PARTIES:	JAMES HUGH MALCOLM TAYLOR AND ROBYN GRACE VINCENT v DIAMAND & ZIKOS DEVELOPMENTS PTY LTD ACN 009 652 439
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	Appeal From Supreme Court Exercising Territory Jurisdiction
FILE NO:	AP16 OF 1996
DELIVERED:	20 June 1997
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JUDGMENT OF:	Martin CJ, Angel and Priestley JJ

CATCHWORDS:

Appeal and new trial - Interlocutory injunction - Mareva injunction - whether sufficient evidence to satisfy risk that assets will be dissipated - Appeal allowed

Federal Court of Australia Act (Cth)
Trade Practices Act (Cth)
Supreme Court Act (NT)

Derby & Co Ltd v Weldon (No 1) [1990] Ch 48 Applied
Jackson v Sterling Industries (1987) 162 CLR 612 Applied
Mitchell v Saengjan (1994) 117 FLR 273 Applied
Ninemia Corporation v Trave G.mb H [1983] 1 WLR 1412 Applied
Patterson v BTR Engineering Australia Ltd (1989) 18 NSWLR 319 Applied
Riley McKay Pty Ltd v Riley [1982] 1 NSWLR 264 Applied
Third Chandris Shipping Corp v Unimarine SA [1979] QB 645 Applied
Zafiropoulos v Registrar-General (1980) 24 SASR 133 Applied
Z Ltd v A-Z [1982] QB 558 Applied
American Cyanamid [1975] AC 396 considered

REPRESENTATION:

Counsel:

Appellant:	S R Southwood, M F Michaels
Respondent:	M P Spargo

Solicitors:

Appellant:	Clayton Utz
Respondent:	Close & Carter

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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. AP16 of 1996

BETWEEN:

JAMES HUGH MALCOLM TAYLOR AND ROBYN GRACE VINCENT
Applicants

AND:

DIAMAND & ZIKOS DEVELOPMENTS PTY LTD ACN 009 652 439
Respondent

CORAM: MARTIN CJ, ANGEL and PRIESTLY JJ

REASONS FOR JUDGMENT

(Delivered 20 June 1997)

THE COURT:

This is an application for leave to appeal from an order of Kearney J made on 11 December 1996 dismissing an application by the applicants for a Mareva injunction.

By their summons dated 20 November 1996 the applicants sought the following relief:

"1.1 until further order, the defendant, whether by itself, or its servants or agents or otherwise, be restrained from selling, transferring, mortgaging, encumbering or otherwise dealing with or disposing of its interest in the land described in the Schedule;

1.2 until further order, the defendant, whether by itself, its servants or agents otherwise, be restrained from selling, transferring, mortgaging, encumbering or otherwise dealing with or disposing of its assets within the Northern Territory of Australia otherwise than for the payment of any debts bona fide incurred, for defraying legal expenses that are bona fide incurred in defending these proceedings or for paying any insurance, mortgage payments, rates, taxes and other statutory charges properly payable in respect of its assets;

1.3 until further order, the defendant whether by itself, its servants or agents otherwise, be restrained from removing any of its assets from the Northern Territory of Australia."

That summons originally came before the learned judge on an ex parte application on 20 November 1996 when he made an order in the following terms.

"1. Upon the plaintiffs, by their counsel, giving the usual undertaking as to damages:-

1.1 until further order, the defendant, whether by itself, its servants or agents or otherwise, be restrained from selling, transferring, mortgaging, encumbering or otherwise dealing with or disposing of its interest in the land described in the schedule;

1.2 until further order, the defendant, whether by itself, its servants or agents or otherwise, be restrained from selling, transferring, mortgaging, encumbering or otherwise dealing with or disposing of its assets within the Northern Territory of Australia otherwise than for the payment of any debts bona fide incurred, for defraying legal expenses that are bona fide incurred in defending these proceedings or for paying any insurance, mortgage

payments, rates, taxes and other statutory charges properly payable in respect of its assets;

1.3 until further order, the defendant whether by itself, its servants or agents or otherwise, be restrained from removing any of its assets from the Northern Territory of Australia;

2. there by liberty for all parties to apply on short notice inter alia to vary or set aside these orders;

3. the summons and supporting affidavits of James Hugh Vincent Taylor and Michael Patrick North both sworn on 20 November 1996 be served together with this order, on the defendant within twenty four hours;

4. the further hearing of this Summons be adjourned to 28 November 1996 at 10.15am;

5. the costs of this application be reserved; and

6. a transcript of the proceeding today be made and placed on the Court file.".

Mareva injunctions are invariably sought ex parte and for obvious reasons. As Mustill J said in *Third Chandris Shipping Corp v Unimarine* SA [1979] QB 645 at 653D:

> "The whole point of the Mareva jurisdiction is that the plaintiff proceeds by stealth, so as to pre-empt any action by the defendant to remove his assets ... .".

Unlike ordinary injunctions where the ordinary practice on an ex parte application is to make an order until a day certain, usually the day set for an inter partes hearing, Mareva injunctions when ordered on an ex parte basis should be until further order: see *Z Ltd v A-Z* [1982] QB 558 (CA) at 587F-

588D, where Kerr LJ suggested that the practice of invariably inserting a return date in the ex parte order should be avoided:

> "...while it must of course always be clear that it is open to the defendant, or any third party affected by the order, to apply to have it varied or discharged on short notice, and even ex parte in extreme cases, reliance on such means of adjustment should only be a secondary consideration. The primary consideration should be at the stage of the ex parte application, and what then appears to be the appropriate order.".

The normal practice with respect to ordinary ex parte applications for injunction is stated in the Full Court of South Australia decision of *Zafiropoulos v Registrar-General* (1980) 24 SASR 133. As regards ex parte Mareva injunctions and the practice with respect to inter partes hearings the Court of Appeal said in *Ninemia Corporation v Trave G.mb H* [1983] 1 WLR 1412 at 1425-6:

> "... the judgment correctly stated that 'the judge who hears the proceedings inter partes must decide on all the evidence laid before him' and this clearly is what the judge did in this case. Whether the inter partes hearing takes the form of an application by the defendants to discharge the injunction, as is usual in the Commercial Court, or whether - as in the Chancery Division - the injunction is only granted for a limited time and there is then an inter partes hearing as to whether or not it should be continued, the judge must consider the whole of the evidence as it then stands in deciding whether to maintain or continue, or to discharge or vary, the order previously made.".

When the summons came on for hearing before Kearney J on 28 November 1996 the ex parte order was still on foot. His Honour appears to

have considered the summons de novo. His Honour clearly decided the matter on the evidence then before him and dismissed the applicants' summons.

The inter partes hearing before the learned judge took some three days in which time Mr Zikos, a director of the respondent company was cross-examined on his affidavit before the judge. As to this we agree with the remarks of Parker LJ (with which May and Nicholls LJJ expressly agreed) in *Derby & Co Ltd v Weldon (No 1)* [1990] Ch 48 at 57, 58. We agree that Mareva hearings should be counted in hours not days, that they "should be decided on comparatively brief evidence" and that "they will take hours not days and that appeals will be rare". Other than in special compelling circumstances we are of the view that it is undesirable for a judge hearing an interlocutory application for an injunction (including a Mareva injunction) to hear oral evidence or cross-examination on affidavits.

The respondent is a building and development company which has operated in Darwin for a number of years. The respondent developed and constructed a block of units at Cullen Bay known as "The Anchorage". All of the units in The Anchorage are sold but for four which the respondent retains currently as unencumbered units. The applicants purchased a unit on the top floor of The Anchorage. A dispute has arisen between the applicants and the respondent, inter alia, over the construction of a roof of a common walk way at the premises. The roof obscures the applicants' view of Mindil Beach. The applicants have commenced proceedings claiming inter alia damages for breach of contract and pursuant to the *Trade Practices Act*. The directors of

the respondent are also the sole directors and share holders of a company named Diamand and Zikos Holdings Pty Ltd ('the holding company'). Until a short time before the dispute between the applicants and the respondent development company arose the holding company had not operated as a development and construction company but rather had purchased and managed properties. The holding company proposes to construct a thirty five unit residential development on another block of land at Cullen Bay. There is no evidence before the Court as to the value of any property purchased or managed by the holding company or of the cost of development by the holding company for the proposed residential development at Cullen Bay. However given the size and location of the development it is probably some millions of dollars. The respondent development company currently owns eight units, four at The Anchorage development and another four at a location called Marina Crescent. The latter four units are subject to mortgage with Esanda Finance Corporation Ltd. According to Mr Zikos the eight units are valued at some two million dollars or thereabouts and no money is currently owing to Esanda Finance Corporation Ltd. The defendant development company currently owes $200,000-00 to the National Australia Bank. Mr Zikos, a director of both the respondent development company and the holding company said the respondent will be involved in the holding company's development, lending it the proceeds of sale of the units and acting as guarantor of the holding company for purchase and project finance. No details of the guarantee arrangements and as to whether security over the respondent development company's assets as part of those arrangements have been disclosed. In the course of his cross-examination Mr Zikos said that the

respondent development company would not be prejudiced in its arrangements with the holding company if one of the Marina Crescent units was withheld from sale.

The learned judge said he saw nothing in Mr Zikos' evidence to give rise to a concern that the respondent will dissipate its assets. His Honour said:

> " Applying the test expressed by Lawton LJ in *Third Chandris Shipping Corporation v Unimarine SA* (1979) QB 645 - the capacity of an honest man to spot a likely defaulter - I see nothing in Mr Zikos' evidence to give rise to a concern that the defendant will dissipate its assets. In reaching that conclusion I should record that I am well aware of the abuse of company structures in the Territory designed to render valueless the rights of persons who enter into arrangements with such companies.
>
> I accept that the draft minutes of order handed up by Mr Southwood on 6 December minimise any prejudice to the defendant. That, however, does not address the question of whether a Mareva injunction should issue in the first place. It is for the plaintiffs to show that a Mareva injunction should be granted.
>
> It is not the function of the Court on an application for a Mareva injunction, to resolve conflicts in the affidavit evidence. At the end of the day, for present purposes, the contents of the telephone conversation North/Zikos remain in dispute. It is a fact that the defendant presently has substantial assets in the form of units. The plaintiff's claim is quantified in par45 of Mr Taylor's affidavit of 20 November at 'some tens of thousands of dollars at least'; the defendant's current assets are far in excess of that.
>
> While the existence of a prima facie case against the defendant is not in issue, I am not satisfied on the facts of this case that a sufficient risk has been shown that the defendant will dissipate its assets such as to give rise to a danger that the plaintiffs, if successful, will not be able to have their judgment satisfied. Accordingly, I do not consider that it is appropriate on the facts of this case to grant a Mareva injunction. The plaintiffs' application of 20 November is refused.".

His Honour had previously stated what a plaintiff had to establish in order to justify the Court granting relief by way of a Mareva injunction. Having referred to *Patterson v BTR Engineering Aust Ltd* (1989) 18 NSWLR 319 at 321-2 and *Mitchell v Saengjan* (1994) 117 FLR 273, his Honour said:

> " In the present case the danger alleged is that the defendant may dissipate its present assets. The Court in *Patterson* (supra) considered that it was undesirable to formulate a precise definition of the standard of proof of this danger, and it was not appropriate to apply as the test that the Court only intervenes if there is 'more than a usual likelihood' that the danger exists. I consider that it must be shown that the danger is sufficiently substantial to warrant the injunction; there must be a real risk of a dissipation of assets by the defendant such that there is a real danger that the plaintiffs, if successful, would not be able to have their judgment satisfied. In saying that, I am not formulating some general test; it is for the Court in the particular circumstances of each case to decide whether sufficient danger has been shown.
>
> It is common ground between the parties that the two requirements identified in *Patterson's* case (supra) (p6) are the requirements which the plaintiffs must satisfy in this case: a prima facie case against the defendant, and a danger that the defendant will so dispose of its assets that there is a danger that the plaintiffs, if successful, could not have their judgment satisfied. I consider that the evidence relating to both requirements must be considered as a whole, in deciding whether the injunction sought should be granted.
>
> The defendant by its counsel Mr Spargo rightly conceded that in the light of Mr Taylor's affidavit of 20 November and its annexures, the plaintiffs have established a prima facie case for the purposes of this application. I consider that this is not one of those exceptional cases where the danger of the dissipation of assets can be inferred from the existence of the prima facie case.".

Neither party before this Court suggesting that this was other than an appropriate approach, it is unnecessary for this Court to express any concluded

view as to what a plaintiff must establish in order to obtain a grant of relief by way of Mareva injunction. As Rogers AJA said in *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 327, one of the hallmarks of the Mareva injunction has been its adaptability and it is still the subject of development on a case by case basis. ".... it is, accordingly undesirable to undertake the formulation of general tests or boundary lines which might, in their very generality, preclude or distort the useful development of this new remedy": see *Riley McKay Pty Ltd v Riley* [1982] 1 NSWLR 264 at 276. The two questions referred to in the cases namely whether a plaintiff has made out a prima facie case against a defendant on its claim for substantive monetary relief, as it has sometimes been put in the cases, and secondly whether a plaintiff has shown a threat that assets would be dissipated by a defendant so as to defeat the plaintiffs' victory if he ultimately wins his monetary claim are but aspects of the ultimate question, namely whether in all the circumstances of the application for Mareva relief it is "just and convenient" to grant the injunction: see s69(1) of the *Supreme Court Act* (NT), *Ninemia Corporation v Trave G.mb H* (supra) at 1426, and *Jackson v Sterling Industries* (1987) 162 CLR 612 at 623 where Deane J grounds Mareva relief in "... the armory of a court of law and equity to prevent the abuse or frustration of its process ...", and says the power of the Federal Court to grant such relief is comprehended by s23 of the *Federal Court of Australia Act*.

It has been said that the approach to interlocutory injunctions called for in the decision in *American Cyanamid* [1975] AC 396 has as such no application to the granting or refusal of Mareva injunctions which, it has been said, proceed on principles which are quite different from those applicable to other interlocutory injunctions: see *Polly Peck International plc v Nadir (No 1)* [1992] 4 All ER 769 at 786; *Chitel v Rothbart* (1982) 141 DLR (3d) 268, 39 OR (2d) 513; *Canadian Pacific Airlines Ltd v Hind* (1981) 122 DLR (3d) 498 at 503, 32 OR (2d) 591 at 596. With all due respect, in our view the preferable and more flexible approach is that taken by Parker LJ (with the express concurrence of May LJ and Nicholls LJJ) in *Derby & Co Ltd v Weldon (No 1)* [1990] 1 Ch 48 at 57-58 when he said:

> "There are in essence only three issues; (i) has the plaintiff a good arguable case; (ii) has the plaintiff satisfied the court that there are assets within and, where an extraterritorial order is sought, without the jurisdiction; and (iii) is there a real risk of dissipation or secretion of assets so as to render any judgment which the plaintiff may obtain nugatory. Such matters should be decided on comparatively brief evidence. In *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 407-408, Lord Diplock, dealing in that case with an application for an interlocutory injunction, said:
>
> > 'It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to
> >
> > decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages upon the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz. abstaining from expressing any opinion upon the merits of the case until the hearing': *Wakefield v Duke of Buddleugh* (1865) 12 LT 628, 629.'

> In my view the difference between an application for an ordinary injunction and a Mareva lies only in this, that in the former case the plaintiff need only establish that there is a serious question to be tried, whereas in the latter the test is said to be whether the plaintiff shows a good arguable case. This difference, which is incapable of definition, does not however affect the applicability of Lord Diplock's observations to Mareva cases.
>
> In the present case this seems to have been forgotten. ....'.

As has been said, ultimately it must not be forgotten that although on an application for Mareva relief it is necessary to lead evidence on an issue which will not arise at trial, that issue being whether there is a threat of abuse or frustration of the court's process, the ultimate question is always the same, namely whether it is just and convenient to grant the relief sought. As the court said in *Riley McKay* (supra) at 276:

> " A number of matters must be established in order to entitle the plaintiff to obtain a "Mareva" injunction. As with other interlocutory injunctions, the court will be concerned to evaluate whether the plaintiff has made out a sufficiently strong case to justify the grant of the interlocutory remedy; the court will be concerned to evaluate the balance of convenience; and the court will ultimately be concerned with general discretionary considerations. These three aspects are inter-related and overlap to a greater or lesser extent - particularly the first and the second.
>
> As has been made clear by judgments in England, the jurisdiction is still the subject of development on a case by case basis. It is, accordingly, undesirable to undertake the formulation of general tests or boundary-lines which might, in their very generality, preclude or distort the useful development of this new remedy.".

Although the court's function is not to make findings of fact, nevertheless it is to take into account the apparent strength or weakness of the respective

cases in order to decide whether a plaintiff's principle claim for monetary relief is sufficiently strong on the merits. So too, when considering whether a plaintiff is sufficiently at risk to warrant relief by way of Mareva injunction. The task includes assessing the apparent plausibility of statements in affidavits and, if necessary and warranted, drawing adverse inferences. The court is entitled to look at the credibility of affidavit evidence just as on an application for summary judgment: see *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341; *National Westminster Bank v Daniel* [1995] 1 WLR 1453. The function of the judge hearing an application for Mareva relief upon affidavits is to make a realistic assessment of the merits.

Spry correctly states the position in the 4th edition of his work, Equitable Remedies (1990) at p509:

> " It must be stressed that a Mareva injunction is a discretionary remedy and that the decision whether or not relief should be granted depends on all the circumstances of the relevant case.", citing, generally, *Z Ltd v A-Z* [1982] QB 558 and *CBS United Kingdom Ltd v Lambert* [1983] Ch 37.

In the present case there was a conflict in the affidavit evidence of Mr Zikos and a Mr North. Mr North swore an affidavit on 20 November 1996 deposing to a telephone conversation with Mr Zikos. It is desirable to set out that evidence in full:

> "1. On or about 12 noon on 18 November 1996 I was speaking by telephone to George Zikos, a director of the Defendant.
>
> 2. I know that George Zikos is a principal of the developer, the

Defendant, of the condominium developments at Cullen Bay known as the "Anchorage" and "Baywatch".

3. I, jointly with my wife, have purchased a unit from the Defendant in the Anchorage and have had contact with both George Zikos and another director of the Defendant Chris Diamand, regarding repair of defects to the unit.

4. The conversation with George Zikos initially concerned repairs to my unit.

5. George Zikos then said words to the effect to me:

> 'We want you to get your name off the list from the class action from Halfpennys'.

George Zikos mentioned about five names including Flowers, GWR and Norths that I recall.

6. I then said words to the effect:

> 'I haven't seen the document. I don't know what you're talking about. Judy [my wife] is on the board of the Body Corporate, but I don't attend the meetings'.

7. George Zikos continued with words to the effect:

> 'If they [the Body Corporate] had approached us without going through lawyers we may have been prepared to negotiate something with them.'

and

> 'We are not going to oppose or argue with the claims from them because at the end of the day we don't have any money. Diamand and Zikos have disposed of all its assets. It doesn't have any money in its bank account.'

8. I then said words to the effect:

> 'What about the 4 flats you have in the Anchorage?'

George Zikos replied:

> ‘They are fully mortgaged to the National Bank. They are no longer in our names. We no longer have any assets.’

9. George Zikos then asked:

> ‘Is James Taylor the one who is stirring this up? A work mate of his has put his name down for a unit in the adjoining Baywatch complex so they can’t be too concerned about the units’.

I replied with words to the effect that I did not know the answer to his question.”.

Mr Zikos swore an affidavit on 26 November 1996 and deposed, inter alia, as follows:

> “3. On the 18th November 1996 I returned the telephone calls of Michael Patrick North after receiving messages from my bookkeeper that he had telephoned me on two occasions that morning.

4. The conversation with Michael Patrick North initially concerned a subject of which I had no previous knowledge namely a dispute between him and the body corporate of the Anchorage Development at Cullen Bay concerning some wrought iron window and door security bars. Michael Patrick North began the conversation by saying words to the effect to me:

> 'The body corporate has asked me to remove the wrought iron security bars which I had erected to my unit after the purchase and I would like a letter from your company giving me permission to erect the same backdated to the time the company controlled the Body Corporate, as owner all (sic) the units'.

I did not give a positive response to Mr North's request for the back dated letter but said words to the effect:

> 'Since returning from our holiday in Greece Chris Diamandopoulos and myself have been actively involved in addressing concerns expressed by purchasers of units in the Anchorage Development and attending to claims made under the maintenance defects clauses in their contracts. We would like to meet with you to address any concerns that you have.'

5. I also informed Mr North that we would like to resolve any threatened class action by purchasers of units in the Anchorage Development. I did not and would not have mentioned the name of Halfpennys in connection with the class action because I have no knowledge of that firm being involved in such an action.

6. The conversation with Michael Patrick North concluded with he repeating his request that I supply him with a back dated letter. My impression, from the tone of his voice, was that he was disappointed that he did not receive a positive response to his request.

7. During the conversation with Mr North I did not make any reference to Diamand & Zikos Developments Pty Ltd having disposed of all its assets or having no money in its bank accounts or that the Directors did not have any money.".

Mr Zikos was cross-examined upon his affidavit. He said, amongst other things, that he had "no idea" what the threatened class action against the respondent was about. He said there was "no reason" why the holding company rather than the respondent development company was doing the new development. He gave some general evidence about purchasers making claims in relation to minor defects. He did not condescend to particulars.

Contrary to the learned judge's conclusion that he was not satisfied that Mr Zikos' evidence relating to the financial position of the respondent was such as to lead to legitimate concern as to dissipation, we are of the view that Mr Zikos' evidence leaves much to be desired and is unconvincing. Although it is plainly no function of this Court any more than the learned judge to make findings on disputed facts on an application such as this, this is not to say that the Court should not look critically at affidavit material: see *Eng Mee Yong v Letchumanan* (supra). The stated absence of any reason for the commencement of the new development by the holding company without participation by the respondent development company - save to provide loans and a guarantee, Mr Zikos' unsatisfactory and perfunctory evidence about remedying minor defects pursuant to a defect clause, when questioned about the class action he speaks of in his affidavit, the lack of any substantive evidence from the respondent as to its true asset/liability position, actual or prospective, the lack of any evidence about the number and magnitude of claims (if any), in addition to that of the applicants, which have been made against the respondent, the fact Mr Zikos referred to a class-action in his affidavit, and, that Mr Zikos, according to Mr North (who was not cross-

examined on his affidavit), had used the expression in the disputed phone call, all call for some explanation, and the absence of any satisfactory explanation leaves us with a distinct feeling of unease.

We think the learned judge erred in his evaluation of the affidavit material before him and of Mr Zikos' evidence (on which he based the exercise of his discretion). The learned judge said he was "not satisfied that what is said in that affidavit (of Mr Zikos) is such that it can be concluded that what Mr North said in his affidavit is more likely to be correct and preferable version of their conversation" and that "... at the end of the day, for present purposes, the contents of the telephone conversation North/Zikos remain in dispute".

We are of the view, with respect, that these statements overlook important aspects of this evidence and the issues. Mr Zikos says he used the expression "class-action" in the conversation. On the applicants' application for Mareva relief there was not only to be weighed in the scales the size of the applicants' claim - "some tens of thousands of dollars" - and the current assets of the respondent, on Mr Zikos' evidence some two million dollars worth, but the details and financial ramifications of the arrangement or proposed arrangement between the respondent development company and the holding company, including the financial ramifications and prospects of the holding company's new development, and the number and magnitude of claims against the respondent development company in respect of The Anchorage development which might well cause that company to divest itself of assets or so arrange its

affairs as to thwart any such claims. Significantly these matters were the very matters the respondent and Mr Zikos did not explain though given ample opportunity to do so. The learned judge does not appear to have considered the significance of these matters. The Anchorage development consisted of some twenty four units (the applicants had purchased Unit No 24) or more. For all the Court knows The Anchorage development may now be occupied by twenty or so people each with a claim for "some tens of thousands of dollars at least". We simply do not know but the absence of any evidence from the respondent addressing these issues counts for much.

We have reached the conclusion that a Mareva order should have been made, if not as broadly termed as that in the applicants' summons, at least in the restrictive terms sought in the draft Notice of Appeal, viz:

> "2. Unless otherwise agreed with the plaintiffs and until the conclusion of this proceeding the defendant, its servants and agents shall not transfer, sell, charge, assign, mortgage or encumber or otherwise dispose any interest or any part of any interest held by the defendant in Unit 019 entitlement 039 of 1000 being unit within Lot 5893 Town of Darwin plan UP 96/056 located at Paspaley Place, Cullen Bay in the Northern Territory nor shall the defendant, its servants and agents enter into any contract to transfer, sell, charge, assign, mortgage or encumber or otherwise dispose of the said interest or any part thereof."

The fact is that the Court simply does not know and has not been told

(a) the legal relationship and the financial ramifications

of such relationship as between the respondent development company and the holding company

(b) the number, nature and magnitude of any claims against the respondent - in particular with respect to The Anchorage development - the "class-action" referred to in the affidavit material.

Absent full disclosure by the defendant on these matters, it seems to us that as a matter of discretion and having regard to all the circumstances that the balance of convenience favours the granting of an order in terms as now sought by the applicants. The respondent can hereafter apply to discharge the order on new evidence which dispels any present unease. We think the respondent's failure to be forthcoming and to adduce evidence on the matter we have mentioned is good reason for exercising the Court's discretion against the respondent. The respondent's failure to explain these matters, when considered in conjunction with the circumstances that

(i) although a matter of conflicting evidence of Mr Zikos, the respondent is selling at least four of its eight units;

(ii) the respondent is using the proceeds of sale of units to finance the development to be made by the holding company;

(iii) any remaining assets will be used to guarantee finance being provided to the holding company;

(iv) no evidence has been led about the extent of finance required for or prospects of success of the project undertaken by the holding company;

(v) no prejudice will be suffered by the respondent if a Mareva injunction is granted

calls for an order to be made.

The whole of the circumstances give rise to a feeling of such unease that one may - and we do - infer a danger that the respondent may well take steps designed to ensure that its assets are no longer available or traceable if judgment on the applicants' claim is given against it; cf. *Mitchell v Saengjan* (supra) at 282, *Z Ltd v A-Z* (supra) at 585 F-G and the approach of Mustill J in *Third Chandris Shipping Corp v Unimarine SA* (supra) at 652, which was expressly approved by Gleeson CJ in *Patterson v BTR Engineering* (supra) at 325. We think we are entitled to draw that inference: *Commercial Union v Ferrecom Pty Ltd* (1991) 22 NSWLR 389 at 418, 419 (on appeal 176 CLR 332); *Allstate v ANZ Bank* (1996) 136 ALR 627 at 630, 631 and cases there cited, and see also *R v Beserick* (1993) 30 NSWLR 510 at 532.

We would grant leave to appeal, allow the appeal and make an order in terms sought in the draft Notice of Appeal. The applicants' should have their costs in this Court and below. There will be orders accordingly. Liberty to speak to the minutes before Angel J.
