

JERSEY / JUDGMENT

# Virani v Virani [2000]

## JRC 83A (17 May 2000)

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### JUDGMENT

THE DEPUTY BAILIFF: 1. This summons raises issues as to whether the requirements for leave to serve out of the jurisdiction have been complied with and as to the effect, upon an Order of Justice containing interim injunctions, of a failure to table the proceedings on the return date. The factual background 2. On 10th November 1999, Dr. Mustapha Virani ("Dr. Virani ") commenced proceedings in the High Court of Justice in London against Mujtaba Virani and Fatmabai Virani ("the defendants"). It is not necessary to go into any detail as to the nature of the claim. Suffice it to say that Dr. Virani alleged that the defendants had wrongfully dealt with and converted to their own use certain assets which belonged to a partnership formed originally between three Virani brothers, namely Mohamed Fazal Virani , deceased (father of Dr. Virani ), Asgher Fazal Virani deceased (father of the defendants) and Mohamedtaki Fazal Virani . He alleged that certain United Kingdom assets of the partnership had been transferred to Jersey by the defendants. Astill J granted a world-wide Mareva injunction against the defendants in respect of all their assets, save insofar as they exceeded £1.6M. 3. On 19th November, 1999, Hamon, Deputy Bailiff, signed an amended Order of Justice (the amendments are of no significance) brought by Dr. Virani against the defendants ("the first Order of Justice"). The proceedings were brought in support of the English proceedings referred to above. There were three parties cited, namely Lloyds TSB Bank plc (which held an account to which money had been paid), Alburgh International SA (" Alburgh ") (which was the registered owner of the UK assets in question) and Langtry Trust Group ("Langtry") (which administered Alburgh in Jersey). The first Order of Justice contained ex parte injunctions against the defendants restraining them from dealing with any of their world-wide assets save to the extent that they exceeded £1.6M. There were supporting injunctions against the parties cited and accompanying disclosure orders. The proceedings were served on the parties cited who complied with the disclosure orders. Dr. Virani (for whom Philip Sinel & Co. acted) intended to apply in the normal way to the Judicial Greffier for leave to serve the Order of Justice out of the jurisdiction, both the defendants being resident in the United States. 4. The first Order of Justice came before the Royal Court on the afternoon of Friday 26th November following service upon the three parties cited. Messrs. Crills had been instructed by the defendants. Advocate Grace of that firm appeared to protest the jurisdiction, notwithstanding that the defendants had not yet been served. Advocate Sinel explained to the Court that he was

intending to seek an order from the Judicial Greffier for leave to serve out of the jurisdiction and for an order for substituted service on Crills. As Advocate Grace was present representing the defendants, the Court ordered that service be effected upon Advocate Grace there and then. 5. Not long afterwards, a question arose in the English proceedings as to whether Dr. Virani was validly constituted as plaintiff in view of the fact that no letters of administration had been granted to him in England in relation to his father's estate. Accordingly, it was decided that Mohamedtaki Fazal Virani ("the Plaintiff"), being the surviving brother, should begin a new action based upon the same allegations. 6. Accordingly, on 16th December, 1999, that action was commenced in England. Mr. M. G. Tugendhat, QC (sitting as a Deputy Judge) in the High Court granted similar injunctions to those granted in the first proceedings. He ordered that the injunctions made by Astill J in the first proceedings should be discharged upon service of the order made by him in the second proceedings. He further ordered that Dr. Virani pay the defendants' costs in relation to the first proceedings. 7. On 11th January 2000, Hamon, Deputy Bailiff, signed an Order of Justice commenced by the Plaintiff against the defendants ("the second Order of Justice"). The second Order of Justice was in virtually identical form to the first Order of Justice save that the Plaintiff was now the plaintiff instead of Dr. Virani. It therefore mirrored the change in the English proceedings. The second Order of Justice contained similar injunctions against the defendants and the parties cited, as had been contained in the first Order of Justice. It thus contained freezing injunctions against the defendants' world-wide assets, save to the extent that they exceeded £1.6M. 8. On 12th January 2000, two significant events took place. First, an order was made in the first Jersey proceedings intended to mirror that made by Mr. Tugendhat QC in the English proceedings on 16th December. Thus, the injunctions in the first Order of Justice were ordered to be discharged upon service (our emphasis) on the defendants and the parties cited of the second Order of Justice. Subject to this, the first action was withdrawn and Dr. Virani was ordered to pay the costs of that action. 9. On the same day, changes were made in England to the second English proceedings. In a hearing before Buckley J, the injunctions against the defendants were discharged. They were replaced by undertakings by the defendants (i) to permit the share certificates for the issued share capital of Alburgh to be held by the Plaintiff's solicitors to the order of the English Court; and (ii) not to give any instructions to Alburgh or the directors of Alburgh or Langtry Trust Group without the prior written consent of the Plaintiff and Dr. Virani. The Plaintiff and Dr. Virani also gave certain undertakings to the English court which made it clear that, if agreement could not be reached between the parties, the partnership would be wound up in accordance with English law. 10. The significance of the order of Buckley J on 12th January was that the personal assets of the defendants were freed from restraint by injunction. The only assets which remained subject to restraint (by undertaking rather than injunction) were the assets of Alburgh, which were said by the Plaintiff to be partnership assets. It is to be seen therefore that, as from 12th January, there was a mismatch between the restraining orders in the English and Jersey proceedings. In the Jersey proceedings, the world-wide personal assets of the defendants remained frozen (subject to a limit of £1.6M), whereas, under the English proceedings, the defendants were now free to deal with their personal assets as they wished. One would have thought that it would have been a simple matter to ensure that the injunctions in the Jersey proceedings were varied to match the terms of the undertakings of

the defendants in the English proceedings. That it has proved not to be so does not reflect well on any of the parties. 11. To return to the narrative, the second Order of Justice contained the following order at page 12:- "The Plaintiff may effect personal service of this Order on the First Defendant and the Second Defendant by causing the same to be served personally on their Jersey advocates, Messrs. Crills." The second Order of Justice was duly served by the Viscount's officers on Messrs. Crills in accordance with this provision. It was also served on the parties cited. The return date was Friday 21st January. 12. Unfortunately, Messrs Philip Sinel & Co. omitted to table the proceedings for 21st January. They were clearly aware of this omission before the sitting of the Samedi Court because Advocate Michel pointed out the failure to table in a letter dated 20th January. Furthermore, on 21st January, Philip Sinel & Co. wrote to Advocate Michel informing him that the matter had not been tabled for that afternoon but that the second Order of Justice would be re-served by the Viscount with a new return date for Friday 28th January. Advocate Sinel made no application to the Court to exercise its discretion to allow late tabling (see *Morris v. States of Jersey* (1994) JLR N3. 13. Advocate Michel objected that it was not permissible to re-serve the second Order of Justice, but that is what occurred. The matter was duly tabled for 28th January and on that date, the second proceedings were placed on the pending list. In accordance with Rule 6/7A (3)(a), the defendants applied to the Bailiff's Chambers for the issue of a summons to dispute the jurisdiction. That summons was issued on 4th February with a return date for 16th March. Subject to the preliminary issue referred to below, it is that summons which is now before the Court. The issues 14. The defendants raise two procedural issues in relation to the second proceedings:- (i) They say that no leave to serve the second Order of Justice out of the jurisdiction was ever obtained. The purported service on Crills is therefore invalid and of no effect ("the service issue"). (ii) They further submit that the failure to table the second Order of Justice on 21st January means that the proceedings were discontinued. The Order of Justice could not simply be re-served. It had lapsed. The Plaintiff had to present a new Order of Justice to the Bailiff for signature before he could recommence the action ("the tabling issue"). Preliminary issue 15. The Plaintiff takes a preliminary point, namely that the summons before the Court does not comply with Rule 6/7A and accordingly cannot be heard. As recited above, the original hearing date for the summons was 16th March. Between the course of February and early March, the parties were in active correspondence in order to see if the matter could be satisfactorily resolved by amending the Jersey injunction so as to conform with the more limited undertakings given in the English proceedings. On 14th March, (some two days before the hearing date for the summons), Advocate Michel sent a fax to Advocate Sinel in the following terms:- "Dear Sirs, Mohamedtaki Fazal Firani -v- Mujtaba Virani and Fatmabai Virani I received three letters from you yesterday. Had your clients agreed to proceed in Jersey as they had agreed to proceed in England there would be no question of the hearing scheduled for later this week taking place. The matter would have been compromised. As it is, settlement cannot be far away and, therefore, it is a pointless exercise (ignoring the Practice Direction) proceeding to a hearing this Thursday when, if settlement is in fact reached, the hearing will have been a complete waste of costs. In my facsimile of the 10th March I stated that I would only be preparing the bundles if your clients accepted responsibility for the costs thereof. I have received no sensible reply to that letter. Under the circumstances, and in the interests of not wasting our respective clients' monies, I

have notified the Bailiff's Secretary that I am not proceeding with my Summons on Thursday. I propose, however, to fix a fresh date for the hearing of that Summons so that if we cannot agree terms then the Summons can proceed to its inevitable conclusion. Accordingly I hereby give you formal notice that I will be appearing before the Bailiff's Secretary on Friday, 24th March, 2000 at 10.15 a.m. in order to fix a fresh date for the hearing of that Summons. Finally for the avoidance of doubt I do not accept that your clients can have suffered any costs let alone costs thrown away by reason of the adjournment. Yours faithfully, R. J. Michel" 16. He therefore vacated the date and, on 24th March, the summons was re-issued with a new return date of 26th April. The Plaintiff did not consent to the vacating of the date on 16th March, but neither does he appear to have objected. 17. Mr. Sinel argues that, because it was a unilateral decision by the defendants not to proceed with the original summons, it must be regarded as having been withdrawn. It is the same as would be the case if the defendants had simply decided that they did not wish to continue to dispute the jurisdiction and had therefore withdrawn the summons. It would not then be open to the defendants, possibly some months later, to change their minds and issue a new summons to dispute the jurisdiction. This is because of Rule 6/7A(3)(a)(ii), which requires a defendant who wishes to dispute the jurisdiction, to apply to the Bailiff's Chambers within 28 days of the matter being placed on the pending list, for a date to be fixed. Mr. Sinel says that the present summons is to be regarded as a new summons issued on 24th March, which is outside the required 28 day period. He accepts that, if the initial application is made within the 28 day period, hearing dates can be adjourned, either by agreement or by order of the Court. However, he says that this amounted to a unilateral withdrawal by the defendants and the re-dated summons must therefore be regarded as a new summons issued outside the required period. 18. The Court does not see it in that way. In his letter of 14th March, Advocate Michel makes it absolutely clear that he is not withdrawing the summons. He simply states that he does not wish to proceed on the planned hearing date because of the risk of incurring unnecessary costs in the context of the negotiations between the parties. The letter makes it clear that, if there is no settlement, he will be fixing a new date. Indeed, he goes further and gives notice of the date upon which he will be attending upon the Bailiff's Secretary in order to fix a new hearing date. We cannot interpret this letter as being a withdrawal of the defendants' challenge to the jurisdiction. The challenge is maintained at all times in its original form; it is only the hearing date which has been changed. Accordingly we find that the defendants are not in breach of the requirement of Rule 6/7A(3)(a)(ii). 19. We would add that, even if we had concluded that the defendants were technically in breach (in that it is deemed to be a new summons) we would, on the facts of this case, have no hesitation in granting leave for an extension of time under Rule 1/5. The Service Issue 20. The defendants' case is simple. Service out of the jurisdiction is not permitted without leave of the Court. Not only was no leave granted in this case, but no application for leave to serve the second Order of Justice out of the jurisdiction was ever made. The affidavit presented to the Deputy Bailiff at the time of signature of the second Order of Justice did not comply with the requirements of Rule 9 of the Service of Process (Jersey) Rules 1994 . The order in the second Order of Justice was merely one for substituted service. It follows, say the defendants, that there has been no valid service of the second Order of Justice on the defendants. 21. Mr. Sinel responds that this is wholly technical point which is devoid of merit in relation to the justice of the case

and is also wrong in law. Paragraph 2 of the second Order of Justice gave the addresses of the defendants in the United States. It was therefore obvious to the Deputy Bailiff that leave to serve out of the jurisdiction was required. By giving leave for substituted service on Crills, the Deputy Bailiff must be taken to have granted leave to serve out of the jurisdiction followed by an order for substituted service. Mr. Sinel further argues that this was simply a continuation of the previous proceedings and that Crills were on record as representing the defendants in those proceedings. It was therefore permissible to serve on them in any event. The Deputy Bailiff was familiar with the background to the case, having signed the first Order of Justice. He knew that Crills were instructed by the defendants. By presenting an Order of Justice which contained the draft order for substituted service in respect of defendants who, on the face of the Order of Justice, were resident out of the jurisdiction, the Plaintiff had implicitly made an application for leave to serve out of the jurisdiction. Furthermore, he had complied with the requirements of Rule 9 of the 1994 Rules. The affidavit of the Plaintiff in support of the second Order of Justice exhibited the affidavit sworn in the English proceedings. This in turn exhibited a long statement setting out the factual background to the dispute. From this, it was obvious that the grounds of Rule 7 of the 1994 Rules which were relied upon by the Plaintiff for service out of the jurisdiction, were those contained at paragraph (b) (seeking an injunction in the jurisdiction), paragraph (e) (breach of contract committed in Jersey) and paragraph (m) (the Jersey proceedings were brought in order to enable any judgment in the English proceedings to be enforced). Although no specific reference was made to Rule 7 in any of the affidavits before the Deputy Bailiff, it must have been obvious to him that these were the grounds relied upon and that therefore there were valid grounds for granting leave for service out of the jurisdiction. 22. The Court is in no doubt that the defendants' arguments are correct. Article 2 of the Service of Process and Taking of Evidence (Jersey) Law, 1960 provides that any process summoning a person outside the island to appear before the Courts of the island may be served on that person in such cases and in such manner as may be prescribed by Rules of Court. The relevant Rules are the Service of Process (Jersey) Rules 1994. Rule 5 is in very clear terms:- "No summons shall be served outside the island without the leave of the Court". 23. Rule 7 specifies those circumstances in which service out of the jurisdiction may be allowed. They are set out in paragraphs (a) to (s) of Rule 7. Rule 8 makes it clear that the parties to a contract may agree to confer jurisdiction even in circumstances which do not fall within Rule 7. Rule 9 sets out what must be produced in support of an application to serve out of the jurisdiction and is in the following terms:- "Application to be supported by evidence Every application for leave to serve such summons on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent, the plaintiff has a good cause of action, and showing in what place or country such defendant is, or probably may be found, and the grounds upon which the application is made; and no such leave shall be granted unless it be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Part of these Rules". 24. Rule 10 goes on to provide that any order giving leave to serve out of the jurisdiction shall specify the date upon which the defendant is to appear before the Royal Court. Rule 16 confers power to make orders for substituted service as may be necessary to give effect to the Rules. 25. In general, courts assume jurisdiction on a territorial basis, i.e. over those persons physically in the territory

in which the court is situated. It is a strong thing to purport to exercise jurisdiction over persons who do not reside in the territory. In Jersey, as in England, the grounds upon which the Court is able to assume jurisdiction over non resident persons are clearly defined and limited. Furthermore, it is made clear in the Rules that the applicant must specify the ground upon which he relies and that the Court should not grant leave unless it is sufficiently persuaded that the case is a proper one for service out of the jurisdiction. The whole tenor of the 1994 Rules is that any application for leave to serve out of the jurisdiction must be adequately presented by the applicant and carefully considered by the Court. 26. The second Order of Justice was a new set of proceedings. There was a different plaintiff and it cannot be regarded as a continuation of the first proceedings. It therefore has to be considered on its own. The affidavit in support of the second Order of Justice does not comply with the requirements of Rule 9. Although the affidavit and exhibits explain the nature of the dispute in considerable detail, the Plaintiff does not specifically depose, as required by Rule 9, that he believes that he has a good cause of action. Nor does the affidavit show (other than by incorporation of the draft Order of Justice) in which country the defendants are to be found. The clear intention of Rule 7 is that the affidavit should contain this information. However, the Court accepts that these two defects are minor and nothing would flow from them on their own. 27. More significantly, there is no reference in the affidavit accompanying the second Order of Justice to Rule 7 or to which of the paragraphs of Rule 7 are relied upon as conferring the power to serve out of the jurisdiction. In our judgment, in order to comply with Rule 9, an affidavit in support of an application to serve out of the jurisdiction must specify, by reference to Rule 7, which paragraph(s) are relied upon and must relate those paragraphs to the facts of the case sufficiently to satisfy the Court that there are valid grounds under those paragraph(s) of Rule 7 for granting leave. It is not sufficient to produce an affidavit simply setting out the factual basis of the claim and leaving the Court to try and ascertain which paragraphs of Rule 7 may be relied upon by the plaintiff. It follows that the affidavit sworn in support of the second Order of Justice did not comply with the requirements of Rule 9. 28. The fact that an affidavit in support of an application for leave to serve out of the jurisdiction is defective (in that it does not comply with Rule 9) does not of itself necessarily invalidate any order for leave to serve out. It is primarily for the judge considering the application to serve out of the jurisdiction to consider whether the affidavit is in sufficient form and whether it gives him sufficient information to make a decision. The success of an application to set aside leave on grounds of failure to comply with the requirements of Rule 9 will depend upon the facts of the case, including any prejudice to the defendant, the extent and effect of any non-disclosure by the plaintiff and whether the Court is satisfied that, notwithstanding the failure, there are clearly valid grounds for leave to serve out. 29. However, this case goes further. It is not simply a case of a defective affidavit in support of an application to serve out of the jurisdiction. There was no such application. Nowhere in any of the documents produced to the Deputy Bailiff is there a paragraph which states that application is sought for leave to serve out of the jurisdiction. Given that there is no application, it is hardly surprising to find that neither is there any order granting leave to serve out of the jurisdiction as required by Rule 5. Because there is no order granting leave, there is no specific return date, as required by Rule 10. The Court cannot accept the contention that, because the defendants must have been known to the Deputy Bailiff to be

resident in the United States (because it says so in paragraph 2 of the draft Order of Justice) and he made an order for substituted service, his decision is to be taken as granting leave to serve out of the jurisdiction. The exercise by the Court of the exorbitant jurisdiction to convene a non-resident person to its process is not to be implied from some different order (in this case an order for substituted service) interpreted against a detailed knowledge of the relevant facts. An order granting leave to serve out of the jurisdiction must be stated in clear terms, pursuant to Rule 5. An application for leave must not only be made clearly and unambiguously, but it must also be supported by an affidavit complying with Rule 9, so that the Court's attention is directed towards the issue and towards the relevant facts and principles necessary to decide that issue. 30. There being no order for leave to serve out of the jurisdiction on the defendants, any purported service on Crills pursuant to the order for substituted service contained in the second Order of Justice was invalid. The defendants have therefore not been validly served with the second Order of Justice. The tabling issue 31. Mr. Michel argues that, the Plaintiff having failed to table the proceedings for the initial return date on 21st January, those proceedings have been discontinued (see *Racz v. Perrier & Labesse*

(1979) JJ 151. The proceedings having been discontinued, the injunction lapsed. It is not open to the Plaintiff to re-impose them simply by re-serving the original Order of Justice. In this connection, he referred to the fact that, when actions are first presented to the Samedi Division, it is the invariable procedure for the plaintiff to ask for any ex parte interim injunctions to be continued. If such injunctions were continued simply because they were in the Order of Justice, that would not be necessary. He asserts therefore that the Plaintiff should have reverted to the Bailiff in order to obtain a new Order of Justice in order to recommence the action. 32. Mr. Sinel relies upon Rule 15/6(2) which provides that an Order of Justice shall remain in force for a year. He contends that the second Order of Justice remained in being, notwithstanding the discontinuance of the action caused by the failure to table. It was therefore open to him simply to re-serve the Order of Justice. Even if, which he does not concede, the injunctions lapsed upon discontinuance, they were re-imposed upon service for the second time. He refers to *Racz* at page 158 where it is stated that, after the failure to table, and of an application for late tabling "..... the original Order of Justice was re-served on 26th June and tabled in due time". He accepts that, because of the decision in *Racz* that the action was prescribed, the validity of the re-service of the original Order of Justice was not considered by the Court. Nevertheless, he points out that it was Advocate Michel himself who acted for the plaintiff in that case and therefore presumably considered that re-service of the original Order of Justice was possible. Furthermore, he points out that the Court did not comment adversely on what was done. In response, Advocate Michel says simply that, upon mature reflection, he considers that he was wrong on that occasion. 33. Neither side has been able to produce any authority as to whether, upon discontinuance, an Order of Justice can be re-served in its original form or whether, particularly where it contains interim injunctions, it has to be re-issued by the Bailiff. The Court therefore has to revert to general principles. One starts with *Racz* where, at page 159, the Court said this:- "We consider that where a defendant is summoned to

appear before Court at a certain time on a certain day, and the action is not called because the plaintiff has failed to deposit the "billet" with the Greffier, as required by Rule 6/6(1), then the action is deemed to be "discontinued" for the purpose of Rule 6/5. It is not for the defendant to conjecture whether the absence of the action from the "Table" is due to an accidental omission or a deliberate action on the part of the plaintiff. He has been summoned to appear, but the action is not listed on the "Table" and the case against him is not called. So far as he is concerned, the action against him has been discontinued." 34. In our judgment, the natural interpretation of that passage is that the whole action against the defendant has ended, albeit without prejudice to the plaintiff's right to recommence. If the action has been discontinued, it seems most likely that any ex parte injunctions contained in the Order of Justice have lapsed. 35. This is consistent with the general practice of the Court. An ex parte injunction is an exceptional order. Without hearing the defendant, the Court makes an order which restrains him from doing things which he would otherwise, usually lawfully, be able to do. Such orders must be closely monitored and controlled by the Court. Such monitoring and control takes place at the first tabling of the action. The defendant is then entitled to appear. The invariable practice is that, if the plaintiff wishes the interim injunction which was granted ex parte to continue, he asks the Inferior Number to continue it. The defendant can argue the point. If continued, the injunctions then take their force from the order of the Inferior Number rather than from the Order of Justice signed by the Bailiff. 36. In its effect, this is not wholly different from the practice which we understand to exist in England, where ex parte injunctions are granted only for a specified period, so that the plaintiff has to return to the Court if he requires an extension. 37. In essence, the Order of Justice is the starting mechanism for proceedings. The Bailiff has power to grant an ex parte injunction. However, once the Order of Justice is served, the matter then falls within the jurisdiction of the Court and becomes part of the Court process governed by its Rules. The continuation or discharge of the injunction is then a question for the Court, i.e. the Inferior Number. The Order of Justice is subsumed into the procedure of the Court and has, in effect, become simply a pleading of the plaintiff's case. Rule 15/6(2) is to cover cases where the Order of Justice is signed but not served so that it is simply kept ready for use. For example, an Order of Justice may be prepared when a defendant is out of the island but is expected to return. The Order of Justice can then be held pending service upon his return. The Rule has been in existence in its present form for many years. It was formulated at a time when all Orders of Justice were signed by the Bailiff. Nowadays, it is only where ex parte interim relief is sought that an Order of Justice is required to be signed by the Bailiff. 38. The matter can be further tested by considering the possible consequences if Mr. Sinel is correct. It would, in theory, be possible for a plaintiff to serve an Order of Justice but then never table the action. Mr. Sinel inclined to the view that an Order of Justice and its accompanying injunctions remained in force because of Rule 15/6(2) even upon discontinuance by failure to table. It would follow that even if the plaintiff never re-served or re-tabled the proceedings, the defendant would be enjoined on an ex parte basis for up to a year, and this despite the fact that the action had been discontinued. This would seem

to be a very undesirable state of affairs. 39. As a fall-back position, Mr. Sinel was willing to accept that the injunctions contained in an Order of Justice might lapse upon discontinuance through non tabling, but could be reconstituted upon re-service with a new return date. This envisages the possibility of ex parte injunctions being discharged and re-imposed without any intervention on the part of the Bailiff or the Court. This could take place on more than one occasion if the plaintiff repeatedly failed to table after service. This again would be an extremely undesirable state of affairs. Furthermore, it would be inconsistent with Advocate Sinel's primary contention that an Order of Justice has full force and effect in accordance with its terms for up to one year. 40. The Court's procedures must ensure that ex parte injunctions are not left in force for long periods without supervision on the part of the Court and are not capable of being discharged and re-imposed without the intervention of the Court. In our judgment, an Order of Justice containing an ex parte injunction has a self-standing existence only for so long as the procedure for bringing the matter before the Court has not yet started. Upon service, that process commences. If the matter is tabled, it is for the Inferior Number to determine whether the injunction should be continued or discharged. If the matter is not tabled, the action as a whole is discontinued and the Order of Justice has no continuing existence. It has become subsumed in the process of the Court which has been discontinued. The plaintiff must obtain a new Order of Justice from the Bailiff if he wishes to maintain his claim against the defendant and re-impose the injunctions. It follows that, in this case, assuming valid service of the second Order of Justice on the defendants, the proceedings as a whole were discontinued by the failure of the Plaintiff to table them for 21st January. It was not open to the Plaintiff to re-serve the original Order of Justice. A new Order of Justice signed by the Bailiff had to be obtained. The second Order of Justice was validly served on the parties cited. The proceedings against them were discontinued by the failure to table on 21st July and the injunctions against them lapsed. The conduct of the parties

41. Both sides were anxious to submit that they had behaved reasonably and that it was the other side which had been unreasonable. We were taken in detail through the 'without prejudice' correspondence covering January to March, both sides having agreed to this course of action. It is to be recalled that, on 12th January, the injunctions against the personal assets of the defendants were discharged in the English proceedings and replaced by undertakings limited to the assets of Alburgh, which were said to be partnership assets. Over three months later, the Jersey injunctions have not been amended or replaced by undertakings to reflect that occurrence. This is a highly unsatisfactory state of affairs. 42. We do not think it necessary to lengthen this judgment by going through the correspondence in detail. Suffice it to say that the correspondence gives us an impression of two parties speaking, but not listening, to each other. The Plaintiff's advocates wrote on 20th January indicating that, in the light of the new English order, the parties should be able to agree some formula for safeguarding the partnership assets. On 24th January, the Plaintiff's advocates wrote again asking for proposals from the defendants to give an undertaking which would enable the injunctions to be discharged. They wrote again to like effect on 4th February. During this period, the defendants were writing letters taking the

two procedural points which have been the subject of this summons. Furthermore, they were contending that, in the light of the fact that the English injunctions had been discharged, it was an abuse of process for the Plaintiff to maintain them (or seek to reimpose them by re-service) in Jersey. On 1st February, Advocate Michel wrote that the Jersey proceedings should be discontinued with the injunctions withdrawn and an order for costs in favour of the defendants. On 8th February, Advocate Michel offered undertakings in the same form as in the English proceedings, subject to an order for indemnity costs in his clients' favour. That offer was withdrawn on 14th February when no response had been received from Advocate Sinel. On 2nd March, Advocate Sinel produced a draft consent order which contained an undertaking on the part of the defendants and would discharge the injunctions. The undertaking did not mirror the undertakings given by the defendants in the English proceedings although Advocate Sinel assured us that its effect would have been much the same. The draft order provided that the costs of the second Jersey proceedings would be treated as costs in the cause of the second English proceedings. Advocate Michel's response seemed to accept that the terms of the undertaking were broadly acceptable but there remained a dispute as to costs. We have not been informed as to what, if any, negotiations took place thereafter. One suspects that both parties had by then become entrenched. 43. The Court is of the view that it is a matter of regret that costs have been incurred in hearing this summons. Before the Court, both parties accepted that the partnership assets in Jersey should be safeguarded, pending resolution of the English proceedings, and that the injunctions in respect of the personal assets of the defendants should be discharged; in other words, the undertakings in the English proceedings should be replicated in the Jersey proceedings either by amended injunctions or by way of undertakings, it matters not which. It is clear to the Court that, following the English order of 12th January, discharging the injunctions, it should have been a simple matter to modify the Jersey orders in similar fashion. The injunctions in respect of personal assets could have been discharged leaving only an injunction dealing with the assets and shares in Alburgh in the same terms as the undertakings given in England. Alternatively, undertakings in those terms could have been given and the injunctions discharged altogether. It is clear that the parties were not able to agree on who should pay the costs of the second action to the date of any such modification, but had this modification been agreed - as it should have been - on or about 28th January, the costs incurred in relation to the second proceedings would have been minimal. In default of agreement between the parties, the Court could have been asked to rule on the question of costs alone. 44. Looking at the matter broadly, the Court considers that the plaintiff and the defendants are both to blame for the sorry situation which has now come to pass. The Plaintiff seems to have considered that it was up to the defendants to come forward with satisfactory undertakings. However, it was the Plaintiff who had obtained interim injunctions from the Court, which he now knew to be too wide, in that it had been ruled in England that injunctions could not be maintained in respect of the defendants' personal assets. In our judgment, when a plaintiff has obtained an injunction which he discovers to be wider than is necessary, it is incumbent upon him to return to the Court in order to

explain that the order is too wide and seek a variation. It is the plaintiff who has set the wheels of the Court in motion and has invited the Court to exercise the exceptional remedy of granting an ex parte interim injunction. It is not right for a plaintiff who knows that an injunction is in terms which are wider than is necessary, to sit back and wait for the defendant to come forward with proposals for a modification. It is his responsibility to ensure that the exceptional remedy of an injunction is not granted in wider terms than is necessary. We do not think it reasonable for the Plaintiff to have taken no steps in this regard for over three months, given the lack of progress in securing satisfactory alternative measures, such as undertakings, from the defendants. Furthermore, the Plaintiff has lost the procedural arguments. It would have been a straightforward matter for the Plaintiff to accept these arguments at an early stage, issue a new Order of Justice with amended injunctions, signed by the Bailiff, and arrange for service and tabling in the usual way. 45. We also find the defendants to be at fault. They became so convinced that the Plaintiff had gone wrong procedurally that they lost sight of the bigger picture. They would have been far better advised to overlook the technical deficiencies in the Plaintiff's position and to agree at an early stage to provide undertakings or agree a variation in the injunctions to reflect the exact form of undertaking given in the English proceedings. As has been seen, they were willing to offer such undertakings for a week in February but only on the basis that the Plaintiff pay indemnity costs. In any event, the offer was withdrawn, (in our judgment, prematurely) after a week. Although the defendants have been successful on the procedural points which they have raised, we think, as will be seen from the conclusion of this judgment, that they are no better off than they would have been if they had agreed an appropriate variation in January. On the contrary, they are worse off, in that they are left with injunctions in a wide form and unnecessary costs have been incurred. Conclusions and the practical consequences 46. We have ruled that the second Order of Justice was never validly served on the defendants. So far as the defendants are concerned, the tabling issue falls away as it can only arise following valid service. The Plaintiff therefore holds the second Order of Justice, which continues to exist, and it would technically be open to the Plaintiff now to seek leave to serve that Order of Justice out of the jurisdiction on the defendants and to re-commence the action following proper service. However, the second Order of Justice was validly served on the parties cited. The action against them was discontinued by the failure to table on 21st January. The injunctions against the parties cited contained in the second Order of Justice therefore lapsed. 47. If we are wrong on the service issue, the second action was discontinued against the defendants as well as the parties cited by reason of the failure to table for 21st January. In those circumstances, the second Order of Justice has no continuing existence for the reasons which we have given. The Plaintiff would therefore have to obtain a new Order of Justice from the Bailiff or Deputy Bailiff if he wished to recommence his claim against the defendants. 48. In our judgment, it would be an abuse of process for the Plaintiff to seek now to re-serve the second Order of Justice in its present form in the knowledge that the injunctions contained in it are wider than is reasonable (in that they freeze the personal assets of the defendants) and that a new Order of Justice will in any

event be required for any relief against the parties cited. The correct course would be for the Plaintiff to issue a new Order of Justice with injunctions drafted so as to reflect those which are now contained in the English undertakings and no more. The Plaintiff would have to apply to serve that new Order of Justice out of the jurisdiction. We see no reason why that application should not be made at the same time to the Bailiff or Deputy Bailiff at time of presentation of the Order of Justice (duly supported by an affidavit complying with Rule 9), nor why an application should not be made at the same time for substituted service of the proceedings on Crills. 49. In the meantime, because there has been no valid service of the second Order of Justice, the injunctions against the defendants in the first proceedings continue in effect, pursuant to the Act of the Royal Court 12th January. These are, of course, in the same wide terms as are presently contained in the second Order of Justice and therefore freeze the personal assets of the defendants. Should the Plaintiff delay unreasonably in coming forward with modified injunctions as described above, we see no reason why the defendants should not apply to the Court to vary the Act of 12th January by discharging the injunctions in the first proceedings. In the absence of any new injunctions, this would result in all the assets in Jersey being free of restraint, so far as the proceedings in Jersey are concerned. Authorities *Morris -v- States of Jersey* (1994) JLR N.3; (2 nd June, 1994) Jersey Unreported. Royal Court Rules (1993), as amended: Rules 5/4(a); 6/7(a); 5/10(1); 6/6; 15/6(2). Service of Process (Jersey) Rules 1994: Rules 5, 7, 9, 10, 16. Service of Process and Taking of Evidence (Jersey) Law, 1960: Article.2. *Racz -v- Perrier & Labesse* (1979) JJ151. Page Last Updated: 02 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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