduct an unreasonable response to the situation in which Mr. Clewley had placed him. Moreover, had he been entitled to rescind, that rescission would have avoided the agreement retrospectively whenever notice of it was given.

If these points are right, as I think that they are, it does not matter whether there is an implied undertaking in damages by an *ex parte* applicant who does not give an express one. The Royal Court considered that there was not, but I should prefer to reserve that question to another day.

I think that the appeal should be dismissed.

THE PRESIDENT: I agree.

CLARKE JA: I also agree.

Authorities

Hughes -v- Clewley (1994) 2 Lloyds Law Reports 420.

Hughes -v- all other persons claiming ownership of or other interest in the yacht "Siben" (5th September, 1995) Unreported Judgment of the High Court of England, Queen's Bench Division (Clarke J.).

Hughes -v- all other persons claiming ownership of or other interest in the yacht "Siben" (13th October, 1995) Unreported Judgment of the High Court of England, Queen's Bench Division (Clarke J.).

Hughes and all person claiming ownership of or other interest in the yacht "Siben" (17th November, 1995) Unreported Judgment of the High Court of England, Queen's Bench Division (Clarke J.).

Clewley -v- Hughes (20th November, 1995) Jersey Unreported.

Hughes-v-Clewley (21st June, 1994) Jersey Unreported CofA.

McPhail -v- Hamilton (1878) 5 R 1017, 120-1.