[HIGH COURT OF AUSTRALIA.]

THOMAS A. EDISON LIMITED . . . PLAINTIFFS;

AND

BULLOCK . . . . . DEFENDANT.

H. C. OF A. 1912.

MELBOURNE, *Oct.* 28, 31.

Isaacs J.

Practice—Interlocutory injunction—Order made ex parte—Duty of full disclosure—Dissolution of injunction.

It is the duty of a party asking for an interlocutory injunction *ex parte* to bring before the Court all facts material to the determination of his right to that injunction, and omission to bring any material facts before the Court is a ground for dissolving an injunction so obtained.

MOTION to dissolve an interlocutory injunction.

The facts are sufficiently set out in the judgment hereunder.

J. R. Macfarlan, for the defendant, in support of the motion.

Mann, for the plaintiffs, to oppose.

[Counsel referred to *Boyce* v. *Gill* (1); *Wimbledon Local Board* v. *Croydon Rural Sanitary Authority* (2).]

Cur. adv. vult.

October 31.

ISAACS J. read the following judgment:—This is a motion to dissolve an interlocutory injunction obtained by the plaintiffs from *Barton* J. on 16th September 1912 at Sydney, restraining the defendant from selling or offering for sale Edison phonographs, records and blanks at prices less than those licensed by the plaintiffs without their consent, and from including in his

(1) 64 L.T., 824. (2) 32 Ch. D., 421.

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offer for sale of Edison phonographs any horns or gramophones or other articles not listed to go with an Edison phonograph as a regular outfit, and from including in a sale or offer of Edison records or blanks other articles without giving the price of such phonograph records or blanks. The injunction was granted until the hearing of the suit or further order, and liberty was given to defendant to move to dissolve it. Notice by telegram was directed, the defendant trading in Adelaide.

The action was commenced on the day the injunction was obtained.

The only case presented to the learned Justice was that the plaintiffs were the owners of certain Commonwealth patents, and wholesale vendors of the patented articles; that the defendant, a retail vendor of such articles, had in April 1909 entered into an agreement with the plaintiffs by which, in clause 3, he had in effect undertaken not to sell under list price directly or indirectly, and not to include other goods except upon certain terms interpreted by the plaintiffs to be those mentioned in the order for injunction; that the defendant, notwithstanding, was proceeding and intended to sell his entire phonograph stock in violation of his agreement of April 1909, and that irreparable damage would result unless the intended sale were prevented.

The defendant's present application to dissolve the injunction is rested on two grounds: first, non-disclosure to *Barton* J. of material facts; and next, that no breach was committed or intended.

As to the first ground, it now appears, on uncontradicted evidence, that in February of this year the defendant, finding his cycle and motor trade increasing, sought and obtained from the plaintiffs on the 6th of that month permission to dispose of his entire phonograph stock of Edison goods. Conditions were attached, namely, that, if the sale were to be to an established dealer, the proposed purchaser should be approved by the plaintiffs—and in that case the price was stated to be immaterial to the plaintiffs; and that, if the sale were to be to any other party, that party must be willing to become an established dealer and must execute the plaintiffs' dealer's agreement.

Acting on this, the defendant on 7th and 10th September

advertised for tenders returnable on the 14th, for his entire phonograph stock, enumerating the number of each class of article, some being non-Edison goods.

Telegrams and letters have passed between the parties with reference to this advertisement and the proposed sale, and it is easy to see how a question might arise whether or not the defendant intended to do something outside the limits of the permission of 6th February, or outside the limits of the permission ultimately conceded by the later correspondence.

The defendant, in his second ground, contends that he was acting and intending to act entirely within those limits, while the plaintiffs insist that the reasonable inference to be drawn from the defendant's acts and statements was that there was a real danger of his overstepping those limits unless immediate action were taken.

But, however that may be, it is an entirely new case, and essentially different from that presented to my learned brother. He was not afforded the opportunity of considering the real circumstances, and of exercising his discretion upon them. The law in such a case is well established. There is a primary precept governing the administration of justice, that no man is to be condemned unheard; and therefore, as a general rule, no order should be made to the prejudice of a party unless he has the opportunity of being heard in defence. But instances occur where justice could not be done unless the subject matter of the suit were preserved, and, if that is in danger of destruction by one party, or if irremediable or serious damage be imminent, the other may come to the Court, and ask for its interposition even in the absence of his opponent, on the ground that delay would involve greater injustice than instant action. But, when he does so, and the Court is asked to disregard the usual requirement of hearing the other side, the party moving incurs a most serious responsibility.

Dalglish v. *Jarvie* (1), a case of high authority, establishes that it is the duty of a party asking for an injunction *ex parte* to bring under the notice of the Court all facts material to the determination of his right to that injunction, and it is no excuse

(1) 2 Mac. & G., 231.

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for him to say he was not aware of their importance. *Uberrima fides* is required, and the party inducing the Court to act in the absence of the other party, fails in his obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application. Unless that is done, the implied condition upon which the Court acts in forming its judgment is unfulfilled and the order so obtained must almost invariably fall. I add the word "almost" in deference to such an exceptional case as *Holden* v. *Waterlow* (1). The obligation is stated by *Turner* L.J. in that case (2) to be to "state their case fully and fairly," and so by *Sugden* L.C. in *Dease* v. *Plunkett* (3), where he said:—"The plaintiff had not fully and fairly disclosed the entire facts of the case." Lord *Cottenham* L.C., in *Brown* v. *Newall* (4), observes that the power to grant such an injunction should exist is indispensable, but, from the liability to injustice, must be exercised with caution. Then he says (5):—"The Court can have no ground upon which it can proceed, in granting an *ex parte* injunction, but a faithful statement of the case." The learned Lord Chancellor distinguishes between mis-statement, or suppression likely to influence the Court in acceding to the application, and that which is immaterial.

In the present instance the admitted circumstances are most material: no order could have been made had they been stated, without considering and weighing them, and therefore the order for injunction was improperly obtained. In *Clifton* v. *Robinson* (6), even forgetfulness of a material fact was not a sufficient excuse to prevent the injunction being dissolved. See also *Fuller* v. *Taylor* (7), before *Wood* V.C., where correspondence was not disclosed. *Boyce* v. *Gill* (8), cited by Mr. *Macfarlan*, is a recent instance where these principles were applied. Mr. *Mann* endeavoured to support it then upon the effect of the facts omitted; but that is not permissible, the law and reasons being fully stated by *Pepys* M.R. (afterwards Lord *Cottenham* L.C.) in

(1) 15 W.R., 139.
(2) 15 W.R., 139, at p. 140.
(3) Drury, 255, at p. 261.
(4) 2 My. & C., 558, at p. 570.
(5) 2 My. & C., 558, at p. 571.
(6) 16 Beav., 355.
(7) 32 L.J. Ch., 376.
(8) 64 L.T., 824.

Attorney-General v. *Mayor of Liverpool* (1). See also *Maclaren* v. *Stainton* (2). In the ordinary course of events, therefore, the injunction of 16th September should be dissolved, and with costs.

This would not prevent the plaintiffs from applying *de novo* for an injunction upon the merits as they now appear (*per* Lord *Cottenham* L.C., in *Fitch* v. *Rochfort* (3)).

The parties, however, have agreed to treat this motion as the trial of the action, a very proper course to take, because the only object in commencing proceedings was to stop the anticipated sale by tender and acceptance in supposed derogation of patent and contractual rights, and no further evidence is reasonably possible.

In this aspect I have to consider upon the materials before me, whether the defendant intended or intends to act in breach of the permission actually contained in the correspondence read as a whole, not merely whether he intended or intends to act consistently with his understanding of it.

Bringing the matter to a point, I have to consider whether the defendant intended or intends, unless restrained, to transfer his Edison goods by acceptance of tender, without first obtaining the plaintiffs' approval of the proposed purchaser, and, in case the proposed purchaser is an outside person, without that person becoming an established dealer. The defendant himself is not in Australia, but his manager has sworn that no such intention existed or exists, and he has not been cross-examined, and I have no evidence to the contrary, or inconsistent with the statement.

Though a sworn declaration of intention is not by any means decisive where there are circumstances pointing differently, there is nothing here which would lead me to disbelieve it.

Learned counsel for the defendant has further undertaken that his client will not complete any sale, or actually transfer any goods being patented articles, until the proposed purchaser has been approved by the plaintiffs, and, in the case of such proposed purchaser not being already an established dealer, until that person has entered into a dealer's agreement with the plaintiffs.

(1) 1 My. & C., 171, at p. 210. (2) 16 Beav., 279, at p. 290.
(3) 18 L.J. Ch., 458, at p. 460.

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Learned counsel for the plaintiffs has for his clients intimated that approval will not be arbitrarily withheld, and that no arbitrary refusal will be given to accept a proposed purchaser as an established dealer.

I find as a fact that no act has been done, threatened, or intended in violation of the plaintiffs' rights, and the action must be dismissed. As to the costs: I think the defendant, though not actually intending any breach of understanding, was not as explicit as to conditions of sale as he might have been either in the advertisement, or in his replies when his methods of proceeding were challenged. On the other hand, I think the plaintiffs, though not unnaturally apprehensive, were somewhat precipitate. The mutual agreement to treat this as the trial of the action has, however, saved future trouble and expense on both sides, and made this application serve the larger purpose of terminating the whole litigation at a stroke, thereby absorbing the minor object of merely dissolving the injunction, which falls with the rest.

And so, upon the whole, I think justice is best served, and perhaps friendlier relations promoted, by directing judgment to be entered for defendant without costs.

Judgment for the defendant.

Solicitors, for the plaintiffs, *Lynch & McDonald* for *Pigott & Stinson*, Sydney.

Solicitors, for the defendant, *Blake & Riggall* for *Stephen, Jaques & Stephen*, Sydney.

B. L.