ROYAL COURT

12th September, 1990 130.

Before: The Bailiff, and
Jurats Vint and Hamon

Between:	**Talika Investments Limited**	Plaintiff
And:	**Olec Properties Limited**	First Defendant
And:	**Malcolm Leslie Sinel,** **Julian Anthony Clyde-Smith,** **Michael Cameron St. John Birt,** **Jonathan Greville White,** **Marc Sylvanus Dorey Yates,** **Steven Alexander Meiklejohn, and** **Richard Wilkinson Thomas**	Second Defendants

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Application by defendants to raise
interim injunction.

Advocate M.V. Voisin for the plaintiff.
Advocate W.J. Bailhache for the defendants.

JUDGMENT.

BAILIFF: This is a summons by the defendants in the second action brought against them by the plaintiff, Talika Investments Limited, which concerns certain properties in town, one of which is owned by the

plaintiff, Talika Investments Limited; the adjacent property being owned or controlled by the first defendant and the second defendants; the exact position is not material to this hearing. What is important is that there was a first action between the same parties in which the plaintiff obtained injunctions against the defendants - I shall describe them in the plural for the sake of convenience - preventing the defendants from doing any work to cover over a lightwell or a yard in which a number of light hatches had been placed, and which is situate between the property owned by the plaintiff and that of the defendants.

The plaintiff had let its property, "Pirouet House", to the defendants on the 14th October, 1983. The description of the offices which it let were these: "....les bureaux situés au premier, deuxième et troisième étages...." Nowhere was it mentioned that the ground floor was also let.

The lightwell, which I have just mentioned, covers part or all - and again we were not given the exact information - of the ground floor between "Pirouet House" and the adjacent property owned by the defendants. There was a window - again we are not clear whether that window is still there, or whether there is now a door there - in a wall at first floor level of the property belonging to the defendants which they were in the course of opening up to make into a door so that they could cross the roof of the lightwell to get from their property to the property which they had leased from the plaintiffs.

The first Order of Justice enjoined them from doing any work in furtherance of their design to build over the lightwell and make a sheltered passageway from their building to the building which they had leased.

A second Order of Justice was obtained by the plaintiffs, ex parte, from the Deputy Bailiff, preventing the defendants and their employees and other persons claiming under them, from even walking over the lightwell. It is obvious to us that the defendants were accepting that they could not build over it. We were told in the course of the hearing that the only way left for the defendants to get from one

building to the other was for them to go out onto the pavement of the public road and to use the outside doors. It would be much more convenient, as we understand from the photographs we have been shown, for them to be able to cross over using the roof of the lightwell. We have been told that there was an undertaking at the time of the lease that the two properties would be kept separate; but we are not concerned with those undertakings at the moment. We are concerned with the second injunction, which was obtained from the Deputy Bailiff, preventing the defendants and their employees and those claiming under them from even crossing over - rain or no rain - between the two properties.

The application to the Deputy Bailiff was supported by an affidavit sworn by a director of the plaintiff company on the 23rd August, 1990, and it may be said, I think, that the Deputy Bailiff based his decision to issue the present injunction, which is now appealed against, on the 24th day of August on the facts set out in that affidavit.

Mr. Bailhache has drawn our attention to a number of what he says are material omissions from the affidavit. First, the fact that the allegations in the first Order of Justice were being strenuously defended was not disclosed.

Secondly, the fact that the defendants were claiming that the demised premises included the roof of the lightwell was not disclosed. These were significant omissions.

Thirdly, the correspondence clearly shows that the defendants were asking that an application for a second injunction should be heard inter partes and not ex parte, or at least that early notice would be given to them if an ex parte application were made. The application was made ex parte and the Deputy Bailiff was not made aware that there had been a request that it should have been made inter partes.

Fourthly, paragraph 7 of the affidavit reads as follows: "That Michael Voisin & Co. have written to the First Defendant with regard to the trespass on the lightwell, which has not been denied and which has

not ceased". That, Mr. Bailhache said, is quite the opposite of the truth and in fact the defendants have always claimed there was no trespass because they claimed that the lightwell was part of the demised premises and again, Mr. Bailhache says, that was a material omission.

Lastly, he said and this is not denied by Mr. Voisin who said it was an oversight, there is no undertaking as to damages mentioned either in the affidavit or in the Order of Justice itself.

Now, are these material and important omissions? We think they are. I now have to move on briefly to the question of the law to be applied. Fortunately, there are a number of Jersey cases which although not totally consistent one with the other, are sufficiently clear to enable me to say what I conceive the law to be in cases of this nature.

It is clear to me from reading these cases which are Johnson Matthey Bankers Limited -v- Arya Holdings Limited & Anor. (1985-86) JLR 208; Trasco Intl. A.G. -v- R.M. Marketing Limited (29th October, 1986) Jersey Unreported; and Walters & Ors. -v- Bingham (1985-86) JLR 439, that if an affidavit is submitted to the Bailiff or Deputy Bailiff to obtain an injunction, whether a Mareva or other injunction, and there are in that affidavit a number of material omissions, then it is open to the Court to lift those injunctions. We say that on the authority, if authority is needed, of Trasco. But the question of injunctions was most carefully and thoroughly examined by the learned Deputy Bailiff in the Walters -v- Bingham case. In that case at p.463 he suggested that the authority of the Trasco case should be regarded as restricted to Mareva type injunctions, that is to say to the exercise of the extraordinary jurisdiction of the Royal Court.

Without hearing further argument on this point it seems to us that there is little authority in that passage to support that suggestion. I would wish to hear further argument on that point before ruling or before holding that in my opinion that passage goes too far, but prima facie it does appear to express a restriction which I do not think should apply.

I agree therefore the principles which are clearly set out in the cases I have mentioned, but in particular that in Trasco where in that case the learned Court refers to the Chandris case, at p.6 in the following passage:

> "This being the case, we propose to follow the principles as they were set out in Johnson Matthey -v- Arya (supra). As that judgment is still unpublished, we propose to set out the guidelines (as found in 4 Halsbury 37 para 362, or, for that matter in the Rules of the Supreme Court, 0.29/1/16). They are as follows, and derive from the Third Chandris action (supra) ...." (which is the case of the Third Chandris Corporation -v- Unimarine S.A. (1979) 1 W.L.R. 122, where Lord Denning M.R. made certain observations). In the passage referred to by this Court in Trasco Lord Denning says this:-
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> "The guidelines to be observed on an application for a Mareva injunction ...." (and I interpose here to say that I cannot see why those guidelines should not apply to any case of an injunction sought which could have the effect of depriving a defendant of the exercise of his or her legal rights) "....are (1) the plaintiff must make full and frank disclosure of all matters in his knowledge which are material for the judge to know;...." (well, we have already ruled that in our opinion that full and frank disclosure was not made) "....(2) he must give particulars of his claims against the defendant, stating the ground of his claim and its amount, and fairly stating the points made against it;...." (well that was not done in the affidavit) "...(3) he must give some grounds for believing that the defendant has assets within the jurisdiction;...." (that isn't relevant in this case) "...(4) he must give some grounds for believing beyond the mere fact that the defendant is abroad, that there is a risk of the assets being removed before the judgment or the arbitral award is satisfied;...." (again, that doesn't apply to the instant case) "....(5) he must give an undertaking as to damages".

As I have said applying three out of the five tests (the only ones which are relevant) the plaintiff has failed all three.

But the matter goes a little further than that. Although in the Trasco case the Court refused to reimpose the interim injunctions, having discharged them, we think that this is a case where we should consider the reimposition of the interim injunctions. What would be the effect of our doing so? It would merely prevent the defendants from walking across the top of the lightwell until the main issue has been decided. The ownership or the use of that lightwell is the very point which has to be decided in the main issue, that is to say the issue brought about by the first Order of Justice, and we do not think that the prejudice to the defendants would be such that we ought to deprive the plaintiffs of the right to say: "Let us leave things as they are until the main issue is decided". This is after all an action in trespass, and as in an action in trespass the defendants are claiming they are not trespassers we do not think it right and fair to the plaintiffs to allow them to go over the lightwell when that very part over which they seek to exercise a claimed right is very much in dispute.

We are invited by Mr. Bailhache to say that although we would discharge the injunctions, the Court ought to take the opportunity to add that if any oversights in the original injunctions could be removed by subsequent affidavits, contrary to the Trasco ruling, the Court should be prepared to reimpose them if those oversights were thereby remedied. We are quite prepared to do that, Mr. Bailhache; we think that the Court ought not to deprive itself if it thought it right, of the power to reimpose interim injunctions in appropriate cases.

Mr. Voisin has suggested that although the Deputy Bailiff did not have the details of the first action disclosed to him in the affidavit it was up to him to find out by asking the Greffe what was the defence. We think there is no merit at all in that suggestion. It is not for the Bailiff or Deputy Bailiff to do research every time an Order of Justice is placed before him; it is incumbent upon counsel to provide the Bailiff or Deputy Bailiff with the fullest and frankest information without which he cannot exercise his judicial discretion.

Secondly, one must take the facts as they are at the time when the injunctions are sought. Therefore although Mr. Voisin's argument is attractive in the sense that the second injunction is merely supplemental, it was not supplemental in the accepted sense of the word. Having said that we are satisfied that it would be right for us to reimpose the injunction pending the hearing and we do so, however, on the undertaking in damages which Mr. Voisin has given this afternoon.

Authorities cited:

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

Johnson Matthey Bankers Limited -v- Arya Holdings Limited & Anor. (1985-86) JLR 208.

Trasco Intl. A.G. -v- R.M. Marketing Limited (29th October, 1986) Jersey Unreported.