25 pages

ROYAL COURT
(Samedi Division) 165 & 166.

Hearing: 20th, 21st, 22nd, 23rd June, 1994.
Judgment Reserved: 23rd June, 1994.
Reserved Judgment: 10th August, 1994.

Before: The Deputy Bailiff, and
Jurats Coutanche and Gruchy

First Action

Between:	Mayo Associates S.A.	First Plaintiff
	Troy Associates Limited	Second Plaintiff
	T.T.S. International S.A.	Third Plaintiff
And:	Anagram (Bermuda) Ltd.	First Defendant
	Robert Young	Second Defendant
	Maureen Young	Third Defendant
	Lionrock Ltd.	First Party Cited
	Edgefield Properties Ltd.	Second Party Cited
	Box Ltd.	Third Party Cited
	Starshield Limited	Fourth Party Cited
	Cantrade Private Bank Switzerland (C.I.) Ltd.	Fifth Party Cited
	TSB Bank Channel Islands Limited	Sixth Party Cited

Second Action

Between:	Anagram (Bermuda) Ltd	First Plaintiff
	Robert Young	Second Plaintiff
	Maureen Young	Third Plaintiff
And:	Mayo Associates S.A	First Defendant
	Troy Associates Limited	Second Defendant
	T.T.S. International S.A.	Third Defendant

Advocate P.C.Sinel for the plaintiffs in the first action
and the defendants in the second action
Advocate D.F. Le Quesne for the defendants in the first action
and the plaintiffs in the second action

THE DEPUTY BAILIFF: On Christmas Eve, 1993, the learned Bailiff signed an Order of Justice submitted by the Plaintiffs in this action. The allegations in the Order of Justice were that the first plaintiff company ("Mayo"), a company registered in Switzerland, acted as trustee and administrator of settlements for about ninety clients. Mayo appointed the second plaintiff company, ("Troy"), a Liberian corporation, as investment manager for each of the clients investing funds with Mayo. The third plaintiff company("TTS") is a Panamian corporation, wholly owned by Mayo. We shall refer to the three plaintiff companies collectively as ("the plaintiffs"). The first defendant, Anagram (Bermuda) Limited ("Anagram") is a Bermudan company, owned or controlled by the second and third defendants, whom we shall call "Mr. Young" and "Mrs. Young" respectively. We refer to them collectively as "the defendants". Troy had sub-contracted its investment management function in respect of the ninety clients referred to above to Anagram. The defendants were foreign currency traders, and it was alleged that they were under an express contractual duty to provide the plaintiffs with accurate currency balances and account valuations on a monthly basis.

The plaintiffs' claim, as set out in the Order of Justice, was, in essence, that the defendants provided monthly valuations which were false. They claimed that, at the end of October, 1993, there were discrepancies between the valuations provided by the defendants and the true value of the assets under management which totalled $24,715,044.91. The plaintiffs accordingly claimed that amount. It was further claimed that, as a result of the false valuations, the defendants had received commissions to which they were not entitled in the sum of approximately 1.6 million dollars. Against that background, the plaintiffs sought *ex parte*, and were granted, interlocutory orders both against the defendants and against four parties cited. The first three parties cited were companies allegedly owned or controlled by the defendants and the original fourth party cited was Cantrade Private Bank Switzerland (C.I.) Limited ("Cantrade"). Subsequently, on a date which is not clear from the papers, two further parties cited were joined in the proceedings. The interlocutory orders made by the learned Bailiff were as follows:

> *"A. Wherefore it is hereby ordered that service of these presents upon the defendants and the first, second and third parties cited shall operate as an immediate interim injunction prohibiting the defendants and the first, second and third parties cited by themselves, their servants, agents or nominees from charging, disposing of, dealing with, pledging or alienating in any manner whatsoever their monies, shares, stocks or other assets whatsoever, wheresoever held and of whatever nature and save as so far as the value thereof exceeds the sum of twenty-six million, three hundred and fifteen thousand ($26,315,000.00) without the prior written consent of the*

plaintiff's advocate, save for such steps as are necessary to safeguard the aforementioned assets.

B. Wherefore it is hereby ordered that the defendants and the first, second, and third parties cited shall reveal the full nature, extent and value of their assets wherever situate and howsoever held identifying with full particularity the nature of all such assets, their whereabouts and whether the same be held in their name, severally, jointly with another or by nominees, trustees, custodians on their behalf, without prejudice to the generality of the foregoing Mr. Young and Mrs. Young shall reveal the existence of any trust of which they are settlors or beneficiaries (actual or potential) and shall further provide a schedule of assets in respect of such trust or trusts. Such disclosure to be verified by affidavit sworn and delivered to the plaintiff's advocate within seven days of this Order.

C. Wherefore it is hereby ordered that the fourth party cited shall reveal in so far as it is within its knowledge the full nature, extent, value and whereabouts of any monies shares, stocks or other assets whatsoever beneficially owned by any one or more of the defendants or the first, second or third parties cited.

D. Wherefore it is hereby ordered that the plaintiffs shall have leave by their advocate or a representative thereof accompanied by such persons as shall be duly authorised by the plaintiffs in the company of the Viscount or one of his duly appointed officers to enter upon the following premises:

(a) The property known as Edgefield, Old Beaumont Road, St. Peter in the Parish of St. Peter, Jersey

(b) The offices of "Anagram" situate at 17 Bond Street, St. Helier, Jersey

And there to search for and locate, inspect and remove for photocopying any documents of whatsoever nature relating to; this dispute, the whereabouts of the monies of the plaintiffs and the nature, extent and whereabouts of the interests and assets of the defendants and of the first, second and third parties cited, and further to search for and locate, inspect and remove for copying such computer discs as may contain information relevant to these matters.

E. And it is further ordered that persons having notice of the contents of this Order shall facilitate its execution and shall indicate the whereabouts of such

documents as aforesaid and shall make such documents available to the plaintiffs.

And it is further ordered that the plaintiffs shall have leave to use any documents obtained by virtue of the orders herein in proceedings in other jurisdictions relating to the sum of money herein mentioned."

The orders were signed, as we have said, on 24th December, 1993. The Anton Piller order contained in paragraph C was executed on the 29th December. Documents, which were listed, were taken from the home of Mr. and Mrs. Young and numerous boxes of papers were subsequently removed from the offices of Anagram in Bond Street. On the 31st December, 1993, the defendants applied to discharge the Anton Piller order contained in paragraph D of the Order of Justice and further applied for an order that the plaintiffs be prohibited from using any of the items obtained as a result of the Anton Piller order in any other jurisdiction until further order of the Court. The Court refused the application. The defendants have now applied (I) to set aside or vary the Orders contained in paragraphs A and B above, and (II) to prohibit the plaintiffs from using, pursuant to the second part of paragraph E, any information obtained as a result of the orders contained in paragraphs A, B and D *"until such time as the plaintiffs shall have given proper undertakings to the Court to obtain leave so to do, such leave to be sought inter partes."*

I. <u>Application to set aside interim injunctions in paragraphs A and B of the Order of Justice</u>

Mr. Le Quesne submitted that the orders should be discharged. He based his submission on a number of contentions the more cogent of which we shall examine *seriatim.*

(a) <u>Failure to give adequate undertakings</u>

Mr. Le Quesne was critical of the breadth of the Anton Piller order granted to search Mr. and Mrs. Young's home and Anagram's offices and to seize documents. He cited a number of authorities to underline his submissions that adequate safe-guards were not incorporated in the order and indeed that the order should not have been granted. He does not, however, seek any variation or lifting of the Anton Piller order granted on the 24th December, 1993, as he takes the view that that horse has bolted and that there is now no purpose in seeking to close the stable door. He submits, however, that these deficiencies are relevant to the question of whether the Mareva-type orders should be lifted. We do not accept that submission. Whether or not the Anton Piller order should have been granted in the terms in which it was granted does not in our judgment assist to determine the issues now before the Court. We are concerned only with the Mareva-type

orders and the adequacy of undertakings given in relation to those orders.

Mr. Le Quesne submitted that the only undertaking given by the plaintiffs was a cross-undertaking in damages. The value of that undertaking is the subject of a further ground of attack to which we shall come in due course. Counsel submitted, in accordance with a passage from the 1993 United Kingdom Supreme Court Practice, that undertakings relating to the giving of notice to the defendants, the giving of a telephone number of a representative of the plaintiffs' solicitors to whom notice of any application to set aside or vary could be given, the serving of copies of the order, affidavits and exhibits forthwith, the payment of the reasonable costs of the parties cited, and notification of the right to set aside or vary should all have been included. Furthermore, counsel submitted, on the authority of the English case of Law Society v. Shanks (12th October, 1987), (1987) 131 8J 1626 that proper provision for living expenses should have been made. The note of that case put before us records :

> *"Sir John Donaldson, MR, said that Mareva injunctions should always make provision for living expenses unless it was known that a defendant had other funds. There should always be provision for him to discharge his ordinary debts as they became due. The present injunction was plainly wrong in not having made such provisions."*

To these submissions Mr. Sinel replied that it was not obligatory to follow the practice directions of the English Court. If this Court wanted a similar practice followed it should issue its own practice direction. He went on to argue that in fact the majority of the requirements set out in the English practice direction had actually been observed.

We think that there is some force in Mr. Sinel's submission that this Court itself should issue a direction as to the practice to be followed by those seeking a Mareva-type injunction. While it may be that many of the omissions criticised by Mr. Le Quesne had no practical consequence in this case, that could not be said, it appears, of the failure to make proper provision for living expenses. We agree with the view expressed by the English Court of Appeal that, unless it is known that a defendant has other funds available to him, proper provision should always be made for living expenses. However, we understand that proper provision has now been made. In that it was always open to the defendants to return to court and to make complaint about it, we do not consider that this failure is sufficient in itself to disturb the orders made by the learned Bailiff.

(b) Failure to make full and frank disclosure

Counsel for the defendants drew our attention to a passage from the Judgment of Bingham L.J. in Siporex Trade SA v. Comdel Commodities Limited (1986) 2 LlR 428, at page 437:

> *"The scope of the duty of disclosure of a party applying ex parte for injunctive relief is, in broad terms, agreed between the parties. Such an applicant must show the utmost good faith and disclose his case fully and fairly. He must, for the protection and information of the defendant, summarize his case and the evidence in support of it by an affidavit or affidavits sworn before or immediately after the application. He must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. He must investigate the nature of the cause of action asserted and the facts relied on before applying and identify any likely defences. He must disclose all facts which reasonably could or would be taken into account by the Judge in deciding whether to grant the application. It is no excuse for an applicant to say that he was not aware of the importance of matters he has omitted to state. If the duty of full and fair disclosure is not observed the Court may discharge the injunction even if after full enquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure."*

In our judgment this passage fairly reflects the state of the law in this jurisdiction. It is a serious matter to obtain Mareva-type relief *ex parte* and there is a heavy burden on an applicant to be, so far as possible, even-handed and dispassionate in describing the strengths and weaknesses of his case.

The main thrusts of Mr. Le Quesne's submission on this limb were that the plaintiffs failed to make clear to the learned Bailiff (1) that the defendants had no authority to withdraw money from the bank accounts and (2) that the Cantrade bank statements showed only part of the picture. Before examining this submission it is necessary to look more closely at the allegations made in the Order of Justice. We observe in passing that the Order of Justice has been amended since 24th December 1993 but for present purposes nothing turns on those amendments.

It appears from the Order of Justice that, following the appointment by Troy of Anagram as investment manager, a number of accounts in the name of TTS were opened at Cantrade. In respect of smaller investors there was a deposit account known as "the principal collateral account" and a further account for trading purposes known as "the principal trading account". In respect of larger investors separate collateral deposit accounts were opened

(known as "the 'F' collateral accounts") and a related trading account known as "the 'F' trading account".

The Order of Justice continues:

"18. It was expressly agreed by the defendants or one or more of them with each of "Mayo", "Troy" and "TTS" that the defendants or each of them provide accurate currency balances and account valuations on a monthly basis to "Mayo", "TTS", AND "Troy". It was further expressly agreed by the defendants or one or more of them that in the event of losses on either of the trading accounts exceeding ten percent (10%) of the sums placed in either the "principal collateral account" or the 'F' collateral accounts, the defendants or any one or more of them would immediately so inform the plaintiffs and would cease trading on the principal account and the 'F' trading account

19. In breach of the aforementioned express terms the defendants or any one or more of them have produced to "TTS" c/o "Mayo" monthly currency balances and account valuations which were false. Annexed hereto marked 'C' are a sample of the reports produced to "TTS" c/o "Mayo" between 1991 and 1993, which reports showed an almost constant trend of increased values culminating in an alleged combined value from the hereinbefore mentioned "principal collateral accounts" and "principal trading accounts" of twenty-one million, seven hundred and ninety-one thousand, six hundred and sixty United States Dollars and ninety-one cents ($21,791,660.91), this as at 31st October 1993 and an alleged combined value for the 'F' collateral accounts and the 'F' trading accounts at fourteen million, three hundred and three thousand, three hundred and eighty-four United States dollars ($14,303,384.00).

20. The true combined value of the "principal trading accounts" and "principal collateral accounts" as at 31st October, 1993, was eight hundred and twenty thousand United States Dollars ($820,000.00). The true combined value of the 'F' trading accounts and 'F' collateral accounts was as at 31st October 1993 approximately ten million, five hundred and sixty thousand United States Dollars ($10,560,000.00).

21. In the premises the said defendants or any one or more of them are liable to account to the Plaintiffs herein for the sum of twenty-four million, seven hundred and fifteen thousand and forty-four United

States Dollars and ninety-one cents ($24,715,044.91)".

By dint of simple arithmetic it will be seen that the plaintiffs were thus claiming the difference between the report valuations and the "true" valuations. It may also be seen that on the face of the Order of Justice there is at least one ambiguity. On the one hand it is asserted that the report valuations were "false". On the other hand it is asserted that the defendants are liable to pay the balance between the two sets of valuations. This seems a *non-sequitur*. If the valuations were false and misled the plaintiffs as to the true financial position, there may well be a liability to pay damages for breach of contract. If the valuations were false and were intended to disguise defalcations by the defendants, there would also be a liability arising from that fraud. But it is difficult to see how in either event false valuations can be made the basis for assessing any liability which the defendants may have to the plaintiffs.

Be that as it may, the clear implication from the Order of Justice is that the plaintiffs are alleging that they have been defrauded of large sums of money by the defendants. This implicit allegation was fortified by a passage in Mr. Stott's affidavit submitted in draft to the learned Bailiff on the 24th December and sworn on the 30th December, 1993. Mr. Myles Tweedale Stott is a chartered accountant. He is the chief executive officer and beneficial owner of Mayo and a director of TTS. The relevant passages referred to by counsel are as follows:

> *"6. I also received from a Mr. Alfred Williams of Touche Ross, Chartered Accountants of Nottingham, England, monthly performance evaluations forwarded via Mr. and Mrs. Young and/or "Anagram" on a quarterly basis as well as annual performance evaluations in respect of the trading accounts upon which Mr. and Mrs. Young and/or "Anagram" were signatories, which evaluation I now know to be completely inaccurate.*
>
> ...
>
> *19. I wish to explain how a loss in excess of US$20M ($20,000,000.00) has been suffered notwithstanding the fact that none of the defendants are signatories on the collateral accounts. When at the end of November 1993 I told "Cantrade" to cancel the defendants' authority under the third party mandate thus effectively putting an end to trading it became apparent that there were substantial deficits on the trading accounts, these have since been netted off against the collateral accounts."*

Mr. Le Quesne's first submission is that the plaintiffs should have disclosed to the learned Bailiff that by the terms of the bank mandate with Cantrade the defendants had no authority to withdraw money from any account. Although the defendants were in possession of a standard foreign exchange dealing mandate from Cantrade it was only when the supplementary affidavit of Mr. Stott was filed shortly before these proceedings that a copy of the actual mandate for one of the accounts became available to the defendants. The mandate, dated 21st March, 1988, empowered Anagram Econometrics Limited to operate account number 209961 (the principal trading account) on behalf of TTS in regard to dealings in foreign exchange transactions subject to the following proviso:

> *"**PROVIDED ALWAYS** that this authority is limited to the transfer of funds to TTS's accounts for foreign exchange dealings only and shall not be construed as giving them the power to give, vary or revoke any instructions to you regarding the withdrawal of any monies from TTS's account or accounts."*

We assume that Anagram, which took over from Anagram Econometrics Ltd. in or about 1990, acted on identical mandates. Mr. Le Quesne contended that the terms of the Cantrade mandates should have been disclosed to the learned Bailiff and that, if they had been so disclosed, he might have queried the implicit allegation that the defendants had defrauded the plaintiffs of some $25 million.

Mr. Sinel's reply to this was that there was no material non-disclosure. He submitted that the second paragraph from Mr. Stott's affidavit cited above made it clear that Mr. Young could not draw on the accounts. He drew our attention to part of paragraph 16 of the Order of Justice which stated:

> *'"Pursuant to a third party mandate "Anagram" was empowered to trade on the "principal trading account".'*

Our conclusion is that there was a material non-disclosure. The first affidavit of Mr. Stott does not make clear, as it ought to have done, that none of the defendants had the authority to withdraw money from the TTS accounts. This was information which was clearly in the possession of the plaintiffs at the time when the *ex parte* application was made on the 24th December, 1993. Had this information been given to the learned Bailiff it might well have affected his decision to make the interim order.

Mr. Le Quesne's second submission on this limb was that the plaintiffs knew at the time of their application for *ex parte* relief that the monthly reports did not reveal cleared cash balances but included options. Our attention was drawn to correspondence which appeared to confirm that the plaintiffs were aware of this. On the other hand, Mr. Stott has by affidavit

denied that this correspondence shows his understanding of the agreed reporting convention. It is clear that there is a fundamental dispute between the parties as to the purpose of the monthly reports and the nature of the information which those reports did and/or should have contained. We are not satisfied that there was any material non disclosure by the plaintiffs on this issue. In our judgment the correspondence annexed to Mr. Stott's affidavit sworn in support of the application for interim relief sufficiently indicated the existence of a conflict between the parties as to the reporting procedures.

Our conclusion on this limb that there was, in relation to the terms of the Cantrade mandates, a material non disclosure is sufficient to dispose of this part of Mr. Le Quesne's application. However, in deference to the detailed submissions which he made to us, we think that it is desirable to deal with two other matters.

(c) Abuse of Process

Mr. Le Quesne made a number of submissions alleging that, since the orders were made on the 24th December, 1993, the defendants had abused the process of the Court.

(1) In his affidavit sworn on the 25th March, 1994, Mr. Young deposed that one of the persons authorized by the plaintiffs to implement the Anton Piller order was a private detective, Mr. Watkins. Mr. Young saw him going through his (Mr. Young's) papers at the offices of Anagram when the order was executed. Early in January it appears that an anonymous caller left a message overnight on the ansaphone of Messrs. Vibert & Valpy to the effect that the offices of Anagram had been "bugged". The police were called and a transmitter, disguised as a plug adaptor, was found behind the desk in Mr. Young's office. Mr. Le Quesne applied for, and was granted, leave to call police officers to give evidence of their findings. Inspector Garrett told the Court that the police had carried out tests on the transmitter and found that it was operating on a very high frequency, customarily found in eavesdropping devices. Its effective range was throughout Bond Street (where the offices of Anagram are situated). Further evidence was then given by Sergeant Parrott, who had carried out enquiries. He had ascertained that a small room above Bond Street Jewellers had been rented for the period 5th to 19th January 1994 by a company connected with Mr. Watkins. He had subsequently spoken to Mr. Watkins who had admitted that he had rented the room for observation purposes because he had an interest in the premises of Mr. Young. Sergeant Parrott had not disclosed to Mr. Watkins the discovery of the transmitter. Sergeant Parrott ascertained that the room in question did give a good view of Mr. Young's office premises. Having taken legal advice, Sergeant Parrott had learned that the placing of the transmitter apparently did not involve the commission of a criminal offence, and no further action had therefore been taken by the police.

Mr. Sinel had objected to the giving of this evidence on the ground that it was irrelevant and a waste of time. That objection was overruled by the Court on the basis that the evidence was relevant to the question of whether there had been an abuse of process, a question which had been raised in Mr. Young's affidavit in March 1994. The Court considered whether it should call Mr. Watkins as a witness, but objection to this course was raised by Mr. Sinel on the ground that Mr. Watkins could not be asked questions which might tend to incriminate him. It was submitted by Mr. Sinel that Mr. Watkins needed independent legal advice and he queried whether the Court had power to summon a witness during the course of a hearing as to whether a Mareva injunction should be lifted. He added that Mr. Watkins had had no opportunity to examine the transmitter and that it would be contrary to the rules of natural justice for Mr. Watkins to be questioned without proper notice. Having considered these submissions the Court determined that it did have power to summons Mr. Watkins to give evidence but suggested to Mr. Sinel that that course of action could be avoided if Mr. Sinel were able to say on instructions that Mr. Watkins was employed by the plaintiffs to carry out observations from the premises in Bond Street. Mr. Sinel acceded to that suggestion and, having taken instructions, confirmed that Mr. Watkins was employed by Mayo and Troy to carry out those observations.

Mr. Le Quesne submitted that the placing of the transmitter was a matter of the utmost gravity. If the Court imagined that the transmitter had been placed in the offices of Anagram under cover, as it were, of the Anton Piller order, it would be a very serious contempt of court and a gross abuse of process. He submitted that it was significant that there had been no response to this serious allegation until the affidavit of Mr. Stott was filed shortly before the hearing. Even then, Mr. Stott's response had been oblique. At paragraph 7DD he deposed:

> *"Paragraph 33: Dr. Young has consistently lied and sought to mislead and confuse. Dr. Young makes a number of assumptions and allegations which are fanciful, circumstantial and untrue. I am advised that Advocate Sinel's reference to Dr. Young being under observation related to the fact that Mr. Watkins had been keeping Dr. Young under visual observation for some days prior to the service of the injunction".*

Mr. Le Quesne pointed out that there was no denial by Mr. Stott of the allegation that the transmitter was planted under cover of the Anton Piller order.

Mr. Sinel's response to this was that there was no evidence before the Court that the transmitter was placed in the offices of Anagram at a time when the Anton Piller order was executed, nor

that the transmitter was placed on the instructions or with the connivance of the plaintiffs.

This is, of course, correct, but there is nonetheless revealed a disturbing state of affairs. We make no finding as to whether the transmitter was placed in the offices of Anagram by Mr. Watkins during the execution of the Anton Piller order. We observe only that there is circumstantial evidence which could lead a court to the conclusion that the transmitter was so placed. The following facts have, however been established.

(i) A transmitter was found secreted in the offices of Anagram after the execution of the Anton Piller order.

(ii) Mr. Watkins was part of the team executing the Anton Piller order.

(iii) Mr. Watkins was carrying out observations on Mr. Young and on the premises of Anagram.

(iv) Mr. Watkins was instructed by Mayo and Troy.

All this was known to the plaintiffs after the filing of Mr. Young's affidavit on the 25th March 1994. We agree with Counsel for the defendants that if a party caused a transmitter secretly to be placed in offices being searched pursuant to an Anton Piller order, it would be a gross abuse of process, quite apart from any question of contempt. We would therefore have expected from the plaintiffs a straightforward denial that they had instructed such an action to be taken on their behalf. We would also have expected the plaintiffs immediately to have made enquiries of their agent as to his involvement, if any. The passage in Mr. Stott's affidavit which we have quoted contains no such express denial or evidence of any such enquiries. It treats the allegation in Mr. Young's affidavit with circumlocution and evasion. We can see no reason on the face of it why an enquiry agent should be present at the execution of an Anton Piller order. Given that he was present, we consider that an explanation should have been given in view of the allegation contained in Mr. Young's affidavit.

(2) Mr. Le Quesne submitted that, in breach of the implied undertaking, the plaintiffs had used material obtained pursuant to the Anton Piller order for a collateral purpose. It is not contested that on 14th March, 1994, Mayo sent a bulletin to all clients of TTS, the first paragraph of which was in the following terms:

> *"The investigative chartered accountants, Coke-Wallis & Tomes, in Jersey, Channel Islands, have concluded their assessment of the value of the TTS International S.A. general account at Cantrade Private Bank Switzerland*

(C.I.) Limited (hereinafter referred to as "Cantrade"). A copy of their report is enclosed."

The interim report dated 14th March 1994 of Messrs. Coke-Wallis Tomes & Co. enclosed with that bulletin stated inter alia that:

"The work done by Coke-Wallis, Tomes & Co. to date is as follows.

...

A partial review of the documents obtained during the raid on the home of R. Young and offices of Anagram (Bermuda) Limited on 29th December, 1993".

The report drew conclusions which were unfavourable to Mr. Young.

Mr. Le Quesne cited a decision of the House of Lords of Crest Homes plc v. Marks (1987) 1 AC 829. At page 853, Lord Oliver of Aylmerton stated:

"The purpose of an Anton Piller order is, primarily, the preservation of evidence which might otherwise be removed, destroyed or concealed, but it operates, of course, also as an order for discovery in advance of pleadings. It is clearly established and has recently been affirmed in this House, that a solicitor who, in the course of discovery in an action, obtains possession of copies of documents belonging to his client's adversary, gives an implied undertaking to the Court not to use that material, nor to allow it to be used for any purpose other than the proper conduct of that action on the part of his client: See Home Office v. Harman [1983] 1 AC 280. It must not be used for any "collateral or ulterior" purpose, to use the words of Jenkins J in Alterskye v. Scott [1948] 1 All ER 469, approved and adopted by Lord Diplock in Harman's case, at page 382. Thus, for instance, to use a document obtained on discovery in one action as the foundation for claim in a different and wholly unrelated proceeding would be a clear breach of the implied undertaking: See Riddick v. Thames Board Mills Limited [1977] QB 881. It has recently been held by Scott J in Sybron Corporation v. Barclays Bank plc [1985] Ch.299 - and this must, in my judgment, clearly be right - that the implied undertaking applies not merely to the documents discovered themselves, but also to information derived from those documents, whether it be embodied in a copy or stored in the mind."

Mr. Le Quesne submitted that the use of information obtained from a study of the documents secured following the Anton Piller

order for the purpose of briefing clients of TTS was a clear breach of the implied undertaking and an abuse of process.

Mr. Sinel conceded that there was an implied undertaking that documents would not be used for a collateral purpose and further conceded that the information seized from the defendants was used for the accountants' report. He denied that there was a breach of the implied undertaking for two reasons. First, he argued that the disclosure was made for the purposes of the litigation. Secondly, he argued that the plaintiffs were trustees for the investors and that the investors were therefore effectively parties to the litigation. We reject both those arguments. The disclosure was for a collateral purpose, i.e. for keeping investors informed about the progress of litigation; it was not for the purpose of the litigation itself. Furthermore, whatever the precise legal relationship between the plaintiffs and the investors may be, it is clear that the investors are not parties to the litigation. There was, therefore, in our judgment a breach of the implied undertaking given to the Court.

(3) Mr. Le Quesne submitted that the basis of the plaintiffs' claim had changed fundamentally since the interim orders were obtained but the plaintiffs had failed to amend their pleading and to seek to reduce the amount injuncted by the Mareva order. Counsel based his submission on a letter which had recently come into his hands. This was a letter dated 12th April, 1994, from Messrs. Philip Sinel & Co. to Advocate A.R.Binnington acting for Cantrade. We observe in passing that the way in which that letter is expressed does not reflect credit upon the author, nor indeed upon the legal profession. For these purposes, however, it is the second paragraph of that letter which is significant.

> *"When we instituted proceedings against Dr. Young last year, we were unable to ascertain why there was such a divergence (approximately twenty-five million U.S. dollars) between the alleged values of our clients' accounts and their actual value. Accordingly we commissioned a report from Coke-Wallis Tomes & Co. stripped to its essentials. Cantrade Private Bank Switzerland (C.I.) Ltd. and Dr. R. Young appears (sic) to have dishonestly appropriated approximately ten million U.S. dollars split roughly as to three quarters Cantrade and one quarter Dr. Young."*

Mr. Le Quesne submitted that this was an admission that there was no legal basis for the allegation contained in the Order of Justice that the defendants had misappropriated some $24 million. This material reduction in the amount of the claim to $2.5 million had not been referred to in the affidavit of Mr. Stott sworn shortly before these proceedings nor otherwise disclosed to the defendants in these proceedings. Yet there continued in being a Mareva injunction preventing the defendants from dealing with

their assets up to a figure of over $26 million. The plaintiffs had therefore failed in their duty to the Court by neglecting to notify the Court and the defendants of this significant change in position.

Mr. Sinel conceded that the Order of Justice required amendment in the light of information now in the possession of the plaintiffs. He explained the failure to amend by referring to the several fronts on which the plaintiffs had been doing battle in order to recover their funds. In short, they had not had time to attend to the amendment of the Order of Justice. He denied however that the plaintiffs were no longer claiming $25 million from the defendants. It was, he submitted, a simple breach of contract. The defendants were supposed to be trading at a profit and had not done so. Alternatively, or perhaps in addition, Counsel argued that the plaintiffs had a claim in tort for conversion. The defendants had made representations in their reports and had wrongfully converted the funds referred to in the reports.

We make no observations on the force of those arguments with regard to the dispute between the plaintiffs and the defendants. The arguments that the plaintiffs were entitled to claim damages of $25 million from the defendants either for breach of contract by failing to make trading profits or for the tort of conversion are however entirely new. It does appear that there has been a significant shift in the nature of the claim. Whether it remains a claim for $25 million or is now reduced to $2.5 million, the basis appears not to be fully set out in the Order of Justice.

Taken in the round, we agree with Counsel for the defendants that the plaintiffs have adopted a cavalier approach since obtaining their interim orders on 24th December, 1993. As has been stated on several occasions the Mareva injunction and the Anton Piller order are the nuclear bombs in the arsenal of the law. They are to be handled with extreme care. Once such orders have been obtained, it is incumbent upon plaintiffs to ensure that they are executed with the utmost propriety, that implied undertakings are observed and that the Court is apprised in a timely manner of any material factors affecting the issuance of the orders. Mr. Le Quesne submitted that the cumulative effect of his submissions on this limb was that the plaintiffs had abused the process of the Court. We agree.

(d) Cross-undertaking in damages

Mr. Le Quesne submitted that the cross-undertaking in damages given by Mayo and Troy at the time when the interlocutory orders were made by the learned Bailiff was worthless. It was clear from the report of Coke-Wallis Tomes & Co. to which reference has been made that the plaintiffs were short of funds. Furthermore the plaintiffs were all foreign corporations. In his first affidavit Mr. Stott had deposed that Mayo & TTS had *"no assets in the*

jurisdiction save for the residue of the collateral accounts which belong to its (sic) clients and some smaller accounts, also belonging to clients, unless the missing monies can be recovered. TTS and Mayo have potential claims which far exceed their available assets".

To this very candid appraisal by Mr. Stott, Mr. Sinel added during the course of his submissions that Mayo and Troy were ruined. They had lost everyone's money.

It is clear from the judgment of the Court on 31st December, 1993, when a similar argument was addressed in the context of the Anton Piller order, that the absence of funds available to the plaintiffs was a matter of concern. The Court cited a passage from Bean on Injunctions (2nd edition) at page 127 which read:

> ***"The plaintiff must give an undertaking as to damages and the Court must be satisfied that the plaintiff is good for such damages."***

The Court was, however, viewing the matter against the background of the candid admissions of Mr. Stott referred to above and the submission by Counsel for the plaintiffs that the defendants had "misappropriated - Mr. Sinel has quite openly said 'stolen' - enormous sums of money." Against that background, the Court stated:

> ***"We do not find in all the circumstances of this case that the undertaking in damages is such that it ought by itself to be taken into account solely in order to set aside the Anton Piller order, notwithstanding the actual absence of direct funds drawable upon by the plaintiffs in this jurisdiction."***

In our judgment the balance has now shifted. The "enormous sums of money" claimed have now become (probably) no more than $2.5 million or so. Mr. Sinel told us that the alleged fraud was perpetrated (1) by falsely reporting profits which did not exist and (2) by sharing secret commissions with Cantrade. As against that, there is a dispute as to the falsity of the reports and, it appears, some sharing by the plaintiffs of the so-called secret commissions. Mr. Le Quesne put before us some evidence of the financial embarrassment of Anagram which, he said, was caused by the imposition of the Mareva injunction. Furthermore, we have found that there was a material non-disclosure and that the plaintiffs have abused the process of the Court. For these three reasons, material non-disclosure, abuse of process and inadequacy of the cross-undertaking in damages, the Mareva-type injunctions can no longer be sustained. We accordingly grant the application of the defendants and set aside the interim injunctions contained in paragraphs 25A and B of the plaintiffs' amended Order of Justice.

II. Application to prohibit the use of information.

We turn next to the second part of the defendants' application which prays the plaintiffs to show cause why:

> *"The plaintiffs should not be prohibited from using pursuant to the second part of paragraph (E) of the prayer to the plaintiffs' said Order of Justice any information that may be obtained as a result of paragraphs (A) (B) and (D) of the prayer to the said Order of Justice until such time as the plaintiffs shall have given proper undertakings to the Court to obtain leave so to do, such leave to be sought inter partes."*

For convenience we reiterate that the second paragraph of paragraph (E) of the Order of Justice signed by the learned Bailiff on 24th December 1993 is in the following terms:

> *"And it is further ordered that the plaintiffs shall have leave to use any documents obtained by virtue of the orders herein in proceedings in other jurisdictions relating to the sum of money herein mentioned."*

Mr. Le Quesne submitted that this was an unusual order and suggested that Mr. Sinel had slipped in this provision without drawing the learned Bailiff's attention expressly to it. It is certainly true that the order was unusual. The learned Bailiff had himself decided in Bass (GH) & Co. v. Royal Bank of Scotland plc (1989) JLR N3 that an applicant may only use documents which he has already obtained by discovery through proceedings in the Royal Court in related but separate proceedings outside the jurisdiction if he obtains the Court's leave to do so. But there seems no evidence that the order was made as it were *per incuriam*. The learned Bailiff, in delivering the judgment of the Court on 31st December, 1993, only seven days after granting the interim orders, referred expressly to it:

> ***"The plaintiffs obtained ... on Christmas Eve an Anton Piller order in fairly stringent terms with permission to use the information thus obtained when the order was executed in other actions outside this jurisdiction".***

We cannot believe that the Court would have referred to the order in such terms if it had been obtained by sleight of hand. The burden is on the defendants to satisfy the Court that this interim order should now be revoked. Mr. Le Quesne submits that the Court should require the plaintiffs to obtain leave *inter partes* because they have already breached the implied undertaking not to use documents for a collateral purpose, i.e. by using information for the purpose of briefing the investors. The plaintiffs should not, therefore, be entitled any longer to the

privilege of this unusual provision. We agree, but there is, in our judgment, another reason for arriving at that conclusion. The order permits the use of the documents in "proceedings in other jurisdictions relating to the sum of money herein mentioned". That sum of money is (presumably) $26,315,000. But, as we have indicated above, that figure is no longer a reliable indicator of the amount in issue in these proceedings. We consider that, in view of the conclusion at which we have arrived in relation to the interim injunctions, it is no longer appropriate that the plaintiffs should be permitted to use the documents or information which they obtained as a result of the Anton Piller order in extraneous proceedings without the leave of the Court. We accordingly grant the defendants' application and it follows that the second paragraph of paragraph (E) of the prayer of the amended Order of Justice is hereby struck out.

We turn now to the application of the plaintiffs in a separate set of proceedings (No. 94/91) in which they are the defendants. For convenience, we shall however continue to refer to them as the plaintiffs. This application asks that the interim injunctions granted by the learned Bailiff on 31st March, 1994, be dismissed. As will be clear from the terms of the injunctions set out below, the application covers terrain which we have already traversed in the context of the implied undertaking as to the use of documents obtained on discovery.

> *"That [Mayo, Troy and TTS] be restrained and an injunction be granted restraining them until trial or further order, whether by themselves, their servants, agents or otherwise howsoever, from:-*
>
> *(i) using the documents seized by [Mayo, Troy and TTS], their servants or agents, in the course of executing the Order of Justice dated 24th December, 1993, otherwise than for the purpose of conducting the defendants' case against the plaintiffs in that action.*
>
> *(ii) distributing copies of the "interim report of the accountants" dated 14th March 1994 prepared by Coke-Wallis Tomes & Co. to persons other than [Mayo, Troy and TTS] or their experts and legal advisers."*

The procedural history of these proceedings is unusual. The Order of Justice containing the interim injunctions recited above was served upon Messrs. Philip Sinel & Co., the legal advisers of the plaintiffs. The Order of Justice provided that such service should operate as an immediate injunction upon Mayo, Troy and TTS in the terms of paragraphs (i) and (ii) above. The action was tabled but when it came before the Court on 15th April, 1994, the

Court ruled that the Order of Justice had not been properly served on Mayo, Troy and TTS and that an application for leave to serve out of the jurisdiction was required. Since then, no steps have been taken to seek such leave. Mr. Sinel was very critical of this failure which, he submitted, deprived his clients of the right to file an answer and left the proceedings hanging in the air. Yet, because the Order of Justice had been served on his firm, his clients were bound by the injunctions.

We think that there is some force in this criticism and indeed we have some doubt as to whether the proceedings were properly brought in this form. It is difficult to see why it was not thought appropriate to issue a summons in relation to the original proceedings drawing to the Court's attention the alleged breach of the plaintiffs' implied undertaking to the Court. The Court could then, if satisfied that there had been a breach, have made the appropriate order.

Be that as it may, there appears, in the light of our decision on the defendants' applications, to be no need for these injunctions to continue in force. The plaintiffs will need the leave of the Court to use any of the documents which they have obtained pursuant to the Anton Piller order for proceedings in other jurisdictions or for any other collateral purpose. The plaintiffs would ignore that position at their peril.

We therefore grant the application and discharge the injunctions contained in the defendants' Order of Justice.

We are prepared to hear Counsel on the question of costs.

Authorities

Lock plc -v- Beswick [1989] 1 WLR 1268.

Columbia Pictures Inc. -v- Robinson [1987] Ch.38.

Law Society -v- Shanks [1987] 131 8J 1626.

Universal Thermosensors Ltd. -v- Hibben [1992] 1 WLR 840.

Siporex Trade S.A. -v- Comdel Commodities Ltd. [1986] 2 LlR 428.

Behbehani & Ors. -v- Salem & Ors. [1989] 1 WLR 723.

Tate Access Floors Inc. -v- Boswell [1991] Ch. 512.

Polly Peck International -v- Nadir (No. 2) [1992] 4 All ER 769.

Babanaft International Co. -v- Bassatne [1990] 1 Ch. 23.

Derby & Co. Ltd. -v- Weldon [1990] 1 Ch. 65.

Crest Homes plc -v- Marks [1987] A.C. 829.

Sony Corp. -v- Anand [1981] FSR 398.

Roberts -v- Jump Knitwear [1981] FSR 527.

Bean on Injunctions (2nd Ed'n): p. 127.

Bass (GH) & Co. -v- Royal Bank of Scotland plc (1989) JLR N.3.

JUDGMENT ON COSTS AND ON STAY APPLICATIONS.

THE DEPUTY BAILIFF: So far as the applications for costs are concerned the decision of the Court is that they will follow the event in respect of both applications. The plaintiffs will therefore pay the costs of the defendants' application and the defendants will pay the costs of the plaintiffs' application in the second action.

Mr. Le Quesne submitted that the plaintiffs should pay the costs of the defendants on a full indemnity basis. He reminded the Court that it had found that there was a material non disclosure and that there had been an abuse of the process of the Court and that the plaintiffs' cross undertaking in damages had been inadequate. This question, as indeed all questions arising out of applications for costs, are a matter for the presiding judge.

My decision is that the plaintiffs should pay the costs of the defendants in relation to the first application on a full indemnity basis because they have, as the Court has found, abused the process of the Court. My decision is particularly influenced by the mode of execution of the Anton Piller Order when a private detective was permitted to accompany those executing the order and a listening device was subsequently found in the premises of Diagram and there was a lamentable failure on the part of the plaintiffs either to investigate any connection between their agent and that listening device, or to deny that they had authorised or connived at its placing.

In the second action the defendants will pay the costs of the plaintiffs on a taxed basis.

Mr. Sinel made a number of further applications. First he applied for leave to appeal to the Court of Appeal and that application is granted. The plaintiffs have leave to appeal. Secondly he made an application that the defendants, or their legal advisers, should pay the costs incurred by the plaintiffs as a result of the filing of an 80 page affidavit by Mr. Young on the basis that costs have been unnecessarily wasted.

Mr. Sinel drew our attention to the Rules of the Supreme Court, Rule 62/106 where it is provided that where a plaintiff adopts an entirely wrong procedure he may, although successful, have to pay the appellants costs. Mr. Sinel went on to draw our attention to the English case of Hill -v- Hart Davies (1882) H 2755, the head note of which reads as follows:

"Although there is no rule of court specially giving power to the court to take pleadings or affidavits off the file for prolixity yet the court has an inherent power to do so in order to prevent its records from being made the instruments of oppression. Where however an affidavit of documents was of oppressive length, but it appeared to the court that delay and expense would be caused by filing a fresh one, the court permitted it to remain on the file but ordered the party filing it to pay the costs of it."

In that case Lord Justice Fry said:

"I am not inclined to express an opinion whether documents set out in the affidavit are relevant or not, but assuming that they are, it is perfectly plain to my mind that they might have been set out in a way which could not have been oppressive. There is a prolixity in this affidavit of which no account can be given except a desire to cause vexation and costs to the defendant."

We have examined carefully the affidavit of Mr. Young of which complaint has been made. We do not consider that it was either an instrument of oppression or of such prolixity that it could only have been intended to cause vexation and costs to the plaintiffs. It was certainly a full affidavit but very serious issues had been raised and the defendants were subject to a Mareva injunction and an Anton Piller Order. It was, in our judgment, entirely understandable that Mr. Young should wish to put his case in full so as to ensure that no material contention or background information was not before the court. We therefore reject this application.

Thirdly, Mr. Sinel made an application for a stay both of the judgment and of the orders for costs which we have just made. Mr. Sinel based his argument primarily upon the case of Wilson -v- Church (No.2) (1879) 12 Ch.D. 454. This was a case where, in a suit by a bond holder of a railway company, on behalf of himself and other bond holders against the company, claiming that the money advanced should be returned instead of being applied in the undertaking, judgment was given for the plaintiff with costs and it was ordered that the money should be forthwith distributed among the bond holders. The bonds were payable to bearer and the bond holders were very numerous and many were residing abroad. On the other hand the defendant company was insolvent and it was very doubtful whether, if the undertaking were carried out the shareholders would get any benefit from it. The defendants appealed and moved to stay the proceedings pending appeal and the Court held that there were sufficient grounds in that case to induce the Court to stay the distribution of the fund pending the appeal. Cotton L.J. said at page 458:

"Acting on the same principle, I am of opinion that we ought to take care that if the House of Lords should reverse our decision, and we must recognise that it may be reversed, the appeal ought not to be rendered nugatory. I am of the opinion that we ought not to allow this fund to be parted with by the trustees for this reason. It is to be distributed among a very great number of persons and it is obvious that there will be a very great difficulty in getting back the money parted with if the House of Lords should be of opinion that it ought not to be divided amongst the bond holders. They are not actual parties to the suit, they are very numerous and they are persons who could be difficult to reach for the purpose of getting back the fund. If there had been any case made by the plaintiff that this appeal was not bona fide and it was for some indirect purpose, not for the purpose of trying whether the judgment of this court was right, the case would have stood in a different position but there is no affidavit or tangible fact upon which, in my opinion, we can rely for the purpose of arriving at the conclusion that such is the fact."

Mr. Le Quesne's reply to that argument was that on the face of that dictum the court had no discretion as to whether or not a stay should be granted. He pointed out that in any case where a Mareva injunction was granted and was subsequently lifted the plaintiffs returned to the position in which they had been prior to the granting of the Mareva injunction. Yet the Court, he submitted, did not always grant a stay. It did, in the exercise of its jurisdiction, have a discretion.

We are very conscious of the warning contained in the judgment of Megarry J. in Erinford Properties -v- Cheshire County Council (1974) 1 Ch. 261 to which Mr. Sinel drew our attention. In that case Megarry J. stated:

"Judges must decide cases even if they are hesitant in their conclusions and at the other extreme a judge may be very clear in his conclusions yet on appeal be held to be wrong. No human being is infallible and for none are there more public and authoritative explanations of their errors than for judges. A judge who feels no doubt in dismissing a claim to an interlocutory injunction may perfectly consistently with his decision recognise that his decision might be reversed and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal.

I cannot see that a decision that no injunction should be granted pending a trial is inconsistent, either logically or otherwise, with holding that an injunction should be

granted pending an appeal against the decision not to grant the injunction, or that by refusing an injunction pending a trial the judge becomes functus officio quoad granting any injunction at all.

There will of course be many cases where it would be wrong to grant an injunction pending appeal, as where any appeal would be frivolous, or to grant the injunction would inflict greater hardship than it would avoid, and so on. Subject to that the principle is to be found in the leading judgment of Cotton L.J. in Wilson -v-Church where speaking on an appeal from the Court of Appeal to the House of Lords he said: 'When a party is appealing, exercising his undoubted right of appeal, this Court ought to see that the appeal, if successful, is not nugatory'."

We have a discretion and in our judgment we have to hold the scales in exercising that discretion fairly between the parties. It is true that, if our judgment is reversed and in the meantime Mr. Young has removed all his assets and those of Anagram from the jurisdiction, the plaintiffs might have difficulty in enforcing any judgment which was given in their favour. On the other hand, one of the reasons for lifting the Mareva injunctions was the inadequacy of the cross-undertaking in damages offered by the plaintiffs. As we have found, the plaintiffs appear to have no assets in the jurisdiction upon which they could draw to satisfy an order for damages or costs which might be made against them. If the defendants were ultimately successful they would therefore be placed in exactly the same position as the plaintiffs claim to fear if the judgment is not stayed pending appeal. On balance and in the exercise of our discretion we refuse to stay either the judgment or the orders for costs which we have just made.

Finally, Mr. Sinel applied for the injunctions to be reimposed pending appeal. In support of that application Mr. Sinel submitted that although the Court had found that its process had been abused, all these were technical matters. The listening device had no bearing upon the judgment, and the plaintiffs had only been guilty of an oversight in relation to the failure to give full information at the time when the application for the interim orders had been made.

Mr. Le Quesne argued that the whole basis for the injunctions had disappeared. It was not clear what the plaintiffs' case was, and the plaintiffs admitted that their Order of Justice was in need of amendment but they had not in fact taken steps to amend it.

We do not consider, in the exercise of our discretion, that this is an appropriate case to reimpose the injunctions which we have ordered to be lifted and this application, Mr. Sinel, is accordingly refused.

Authorities

Wilson -v- Church (No.2) (1879) 12 Ch.D. 454.

Erinford Properties Ltd & Anor. -v- Cheshire County Council (1974) 1 Ch. 261.

4 Halsbury 44: paras. 259-60.

Hill -v- Hart Davies 26 Ch.D. (1882) H. 2755.