

ROYAL COURT
(Samedi Division)

23rd August, 1996

152.

Before: Sir Philip Bailhache, Bailiff, and
Jurats Le Ruez and Quérée

Between:	Andrew David Wilkins and Phillip Wardel Moorrees Reynolds Provisional Trustee in bankruptcy of Virginia Anne King Headrick and Andrew David Wilkins Provisional Trustee in bankruptcy of Robert John Headrick and Andrew David Wilkins Provisional liquidator of Headrick Vehicle Trading (Pty.) Limited	Plaintiffs
And:	Virginia Anne King Headrick and Robert John Headrick and Tensing Investments Limited and Hill Samuel (Channel Islands) Trust Company Limited as Trustees of The VAK Headrick Family Trust and/or The Headrick Vehicle Trust and/or The Headrick Family Trust	First Defendant Second Defendant Third Defendant Fourth Defendant
And:	Hill Samuel Bank (Jersey) Limited and Hill Samuel (Channel Islands) Trust Company Limited	First Party Cited Second Party Cited

Application by the Plaintiffs to delete a proviso from
the Order of Justice excepting living expenses and
the payment of legal fees from injunctions
restraining the Defendants from dealing with
monies within the jurisdiction.

Advocate C.P.G. Lakeman for the Plaintiffs.
Advocate D.F. Le Quesne for the First, Second
and Third Defendants.

JUDGMENT

THE BAILIFF: This is a summons issued by the Plaintiffs in this action seeking the deletion of a proviso in an Order of Justice signed by the Deputy Bailiff on 7th June, 1996. The Order of Justice contained a number of injunctions restraining the Defendants from inter alia dealing with monies within the jurisdiction. The proviso which the Plaintiffs seek to delete is in the following terms:

"PROVIDED FURTHER THAT

(c) nothing in this Order shall prevent the payment by the Defendants of its ordinary and usual expenses (including legal advice for the purpose of these proceedings) up to a maximum of £1,000 per week or the payment of such further sums as may be agreed by the Plaintiffs' Advocate in writing; and.

(d) nothing in the Order of Justice shall prevent the transfer of assets or payment of sums by or on behalf of the Defendants or any of them then in the ordinary course of business which would in the ordinary course of business have been transferred or paid".

The Defendants opposed the application to delete the proviso.

The Plaintiffs' arguments may be shortly put as follows:

1. It is said that provision for living expenses and for the payment of legal fees is inappropriate in the context of an injunction obtained in support of a proprietary claim. Mr. Lakeman points out that although the proceedings were launched only on the basis of provisional sequestration orders, final sequestration orders were made by the Supreme Court of South Africa on 18th July, 1996. He submits that the Plaintiffs are in effect trustees in bankruptcy and that the assets which have been enjoined are vested in the sequestrators. Mr. Lakeman cited an extract from Dicey & Morris on the "The Conflict of Laws" (12th Ed'n: 1993) Vol 1 at p.190:

"The description of an injunction as a Mareva injunction is a convenient label to describe an injunction restraining the removal or dissipation of assets in which the plaintiff claims no proprietary interest, and strictly it should be distinguished from cases in which the plaintiff seeks to trace assets. Thus, if the plaintiff's claim relates to a particular fund or to a particular piece of property, the injunction might relate only to that fund or property. So also, an injunction in relation to a particular fund would not be subject to the normal proviso in a Mareva injunction allowing the use of the money for normal business purposes or for legal fees."

Mr. Lakeman also drew our attention to the English case of Finers & Ors. -v- Miro (1991) 1 WLR 35, the headnote of which reads as follows:

"The first plaintiffs were a firm of London solicitors of which the second plaintiff was a partner. The remaining plaintiffs were two companies owned and controlled by the first plaintiffs. The second plaintiff acted as solicitor for the defendant, who was resident in England, in setting up companies

5 and trusts under schemes for holding substantial assets on
behalf of the defendant. Following allegations that the
defendant acquired the assets by fraud in dealings with a
United States insurance company in liquidation, the plaintiffs
by an originating summons applied under R.S.C., Ord. 85 for
directions in respect of their possession and control of the
assets. The judge directed that notice of the proceedings be
given to the liquidator and he refused an application by the
defendant, against whom actions had been started by the
liquidator in the United States, for a payment out of the
assets for the purpose, inter alia, of meeting his legal
expenses.

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15 On the defendant's appeal on the grounds that the court did not
have jurisdiction to determine the proceedings which should,
therefore, be struck out, and that the judge erred in not
authorising a payment out of the assets:-

20 Held, dismissing the appeal, that since it was arguable that
the defendant had acquired the assets from the insurance
company by fraud, thus giving rise to a claim by the liquidator
or the insurance company against the defendant or the
plaintiffs in England that they were held by the plaintiffs on
a constructive trust, the court had jurisdiction to give such
directions as would enable the liquidator, with sufficient
knowledge of the facts, to decide whether or not to make any
claim to the assets or object to any transfer or release of
them to the defendant; that the defendant's right to secrecy or
legal professional privilege as against the plaintiffs was
overridden by the prima facie case of fraud against him; but
that, on the facts, it was proper to authorise a payment out of
the assets to enable the defendant to have adequate legal
representation in the proceedings in which he was involved both
here and in the United States".

35 Mr. Lakeman drew from this case the propositions: (1) that a
proprietary claim raises the presumption that there should be no
provision for legal expenses; and (2) that the Court is entitled to
probe the nature of the claim.

40 2. It is said that even if the claim is not a proprietary claim the
Court should delete the proviso on the balance of convenience test on
the basis that there is no need for it. In support of that contention
counsel argues that on his own affidavit the First Defendant has
contended that he is not bankrupt. It follows, the argument runs, that
45 he is not in need of the protection of the proviso because he must have
other funds available to him.

50 Counsel for the Defendants made essentially four points in reply.

55 First, Mr. Le Quesne submitted that there was no evidence that the
Plaintiffs had a proprietary claim to the monies paid into Jersey, nor
was such a claim asserted in the Order of Justice. This was not a case
of stolen money being spirited away; on the Plaintiffs' own Order of
Justice it was asserted that the monies had been legitimately borrowed
from a bank. Mr. Le Quesne argued that the money transferred out of

South Africa to Jersey was money to which the Defendants had legal rights, even if it had been borrowed.

5 Secondly, counsel invited us to consider the circumstances surrounding the application for leave to delete the proviso. Essentially Mr. Le Quesne submitted that the Plaintiffs appeared perfectly happy with the proviso until 23rd July, but on 1st August notified the Defendants that this summons would be brought. No new factors had come into play between 23rd July and 1st August. Counsel submitted that this was a cavalier approach to a Mareva type injunction. 10 Furthermore, no affidavit had been filed in support of the summons explaining why it was now thought necessary to seek the deletion of the proviso.

15 Thirdly, on proper analysis, the Order of Justice could be seen to be defective in a number of ways, particularly in what it omitted to disclose. For example, there was no explanation as to the identity of the creditors, other than the bank from which money had been borrowed. It was not even clear whether the bank had made formal demand for 20 repayment. The circumstances in which the provisional sequestration orders had been made were shrouded in uncertainty.

25 Fourthly, counsel reminded the Court that Mr. Lakeman had been content to rely upon the affidavit of the First Defendant as the only evidence of his means. That affidavit disclosed assets, all of which were subject to injunctions. It followed, submitted Mr. Le Quesne, that the First and Second Defendants had no assets over which they exercised legal control with which to maintain themselves or to pay for legal 30 advice other than the allowance made by the proviso which the Plaintiffs now sought to delete.

35 The Court has found this a difficult matter to grasp and has an uncomfortable feeling that it is not fully informed. On the face of it the Court would certainly wish to give such assistance as it properly can as a matter of comity to the Supreme Court of South Africa. But there is some force in Mr. Le Quesne's submission that the Order of Justice is less than crystal clear. We accept that it was drafted against a background of urgent concern to restrain funds in Jersey. There has, however, been time to seek leave to amend. There is no 40 evidence before the Court as to the nature of the sequestrators' title, nor specifically as to their rights to pursue assets paid away by the First and Second Defendants before the provisional orders were made.

45 There is also the curious fact, which neither counsel was able satisfactorily to explain to the Court, that the Defendants have agreed to pay to the Plaintiffs some three and a half million rands' worth of the money injunctioned in Jersey. Neither the Plaintiffs nor the Defendants saw fit to explain their stance in relation to this summons by filing affidavit evidence.

50 Finally, no submissions were addressed to us by either counsel on paragraph (d) of the proviso.

55 We have applied the balance of convenience test to the different arguments laid before us and we have concluded that the Order made by the Deputy Bailiff on 7th June, 1996, should be left undisturbed. The summons is accordingly dismissed.

Authorities

Dicey & Morris: "The Conflict of Laws" (12th Ed'n: 1993): Vol 1: Rule
17: pp.189-194.

Gee: "Mareva Injunctions" (3rd Ed'n: 1995): pp.245-253.

Finers & Ors. -v- Miro (1991) 1 WLR 35.

Barclays Bank PLC -v- Thorpe & Ors. (13th June, 1995) Jersey Unreported.