

ROYAL COURT  
(Samedi Division)

20

25th January, 1996

Before: The Bailiff, and Jurats  
Orchard and Gruchy.

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

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Applications by the Defendant for an Order that:

1. That the injunctions contained in the Orders of Justice dated 10th December, 1991, and 7th December, 1992, should be lifted on the grounds, *inter alia*, that the Plaintiff failed to disclose to the Court, when seeking the injunctions, that part of the consideration for the transfer of the yacht "Siben" was the Plaintiff's purchase of a business, Villas Rouges, a house of disrepute, thereby failing to disclose to the Court that the contract between the parties was illegal on the ground that it was for immoral purposes;
2. That the Plaintiff should not pay the Defendant damages for the wrongful imposition of the injunctions referred to in paragraph 1 above, alternatively, that there should not be an inquiry into such damages;
3. That the Defendant should be granted further or other relief; and
4. That the Plaintiff should pay the costs of and incidental to this present application on a full indemnity basis.

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Advocate A.D. Hoy for the Defendant.  
Advocate N.F. Journeaux for the Plaintiff.

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JUDGMENT

5 THE BAILIFF: The litigation between these parties over a contract made in 1991 has a long and tangled history, but this issue is relatively straightforward. It arises from an Order of Justice issued by the learned Deputy Bailiff on 10th November, 1995, on the application of the Plaintiff, to whom we shall refer as "Mr. Clewley".

The prayer of the Order of Justice reads as follows:

10 Wherefore it is hereby ordered as follows:-

15 "(1) that service of this Order of Justice upon the Registrar of British Ships for St. Helier shall operate as an Order made in accordance with Section 30 prohibiting for a period of six months any dealing with the yacht "Siben" registered with the office number 703576 being number 47 in 1990 and without prejudice to the generality of the foregoing prohibiting any sale, charging or mortgaging of the yacht pending further order of the Court.

20 (2) that Mr. Clewley may be permitted to convene the Defendants and the party cited [that is the Registrar of British Ships] before the Royal Court so that in their presence the Court may order

25 (a) confirmation of the said interim injunction until further order of the Court; and

30 (b) that the Order pursuant to Section 30 shall stand for the said period of six months and that Mr. Hughes shall pay to Mr. Clewley the costs of and incidental to these proceedings;

35 (c) an inquiry into damages".

40 The Order of Justice came before the Royal Court on 20th November, 1995, and it is sufficient to state that an Order then issued discharging the interim injunction obtained ten days before. The only remaining paragraph of the Prayer of the Order of Justice relates to the request for an inquiry into damages.

45 The dispute between the parties was succinctly described by the learned Deputy Bailiff in giving the Judgment of the Court on 20th November, 1995, in these terms:

50 "To cut down a very long story, Mr. Clewley purportedly owned a property in Portugal and Mr. Hughes for his own purposes wished to purchase that property. He gave in part exchange the yacht "Siben", a De Lorean motor vehicle and cash. Protracted litigation revealed that Mr. Clewley did not in fact own the property in Portugal that its

*earning potential was not what he held out, and that part of the property was apparently used as a brothel".*

5 The short background to the present application is that on  
10 10th December, 1991, the Defendant in this action (to whom we shall refer as "Mr. Hughes") obtained an order under Section 30 of the Merchant Shipping Act 1894 prohibiting Mr. Clewley from dealing in any way with the yacht "Siben". That interim injunction was, in effect, renewed from time to time until it was discharged on the application of Mr. Hughes on 20th November, 1995.

15 Mr. Clewley now claims that there should be an inquiry into damages on the ground that Mr. Hughes failed to disclose "*when seeking the injunctions that part of the consideration for the transfer of the yacht "Siben" was the Plaintiff's (Mr. Hughes) purchase of a business Villas Rouges a house of disrepute thereby failing to disclose to the Honourable Court that the contract between the parties was illegal on the ground that it was for immoral purposes*".

20 An "inquiry into damages" is not a term of art in Jersey Law. Indeed, neither counsel could draw our attention to any previous case in which this Court has ordered such an inquiry. Bean on Injunctions (6th Ed'n) p.92 describes it in these terms:

30 "*Where an interim or interlocutory injunction is granted, but is subsequently discharged, the defendant may well have suffered damage by reason of having had to comply with the injunction in the meantime. He may then seek to enforce the undertaking as to damages which the plaintiff will have been required to give at the earlier hearing.*

35 "*In order to enforce the undertaking, the damage sustained must be assessed by means of an inquiry as to damages, generally before a master*".

40 We take the view that no particular significance attaches to the employment of this phrase. It is clear that - if an undertaking in damages has been given or can be implied - it may at a stage in the proceedings be appropriate to determine whether the party giving the undertaking should be ordered to pay damages. The Court might order such an assessment to be carried out by the Greffier or it might reserve the assessment to itself.

45 Mr. Hoy's first difficulty in making this application is that no express undertaking in damages was given by Mr. Hughes when the interim injunction restraining any dealing with the "Siben" was obtained. Mr. Journeaux submits that there is in law accordingly  
50 no basis upon which a claim for damages may be made.

5 Mr. Hoy's answer to this submission is that an undertaking in damages should be implied as being the natural and usual price of an interim injunction. It may well be the case that an undertaking in damages is usually required when an interim injunction is issued. There is however no practice direction requiring a judge in Jersey to insert such an undertaking in the Order.

10 Indeed, it appears clear that an undertaking in damages cannot be imposed by the Court without the assent of the party in question.

15 Mr. Journeaux referred us to a passage from Goldrein & Wilkinson: Commercial Litigation: Pre-emptive Remedies (2nd Ed'n) p.83 where the authors state:

20 *"Security will not however be ordered ex post facto: Commodity Ocean Transport Corporation -v- Basford Unicorn Industries Ltd. (The Mito) [1987] 2 Lloyd's Rep.197. Hirst J. inter alia said:*

25 *"Of course, Mr. McClure accepts, as he must, that the Court has no power to impose an undertaking on the plaintiffs; and here I think that if I were to make this order I would in essence, ex post facto, be imposing an additional term to the undertaking, without any knowledge one way or the other as to what the situation would have been if it had been sought by the defendants in the first place. That is something which*  
30 *I think it is wrong in principle to do".*

35 In addition it was acknowledged by Mr. Clewley as long ago as February, 1993, that Mr. Hughes had not given an undertaking in damages.

On 2nd March, 1993, a summons was issued on behalf of Mr. Clewley seeking the lifting or variation of the injunction, or, in the alternative, that:

40 *"The Plaintiff (Mr. Hughes) do provide an undertaking to abide by any order which the Court may decide to make at a later stage requiring the Plaintiff to pay damages to the Defendant (Mr. Clewley) as compensation for loss and damage which he suffers by reason of the Injunctions".*

45 That application was supported by an affidavit sworn by Mr. Clewley on 19th February, 1993, in which he deposed, at paragraph four:

50 *"THAT I verily believe that the Plaintiff has not given an undertaking as to damages".*

No suggestion was made in that affidavit that an undertaking in damages ought to be implied.

5 It is true, as submitted by Mr. Hoy, that a willingness to give such an undertaking was demonstrated in an affidavit sworn by Mr. Richard Byrt, a solicitor acting for Mr. Hughes, on 10th May, 1993. In paragraph 17 he deposed:

10 *"It is accepted that the Plaintiff has not given an undertaking as to damages, as alleged by the Defendant in paragraph 4 of his affidavit. However, the Plaintiff is willing to provide such an undertaking. The consequences of such an undertaking were explained and I am advised that the Plaintiff will provide an undertaking".*

15 In fact, however, that undertaking was never given and the summons was never argued.

20 The summons was re-issued on 23rd November, 1994, with a return date of 12th June, 1995, but for reasons which are immaterial it did not come on for hearing on that day. In our judgment there was no undertaking in damages given by Mr. Hughes and we are not persuaded, on the authorities cited to us, that we have any power to imply such an undertaking.

25 That is not, however, the end of the matter because we should be very reluctant to hold that we had no power to order a person who had wrongly invoked the process of this Court to pay damages for loss which resulted. Even before the enactment of the Bankruptcy (désastre) (Jersey) Law, 1990 it was the case that the Court had asserted jurisdiction to order a creditor wrongfully declaring the goods of a debtor *en désastre* to pay damages for that wrongful act (see de Gruchy -v- Dallain (1890) 214 Ex. 108).

30 We see no reason why that principle should not apply to any wrongful invocation of the Court's process, particularly where the interlocutory relief is obtained *ex parte*. In our judgment we have a discretion, irrespective of whether or not an undertaking or cross-undertaking in damages has been given, to consider whether there has been a wrongful act which ought to be visited with damages.

35 Mr. Hoy submitted that there were two reasons why we should so hold. First, he submitted, that the injunction under section 45 30 of the Merchant Shipping Act, 1894 had been upheld by the Court of Appeal only on the basis that Mr. Hughes had a claim for rescission of the contract of sale of the "Siben" between him and Mr. Clewley and that he was accordingly an interested person within the meaning of the section. The High Court, having refused to rescind the contract, it followed, submitted Mr. Hoy, that the 50 injunction had been wrongly granted.

Secondly, he submitted that Mr. Hughes had wrongly failed to disclose, when applying for the injunction under section 30 of the Merchant Shipping Act, 1894, the existence of the agreement to purchase the Villas Rouges business which was an immoral undertaking involving the provision of the services of prostitutes.

1. In our judgement the first submission can be shortly dismissed. It is true that Clarke J., in the High Court in England, refused to grant an order rescinding the contract. In 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, at p.88, he found that:

*"...the Villas Rouges business was part of the property to be swapped by Mr. Clewley. It follows that it was part of the consideration for the agreement as a whole even though no separate figure was attached to it. A significant part of the Villas Rouges business was the provision of girls for money. Implicit if not explicit in the arrangement was that the girls would provide sexual favours for the clients. In short the business included the provision of prostitutes and thus offended against public morals. I accept the submission that it follows that the contract between the parties was illegal on the ground that it was in part for immoral purposes".*

Clarke J., went on to hold that the Court should not make an order which would have the effect of transferring an illegal business from one party to another. He accordingly refused to order rescission. He did, however, ultimately find in favour of Mr. Hughes on the ground that Mr. Clewley had induced him to enter the contract by two fraudulent misrepresentations. Mr. Clewley was ordered to pay damages in the sum of £282,171.37 together with interest.

At the end of the day, therefore, Mr. Hughes was successful in his action against Mr. Clewley. It does not seem to us that the refusal of the High Court to grant rescission vitiates retrospectively the basis upon which Mr. Hughes obtained his interim order under section 30 of the Merchant Shipping Act.

Sir Godfray Le Quesne, Q.C., in delivering the Judgment of the Court of Appeal (21st June, 1994) Jersey Unreported CofA, stated:

*"...we have no doubt that this case falls within the ambit of s.30. If the appellant establishes the right to rescind which he claims, he will not merely be entitled to levy execution on the ship. Property in the ship will revert to him, and she will be deemed always to have*

belonged to him. His interest in the ship is direct enough, and his connection with her clear enough, to bring the section into play.

5 Mr. Hoy did not submit that, if the plaintiff was an  
'interested person', the Court should in its discretion  
refuse to make the order. We are perfectly satisfied, in  
view of the defendant's failure to offer any answer to the  
10 plaintiff's charges of misrepresentation and his admitted  
desire to mortgage the yacht, that the right exercise of  
the discretion is to make the order. Mr. Hoy did submit  
that difficulties over restitutio in integrum might stand  
in the way of an order of rescission. While the position  
is not entirely clear, we are not satisfied that those  
15 difficulties are great enough to affect the exercise of  
the Court's discretion".

The basis of the Court of Appeal's order was that Mr. Hughes  
was an 'interested person' in the sense that he was claiming a  
20 right to rescission of the contract and consequently claiming a  
right of property in the "Siben". The fact that that claim  
ultimately failed does not, in our judgment, render wrongful the  
obtention of an interim injunction under section 30.

25 That conclusion is reinforced by the fact that it was only  
after the commencement of the hearing before the High Court that  
Mr. Clewley revealed the true nature of the Villas Rouges  
business. Hitherto he had been, to say the least, coy about the  
nature of the business. It was that revelation which was the  
30 principal reason leading Clarke J., to refuse rescission. We find  
no force therefore in Mr. Hoy's first submission.

2. The application for an order under section 30 was supported  
by an affidavit sworn on 9th December, 1991, by Mr. Byrt, the  
35 English solicitor acting for Mr. Hughes. Exhibited to that  
affidavit was a letter from Mr. Clewley which referred to an  
advertisement for the Villas Rouges but did not elaborate upon it.  
We think that it would have been desirable for Mr. Hughes to have  
disclosed the nature of the Villas Rouges business, although we  
40 can understand why he did not. We think, however, that it does  
not lie in the mouth of Mr. Clewley to complain of that omission.  
There was a finding by Clarke J., in the High Court that the  
Villas Rouges business formed part of the overall swap agreement.  
It is clear from the reading of the Judgment, however, that there  
45 was no evidence that Mr. Hughes ever operated the business. Mr.  
Clewley did operate the business and was, of course, fully aware  
of its nature. He could at any time after the issue of the  
injunction have drawn the matter to the attention of the Royal  
Court. He chose not to do so and indeed obfuscated the nature of  
50 the Villas Rouges business until, as we have stated, the hearing  
before the High Court in 1995.

At paragraph 6.2 of an affidavit sworn by Mr. Clewley on 14th January, 1992, in the High Court action he stated:

5       *"I also owned a business known as Villas Rouges. That business arranged holidays for businessmen which included golfing and other entertainment arrangements".*

At paragraph 6.11 of the same affidavit he stated:

10       *"However there had been unfounded allegations that Villas Rouges involved procuring call girls for businessmen in Portugal in the "News of the World" and the Plaintiff telephoned me and asked that reference to Villas Rouges be left out of the agreement and subject to a separate oral*  
15       *agreement between the two of us".*

Mr. Hoy submitted that Mr. Clewley had not lied in this affidavit and suggested that he had used a euphemism. Reference to entertainment arrangements may well be euphemistic but, in our  
20       judgment, the reference to "unfounded allegations that Villas Rouges involved procuring call girls for businessmen" is plainly untruthful. In essence this submission on Mr. Clewley's behalf relies upon his own conduct of an immoral and illegal business. That is no basis for invoking the jurisdiction of this Court and  
25       we reject it.

We can find no grounds for finding that Mr. Hughes acted wrongfully in obtaining the injunction under section 30 of the Merchant Shipping Act, 1894. In the exercise of our discretion we  
30       accordingly refuse the relief sought by Mr. Clewley and the application is dismissed.



## 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.
- Bean: "Injunctions" (6th Ed'n) pp.26-28 & 92-94.
- Goldrein & Wilkinson: Commercial Litigation: "Pre-Emptive Remedies" (2nd Ed'n) pp.80-93.
- Fletcher Sutcliffe Wild Ltd. & Others -v- Burch & Others (1982) FSR 64.
- Digital Equipment Corp & Anor. -v- Darkcrest Ltd. & Anor. [1984] 3 All ER pp.381-392.
- The Law Reports, Ten Years' Digest, 1901-1910: pp.2017-2018.
- Howard -v- Press Printers Ltd (1904) 74 LJ Ch. 100 CA.
- R.S.C. (1995 Ed'n) 29/1/12-29/1/16; 59/4.
- Merchant Shipping Act 1894.
- 4 Halsbury 24: paras. 982-988.
- Snell's Equity (29th Ed'n): pp.27-45; 666-668.
- F. Hoffman - La Roche & Co. A.G. -v- Secretary of State for Trade & Industry (1975) AC 295.
- Tharros Shipping Company Limited -v- Bias Shipping Limited (1994) Lloyds Rep. 577.

Allen & Ors. -v- Jambo Holdings Ltd. (1980) 2 All ER 502 CA.

Modern Transport Co. Ltd. -v- Duneric 55 Co. (1917) 1 KB 370.

Talika Investments Ltd -v- Olec Properties Ltd (& Ors.) (1990) JLR  
200.

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