Iraklis Roussos Nominees Pty Ltd & Anor v Romeso Pty Ltd & Ors [2003] NTSC 102

PARTIES:	IRAKLIS ROUSSOS NOMINEES P/L (ACN 009 600 631) as Trustee for the IRAKLIS ROUSSOS FAMILY TRUST and: IRAKLIS ROUSSOS V ROMESO P/L as Trustee for the ROMESO UNIT TRUST AND: NIGHTCLIFF BUILDERS (NT) P/L (ACN 056 395 861) as Trustee for the NIGHTCLIFF BUILDERS UNIT TRUST AND: LANKY P/L (ACN 051 314 624) as Trustee for the NICHOLAS MELLIOS FAMILY TRUST AND: C. MELLIOS NOMINEES P/L (ACN 009 610 100) as Trustee for the C. MELLIOS FAMILY TRUST AND: LATHER P/L (ACN 054 315 687) as Trustee for the HARALAMBOS MELLIOS FAMILY TRUST AND: CHRISTOS MELLIOS AND: NICHOLAS MELLIOS AND: HARALAMBOS MELLIOS
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY exercising Territory jurisdiction

FILE NO:	57/03 (20305783)
DELIVERED:	2 October 2003
HEARING DATES:	17 September 2003
JUDGMENT OF:	THOMAS J

REPRESENTATION:

Counsel:

Appellant:	G Clift
Respondent:	N Henwood

Solicitors:

Appellant:	De Silva Hebron
Respondent:	Cridlands

Judgment category classification:	C
Judgment ID Number:	tho200331
Number of pages:	34

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

Iraklis Roussos Nominees Pty Ltd & Anor v Romeso Pty Ltd & Ors [2003] NTSC 102
No. 57/03 (20305783)

BETWEEN:

IRAKLIS ROUSSOS NOMINEES P/L (ACN 009 600 631) as Trustee for the IRAKLIS ROUSSOS FAMILY TRUST
First Plaintiff

and:
IRAKLIS ROUSSOS
Second Plaintiff

AND:

ROMESO P/L as Trustee for the ROMESO UNIT TRUST
First Defendant

and:
NIGHTCLIFF BUILDERS (NT) P/L (ACN 056 395 861) as Trustee for the NIGHTCLIFF BUILDERS UNIT TRUST
Second Defendant

and:
LANKY P/L (ACN 051 314 624) as Trustee for the NICHOLAS MELLIOS FAMILY TRUST
Third Defendant

and:
C. MELLIOS NOMINEES P/L (ACN 009 610 100) as Trustee for the C. MELLIOS FAMILY TRUST
Fourth Defendant

and:
LATHER P/L (ACN 054 315 687) as Trustee for the HARALAMBOS MELLIOS FAMILY TRUST
Fifth Defendant

and:
CHRISTOS MELLIOS
Sixth Defendant

and:
NICHOLAS MELLIOS
Seventh Defendant

and:
HARALAMBOS MELLIOS
Eighth Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 2 October 2003)

[1] This is an application for an interlocutory injunction pursuant to s 14 of the Supreme Court Act and Rules 38 and 46 of the Supreme Court Rules.

[2] The injunctive relief is sought as a consequence of a dispute that has arisen between two families. The family of Mr Iraklis Roussos, who are the plaintiffs, and the Mellios family, who are the defendants.

[3] Both families have worked for many years in the building/construction industry in Darwin.

[4] Mr Roussos is the second plaintiff and the managing director of the first plaintiff. The first defendant is the trustee of the Romeso Unit Trust. The second defendant is the trustee of the Nightcliff Builders Unit Trust. The second defendant is not a party to the present proceedings.

[5] The first defendant, the Trustee, is effectively under the control of the first plaintiff together with the third, fourth and fifth defendants. They each hold equal shares in the first defendant. The second plaintiff and the sixth, seventh and eighth defendants are directors of the first defendant. The first plaintiff, third, fourth and fifth defendants, each hold one unit in the Romeso Unit Trust.

[6] Mr Roussos is a co-director in the first and second defendant companies with the sixth, seventh and eighth defendants.

[7] In about August 1999, Mr Roussos on behalf of the Roussos family and the sixth, seventh and eighth defendants on behalf of the Mellios family, incorporated the first defendant. The purpose for the incorporation was to develop land situated at Hidden Valley Road, Berrimah to operate as a caravan park to be known as the "Hidden Valley Tourist Park".

[8] On 23 September 1999, the first defendant was appointed trustee of the Romeso Unit Trust pursuant to a Deed of Settlement. Copy of the Deed of Settlement is Annexure "C" to the affidavit of Nicholas Mellios sworn 4 June 2003 and IR1 to the affidavit of Iraklis Roussos sworn 30 May 2003.

[9] Construction of the caravan park and accommodation for the Catholic Church commenced in or about September 1999. The plaintiffs' claim that the caravan park was completed in or about May 2000. The defendants' assert the caravan park was concluded in March 2000 and opened for business on 1 April 2000.

[10] It is agreed that at or about the time the Romeso Unit Trust was settled there was an agreement that the caravan park would be constructed by the Romeso Unit Trust with monies borrowed from the National Australia Bank.

[11] There is a dispute between the plaintiffs and the defendants as to arrangements in respect of any other borrowing and funding arrangements for the caravan park.

[12] It is agreed that from about March 2000 to April 2003, the caravan park did not show a profit. There were efforts made to sell the caravan park which had not been successful.

[13] It is agreed that on or about 1 April 2003, the first defendant entered into an agreement in writing to lease the caravan park to Mylville Pty Ltd for the rental of $178,909 per annum exclusive of GST. The defendants deny that this agreement was entered into without reference to the first and second plaintiffs as alleged.

[14] On 15 April 2003, the first defendant purported to give a notice to the first plaintiff pursuant to Clause 12 of the Romeso Unit Trust Deed (Exhibit D2 Annexure C) to compulsorily redeem the first plaintiff's unit in the Romeso Unit Trust for the sum of $1 (the first notice). The defendants claim this notice was given in accordance with the terms of the Romeso Unit Trust Deed.

[15] On 17 April 2003, the first defendant undertook to the Supreme Court of the Northern Territory that it would rescind the first notice.

[16] On 21 May 2003, the first defendant purported to give a notice to the first plaintiff, pursuant to Clause 12 of the Romeso Unit Trust Deed, to compulsorily redeem the first plaintiff's unit in the Romeso Unit Trust for the sum of $1. The defendants' claim that the notice was given in accordance with the terms of the Romeso Unit Trust Deed and was valid.

[17] The plaintiff's claim that in issuing the first and second notice and in otherwise purporting to rely on the same, the first defendant acted in breach of the provisions of the Romeso Unit Trust Deed.

[18] Mr Clift on behalf of the plaintiffs, summarised the claims made in the plaintiffs' Statement of Claim. These included misleading statements or inducements to the second plaintiff to offer his home for security for the loan from the National Australia Bank. There are allegations that the failure of the sixth and seventh defendants to offer their homes for security means the second plaintiff and his wife suffer extreme and increased exposure to the National Australia Bank, in the event that the Romeso Unit Trust does not meet its obligations to the lender. The Statement of Claim pleads a cause of action under the Trade Practices Act and the Consumer Affairs and Fair Trading Act. The plaintiffs' claim incompetence in the management of the Trust, breaches of the Trust Deed by the defendants and that in respect of those breaches, the Notice of Redemption is invalid. It is alleged the

valuation, on which the Notice of Redemption is based, is incompetently carried out and the consideration described for the redemption, purportedly in accordance with the Trust Deed, is plainly wrong and unjust. On the plaintiffs' case, the Notice of Redemption was issued in bad faith. The plaintiffs say it was issued as punishment for the plaintiffs' failure to make capital contributions to the Trust. Under the terms of the Trust Deed, specifically par 32, there was no power in the Trust Deed to require the making of any capital contribution.

[19] Mr Clift on behalf of the plaintiffs, submits that in the context of the application for interlocutory injunction, of particular importance is the issue of bad faith by the defendants in the issue of the Notice of Redemption, which it is maintained is in breach of the terms of the Trust Deed.

[20] The plaintiffs' allege a significant breach of the Trust Deed in terms of the demands for capital contribution and that they are being punished for a gross under valuation of the Hidden Valley Tourist Park.

[21] The particulars of the breach are as follows:

> "38. In issuing the first notice and the second notice and in otherwise purporting to rely on the same the First Defendant acted in breach of the provisions of the RUT trust deed.
>
> (a) The notices of the meetings of the unit holders preceding the issue of the first notice and the second notice were not given to the First Plaintiff in accordance with clauses 4.2 and 25.2 of the RUT trust deed.
>
> (b) The first notice and the second notice were not served on the First Plaintiff in accordance with clause 35 of the RUT trust deed.

(c) Before giving the first notice and the second notice the First Defendant had not caused the assets of the RUT fund to be valued in accordance with clause 7 of the RUT trust deed.

(d) The persons engaged by the First Defendant to value the assets of the RUT fund were not competent and/or did not undertake the valuation of the assets competently.

(e) The purchase price in respect of the First Plaintiff's unit in the RUT was not tendered.

39. By reason of the breaches of the Agreement referred to at paragraphs 21, 27, 28(a) above and by reason of the matters referred to at paragraphs 22, 23, 24 and 25 above the First and Second Plaintiffs have suffered loss and damage.

Particulars

(a) The house owned by the Second Plaintiff and his wife is at risk of being sold if the First Defendant does not meet its obligations to the National Australia Bank;

(b) The First Plaintiff has suffered loss by way of income it would have received if the caravan park was managed by a person with the appropriate experience and competence.

40. By reason of the breach of the RUT trust deed referred to at paragraphs 29 and 38 the First and/or Second Plaintiffs have suffered loss and damage.

Particulars

The First and Second Plaintiffs have incurred legal costs by reason of the resolution of the First, Third, Fourth, Fifth, Sixth, Seventh and Eighth Defendants to compulsorily redeem the unit in the First Defendant held by the First Plaintiff which resolution resulted in the issue and rescission of the first notice and the issue of the second notice.

41. Further and in the alternative, the First, Third, Fourth, Fifth, Sixth, Seventh and Eighth Defendants have acted contrary to the provisions of the Trade Practices Act and the CAFTA."

[22] In the Statement of Claim the plaintiffs are seeking orders for the taking of accounts, the tracing of monies and damages. Mr Clift, counsel for the plaintiffs on the application for the interlocutory injunction, advised the Court that an amended Statement of Claim would be filed to include an

application for orders in terms of the application for interlocutory injunction and for a permanent injunction.

[23] On 17 September 2003, the plaintiffs' filed an application for interlocutory injunction seeking the following orders:

> "1. That until further order the First, Third, Fourth, Fifth, Sixth, Seventh and Eighth Defendants be restrained from:-
>
> (a) giving effect to or acting upon the resolutions passed at the meeting of unit holders of Romeso Unit Trust held on 14 April 2003;
>
> (b) acting upon the Notice of Compulsorily Redemption directed to the First Plaintiff dated 21 May 2003 and forwarded by facsimile to the First Plaintiff on 21 May 2003 which Notice purports to compulsorily redeem the First Plaintiff's unit in the Romeso Unit Trust as provided for by Clause 12 of the Deed of Settlement of the Romeso Unit Trust;
>
> (c) acting as if the [First] Plaintiff's unit has already been redeemed pursuant to Clause 12.3 of the Trust Deed by operation of the Notice of Compulsory redemption;
>
> (d) compulsorily redeeming the First Plaintiff's unit in the Romeso Unit Trust as provided for by Clause 12.4 of the Deed of Settlement of the Romeso Unit Trust until further order.
>
> 2. Such further or other order as the Court sees fit to impose.
>
> 3. Costs of this application."

[24] The evidence before the Court for consideration is in the form of affidavit as follows:

1. Affidavit of Iraklis Roussos sworn 30 May 2003 with Annexure, Exhibit P1.

2. Affidavit of Nicholas Mellios sworn 4 June 2003 with Annexures, Exhibit D2.

3. Affidavit of Nicholas Mellios sworn 30 July 2003, Exhibit D3.

4. Affidavit of Christos Mellios sworn 17 September 2003, Exhibit D4.

[25] The plaintiffs claim the defendant failed to bring good skill and management to the operation of the caravan park and the issue of redemption. The plaintiffs assert the Notice of Redemption was issued for an ulterior purpose, being to punish the plaintiffs for failing to make a capital contribution. The claim is that the plaintiffs are being thrown out of the Trust for an ulterior purpose at a gross under valuation of their unit.

[26] Counsel for the plaintiffs argue that in respect of unit trusts an unfettered power must be exercised in accordance with the Trust and not extraneous to the objects of the Trust. The operation must be for unit holders as a whole and not to benefit the majority at the expense of the minority. The submission on behalf of the plaintiffs is that an action by a majority of unit holders to enrich themselves and punish a minority cannot be in good faith and is beyond scope of power under the Trust Deed. The plaintiffs' assert this is what the defendants have done.

[27] I do not accept that this argument has been made out. Clause 12 of the Romeso Unit Trust Deed makes provision for compulsory redemption of units. Clause 12.1 states:

> "The Trustee may with the prior approval of a meeting of unit holders held pursuant to clause 25 hereof at which SEVENTY (70) PER CENTUM of the unit holders present and voting at the meeting pass a resolution approving the redemption hereinafter referred to on

> not less than seven (7) days' notice in writing to any unit holder redeem all or any of the units held by such unit holder."

[28] The issue was discussed by Malcolm CJ in *Gra-Ham Australia Pty Ltd v Perpetual Trustees WA Limited & Ors* (1989) 1 WAR 65 at 81:

> "… The majority were entitled to determine what course of action was in the interests of the unitholders as a whole. Prima facie, it is for the unitholders themselves to determine what is or is not for the benefit of the unitholders as a whole: cf *Peters' American Delicacy Co Ltd v Heath* (1939) 61 CLR 457 at 481 per Latham CJ. There is no suggestion that the majority who voted in favour of the amendments in this case acted otherwise than in good faith."

[29] In the matter before this Court, the onus is upon the plaintiffs to show that the power has not been properly exercised. The plaintiffs have not discharged this onus. "The Court will not presume fraud or oppression or other abuse of power" *Peters' American Delicacy Co Ltd v Heath* (supra) at 482. See also *Cachia v Westpac Financial Services Ltd* (2000) 170 ALR 65 at 83.

[30] The plaintiffs claim that the misleading and deceptive conduct by the defendants placed the second plaintiff at risk of losing the plaintiffs' family home. The plaintiffs also claim that the defendants are in breach of Clause 7 of the Trust Deed of Settlement which provides as follows (Exhibit D2 Annexure C):

> "The Trustee may at any time, and shall if requested by resolution of the unit holders, passed at a meeting held pursuant to clause 25 hereof, cause a valuation of the property and assets of the Fund to be made by such competent valuers or experts as the Trustee may decide, and the value of a unit shall be determined by dividing the

value of the Fund by the number of units issued at the date of the valuation."

[31] In his affidavit sworn 4 June 2003 (Exhibit D2), Nicholas Mellios deposes to the fact that the total liabilities of the first defendant are in the order of $3,000,000. Annexure "G" to this affidavit is a Business Valuation Report prepared by Horwath SA & NT. This shows a net asset (deficiency) in respect of the "Hidden Valley Tourist Park" as being $1,045,536. The valuers state "as there is a deficiency in the net asset at 31 January 2003, the units in the Trust have no value at that date". Annexure "H" is a valuation report prepared by Colliers International. Annexure "I" is an addendum to Business Valuation prepared by Horwath dated 30 April 2003. The units in the Trust are still assessed to have no value.

[32] In par 26 of his affidavit (Exhibit D2), Nicholas Mellios deposes as to the reasons why the third, fourth and fifth defendants determined to redeem the first plaintiff unit on the following basis:

> "(i) the relationship between the representatives of the third, fourth and fifth defendants and the representative of the first plaintiff had deteriorated rendering it difficult to conduct the business of the first defendant;
>
> (ii) it will be necessary for the first defendant to take out further loan facilities for the conduct of the caravan park business in circumstances where the conduct of the first plaintiff indicates that it is not prepared to incur any further liability in relation to the conduct of the first defendant's business;
>
> (iii) it has been and continues to be necessary for the Mellios family to make significant capital injections into the conduct of the business of the first defendant, and the first plaintiff has indicated by its conduct that it is not prepared to share the burden in that respect.

(iv) the conduct of the first and second plaintiff[s] has prevented the negotiation of a further fixed term financial accommodation with the National Australia Bank, and the current financial arrangements are temporary, and repayable on demand;

(v) the conduct of the first and second plaintiffs in refusing to make any capital injections into the business of the first defendant has given rise to a reluctance on the part of the Mellios family to make further capital injections into the business of the first defendant, or to arrange for the repayment of part of the loan from the Catholic Church out of the Mellios family funds."

[33] The plaintiffs have not persuaded me that the defendants acted in bad faith without bona fides or for reasons other than those set out in par 26 of the affidavit of Nicholas Mellios as set out above.

[34] The principles to be applied in deciding whether to refuse or grant an interlocutory injunction are set out by Mason ACJ in *Castlemaine Tooheys Ltd & Ors v State of South Australia* (1986) 67 ALR 553 at 557:

> "The principles governing the grant or refusal of interlocutory injunctions in private law litigation have been applied in public law cases, including constitutional cases, notwithstanding that different factors arise for consideration. In order to secure such an injunction the plaintiff must show (1) that there is a serious question to be tried or that the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief; (2) that he will suffer irreparable injury for which damages will not be an adequate compensation unless an injunction is granted; and (3) that the balance of convenience favours the granting of an injunction.
>
> Recently two members of this court have held that the plaintiff must establish that there is 'a serious question to be tried', to use the expression favoured in *American Cyanamid v Ethicon Ltd* [1975] AC 396 at 407, in preference to the 'prima facie case' test which was adopted in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622 (*Australian Coarse Grain Pool Pty Ltd v Barley*

> *Marketing Board of Queensland* (1982) 57 ALJR 425; 46 ALR 398 (Gibbs CJ); *Tableland Peanuts Pty Ltd v Peanut Marketing Board* (1984) 58 ALJR 283 at 284; 52 ALR 651 at 653 (Brennan J)). In my opinion that is the correct test to be applied at least in the majority of cases - see Mason J, 'Declarations, Injunctions and Constructive Trusts' (1980) 11 *University of Queensland Law Journal* 121 at 128; but cf *Administrative & Clerical Officers Association v Commonwealth* (1979) 53 ALJR 588; 26 ALR 497. However, it may be that in some cases where the public interest would be adversely affected by the grant of an injunction the plaintiff may need to show a probability, even a distinct probability of success, in order to obtain an interlocutory injunction. The degree of likelihood of success in the action is a factor that is related to the balance of convenience in a way shortly to be mentioned."

[35] Mr Clift argues that with the background he has outlined there is a serious question to be tried. He further submits that the balance of convenience favours the plaintiff. This is because the venture of the Trust is for a long term investment in the caravan park. The plaintiffs have reason to believe that with the strengthening of the Darwin economy, the property will become valuable in the long term. The plaintiffs wish to retain their interest in the property and participate in the operation of this venture. It is submitted if the plaintiff is not able to oversee the activities of those in control against whom there are allegations of bad faith and incompetence, then the plaintiffs will be severely disadvantaged.

[36] It is the submission on behalf of the plaintiffs, that damages would not be an adequate remedy. This is because loss of the family home could not be fully addressed by an award of damages. It is further submitted that the input by the plaintiffs in the course the Trust decides to take, will be extremely

valuable. It is contended that with the plaintiffs' input the Trust will be in a better position in the long term, than without it.

[37] Mr Clift referred to the decision of *Shelfa v The City of London Electric Lighting Co* (1895) 1 Ch 287 which contains a check list to be applied in deciding where the balance of convenience lies:

(i) whether or not the injury to the plaintiffs' legal right is small.

(ii) whether the injury to that legal right is capable of being estimated in money.

(iii) whether the injury to that legal right can be adequately compensated by small money payment.

(iv) whether or not there wold be oppression to the defendant in the granting of the injunction.

[38] It is the submission on behalf of the plaintiffs that applying all of those criteria the balance of convenience lies with the plaintiffs who should be granted an interlocutory injunction.

[39] Mr Clift referred to par 26 of the affidavit of Nicholas Mellios sworn 4 June 2003 and submitted that there is no detail given about the breakdown in the relationship and no material to support the assertion that it would be difficult to conduct the business. With respect to the asserted need to inject significant capital into the conduct of the first defendant, Mr Clift points to the fact that par 30.2 of the Trust Deed makes it clear that the Trustee of a

Trust cannot require the unit holders to make any capital injections other than the amounts of their respective subscriptions for units. Section 30.2 of the Trust Deed (Exhibit D2 Annexure C) states:

> "30 Restrictions Upon Trustee
>
> Notwithstanding anything to the contrary herein contained and notwithstanding that but for this provision an obligation at law or in equity might arise the Trustee shall not:
>
> ……
>
> 30.2 have any power or authority to call upon the unit holders or any of them for any payment whatsoever other than the amounts of their respective subscriptions for units;"

[40] Mr Henwood, counsel for the defendants, advised that the application for interlocutory injunction is opposed.

[41] The background to this matter is largely not in dispute. There is agreement as to the fact that there has been a breakdown in the relationship between Mr Roussos and the Mellios defendants. From in or about October 2000, Mr Roussos has not personally taken part in the management of the first defendant even though he is a director of that company. He has purported to conduct himself in his capacity as a director through his solicitors. Details of this correspondence are included in the annexures affidavit of Mr Roussos (Exhibit P1).

[42] The submission on the part of the defendants is that there may be serious issues in relation to other matters raised in the Statement of Claim but there is no evidence of a serious issue in relation to the redemption of the unit.

[43] Further, Mr Henwood argues the balance of convenience favours a refusal to grant an interlocutory injunction. Thirdly, the defendants argue that damages would be an adequate remedy and that a process of accounting between the parties can be effected.

[44] The first plaintiff held one of four units in the Romeso Unit Trust which was constituted under the Trust Deed of Settlement. Clause 12.1 of the Trust Deed of Settlement (Exhibit D2 Annexure C) is set out in par 27 of these reasons for judgment. It is relevant to also set out the other provisions of Clause 12, being Clauses 12.2 - 12.7 (inclusive):

> "12.2 The notice referred to in clause 12.1 shall specify the number of units to be acquitted and the price payable in respect of such units. Before giving such notice the Trustee shall cause the assets of the Fund to be valued in the manner set out in clause 7 hereof and the price per unit shall be determined in accordance with such valuation.
>
> 12.3 Upon the expiry of the period referred to in clause 12.1 hereof such units shall ipso facto be redeemed and the Trustee shall pay to the unit holder whose units have been redeemed the price calculated as aforesaid. The price shall be payable by six equal successive six monthly instalments commencing on that day which is the last day of the month next succeeding the date of redemption and six monthly thereafter. Each of such instalments shall be equal to one sixth of the price. The balance outstanding of the price shall bear interest at the rate from time to time determined by the Trustee being the rate currently charged by the Trustee's Principal Bankers on overdrawn accommodation to the Trust computed in the first instance from the date of redemption. The interest shall be calculated on six monthly rests (with necessary adjustment for any broken periods) and shall be payable upon the same days as are provided for the payment of the instalments of the price.
>
> 12.4 The unit holder shall deliver to the Trustee within seven (7) days of the date of redemption the certificate or certificates comprising the units concerned for cancellation but if the unit

holder fails so to do the Trustee shall have the right to cancel such certificate or certificates.

12.5 Any notice referred to in this clause may be served upon any such unit holder by ordinary or certified mail and sent through the post to the last known address of the unit holder or the last address for the unit holder in the records of the Trustee and shall be deemed to have been served upon the expiration of four (4) days from the time such letter was posted.

12.6 If the unit holder shall fail or refuse to accept the purchase price or any instalment thereof or interest thereon tendered then the Trustee shall hold such amount on behalf of the unit holder in trust absolutely.

12.7 The Trustee shall be entitled to deduct from the amount to be paid to a unit holder on the redemption of units any costs or expenses properly incurred by the Trustee of or incidental to the redemption of the relevant units."

[45] The affidavit of Christos Mellios (Exhibit D4) refers to Minutes of Directors Meeting and Minutes of Meeting of First and Second Defendant as being forwarded by both registered and ordinary post to the plaintiffs at the address of 38 Mary Street, Stuart Park. These Minutes were marked "Return to Sender". On 3 April 2003 a "Notice of Meeting of Unit Holders" was forwarded to the plaintiffs. The envelope was returned to the first defendant about 21 May 2003 as unclaimed.

[46] I note that par 82 of the affidavit of Mr Roussos (Exhibit P1) and the subsequent paragraphs make it clear that Mr Roussos received these minutes and notices by facsimile and was aware of their contents.

[47] I am satisfied that the plaintiffs were properly served with the relevant minutes and notices - see *Hastie & Jenkerson (a firm) v McMahon* (1991) 1 All ER 255, Wolfe LJ at p 259 - 260:

> "… What is required is that a legible copy of the document should be in the possession of the party to be served. This transmission by fax achieves. I therefore conclude that service by fax can be good service subject to any requirement of the order requiring service of a particular document and any requirement of the Rules of the Supreme Court. …"

[48] On 14 April 2003, the unit holders met and resolved that the first plaintiff's unit should be redeemed compulsorily under Clause 12.

[49] The sixth, seventh and eighth defendants met as managing directors of the third, fourth and fifth defendants, the corporate unit holders. Those corporate unit holders made a decision in accordance with the terms of the Deed of Settlement that the first plaintiff's unit should be redeemed. The unit holders are entitled to make that decision under the terms of the Trust Deed because they wish to do so.

[50] *Gra-Ham P/L v Perpetual Trustees WA Ltd & Ors* (supra) Malcolm CJ at 81:

> "… In my opinion all of the propositions, apart from the first which relates to the statutory power, apply equally to a trust deed for a unit trust as they did to a deed of settlement of the kind under which limited companies were once established. In the present case the contract between the unitholders themselves and between the manager and the unitholders contained provision for alteration of existing or accrued rights. Even if the alteration constituted a breach of an existing contract between the manager and any individual unitholder, such a breach would not invalidate the amendment. The fact that the alteration diminished, prejudiced or altered the rights of unitholders was not sufficient to prevent the alteration from being validly made. It cannot be said that the alteration was made otherwise than bona fide for the benefit of the unitholders as a whole. …"

[51] In the case before this Court, one unit holder is complaining about the actions of the majority. The three unit holders in the majority do not owe

any duty to the first plaintiff. There is no fiduciary obligation. I do not consider there is any evidence the three unit holders in the majority acted otherwise than in good faith.

[52] Annexure IR65 to the affidavit of Iraklis Roussos (Exhibit P1) is copy of the resolution to redeem the first plaintiff's unit for $1. This resolution was passed on 14 April 2003.

[53] Clause 7 of the Trust Deed provides as follows (Exhibit D2 Annexure C):

> "The Trustee may at any time, and shall if requested by resolution of the unit holders, passed at a meeting held pursuant to clause 25 hereof, cause a valuation of the property and assets of the Fund to be made by such competent valuers or experts as the Trustee may decide, and the value of a unit shall be determined by dividing the value of the Fund by the number of units issued at the date of the valuation."

[54] There is no evidence produced by the plaintiffs that the valuation prepared by the accountant and land valuer is wrong or that the person who prepared the valuation is not competent.

[55] Annexure IR53 to the affidavit of Iraklis Roussos (Exhibit P1) is a valuation prepared by Horwath SA & NT as at 31 January 2003. It shows a net asset deficiency of $1,045,536.00. This is the same document as Annexure "G" to the affidavit of Nicholas Mellios (Exhibit D2).

[56] The addendum (Exhibit D2 Annexure I) to this valuation prepared by Colliers International changes the position of the Trust to a deficiency of net assets of $1,345,536.00. Colliers' valuation have the lease as the central

aspect of the valuation. Based on these valuations, the $1 for redemption of the unit is appropriate.

[57] By reference to Clause 12.1 of the Trust Deed, the unit is redeemed at the expiry of seven days being midnight on 28 May.

[58] Paragraph 88 of the affidavit of Mr Iraklis Roussos sets out correspondence forwarded by his solicitors to solicitors for the defendant requesting that the defendants not hold the meeting and not pass the proposed resolution.

[59] There is no evidence to contradict the evidence and submission put forward on behalf of the defendants that the meeting was correctly held, the resolution validly passed and the Trustee fulfilled its obligations with respect to the resolution.

[60] The defendants say the plaintiffs are guilty of laches in that they have taken no steps to challenge the underlying issue which is the resolution itself. In the absence of a challenge to the resolution itself, the defendants position is that there is no status quo left to be preserved.

[61] Counsel for the defendants then addressed the issue of service of the Notice of Redemption. Clause 35 of the Trust Deed states as follows (Exhibit D2 Annexure C:

> "Any notice required to be served upon any unit holder pursuant to the terms hereof (except as herein specifically provided) shall be served either personally or by posting to such unit holder either at his last known address or the address set out in the books of the Trust

and shall be deemed to have been served forty-eight (48) hours after the date of posting."

[62] In *NM Superannuation P/L v Hughes & Ors* (1992) 27 NSWLR 26, Cohen J was considering a similar situation under Rule 45 of the New South Wales Supreme Court Rules and said (p 35):

> "I see no reason for finding that a notice sent and received by facsimile transmission is any less a notice in writing than one which is sent and received in any other fashion. The piece of paper which results from the transmission is not the original document nor does it contain an original signature. It therefore may not be adequate in cases where a signature is required. I do not need to decide that question however as r 42 makes no mention of the notice having to be signed on behalf of the company or having the common seal affixed. It merely requires that the notice be in writing. In my opinion that includes any form of printing or other means of reproducing words in visible form. Furthermore, that would be consistent with the meaning given to 'writing' in Acts and statutory instruments under the definition in s 21 of the *Interpretation Act* 1987."

[63] The affidavit of Iraklis Roussos dated 30 May 2003, confirms that the Notice of Redemption was received by facsimile on 15 April 2003 (see par 91 Exhibit P1).

[64] I accept that the Notice of Redemption was properly served upon the plaintiffs.

[65] Mr Henwood then put submissions in respect of whether there was a serious question to be tried.

[66] It is submitted that the plaintiffs Statement of Claim seeks the taking of accounts in relation to various entities and damages. On the defendants

argument this suggests damages would be an adequate remedy and that the relationship between the plaintiffs and the defendants is at an end.

[67] Counsel for the defendants refer to the decision of Lord Diplock in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 406:

> "… The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; …"

and at 408:

> "… So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought."

[68] I accept that this decision sets out the principles to be applied in my consideration of the matter before this Court.

[69] It is the submission on behalf of the defendants that the plaintiffs have not articulated any breach by the defendants which requires the intervention of an interlocutory injunction. It is the defendants contention that the only way the plaintiffs could get a permanent injunction was to challenge the resolution of the meeting of unit holders and that nothing in the writ or the summons goes to that issue.

[70] Counsel for the defendants refers to the affidavit of Iraklis Roussos (Exhibit P1, par 14) who stated that it was agreed that the investment in the

Hidden Valley Tourist Park would be a long term investment and that it was not expected there would be returns in the short term but there would be significant benefits in the long term. The affidavit of Nicholas Mellios (Exhibit D2) refers to this paragraph and goes on to state that it was only agreed between the beneficiaries that there would be no returns in the short term. That the beneficiaries would provide financial support to the first defendant in the conduct of the caravan park from distributions made to the beneficiaries from the second defendant and stating that the second plaintiff has at all times refused to conduct himself in accordance with that agreement. The defendants assert that whatever may be the truth about the agreement it is not in dispute the plaintiffs have not contributed any additional monies to the operation of the Trust and the Trust property. This is in contrast to further contributions made by the other unit holders.

[71] It is conceded on behalf of the defendants that the Trust Deed does not suggest that the first plaintiff had an obligation to comply with a call by the trustee to contribute capital. The defence position is that whilst the plaintiff has no obligation under the Trust Deed to contribute to the Trust, the plaintiffs do not suggest how the Trust should meet its obligations in a situation where it is admitted by all parties that at no stage has the Trust made a profit.

[72] Counsel for the defendants points to the fact that had it not been for the voluntary contribution of the other unit holders the entire asset would have been lost. The evidence refers to securities in favour of the National

Australia Bank and an obligation to the Catholic Church totalling in the order of $2 million dollars.

[73] It is the defendants' argument that the Court in deciding how to exercise its discretion should bear in mind the fact that the second plaintiff has contributed nothing in three years and claims to have been hard done by, by a resolution to remove him from the arrangement. The defendants' submission is the discretion should be exercised to refuse the application for interlocutory injunction.

[74] With reference to the fact that initially the second plaintiff put forward his own home as security, the defendants' argument is that that has nothing to do with this capacity as a unit holder and that he should approach the National Australia Bank and ask to be discharged on the basis he is no longer involved.

[75] Mr Henwood on behalf of the defendants, challenges the matters set out in par 100 of the affidavit of Iraklis Roussos (Exhibit P1). There is a dispute about the fact that the property now being leased will make a profit. The defendants point to the second plaintiff's failure to make contributions, the failure to attend or participate in director's meetings and the conduct of his business through solicitors.

[76] The defendants refer to the rule in *Cherry v Boultbee* 4 MY & CR 171 to support the proposition that the plaintiffs would not be entitled to injunctive

relief. This rule is to the effect that one who seeks payment from a fund, who has an obligation to that fund, has to bring the obligation into account.

Courtenay v Williams (1844) 3 Hare 539 at 553-4; 67 ER 494 at 500:

> "Several ways of putting the case may be suggested in support of the argument on the part of the executors. They must say to the legatee, 'We admit your right to the legacy; you have assets of the testaotr in your hands; pay your legacy *pro tanto* out of the assets,' as in *Jeffs v Wood* (1723) 2 P Wms 128; 24 ER 668 and *Campbell v Graham* 1 Russ & M 453; 39 ER 175. Again, the executor might say, 'You ask for a portion of the assets of the testator; but you are yourself a debtor to the testator's estate, and his assets are diminished *pro tanto* by your default; it is against conscience that you should take anything out of the estate until you have made good what you owe it."

See also *In Re Peruvian Railway Construction Company Limited* (1915) 2 Ch 144.

[77] The defendants concede that there is no valid debt due and owing by the plaintiffs to the defendants. However, it is the defendants contention that the equitable principles are sufficient. These matters are subsidiary to the defendants first proposition that no serious issue to be tried has been identified in this case.

[78] Mr Henwood then turned to the issue of balance of convenience and referred to par 26 of the affidavit of Nicholas Mellios (Exhibit D2). The defendants argue that the status quo is that the units are redeemed and the injunction in the term sought is inappropriate and the plaintiff can not show any need for

protection. The defendants state the plaintiff can be adequately protected in damages and that such assessment of damages will not be a difficult task.

[79] In *American Cyanamid Co. v Ethicon Ltd* (supra) Lord Diplock at 408:

> "As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. …"

[80] The defendants assert the plaintiffs have not discharged the onus upon them to establish that the balance of convenience is in their favour.

[81] Mr Henwood referred to evidence set out in the annexures to affidavit of Iraklis Roussos (Exhibit P1) being Annexures IR23, IR24 and IR25 to establish that there is evidence there will be a need for further capital injection of funds even though the property is now leased and that the assertion by the plaintiff otherwise is without foundation.

[82] It is the defendants' position that the balance of convenience lies in bringing the relationship between the plaintiffs and the defendants to an end where as has occurred in the present circumstances the relationship between the plaintiffs and the defendants has broken down.

[83] The submission for the defendants is that the plaintiffs have not discharged the onus that lies upon them in seeking the interlocutory injunction. The allegations as to breach of trust and breach of duties do not go to the injunction sought. The unit holders have not done anything in breach of the Trust Deed nor is there any duty on the unit holders to exercise powers in a particular way in relation to the other unit holders.

[84] On behalf of the defendants it is submitted that the prejudice to the defendants if the plaintiffs obtain the interlocutory injunction, is that the unsatisfactory relationship between them will continue, there will be an inequality in the financial contributions to be made and there will be a difficulty for the defendants in dealing with the future financial arrangements for the Trust venture.

[85] The defendants assert the powers granted in the Trust Deed in Clause 12 which deals with compulsory redemption, is there for a purpose being the very situation the parties now find themselves in.

[86] Mr Clift, on behalf of the plaintiffs, asserts there is a serious question to be tried because there are issues as to interpretation of the Trust Deed

including interpretation of the relevant clauses of the Trust Deed dealing with compulsory redemption of units and service of notices.

[87] It is the submission of Mr Clift that *Gra-Ham Australia Pty Ltd v Perpetual Trustees WA Limited & Ors* (supra) deals with duties of unit holders, not just trustees and centres on the issue of oppression within unit trusts and how varying provisions should not be misused in any way to aid that oppression. The plaintiffs submission is that the construction of the Trust Deed on the redemption of a unit is a serious issue to be tried and submits that on the wording of Clause 12.1 the trustee has an independent discretion whether to accede to the wishes of the unit holders.

[88] The other serious issue for which the plaintiffs contend is that the language of Clause 7 of the Trust Deed means a valuation in respect of property and assets without reference to liabilities. Clause 7 of the Trust Deed (Exhibit D2 Annexure C) is set out in par 30 of these reasons for judgment.

[89] On behalf of the plaintiffs it is disputed that there was any unreasonable delay on the part of the plaintiffs. It is contended that the plaintiffs commenced action as soon as they became aware that the Trustee had determined (in what the plaintiffs' state was an exercise of a discretion) to accede to the resolution of the unit holders and issue a Notice of Redemption. The plaintiffs state that the redemption of the unit as a matter of law is a triable issue and a serious question to be tried and should be

taken into account in the exercise of the discretion whether to grant an interlocutory injunction.

[90] Mr Clift referred to a further passage from the judgment of Lord Diplock in *American Cyanamid v Ethicon Ltd* (supra) at 406:

> "… but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the defendant's favour at the trial. The court must weigh one need against another and determine where 'the balance of convenience' lies."

[91] Mr Clift confirmed that the initial writ claimed an interlocutory and permanent injunction. This was not transposed on the Statement of Claim which was an error. The Statement of Claim will be amended to include the claim for interlocutory and permanent injunction.

[92] Mr Clift on behalf of the plaintiffs, argued that the defendants had made much of the fact that no contributions had been made by Mr Roussos since October 2000. The plaintiffs submit that the highest the defendant can put it is that Mr Roussos had a moral obligation to make further contributions as distinct from any legal obligation. Mr Clift points to the affidavit of Iraklis Roussos (Exhibit P1, par 24) and the fact that in the relevant period the Mellios family have received director's salaries of $130,333 and there is some correlation between this sum and the demand for capital contributions.

[93] The plaintiff's position is that there is a serious issue to be tried as to any agreement between the plaintiffs and the defendants as to funding that is outside of the Trust Deed.

[94] On behalf of the plaintiffs it was asserted that now the caravan park is leased by a manager, any breakdown in the relationship between the parties is no longer a relevant concern.

[95] The plaintiffs state their answer to the defence submission that the second plaintiff could go to the National Australia Bank and request that he be released from his security, is that the National Australia Bank is under no obligation to accede to such request. It is a commercial matter and a decision to be made by the bank. From the plaintiffs point of view the home could remain security potentially for many years and at the same time the plaintiffs have no potential benefit from the Trust.

[96] The Court was referred to Annexures IR3, IR6, IR14, IR23 and IR28 of the affidavit of Iraklis Roussos (Exhibit P1) to demonstrate that the failure by the defendants to provide financial information has induced the second plaintiff not to make further contributions. Counsel for the defendants asked that I refer to all the Annexures (to Exhibit P1).

[97] The plaintiffs contend that if the Trustee fails to meet its obligations to the National Australia Bank it will be difficult to assess damages for the loss of the plaintiffs' home.

[98] The submission on behalf of the plaintiffs is that if the plaintiffs do not succeed in obtaining the interlocutory injunction they will have no control or ability to monitor what the Trust is doing or power to seek documents or other information from the Trust. In addition the Trustee could make arrangements with the National Australia Bank that increases the second plaintiff's exposure to the risk of loss and his position in terms of damages and tracing and accounting would be made worse if the interlocutory injunction is not granted.

[99] The plaintiffs maintain it will be much more difficult to enforce an accounting and tracing of monies. It is also submitted on behalf of the plaintiffs that they will be put at a major disadvantage, where legal and equitable rights are extinguished.

[100] I am not persuaded that there is any evidence the defendants are in breach of the Trust Deed as claimed by the plaintiffs.

[101] Dealing with the particulars of breach as claimed in par 38 of the Statement of Claim, I make the following findings.

[102] I find that the notices of the meetings were given in accordance with Clauses 4.2 and 25.2 of the Trust Deed. The notice of meeting to be held on 14 April 2003 was forwarded by facsimile and by post both registered and ordinary mail to the address of the plaintiffs 38 Mary Street, Stuart Park - see affidavit of Christos Mellios sworn 17 September 2003 Exhibit D4.

[103] The affidavit of Iraklis Roussos (Exhibit P1) in particular pars 82, 83 and 91 make it clear the plaintiffs received a facsimile copy of the notices which would of itself be sufficient service.

[104] The plaintiffs have not put forward any evidence to establish the failure by the defendants to cause the assets of the Romeso Unit Trust to be valued in accordance with Clause 7 of the Romeso Unit Trust Deed.

[105] There is no evidence to support the plaintiffs assertion that the persons engaged by the defendants to value the assets of the Romeso Unit Trust fund were not competent or did not undertake the valuation of the assets competently.

[106] Whilst the Statement of Claim sets out a variety of claims some of which are clearly serious issues to be tried, the plaintiffs have not satisfied the onus upon them to establish that with respect to the redemption of the plaintiffs unit in Romeso Unit Trust there is a serious issue to be tried.

[107] The defendants have exercised a right under the Trust Deed to redeem the plaintiffs' unit. There is no evidence to contradict the evidence put before this Court that the plaintiff was given notice of the meeting of the directors and the subsequent resolution to redeem the plaintiffs' unit. The plaintiffs assert that the defendants moved to redeem the plaintiffs unit to punish the plaintiffs for not continuing to make contributions to the Trust being contributions that the plaintiffs were not legally obliged to make. There is no evidence that the redemption of the first plaintiff's unit was not in

accordance with the Trust Deed or that it was for some fraudulent or inequitable purpose.

[108] I do not accept that there is evidence to discharge the onus upon the plaintiffs to establish there is a serious issue to be tried with respect to the redemption which is clearly provided for in the Trust Deed.

[109] Further, the Statement of Claim is essentially a claim for the taking of accounts, the tracing of monies and for damages. I accept there is to be an amendment to the Statement of Claim seeking an interlocutory and a permanent injunction in respect of the redemption of the second plaintiff's unit.

[110] The second plaintiff is concerned because he has put forward the family home as security for the loan and is exposing the family home to risk. The second plaintiff is also concerned that he will have no control over the ongoing operations of the Romeso Unit Trust. It is not in dispute that the relationship between the plaintiffs and the defendants has broken down.

[111] I am not persuaded these are reasons why damages would not be an adequate remedy.

[112] Finally, I deal with the question of the balance of convenience. The breakdown in the relationship between the second plaintiff and the Mellios family no doubt makes matters very difficult for all parties. The second plaintiff wants to retain his share of the control of the Romeso Unit Trust.

It is not in dispute that he has not made any financial contribution or participated in the affairs of Romeso Unit Trust other than through his solicitors since October 2000. The defendants claim if this interlocutory injunction is granted there are difficulties with continuing the viability of the Hidden Valley Tourist Park for which the Romeso Unit Trust was established and in pursuing financial arrangements that are needed to enable the business to continue. I have come to the conclusion that the balance of convenience favours the defendants.

[113] For these reasons, I refuse the application for interlocutory injunction.

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