

JERSEY / JUDGMENT

N v M (Family) [2021]

JRC 214 (19 August 2021)

[2021] JRC 214

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judgment

the bailiff: 1. On 16 th July 2021, Clyde-Smith, Commissioner granted an interim injunction to ("N") ("the Plaintiff") against ("M") ("the Defendant") preventing the Defendant from, amongst other things, removing their child, ("P") ("the Child") from the jurisdiction. The return date was fixed before us on 28 th July 2021, at which time the Defendant sought to raise the interim injunctions. 2. The context of this application is as follows: (i) On 24 th June 2021, Registrar Daultrey made an Order in connection with the proceedings between the Plaintiff and the Defendant relating to the Child ("the Order"). The reasons for the Order was set out in her Judgment of that date ("the Registrar's Judgment"). In so far as is material the Order provides: "..... AND UPON it being noted that in the event that either parent wishes to take [the Child] on holiday, they should provide to the other reasonable notice in advance of any intended holiday, with full details of the intended trip including return flight details, accommodation details and details of travelling companions; IT IS ORDERED that: 3. [The Child] shall live with the respondent; 4. The applicant shall continue to have contact with [the Child] as presently agreed between the parties whilst she remains living in Jersey; 5. In the even that [the Child] lives in [Country 1], the applicant shall have contact as shall be set out in a separate order made either by consent or upon separate adjudication by the court, such order will in so far as is possible, include the following: (i) direct contact ideally 6 times per year, 3 times in [Country 1] with father travelling to [Country 1] and 3 times with mother travelling to Jersey or [the UK] (ii) On each occasion of contact, [the Child] will stay with father overnight for an increasing number of days. The Plan should provide for progression of periods [the Child] will be with father, with a view over a period of years and in the fullness of time, to [the Child] spending more than half her school holidays with father, and this to include the parents sharing Easter and Christmas school holidays. (iii) There shall be in addition be frequent video contact. 6. The respondent has leave to remove [the Child] to live in [Country 1] upon the re-condition that she obtain a mirror order in the [Country 1] court relating to such contact order as may be made in accordance with paragraph 5 of this order". 3. The hearing which gave rise to the Order and the Registrar's Judgment took place over a period of four days and evidence was heard from the Defendant, the Defendant's mother and brother, an expert in [Country 1] Law, an expert [Country 1] human rights lawyer, a JFCAS Officer ("R") and from the Plaintiff. A number of issues were dealt with

which were referred to at some length in the Registrar's

Judgment.

4. The Defendant's desire to take the Child out of the jurisdiction to [Country 1] on holiday had been canvassed at some length in the hearing before the Registrar and at paragraphs 134 and 135 of the Registrar's Judgment she said this: "Leave to remove [the Child] for a holiday 134. Mother has made an application for leave to remove [the Child] to [Country 1] for a holiday in June 2021. [R] does not believe that either party represent a flight risk, and I agree with her. 135. Mother cannot leave immediately to relocate in [Country 1] as there are matters that she will need to arrange regarding contact and the mirror order. If she cannot secure a mirror order then she must remain living in Jersey. Mother will wish to travel to [Country 1] to visit relatives and also potentially to secure the mirror order required. The residence order that I make does not prevent either party taking [the Child] out of the jurisdiction of Jersey for up to four weeks. If either parent wishes to take [the Child] on holiday, they share parental responsibility and each must provide to the other reasonable notice in advance of any intended holiday, with full details off the intended trip including return flight details, accommodation details and details of travelling companions. I will record this as part of my order. I make no other order specifically relating to mother's application regarding a holiday in July. The parties will need to meet with [R] as soon as possible to discuss contact and practical arrangements. It is likely that mother will need to visit [Country 1] soon and the detail of such a trip can be part of the discussions between the parties." 5. We do not set out at length extracts from the Registrar's Judgment. It shows the issues that had been raised including the Defendant's personal circumstances and the difficulties that might be encountered before the [Country 1] Courts in enforcing

orders.

The Judgment was before the Commissioner when he granted the injunction. 6. On 14 th July 2021, the Defendant's legal advisers wrote to the Plaintiff's legal advisers advising them that the Defendant wished to take the Child on holiday to [Country 1] for a family wedding. She wished to leave on 16 th July 2021 and return on 30 th July 2021. 7. The Plaintiff responded to the effect that he did not consent to the proposed trip and the Defendant had not provided reasonable notice and there were no legal safeguards in place to address the Plaintiff's concerns about the Defendant's return to the jurisdiction with the Child. The Defendant was, in effect, denying him contact that had been promised and generally the Defendant had not met the requirements of the Order. 8. The Defendant's legal advisers responded confirming that the Defendant would be leaving with the Child and did not require the Plaintiff's consent. It was also alleged by the Plaintiff that he had been provided with insufficient details of the Defendant's travel arrangements. 9. No stay of the Order was applied for but, as we have indicated above, on 16 th July the Plaintiff applied for an injunction to prevent the Child from being removed from the jurisdiction. In his accompanying affidavit the Plaintiff expressed concern that the desire to go on holiday was simply a ruse and the Defendant, who had no connection with Jersey and was

currently living at Accommodation 1 with the Child, would have no reason to return. That was even more so, so he argued, because it was the Plaintiff's intention to appeal the decision of the Registrar. The injunction was granted by the Commissioner on the basis that that appeal would be lodged by 23 rd July 2021, and indeed the notice of appeal was lodged within the time prescribed by the learned Commissioner. 10. The Defendant, at the hearing before us, challenged the injunctions in a number of respects: (a) Firstly, she argued that the injunction should not have been made on an ex parte basis and the application should have been made inter partes . (b) Secondly, there had been a failure to make full and frank disclosure of a number of relevant matters which could well have, had they been known to him, caused the Commissioner to take a different view as to whether or not the injunction should have been granted. In essence, those failures were: (i) A failure to inform the Commissioner that contrary to the Plaintiff's assertion that as he was to lodge an appeal whilst the Defendant was likely to be away in Country 1 she would as a consequence be disinclined to return; it was clear that in fact the Defendant had already been advised by her lawyers as to the likelihood of an appeal and that it had not altered the view that she took; and (ii) A failure to direct the Commissioner to the fact that a request for a holiday had been made as early as May 2021, and not, as suggested in the documentation, brought to the Plaintiff's attention only a day or two before the holiday was to have taken place; (iii) A failure to draw to the learned Commissioner's attention to the provisions of Article 14 of the Children's (Jersey) Law 2002 ("the 2002 Law") which provides, amongst other things, that someone who has had a residence order made in their favour is entitled to take a child away on holiday for period of up to a month and without the consent of the other parties. 11. The Defendant went on to argue that there was no evidence that she would not return to Jersey and indeed the Registrar had found as fact that she was not a flight risk. There was no basis for continuing such a draconian order when the matter had already been considered in full by the Registrar after a hearing in which substantial evidence had been deployed. 12. In response to those arguments the Plaintiff argued that: (a) The timing of the Plaintiff's desire to take a holiday and the availability, or lack thereof, of the Court for an inter partes hearing, meant that an ex parte application was necessary; (b) There had been no failure to make full and frank disclosure and in brief: (i) It was immaterial that the Defendant might have been advised of the possibility of the Plaintiff appealing as there was a difference between anticipating that possibility and the reality of the notice of appeal actually having been filed which would, so it was asserted, inevitably have hardened the Defendant's attitude against a return; (ii) It was apparent in the Registrar's Judgment that the issue of a holiday had been in anticipation between the parties and therefore there was no material lack of disclosure; (iii) Although there had been no express reference to Article 14 of the 2002 Law, the Registrar's Judgment had anticipated in the Order that was made the provisions of Article 14 even though they had not been expressly referred to. (c) The grant of the interim injunction had been justified on its terms and should be confirmed. 13. The Plaintiff argued that were the injunctions to be raised then his ability to obtain recourse through the Courts of Country 1 was highly questionable and he would thereby suffer prejudice. 14. A number of allegations and counter allegations were made through counsel as to, by the Defendant, the effect that the Plaintiff was a controlling person who is behaving unreasonably and, by the Plaintiff, that the Defendant was hostile towards him. It is clear that there is mistrust

between the parties. The Law 15. In connection with whether the matter should have been ex parte or inter partes , both parties relied upon the case of *Milner v Milner Laboratories Limited*, *Leech, Smith and Sim*

[2000] JLR 266 , in which the Plaintiff had obtained interim injunctions ex parte . The summary of the findings of the Court contained in the headnote are as follows: "Held, setting aside the original injunctions and re-imposing those relating to the individual respondents specifically: (1) If its attention had been drawn to the relevant principles of law, it was doubtful that the court would have decided to hear the application ex parte. On consideration of those principles, the injunctions would be set aside, as the representor's concerns did not constitute solid evidence of a serious risk of the individual respondents' dissipating the company's assets if given notice of the application. The only allegation was one of breach and fiduciary duty and not of fraud or dishonesty and Mr. Leech had been resident in Jersey for many years and was well settled here. The conduct alleged did not justify the extreme measure of depriving the respondents of their right to be heard (page 272, lines 22-36). (2) When considering whether to impose interlocutory injunctions, the appropriate test was as follows:

- (a) had the plaintiff shown on the evidence that there was a serious question to be tried? If not, then no injunction was granted;
 - (b) if there was, the court considered whether damages awarded at the trial would have been an adequate remedy for the plaintiff. If so, then no injunction was granted;
 - (c) if not, the court went on to consider if damages would have been an adequate remedy for the defendant. If so, then an injunction was normally granted; (d) if not, the court went on to consider which party would have suffered more uncompensatable damage from the grant or refusal of the injunction; and (e) if the balance of convenience was fairly even , then it was prudent to seek to preserve the status quo, although if one party had a disproportionately stronger substantive case, this might have swung the balance (page 273, lines 1 - 30)....."
16. Also, at page 271 of the Judgment the Court, in citing with approval the decision of Hoffman J in *In re First Express Limited*, said this: "..... The report in the Times Law Reports states ([1991] T. L. R. at 439): "Mr JUSTICE HOFFMANN said that he was firmly of the view that it was wrong for the application to have been made ex parte. It was a basic principle of justice that an order should not be made against a party without giving him an opportunity to be heard. The only exception was when two conditions were satisfied: First, that giving such an opportunity appeared likely to cause the applicant injustice, by reason either of delay or action which it appeared likely the respondent or others would take before the order could be made and Second, when damage to the respondent was compensatable under a cross-undertaking or when the risk of uncompensatable loss was clearly outweighed by the risk of injustice to the applicant if the order were not made. Applicants tended to think that a calculation of the balance of advantage and disadvantage in accordance with the second condition was sufficient to justify an ex parte order. That attitude should be discouraged. One did not reach any balancing of advantage and disadvantage unless the first

condition had been satisfied. The principle *audi alteram partem* did not yield to a mere utilitarian calculation and could be displaced only by invoking the overriding principle of justice which enabled the court to act at once when it appeared likely that otherwise injustice would be caused." 17. The Law in connection with full and frank disclosure is well understood within this jurisdiction. We do not think it necessary to refer to all of the cases that were put before us. However, in *Goldtron Limited v Most Investment Limited*

[2002] JLR 424 this Court (Birt, then Deputy Bailiff presiding) considered an application to raise an interim injunction on the grounds that there had been a failure to make full and frank disclosure. The principles of relevance in this application are well set out in the headnote of that judgment which reads as follows: "Held, setting aside the injunction and re-imposing it: (1) When making an *ex parte* application for injunctive relief, the applicant had a duty to disclose any matters which militated against the making of the order in question, and to identify all potential defences. The plaintiff had failed to discharge this duty as, although it was fully aware of the allegations of serious procedural impropriety in relation to the arbitration and that they would be raised as a defence by the plaintiff, the defence had been placed before the court only as part of the detail of the lengthy majority arbitration decision exhibited to the supporting affidavit. When numerous documents were exhibited, it was not sufficient for the applicant to state generally that a particular point was available to the judge somewhere in the voluminous exhibits. There had therefore been inadequate disclosure and the injunction would be set aside. It was no defence for the plaintiff to state that it was unaware of the importance of the omitted matters. Furthermore, it was open to the court to discharge the injunction even if, after full enquiry, it considered that the order made was just and convenient and would probably have been made even if there had been full disclosure (paras. 14-19). (2) The court had a discretion, however, to re-impose an injunction discharged for non-disclosure. When exercising this discretion, it was to consider that (a) the injunction had been discharged to deprive the applicant of an advantage improperly obtained and to encourage full disclosure in all cases; (b) defendants would stop applying to set aside injunctions obtained as a result of non-disclosure if their re-imposition became routine; (c) it was inappropriate to re-impose an injunction in a case of serious non-disclosure; and (d) innocent non-disclosure, i.e. when the applicant did not know of it or perceive it to be relevant, was an important, but not a decisive, consideration as the applicant had a duty to make all proper inquiries and to give careful consideration to the case being presented (paras. 21-24)....." 18. From this and indeed from the other cases put before us a number of relevant principles can be identified. They are summarised in the Defendant's skeleton argument which we further summarise as follows:- (a) An *ex parte* applicant for injunctive relief must give full and frank disclosure of all matters for and against both his case and the application in order that the court has before it all the facts and authority which may relate to the exercise of its discretion; (b) All matters which count against the grant of the interim injunctions and the exercise of the discretion of the Plaintiff's favour should be placed squarely before the judge including the identification of any potential defences. (c)

That duty encompasses not only facts which are known to the applicant but which would have been known to the applicant if proper enquiries had been made and it includes all relevant authorities and arguments. (d) It does not assist an applicant to state that he may have been unaware of the importance of matters not disclosed and it requires an applicant or indeed his advocate specifically to bring to the court's attention any matter relevant to the exercise of a discretion. A simple passing reference to important material without explanation is insufficient and it is also insufficient to file a significant amount of documentation in which relevant details might be buried. Any such material should have been expressly brought to the judge's attention. 19. There was no dispute that the above principles are applicable to this case and we have considered the matters before us in that light. Decision 20. Firstly, with regard to the suggestion that the matter should have been *inter partes* and not *ex parte*, we are not persuaded in the circumstances of this case that there was any failure on the part of the Plaintiff. Whether or not there was a genuine misunderstanding about the desire for a holiday in July and on specific dates, the fact is until the Judgment of the Registrar was issued it was not clear that the Defendant had the ability to take the child out of the jurisdiction. Notice was provided only 48 hours before and it is difficult to see how this accords with the Registrar's clear understanding that there should be appropriate notice and full details of travel provided. Irrespective of the merits of the application, we think that the timing was such that it was appropriate to make the application on an *ex parte* basis. A court was not available (although enquiry as to this was made by the Plaintiff's legal advisers) and he had proceeded as a result by way of an Order of Justice. Accordingly, we do not think there is anything in this ground of challenge in these circumstances. 21. With regard to full and frank disclosures, the fact that the Defendant already anticipated an appeal and that was not expressly drawn to the Commissioner's attention, does not in our view amount to a failure to make full and frank disclosure. It was clear that an appeal was possible but, in any event, the point advanced by the Plaintiff is that it was the fact of an appeal, particularly one served whilst the Defendant was likely to be away in Country 1 where she was permitted to go, that would have hardened her attitude. 22. Irrespective of the merits of that assertion, we do not think a failure to alert the Commissioner to the fact that she may very well already anticipated an appeal amounts to a failure to make full and frank disclosure. 23. Similarly, we are not persuaded by the point that the Defendant had anticipated in May that she would wish to take the child away. The fact is that it was clear to the learned Commissioner and on the paperwork that the Defendant wanted to take the child away for a holiday to see family and we do not see the fact that she had foreshadowed the desire to do so earlier as a failure of full and frank disclosure. 24. We are, however, concerned by the failure to bring Article 14 of 2002 Law to the attention of the Commissioner. To that end, Advocate Glynn for the Defendant placed before us the case of *W v X*

- [2014] JRC 150 in which the Court, in considering full and frank disclosure in connection with a similar case, at paragraphs 38 et seq said this: "As is well-known, there is a duty on an applicant for ex parte relief to make full and frank disclosure. The terms of this duty were set out in *Goldtron Limited v Most Investment Limited*
- [2002] JLR 424 at paras 14-16. We do not repeat those paragraphs but they emphasise that counsel presenting an ex parte application must alert the Court to any matters which militate against the making of the order in question including any arguments which could reasonably be expected to be raised by a party wishing to oppose the order. 39. In this case, it should have been apparent to counsel for the father that, by reference to Rule 8 of the Rules, it might be argued on behalf of the mother that there was no jurisdiction to make an ex parte parental responsibility order. The fact that the court has, after argument, decided that there is such jurisdiction does not alter the fact that there was a tenable argument to the contrary. 40. The provisions of Rule 8 were not drawn to my attention when I was asked to make the ex parte orders. They should have been. This was a clear failure of the duty to make full and frank disclosure by counsel. The Court could therefore set aside the interim orders on this ground alone. However, having now had the opportunity of fully considering the matter and bearing in mind that this is a matter concerned with the welfare of children, the Court has decided to maintain the orders pending the full inter partes hearing on habitual residence previously referred to". 25. The Registrar had made a residence order in favour of the Defendant alone, and the consequences in law of that should have been brought squarely to the Commissioner's attention. The Plaintiff argues that it was not necessary to do so because the effect of that provision, although not its existence or terms, was before the Commissioner, and set out at paragraphs 134 and 135 of the Registrar's Judgment quoted above. 26. A general reference to the position within a judgment without tying it to the statute underpinning it in our view is not sufficient in this case. The Commissioner should have been told that the statute provided permission to the Defendant to take the child away on holiday. Of course the Commissioner could still, by order, have prevented that from happening but he should nonetheless have been made aware of it. In our view that was a material failure to make full and frank disclosure. 27. The determination by the Registrar, who made a number of findings of fact, followed on from lengthy evidence as we have mentioned above. The Plaintiff had argued before the Commissioner that things had changed since the Registrar's Judgment but we cannot see that anything had materially changed such as would have justified a different finding. As we have said, no application for a stay of the Registrar's Order was made and the Registrar had, so we were informed, heard evidence relating to the wellbeing of the Defendant and the Child, the fact that the Defendant was living in difficult circumstances at Accommodation 1 at present, the fact that the Defendant needed to return to Country 1 to visit family, and perhaps, most significantly, that the Defendant did not represent a flight risk. We have seen the nature of the appeal and although we do not comment upon it, nothing in it causes us to take the view that the Registrar's Judgment was obviously wrong in the sense that there was a gross error on the

face of the Judgment. The Plaintiff, as he is entitled to, is asking for the matter to be reconsidered and will undoubtedly develop in arguments the grounds in the notice. 28. The Plaintiff sought to argue that the Defendant had not always honoured the appropriate contact arrangements that had been made but the Registrar had herself noted difficulties in the past but that the situation had significantly improved in terms of contact. Neither the Registrar nor the JFCAS Guardian considered there to be a flight risk. 29. The granting of an interim injunction, particularly one that in effect restricts the liberty of an individual and requires them to live in relatively restricted circumstances without material recourse to wider family support is a draconian step and should only be taken in the clearest of circumstances. We think that had the learned Commissioner had before him all of the matters as we now understand them he would have been unlikely to have granted the Order. 30. In our judgment the injunction should as a result be discharged. There is no sufficient evidentiary basis in our view to reimpose the injunctions and it is for these reasons that we made those findings on 28 th July 2021 and declined to re-impose them. Authorities Children's (Jersey) Law 2002. Milner v Milner Laboratories Limited, Leech, Smith and Sim

[2000] JLR 266 . Goldtron Limited v Most Investment Limited

[2002] JLR 424 . W v X

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