

JERSEY / JUDGMENT

Barclays v Grima [2003] JRC 212 (18 November 2003)

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judgment

the DEPUTY bailiff: 1. When we adjourned yesterday I indicated that I wanted to think about this matter overnight. In particular I wished to read all of the cases where I had been referred only to extracts. I also indicated that I would not give reasons, but on reflection I think it would be helpful to explain the thinking behind my decision. 2. This is an application for directions in connection with a hearing which has been fixed for two days commencing 10 th December. 3. The background is that the plaintiff bank issued an order of justice on 15 th March 2002 alleging that the defendant had forged her mother's signature in order to transfer monies from an account with the plaintiff in the joint names of the mother, the defendant and her brother Joe ultimately into accounts in her name held with the party cited. A Mareva injunction froze those accounts. The allegation of forgery was based upon an assertion to the plaintiff bank by the defendant's brother Joe supported by a report prepared by an alleged handwriting expert instructed by Joe. The defendant filed an answer denying forgery. 4. Joe and the mother have died during the course of this year. This means that the assets in the joint account with the plaintiff bank would have accrued by survivorship to the defendant. The plaintiff therefore does not wish to continue the litigation as there is no point. The monies would belong to the defendant in any event. It seeks to discontinue the proceedings with no order as to costs and has already agreed to the lifting of the Mareva injunction. The defendant, on the other hand, wishes the proceedings to be dismissed with costs and also wishes to enforce the undertaking in damages given in support of the Mareva injunction on the grounds that she has suffered loss as a result of its imposition. 5. On 22 nd July 2003 the Master made an order that the parties should file summonses seeking their respective desired remedies and that this should come before the Royal Court. He also ordered that the parties should file any appropriate affidavits in support. It is that hearing which has been fixed for 10 th December. However the parties disagree on what it should involve. 6. Mr Sinel, for the defendant, asserts that the plaintiff has raised a serious allegation of fraud, namely forgery, against the defendant. She is entitled to clear her name. Following the Master's order, the defendant has filed several affidavits which, he says, amount to a compelling case that the defendant did not forge the relevant instructions; on the contrary they were given by the mother in order to ensure that the assets went to the defendant and not to Joe. He submits that the Court must ascertain the truth of the allegation of forgery before deciding whether to enforce the

undertaking in damages against the plaintiff. He accepts that this requires discovery to take place and Mr Thompson submits that it would also require the production of reports by experts on handwriting following inspection of the documents produced on discovery. Mr Sinel accepts that such a trial cannot take place on 10 th December. He therefore now suggests that that date should be vacated, orders for discovery etc should be made and a new date should be fixed covering a greater number of days, at which time the Court would rule on whether the forgery allegation was true, decide whether to enforce the undertaking in damages and, if so, assess the amount of damages by reference to the usual issues of causation, remoteness and measure of damages. 7. Mr Thompson, on the other hand, says that the case is now academic because of the death of the mother and Joe. Mr Sinel's suggestion would amount in effect to holding a full trial of the underlying issue in the case merely for the purpose of determining costs and whether the undertaking in damages should be enforced. He accepts that, in the ordinary case, a party who discontinues a claim is to be treated as giving up and must therefore ordinarily pay the costs and expect any undertaking in damages to be enforced against him. But he says that the authorities are clear that this is not invariably the case. He submits that this is one of those cases where, even if it turns out that the forgery allegation was incorrect, the plaintiff should not have to pay the costs nor should it have the undertaking in damages enforced against it having regard to the circumstances in which it instituted the proceedings, the manner in which the respective parties have conducted the proceedings and the circumstances in which the discontinuance is sought, namely because the underlying issue is now academic. 8. He submits that, on 10 th December, the Court should hear and rule upon the plaintiff's submission that, even assuming for these purposes that the forgery allegation is incorrect, the plaintiff should not be ordered to pay costs and should not have the undertaking enforced against it. That would not require any further factual evidence. He accepts that, if the Court were to hold on 10 th December that the truth of the forgery allegation was crucial to its decision on costs or on enforcing the undertaking in damages, then the case would have to be put off for the sort of hearing which Mr Sinel was arguing for and that this should take place following discovery, etc. But a hearing on 10 th December along the lines submitted for by him would, he said, be decisive of the issue if decided in one particular way. The case ought therefore to proceed in this manner. 9. I was referred to various cases. The first was Cheltenham & Gloucester Building Society -v- Ricketts

(1993) 4 All ER 276. In that case, the English Court of Appeal made it clear that the court had a discretion as to whether to enforce an undertaking in damages exercisable in accordance with ordinary equitable principles. The general approach of the court is helpfully set out at pages 281 - 282 of the judgment. What is clear from the decision is that the court has two separate decisions to reach. First, should the undertaking be enforced; secondly, if so, what damage has been suffered and should be compensated for? The court went on to say at 282 (b): - "The court may determine that the undertaking should be enforced but then direct an inquiry as to damages in which issues of causation and quantum will have to be considered. It is likely that the order will include directions as to pleadings and discovery in the inquiry. In the light of the decision of the Court of Appeal in Norwest Holst Civil Engineering Limited -v- Polysius Limited (1987) CA Transcript 644 the court should not

order an inquiry as to damages and at the same time leave open for the tribunal at the inquiry to determine whether or not the undertaking should be enforced. A decision that the undertaking should be enforced is a pre-condition for the making of an order of inquiry as to damages." 10. A similar approach is referred in *Gee on Mareva Injunction and Anton Piller Relief* (3rd Ed'n) at page 124 where it is said:- "But a party covered by the undertaking will have the right, at the appropriate stage, to ask the court to enforce the undertaking against the plaintiff and the court can do so, either assessing the damages summarily or, more usually, by directing that the plaintiff pay the damages awarded on an inquiry as to damages. Whether or not the injunction had been rightly granted is to be decided by the court and should be dealt with before any inquiry as to damages is directed. Such an inquiry should be concerned only with the quantum of damages to be awarded to the defendant pursuant to the jurisdiction conferred on the court by the undertaking. The inquiry should not be concerned with whether or not the injunction was justified. Nor in principle should it be concerned with whether the court, in the exercise of its discretion, should decline to award damages either wholly or in part. Thus once an inquiry has been directed it should be concerned only with matters of causation and the quantification of damages." These two extracts would seem to point against Mr Sinel's submission that there should be just one hearing at which all questions of whether the undertaking should be enforced, and if so, for how much, should be dealt with. 11. Mr Thompson referred me to *Barretts & Baird (Wholesale) Limited -v- Institution of Professional Civil Servants and Others* (15th November 1998) QBD. In that case the plaintiff sought to discontinue proceedings on the grounds that the industrial action in question had now ceased. Henry J was asked to decide whether the plaintiff should pay the defendant's costs as a condition of discontinuance. In passing, having referred to the general rule that a party who discontinues must pay the defendant's costs, he said this:- "The second factor in the exercise of my discretion is that, as Wynn L J pointed out in *Stratford -v- Lindley*, there is a public interest in not forcing people to litigate over costs. The lists should be kept free for necessary rather than quasi-academic contests. The fact that it is no longer necessary for the plaintiffs to litigate because the trade dispute is over and they have decided that they can live with the loss that they have suffered must be a relevant factor in whether to apply what has been expressed to be the general rule on discontinuance. If the general rule as to discontinuance relied on by the defendants applied in all cases, even where the discontinuance was because the matter was largely academic, then inevitably it would lead to more academic or half-academic cases being contested simply to avoid the incident of costs. There is a public interest in the fact that such matters should not be litigated." Although that remark was made in the context of costs, Mr Thompson submits that it is equally applicable to the issue of whether an undertaking in damages should be enforced following discontinuance where the litigation has become unnecessary. 12. Mr Thompson also referred me to *Goldman Sachs International Limited -v- Lyons* (22nd February 1995) Court of Appeal (Civil Division) . There the plaintiffs sought to discontinue proceedings on the basis that the defendant was close to bankruptcy. They would therefore not recover any damages even if successful.

The defendant sought to enforce the undertaking in damages in respect of a Mareva injunction which had been granted against him. The trial judge declined to do so and the Court of Appeal upheld his decision. The Court of Appeal made it clear that the court must consider the circumstances of the discontinuance. Thus Hobhouse L J said this:- "Where it is a case of discontinuance, it is, in my judgment, always necessary to consider the circumstances in which the discontinuance has taken place, albeit against the background that the party discontinuing has to provide some justification which takes his case out of the ordinary course. That justification was provided in the present case by the evidence to which I have referred and to which the judge also referred. Therefore, in my judgment, there is no requirement in this situation that special circumstances must be shown in the sense that that has been used in earlier authorities. All that has to be shown is that the circumstances surrounding the discontinuance are such as to raise a question whether or not it is equitable that the undertaking should be enforced." Having gone on to refer to the submission of the defendant that it was wrong in principle to refuse to order an inquiry into damages where the defendant has not had an opportunity at a trial, or something equivalent to a trial, to call oral evidence and to rebut the allegations that are made against him, the judge concluded that the defendant had had an opportunity in that case through interrogatories and affidavits and concluded as follows:- "Therefore, the circumstances of the case and the issues in the action were not such as to give rise to inequity which would lead to the conclusion that justice required that there be an enquiry into the damages. Indeed, the contrary conclusion follows, as the judge considered it would be inequitable to put a plaintiff in the position where he was faced with the alternative of either proceeding to a trial and wasting costs or of submitting to a judgment for the damages that flowed from the Mareva injunction. There is no error in principle in what the judge did." It is fair to say however, as Mr Sinel submitted, that the evidence of misconduct against the defendant in that case was very strong. 13. I have not found this an easy decision. On the one hand, where discontinuance is sought because there is no longer any live issue in the proceedings, it seems undesirable, for the reasons given by Henry J in *Barretts & Baird* and by Hobhouse L J in *Goldman Sachs*, to order that there must nevertheless be a full trial of the underlying issue merely to decide a question of costs or enforceability of an undertaking in damages. As against that, it may operate unfairly to refuse to order an inquiry into damages where a defendant, because of the discontinuance, has not had an opportunity at a trial, or something equivalent to a trial, to rebut the allegations that are made against him. 14. Nevertheless I have come to the conclusion that Mr Thompson's suggestion offers the best way forward. It would enable the Court to consider whether, even on the assumption that the defendant did not forge the instructions, the circumstances of the institution, conduct and discontinuance of the litigation should of itself lead to the conclusion, as Mr Thompson submits, that the undertaking in damages should not be enforced and no costs should be ordered. If the Court were to agree with his submissions, that would lead to a resolution of the issues without the need for a full trial of the underlying issue of forgery. There would be no direct prejudice to the defendant in such a hearing because the Court would be assuming the very thing that she wishes to

prove, namely that she did not forge the instructions. If the Court were to find against Mr Thompson at such a hearing and conclude that it could not decide whether to enforce the undertaking without reaching a decision as to whether the forgery allegation was well founded or not, the Court could at that stage order the sort of hearing envisaged by Mr Sinel with discovery, production of expert reports, cross-examination etc. Although, as mentioned earlier, the Cheltenham and Gloucester case suggested that a single hearing should not consider both whether an undertaking should be enforced and the quantum, that comment was made in the context of a case where there would in any event have been a trial of the underlying issues. In the unusual circumstance of this case, I would agree with Mr Sinel that it may be desirable to hear all these matters at once, although that would be a decision which need only to be taken if necessary following the decision at the initial hearing. 15. Mr Sinel submitted that the defendant would be prejudiced because of the need for more than one hearing, with consequential delay and additional costs. He stated that, if he lost the initial hearing, he would undoubtedly appeal and would expect to succeed on an appeal. The decision would therefore have caused additional time and expense. I accept that, if this Court were to decide in favour of the plaintiff at the initial hearing and an appeal against that decision were to be successful, time would have been lost. However that has to be balanced against the possibility of achieving a prompt and economical outcome without the need for a full trial in the event of any decision in favour of the plaintiff being upheld by the Court of Appeal. Furthermore the Court has reserved two days for this matter on 10 th December and it seems desirable to use these days rather than waste them, as would be the result of Mr Sinel's suggestion. 16. As to costs, I do not think that they will be added to greatly. The issue to be determined at the preliminary hearing will have to be determined in any event. Mr Thompson is entitled to make his argument. On Mr Sinel's plan, this would therefore form part of the large single hearing at which all issues would be considered. If, at that stage, the issue were to be decided in favour of the plaintiff, all the work in relation to discovery and preparation for the hearing on the issues of forgery and quantum would have been wasted. Furthermore, even if the preliminary hearing is decided against the plaintiff (whether at first instance or on appeal) the Court will no longer need to consider that issue at the main hearing. The plaintiff will have lost on its argument that the circumstances of the case are such that the undertaking should not be enforced in any event. It would seem likely therefore that all parties will accept that the decisions on costs and the enforceability of the undertaking in damages will be bound to follow the finding in relation to the forgery. If at the subsequent hearing the plaintiff wins on forgery, the undertaking will presumably not be enforced; if it loses the undertaking presumably will be enforced; and costs will be decided accordingly. It follows that the issue to be decided at the preliminary hearing will not be re-litigated and the subsequent trial will be shorter and simpler than would otherwise have been the case. 17. For these reasons I have concluded, on balance, that it is preferable to proceed as Mr Thompson submits and to use the two days reserved on 10 th December to determine the issue of whether, even on the assumption that the defendant did not forge the instructions, the Court should nevertheless not enforce the undertaking in damages against the plaintiff

for the reasons in relation to the institution, conduct and discontinuance of the proceedings to be put forward by Mr Thompson. The Court will also consider what orders, if any, should be made on the other matters raised in the two summonses other than the question of damages. I invite submissions from counsel on the exact form of the order. Authorities. Cheltenham & Gloucester Building Society -v- Ricketts (1993) 4 All ER 276. Gee on Mareva Injunction and Anton Piller Relief (3rd Ed'n) at page 124. Barretts & Baird (Wholesale) Limited -v- Institution of Professional Civil Servants and Others (15th November 1998) QBD. Goldman Sachs International Limited -v- Lyons (22nd February 1995) Court of Appeal (Civil Division). Yukong Line Ltd (SK Shipping Ltd)-v- Rendsburg Investments Corporation of Liberia

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