PARTIES:	SAKELLARIOS MAVROS v AA CONSTRUCTIONS PTY LTD (IN LIQUIDATION) AND DIONISIA AGAPITOS, MARIA PASSAS, CLEO GINNIS, TINA AGAPITOS and AGAPITOS AGAPITOS Interveners
TITLE OF COURT:	SUPREME COURT (NT)
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NOS:	No. 137 of 1990
DELIVERED:	Darwin 21 February 1995
HEARING DATES:	2 and 3 December 1992
JUDGMENT OF:	Kearney J

CATCHWORDS:

COMPANIES - winding up - general duties of liquidator - Mareva injunction - special duty to proceed expeditiously

Commissioner for Corporate Affairs v Harvey [1980] VR 669, followed

EQUITY - general principles and maxims - applicants arguably involved in a "dishonest design" - need for transaction impugned under "clean hands" to have immediate and necessary relation to relief sought

FAI Insurances Ltd v Pioneer Concrete Services Ltd (1987) 15 NSWLR 552, followed
Attorney General (U.K.) v Heinemann Publishers Pty Ltd (1987) 8 NSWLR 341, followed

INJUNCTION - Mareva-type injunction - jurisdiction to grant - inherent power - applicable principles - breadth of injunction - whether injunction may restrain parties

outside the jurisdiction dealing with assets outside the jurisdiction

Jackson v Sterling Industries Ltd (1987) 162 CLR 612, applied
Cretanor Maritime Co Ltd v Irish Marine Management Ltd (The "Cretan Harmony") [1978] 1 WLR 966, followed
National Australia Bank Ltd v Dessau (1988) VR 521, followed
Third Chandris Shipping Corporation v Unimarine S.A. [1979] 1 QB 645, followed
Beach Petroleum NL & anor v Johnson & ors (1993) 11 ACLC 75, followed
Winter v Marac Australia Ltd (1986) 6 NSWLR 11, referred to
Coombs and Barei Constructions Pty Ltd v Dynasty Pty. Ltd (1986) 42 SASR 413, followed
ANZ Grindlays Bank plc v Hussein Salaheh Hussein Abdul Fattah (1991) 4 WAR 296, followed
Nippon Yusen Kaisha v Karageorgis [1975] 2 Lloyd's Rep. 137, referred to
PS Refson & Co Ltd v Saggers [1984] 1 WLR 1025, referred to
Siporex Trade S.A. v Comdel Commodities Ltd [1986] New L.J. Rep. 538, referred to
Republic of Haiti v Duvalier [1990] 1 QB 202, referred to
Bond Brewing Holdings Ltd v Crawford (1990) 8 ACLC 198, referred to

INJUNCTION - Mareva-type injunction - obligation on party who succeeds in obtaining the injunction to institute and pursue substantive relief promptly - whether injunction should be discharged because of subsequent delay - relevant considerations

Lloyds Bowmaker Ltd v Britannia Arrow Holdings PLC (1988) 3 All ER 178, followed
Town and Country Building Society v Daisystar Ltd (1989) New LJ 1563, followed

INJUNCTION - Mareva-type injunction - whether Court has power to discharge the injunction conditionally

Langman v Handover (1929) 43 CLR 334, applied
Hanson v Keating (1844) 4 Hare 1; 67 ER 537, followed
United States of America v McRae (1867) 3 Ch. App. 79, followed

INJUNCTION - Mareva-type injunction - application to discharge or vary - nature of application - whether applicants have standing - applicants must establish "a good arguable case" that they are "affected" by the injunction

Supreme Court Rules (NT), r9.06(b)(ii)
Supreme Court (Companies) Rules (NT), r7

Derby & Co Ltd v Weldon (No.1) [1990] Ch.48, followed
Cretanor Maritime Co Ltd v Irish Marine Management Ltd (The "Cretan Harmony") [1978] 1 WLR 966, followed

INJUNCTION - Mareva-type injunction - inherent power to discharge or vary - need to balance the equities

Town and Country Building Society v Daisystar Ltd (1989) New LJ 1563, followed

COSTS - taxation - interveners' application to discharge Mareva-type injunction - whether costs recoverable on indemnity basis

Project Development Co. Ltd S.A. v K.M.K. Securities Ltd [1982] 1 W.L.R. 1470, followed

REPRESENTATION:

Counsel:

Applicants:	J.C.B. Duguid
Plaintiff:	D.E. Francis
Defendant:	J.C. Kelly

Solicitors:

Applicants:	Waters James & McCormack
Plaintiff:	David Francis & Associates
Defendant:	Philip & Mitaros

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 137 of 1990

BETWEEN:

SAKELLARIOS MAVROS
Plaintiff

AND:

A A CONSTRUCTIONS PTY LTD (IN LIQUIDATION)
Defendant

AND:

DIONISIA AGAPITOS, MARIA PASSAS, CLEO GINNIS, TINA AGAPITOS and AGAPITOS AGAPITOS
Interveners

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 21 February 1995)

The application

This is an application brought by Dionisia Agapitos, Maria Passas, Cleo Ginnis, Tina Agapitos and Agapitos Agapitos (herein collectively "the applicants") by summons of 25 August 1992 to discharge, in part, an order made in this action on 13 March 1990 by Asche CJ, restraining World Wide Shipping Services Pty Ltd (herein "World Wide") from dealing with any and all containers consigned by Nikolaos Agapitos or Dionisia Agapitos. Dionisia Agapitos is the wife of Nikolaos Agapitos,

and the other 4 applicants are their 3 daughters and their son.

The applicants also seek an order that the liquidator of the defendant, a building and construction company (herein "the company"), pay the applicants' costs of and incidental to their application, on the indemnity basis provided for in r63.27 of the Supreme Court Rules (herein "the Rules").

The applicants contend that the Court has inherent or implied jurisdiction to grant the relief they seek in respect of what was, in effect, a Mareva injunction. In this connection I note that in *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612 at 622 and 623, Deane J described the power to grant a Mareva injunction as:-

> 622 " ... an accepted incident of the jurisdiction of superior courts throughout most of the common law world ...
>
> 623 ... an established part of the armoury of a Court of law and equity to prevent the abuse or frustration of its process in relation to matters coming within its jurisdiction."

Wilson and Dawson JJ said at p617 that the power was "as much to be found in [the court's] inherent power as in any power to grant such relief." At p619 they said:-

> "[The Mareva injunction] exists - - - to enable a court to protect its process from abuse in relation to the enforcement of its orders."

It is therefore now clear that the Court has inherent jurisdiction to grant the relief sought, in certain circumstances.

The liquidator opposed the application of 25 August 1992 on the basis:

(1) that the applicants lacked standing to make it;

(2) that the applicants did not come with "clean hands", in that they had perpetrated a fraud on the defendant and, by this application, were in effect seeking to take the balance of their property out of the jurisdiction.

The applicants' summons of 25 August 1992 and supporting affidavits of Agapitos Agapitos sworn 5 June 1992 and John Duguid sworn 26 August 1992, were served on the plaintiff, the defendant and World Wide; the last-named did not appear at the hearing, but agreed to abide by the Court's decision.

The background to the application, and relevant events

On 12 March 1990 the plaintiff (one of the then two directors and secretaries of the defendant, the other being Nikolaos Agapitos) applied to wind up the defendant pursuant to s363(1)(c) and s364(1)(e), (f), (fa) and (j) of the Companies Code then in force, and r45 of the Supreme Court (Companies) Rules.

The grounds upon which the plaintiff relied to support his application of 12 March 1990 are set out in his affidavit of 13 March 1990. In par22 of that affidavit, he deposed that:

> "By reason of the matters aforesaid I say that a dispute has arisen between the directors, namely myself and Nikolaos Agapitos which prevents the proper running of the company." (emphasis mine)

There were numerous "matters aforesaid". However, in essence, the plaintiff at par 10 considered that the defendant was in a "dire financial situation" in that it was "presently unable to pay its debts as and when they fall due". He referred in pars 13-17 to various amounts on company cheque butts which aroused "suspicion in my mind as to the whereabouts of the funds of the company and the propriety of payments to the apparent recipients", who included "Nikolaos Agapitos or his family". He deposed in par 21 that he had:

> " - - - grave doubts that the company has been managed in a way that is beneficial to the contributories of which I am one. I am concerned that if the company is left with Nikolaos Agapitos [the then other director and secretary of the defendant, and husband or father of the applicants] having a controlling hand in the affairs of the company, then the financial position of the company may deteriorate beyond its present state, to the ultimate detriment of the contributories".

Annexure "A" to Mr Ford's supporting affidavit of 13 March 1990 indicated that the ground of the application for the appointment of a provisional liquidator was -

> "- - - that a director of the company, Nikolaos Agapitos, appears to have left Australia for Greece with company funds."

Annexure "E" indicated that the purpose of seeking the order in par5 on p5 was to restrain Nikolaos Agapitos from removing his assets from Australia. This is important in view of later events; the plaintiff clearly believed at the time that the contents of the containers in question belonged to Nikolaos Agapitos.

The plaintiff's summons of 12 March 1990 was heard by Asche CJ on 13 March 1990. The defendant, which had been

served, did not appear. His Honour ordered, as far as is presently relevant, that -

> "1. John Jackson be appointed provisional liquidator of the Defendant.
>
> - - -
>
> 5. World Wide Shipping Services Pty Ltd of Cnr Hills and Greenfield Streets, Banksmeadow, in the State of New South Wales be restrained from dealing with any and all containers consigned by Nikolaos Agapitos or Dionysius Agapitos other than by holding the said containers until further order with liberty to World Wide Shipping Services Pty Ltd to apply on three (3) days' written notice to the plaintiff." (emphasis mine).

The order in par5 was sought in the application of 12 March. Several aspects of it are noteworthy. It had the same effect as a Mareva injunction, in that it effectively prevented the consignors of the containers (Nikolaos and Dionisia Agapitos) from directing a third party, World Wide, to carry out their instructions to freight the containers to Greece; yet it was not directed to them, as I consider it should have been. Such an order operates as relief in personam, prohibiting certain acts in relation to the goods in question: see *Cretanor Maritime Co Ltd v Irish Marine Management Ltd (The "Cretan Harmony")* [1978] 1 WLR 966 at 974 and *National Australia Bank Ltd v Dessau* (1988) VR 521 at 529. *Third Chandris Shipping Corporation v Unimarine S.A.* [1979] 1 QB 645 at 668-669, *Beach Petroleum NL & anor v Johnson & ors* (1993) 11 ACLC 75 at 77 and *Winter v Marac Australia Ltd* (1986) 6 NSWLR 11 at 12-13 indicate the criteria which must be satisfied to obtain a Mareva injunction, which temporarily freezes assets required to satisfy an expected judgment, in

order to prevent their removal by the defendant from the jurisdiction.

The jurisdiction of the Court, in general, is bounded by the Territory's territorial limits; see *Coombs and Barei Constructions Pty Ltd v Dynasty Pty. Ltd* (1986) 42 SASR 413. Jurisdiction in a proceeding in personam vests upon service of the Writ on the defendant. When a defendant has left the Territory for Greece before the issue of process against him, at common law the Court had no jurisdiction over him. The Rules now enable the overseas defendant to be served with a Writ, under r7.01(j). He may, alternatively, submit to the jurisdiction. Until he is served, or submits, it is doubtful whether there is jurisdiction to grant an injunction against him, since he is not amenable to the jurisdiction of the Court; see *ANZ Grindlays Bank plc v Hussein Salaheh Hussein Abdul Fattah* (1991) 4 WAR 296 at 300. Here no process had been instituted against Nikolaos (or Dionisia) Agapitos as at 13 March 1990; the Mareva order of 13 March 1990 was an ancillary proceeding, in a vacuum. They had already left the Territory, their whereabouts in Greece were unknown, and the containers in question were in New South Wales. There is no suggestion that Nikolaos or Dionisia Agapitos had prior notice of the application of 12 March 1990.

The classic Mareva injunction was made ex parte and directed at preventing the possible dissipation of assets within the jurisdiction of defendants outside the jurisdiction, whose whereabouts were unknown; see *Nippon Yusen Kaisha v Karageorgis* [1975] 2 Lloyd's Rep. 137. Only very

recently has there been held to be power to make an extra-territorial Mareva order, that is, one in respect of assets *outside* the Territory.

A quia timet order of the type in par5 is draconian in its nature; the Court must be satisfied that it is just and convenient to make it. It seems that the Court must have been satisfied at the time that the company had a cause of action for substantive relief against Nikolaos Agapitos, believed to be the owner of the contents of the containers, and had a good arguable case in that regard; there was a real risk the owner would remove them from Australia; that if this occurred, the company would be unable to enforce a judgment against him; and the balance of convenience favoured the granting of the injunction. I note that to obtain a Mareva injunction, the applicant is usually required to give an undertaking as to damages, and an undertaking to issue a Writ forthwith when, as here, an action has not already been instituted against the owner of the property in question. No such undertakings were required or given in this case. See *PS Refson & Co Ltd v Saggers* [1984] 1 WLR 1025 as to what an undertaking to institute proceedings forthwith, entails. In practice, where such an undertaking is not given or exacted, the nature of the relief sought still requires that proceedings against the intended defendant for substantive relief be instituted promptly; see *Siporex Trade S.A. v Comdel Commodities Ltd* [1986] New L.J. Rep. 538 at p539. See generally p26. At the time (13 March 1990) the plaintiff believed the contents of the containers belonged to Nikolaos Agapitos; the injunction

should have been directed to him, and to World Wide as his agent. No "*Babanaft* proviso" was included or sought to be included in the order of 13 March 1990; see *Republic of Haiti v Duvalier* [1990] 1 QB 202 at 217-8 per Staughton L.J., and *Bond Brewing Holdings Ltd v Crawford* (1990) 8 ACLC 198.

I doubt if there was at the time any mechanism by which an interlocutory order such as that in par5, made by a State or Territory Court, could be enforced in New South Wales; see *Bond Brewing Holdings Ltd v Crawford* (supra) at 203, and *ANZ Grindlays Bank plc v Hussein Salaheh Hussein Abdul Fattah* (supra); see now Part 6 of the (new) Service and Execution of Process Act 1992 (C'th) where "judgment" includes interlocutory orders. However, the aspects mentioned at pp5-8 were not raised before me, and I deal with them no further.

On 23 March 1990, by consent, 4 of the 6 subject containers held by World Wide were released from the order of 13 March.

On 6 April 1990 the applicants' solicitors informed the provisional liquidator's solicitors that the persons claiming ownership of the contents of the remaining 2 containers were Dionisia Agapitos, Maria Passas and Cleo Ginnis, the wife and daughters of Nikolaos Agapitos; see annexure "C" to Mr. Duguid's affidavit of 26 August 1992.

On 14 June 1990, after the provisional liquidator had carried out investigatory work and prepared the required report as to the defendant's affairs, the Court ordered, as far as is presently relevant:

"1. That the said A.A. CONSTRUCTIONS PTY LIMITED be wound up by this Court under the provisions of the Companies (Northern Territory) Code.

2. That JOHN JACKSON of Pannell Kerr Forster, 62 Cavenagh Street, Darwin in the Northern Territory of Australia, an official liquidator, be and is hereby appointed the liquidator of the affairs of the said company."
(emphasis mine)

On 19 June 1990 the liquidator applied to vary the order of 13 March 1990. I note that this shows that 5 days after his appointment he was active on the company's behalf, pursuant to s377(2)(a) of the Companies Code, in relation to the question of the containers. As a result, on 21 June 1990 Angel J ordered that:

"1. The order of the Chief Justice made 13 March 1990 be varied so as to allow World Wide Shipping Services Pty Ltd to permit containers consigned by Nikolaos Agapitos or Dionysius Agapitos to be opened in the presence of a representative of the said Nikolaos Agapitos or Dionysius Agapitos and a representative of the Liquidator, so as to inspect the contents of the said containers, but not otherwise."

Pursuant to this order the contents of the 2 containers were inspected on 3 October 1990.

On 3 March 1992, some 21 months after his appointment, the liquidator instituted proceedings 55 of 1992 against Nikolaos Agapitos, claiming the repayment of an alleged loan of $46,332.78 made by the company to him, and damages for the conversion of the proceeds of cheques drawn on the company's account to the value of $65,000.00. The Writ was to be served in Greece.

On 25 August 1992 the applicants lodged this application seeking, inter alia, the release of the 2 remaining containers; see pp1-2.

On 10 September 1992 the liquidator instituted proceedings 243 of 1992 against Peter and Maria Passas and Dionisia Agapitos, claiming repayment of alleged debts of $14,000 incurred about 16 February 1990, and $10,048.00 incurred about 26 February 1990. The Writ was to be served in Greece.

On 10 September 1992 the liquidator also instituted proceedings 244 of 1992 against Cleo and John Ginnis, claiming repayment of an alleged debt of $10,000 incurred about 26 February 1990. The Writ was to be served in Greece.

On 18 September 1992 the liquidator instituted proceedings 250 of 1992 against Nikolaos Agapitos Pty Ltd as trustee of the Nikolaos Agapitos Family Trust, claiming repayment of $124,933.90, being monies allegedly lent between 30 July 1987 and 20 February 1989.

The applicants' submissions, in outline

Mr Duguid of counsel for the applicants made 5 submissions, viz:

(1)(a) The applicants had standing to apply for the relief they sought, because the contents of the 2 containers were their property, and not the property of the defendant. By virtue of their ownership the applicants were affected by the injunction of 13 March 1990 (par5 on p5)

and, in that capacity, did not have to be joined as parties to proceedings No. 137 of 1990, to obtain its discharge.

(1)(b) Alternatively, pursuant to r9.06(b)(ii) providing for the addition of parties and r1.10(2) of the Rules, the Court has a discretion "at any stage of a proceeding" to join persons as parties to a proceeding; in this case, that discretion should be exercised to join the applicants as parties to proceedings No. 137 of 1990, to give them the necessary standing. See also r36.01 of the Rules, s48A of the Limitation Act, s6 of the Supreme Court (Rules of Procedure) Act, and r7 of the Supreme Court (Companies) Rules.

(2)(a) The Court should exercise its inherent jurisdiction to discharge par5 of the order of 13 March 1990 (p5); further, that restraining order should not be renewed in any other proceeding, as the defendant had failed to establish that the applicants did not come with "clean hands".

(2)(b) Alternatively, if the defendant had established that the applicants did not come with "clean hands" as alleged (p3), that did not mean that their application

of 25 August 1992 should be automatically refused as an abuse of process. Rather, the Court should proceed to consider whether the liquidator had failed to discharge his duties to the Court in that he had been guilty of "unjustified delay" in seeking relief against the applicants. He had failed to institute and pursue proceedings against the applicants as rapidly as it was practicable to do so, after the injunction was obtained on 13 March 1990. If he had so failed, the Court should exercise its inherent jurisdiction to discharge the injunction of 13 March 1990, notwithstanding the applicants' "unclean hands".

(3) The Court's task was to decide whether or not the injunction of 13 March 1990 was appropriate, in the circumstances of the case. The Court could not grant the relief sought, on the condition sought by the defendant at (3) on p13.

In support of those 5 submissions, Mr Duguid relied on the following materials:

(a) the summons of 25 August 1992;

(b) his own affidavit of 26 August 1992;

(c) the affidavit of the applicant Agapitos Agapitos of 5 June 1992;

(d) the affidavit of Katie Kathopoulis, the plaintiff's daughter, sworn 12 March 1990; and

(e) the affidavit of the plaintiff sworn 13 March 1990.

He referred to *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* (supra) at 978; *Town and Country Building Society v Daisystar Ltd* (1989) New LJ 1563; *Lloyds Bowmaker Ltd v Britannia Arrow Holdings PLC* (1988) 3 All ER 178; and S Gee: "Mareva Injunctions and Anton Piller Relief" (2nd ed. 1990), pp232-234.

The defendant's submissions, in outline

Ms Kelly of counsel for the liquidator made 3 submissions, viz:

(1) The applicants had no standing to apply for the discharge of the injunction of 13 March 1990, since they had not established that they owned the contents of the remaining 2 containers, and had therefore failed to show they were affected by that injunction.

(2) She referred to the liquidator's contention as to the applicants' lack of "clean hands" (see (2) at p3), and in relation thereto submitted that in bringing the application of 25 August 1992 the applicants had not complied with the maxims of equity that "he who comes to equity must come with clean hands" and "he who seeks equity must do equity". Later, in the course of developing this submission, Ms Kelly

conceded that the liquidator did not allege "unclean hands" against two of the applicants, Tina and Agapitos Agapitos.

(3) Because "he who seeks equity must do equity", the relief sought should only be granted on condition that the applicants entered Appearances in proceedings Nos. 243 and 244 of 1992 (see pp9-10).

In support of these submissions Ms Kelly relied on:

(1) the affidavit of Geoffrey Wayne Nourse, an officer of the liquidator, sworn 18 September 1992; and

(2) her own affidavit of 24 September 1992.

She referred to Meagher, Gummow and Lehane: "Equity, Doctrines and Remedies" (2nd ed.1984), pars311, 322 and 326; Fry on Specific Performance (6th ed. 1985), p385; and Spry: "Equitable Remedies" (2nd ed. 1980), p232.

The issues

It can be seen from the submissions at pp10-13, that the parties are at issue on five matters, viz:

(A) Do the applicants presently have standing to apply for the relief they seek? If not, can they be joined as parties to this action, and thereby acquire standing to apply?

(B) If the applicants presently have or can acquire the necessary standing, do they come with "unclean hands" such as to prevent them from

successfully invoking the Court's equitable jurisdiction to grant the relief they seek?

(C) Has the defendant unjustifiably delayed in instituting and pursuing its actions Nos 243 and 244 of 1992 against the applicants?

(D) If (B) and (C) are answered "Yes", can and should the Court discharge par5 of the injunction of 13 March 1990, in the exercise of its inherent power?

(E) Is the Court competent to discharge the injunction unconditionally, or only conditionally upon the applicants entering Appearances in actions Nos 243 and 244 of 1992?

The nature of the application

Before dealing with these 5 issues, I turn briefly to the nature of the application of 25 August 1992, and what that entails.

In *Derby & Co Ltd v Weldon (No.1)* [1990] Ch.48, an appeal from a refusal to grant a world-wide Mareva injunction, Parker LJ said at pp57-48:-

> "In *American Cyanamid Co. v Ethicon Ltd* [1975] A.C. 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 Buccleugh* (1865) 12 L.T. 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.
>
> - - -
>
> It is to be hoped that in future the observations of Lord Diplock and Lord Templeman [*in American Cyanamid*] will be borne in mind in applications for a *Mareva* injunction, that they will take hours not days and that appeals will be rare. I do not mean by the foregoing to indicate that argument as to the principles applying to the grant of a *Mareva* injunction should not be fully argued. With a developing jurisdiction it is inevitable and desirable that they should be. What, however, should not be allowed is (1) any attempt to persuade a court to resolve disputed questions of fact whether relating to the merits of the underlying claim in respect of which a *Mareva* is sought or relating to the elements of the *Mareva* jurisdiction such as that of dissipation or (2) detailed argument on difficult points of law on which the claim of either party may ultimately depend. If such attempts are made they can and should be discouraged by appropriate orders as to costs." (emphasis mine)

In my opinion, these observations apply with equal force on an application to discharge or vary an injunction of the Mareva type, such as that in par5 on p5. I turn to the 5 matters in issue, (A) - (E); see pp14-15.

(A) The standing of the applicants

In *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* (supra) Buckley LJ (with whom the other members of the Court of Appeal agreed) said at p978:-

> "Where an injunction has been granted in an action which affects someone who is not a party to the action, he can apply in the action for the discharge of that injunction without himself being a party to the action - - -. Where the interest of the applicant is clear, he may make such application by motion in the action - - - and in my opinion can equally well do so by summons. If it were necessary, it seems that probably there would be power [under the Rules] to add the [applicant] as a party but in the circumstances I do not consider that this is necessary." (emphasis mine)

I respectfully agree with their Lordships' approach. Applying it to the present case, the question is whether the applicants are persons "affected" by the injunction of 13 March 1990. To establish that they are, the applicants must show that they have a "good arguable case" that between them they own the contents of the 2 remaining containers. In an endeavour to do so Mr Duguid relied on the affidavits of:

(1) Katie Kathopoulis, the plaintiff's daughter, sworn 12 March 1990, to the effect that the household effects of Dionisia Agapitos were in the 6 containers which she had seen "in the driveway of the former house of Nikolaos and Dionysius [sic, Dionisia] Agapitos" about 3 March 1990; and that the containers were then being forwarded to World Wide by Nikolaos Agapitos;

(2) the plaintiff, sworn 13 March 1990, to the effect that Nikolaos Agapitos went to Greece in February 1990, followed by his wife Dionysius [sic, Dionisia] in March 1990; it also listed the property of the defendant, in par24;

(3) the applicant Agapitos Agapitos, sworn 5 June 1992, to the effect that he had helped to pack the 6 containers, and that their contents comprised household effects of the applicants; and

(4) his own affidavit, sworn 26 August 1992.

Ms Kelly objected to the reception of certain parts of the affidavit evidence of Agapitos Agapitos, in particular pars 7,8,9,10 and certain phrases in par3. She submitted that pars8 and 9 could not be relied on by the applicants as r43.03(2) of the Rules read with r7 of the Supreme Court (Companies) Rules had not been complied with, in that the affidavit did not set out the grounds for his belief on which the statements of fact therein were based. Mr Duguid accepted that the phrases in par3, and pars7 and 10, should not be received; however, he submitted that the applicants should be allowed to rely on the contents of pars8 and 9.

Notwithstanding r2.04 of the Rules read with r7 of the Supreme Court (Companies) Rules, I ruled that the non-compliance with r43.03(2) meant that the contents of pars8 and 9 should not be received, as the applicants had failed to show good reason why the discretion to receive that evidence, despite the non-compliance, should be exercised in their

favour, in the circumstances of the case: see *J-Corp Pty Ltd v Ingram* (1988) NTJ 329 at 335.

Mr Duguid submitted that the affidavit material, (in particular pars 2 and 3 of Katie Kathopoulis' affidavit, par24 of the plaintiff's affidavit, pars 4, 5 and 6 of Agapitos Agapitos' affidavit, and Annexures C, F and K of his own affidavit), established that the contents of the 2 containers are the same goods which were in the driveway of the former Darwin home of Nikolaos and Dionisia Agapitos on 3 March 1990.

He further submitted that these contents, consisting of household items and effects, were not the type of items which a building and construction company such as the defendant would be expected to own (see pars3 and 24 of the plaintiff's affidavit); and that this supported the submission that the applicants owned the contents, and not the defendant company.

On the other hand, Ms Kelly submitted that pars2, 3, 4 and 5 of the affidavit of Agapitos Agapitos were really statements of fact based on his belief, and little weight should be given to them. Further, par24 of the plaintiff's affidavit did not exhaustively list all the property owned by the company. Consequently, she submitted the affidavit material on which the applicants relied did not establish that the contents of the 2 containers were owned by the applicants; rather, the evidence was contradictory as to the ownership of those contents.

Having regard to the affidavit material relied on by both parties, and what the applicants must show as set out at

p15, I consider that for the purposes of dealing with the application of 25 August 1992 the applicants have established a good arguable case that the items in the 2 containers are their property. It follows that I consider the applicants have standing to apply to discharge the injunction of 13 March 1990, since their interest in doing so is clear; see the citation from *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* (supra) at p16.

This conclusion makes it unnecessary to decide whether the applicants should first seek to be joined as parties to proceeding No.137 of 1990 before their application is entertained. However, having regard to r9.06(b)(ii) of the Rules read with r7 of the Supreme Court (Companies) Rules, I indicate that in the circumstances I would have allowed the applicants to be joined in this action, had that been a pre-requisite, in order that the real issues in dispute in the application could be resolved. I also point out the relevant action in which they could be joined is No.55 of 1992, instituted by the liquidator against Nikolaos Agapitos on 3 March 1992. Proceedings No.137 of 1990, directed to the winding up of the company, do not directly concern the right of action by the company against Nikolaos Agapitos, which founds the injunction of 13 March 1990. The order in par5 (p5) should have been sought by a separate application, in which Nikolaos Agapitos should have been named as the "intended defendant".

(B) Do the applicants come with "clean hands"?

(i) The liquidator's case

Relying on the contents of the affidavit of Mr Nourse of 18 September 1992, Ms Kelly submitted that the applicants committed a fraud on the defendant company, by knowingly participating in a misappropriation of company funds in 3 transactions; see pars2(i)-(p), and (r) of that affidavit. She submitted that it followed that, applying the principles of equity, in particular the maxims that "he who seeks equity must do equity" and "he who comes into equity must come with clean hands", the applicants were debarred from obtaining the relief they sought, the object of which was to complete their "dishonest design" by removing their only remaining assets from the jurisdiction. She referred to Meagher, Gummow and Lehane: "Equity, Doctrines and Remedies" (2nd ed. 1984), pars311, 322 and 326; and Spry: "Equitable Remedies" (2nd ed. 1980) pp231-233.

I note that in this application these two equitable maxims overlap considerably, as far as concerns the defendant's submissions. See *FAI Insurances Ltd v Pioneer Concrete Services Ltd* (1987) 15 NSWLR 552 at 557-561, for a discussion of these "closely related" maxims, and their history.

Ms Kelly put her supporting submissions in the alternative.

First, to obtain relief, the maxim "he who seeks equity must do equity" required the applicants to fulfil their legal and equitable obligations in relation to the defendant's

claims against them. This meant that if they submitted to the jurisdiction of the Court by entering Appearances in proceedings nos. 243 and 244 of 1992 the relief they sought should be granted; but not otherwise. The discretionary relief they sought should only be granted on that condition. See *Hanson v Keating* (1844) 4 Hare 1, 67 ER 537; *United States of America v McRae* (1867) 3 Ch. App. 79 at 88-9, per Lord Chelmsford L.C.; and *Langman v Handover* (1929) 43 CLR 334 at 351-352, per Rich and Dixon JJ.

Alternatively, the applicants' conduct in their transactions (set out in par2(i)-(p) and (r) of Mr Nourse's affidavit) with the defendant had been improper, in the sense that their conduct constituted a legal impropriety which had an "immediate and necessary relation" to the relief they now claimed; see *Dewhirst v Edwards* [1983] 1 NSWLR 34 at 51 and *Dering v Earl of Winchelsea* (1787) 1 Cox 318 at 319-20; 29 E.R. 1184, per Eyre C.B. Accordingly the relief they sought should be refused. See *FAI Insurances Ltd v Pioneer Concrete Services Ltd* (supra) at 557-561 which deals with how close the nexus must be between the transactions giving rise to the question of "clean hands", and the transaction being attacked by the applicants; Young J concluded at p561 that an applicant would be debarred from relief only if the grant of the relief he sought would mean in effect that he was taking advantage of his own wrong. See also *Attorney General (U.K.) v Heinemann Publishers Pty Ltd* (1987) 8 NSWLR 341 at 383, to the same effect.

(ii) The applicant's case

Mr Duguid submitted that the defendant had failed to establish that the applicants came with "unclean hands"; accordingly there were no cogent reasons for the Court's discretion to be exercised in favour of the defendant. In support, he relied on 4 submissions, viz:-

(1) The liquidator did not suggest that two of the applicants (T. and A. Agapitos) had played any part at all in the alleged "dishonest design";

(2) The affidavit of Mr Nourse is directed at the activities of Nicholas Agapitos and not at those of the applicants, and accordingly is irrelevant for the purposes of this application;

(3) Certain parts of the affidavit of Mr Nourse were inadmissible, viz:-

(a) the first paragraph of par2;

(b) the third sentence of par2(j);

(c) par2(q); and

(d) the last sentence in par5; and

(4) As to the 3 alleged transactions the liquidator relied on as constituting the applicant's "dishonest design" (see the affidavit of Mr Nourse pars2(i)-(p) and (r)): the first transaction (see pars2(i) and (r)) related to Nikolaos Agapitos and Peter Passas only, and so was not relevant to the applicants; and the evidence could not support the liquidator's

contention that the second and third of those transactions (see pars2(k), (n), (o) and (r), and 2(l), (m), (n), (p) and (r) respectively) showed that the other 3 applicants (D. Agapitos, M. Passas and C. Ginnis) were knowing participants in a fraud on the defendant.

(iii) Conclusions

I now deal with these submissions. First, the concession by Ms Kelly that two of the applicants (T. and A. Agapitos) were not involved in the alleged "dishonest design", was properly made; see her affidavit of 24 September 1992, annexure "C".

Second, as to the relevance of Mr Nourse's affidavit: I do not accept Mr Duguid's submission that because its prime focus is on Nikolaos Agapitos, it is irrelevant to the present application. I consider that pars (i), (k)-(p) and (r) are clearly relevant to the question whether or not three of the applicants (D. Agapitos, M. Passas and C. Ginnis) come with "unclean hands" and are thereby debarred from obtaining the relief they seek.

Third, as to the contention that certain parts of Mr Nourse's affidavit were inadmissible: during the course of submissions, I ruled that pars2(j) and (q) and the last sentence in par5, should be excluded. I overruled the objection to the first paragraph of par2 on the basis that the deponent was qualified to give his professional opinion based on the outcome of his investigations set out in par2;

r43.03(2) of the Supreme Court Rules had been complied with, in that regard.

Fourth, as to the 3 transactions which allegedly constitute fraud by the applicants on the defendant. Mr Duguid submitted that these transactions do not establish that the 3 applicants have "unclean hands". He submitted that the first transaction, set out in Mr Nourse's affidavit at pars2(i) and (r), and Annexure "F", which involved company cheque No. 205454, was relevant only to Peter Passas and not to any of the applicants, and any impropriety on Mr Passas' part was irrelevant to the applicants. Having regard to par6 and Writ 243 of 1992, the liquidator clearly considered that the applicant Maria Passas may have played some role in the first alleged fraudulent transaction; see pars4-10 of the Statement of Claim in the Writ, especially par5. For the purposes of this application, I do not accept Mr Duguid's submission that the evidence of the first transaction is irrelevant to the applicants; it is clearly relevant to Maria Passas.

As to the second transaction, as alleged in pars2(k), (n), (o), (p) and (r) of Mr Nourse's affidavit, and the third transaction, set out in pars2(l), (m), (n), (o) and (r) of that affidavit, Mr Duguid submitted that the Statements of Claim in Writs 243 and 244 of 1992 were defective in various ways, and the allegations therein could not be supported by the available evidence. It is not necessary to resolve these matters in this application. The general thrust of these submissions was that the evidence of the 3

transactions from which the liquidator inferred that there was a "dishonest design" by the applicants, was insufficient to support the drawing of such an inference; for example, as to the Statement of Claim in Writ 244 of 1992, there was no evidence to support the allegations in par11 thereof that when Cleo Ginnis paid $10,000 about 27 or 28 February 1990 to the plaintiff she knew that he was not authorized by the company to receive it, and that he intended to apply the monies to his own use. Mr Duguid submitted that the affidavits of John Ginnis of 23 March 1990 and Cleo Ginnis of 18 May 1990 - deponents who were not cross-examined - supports the contrary inference that the applicants were not thereby knowingly participating in a fraud on the defendant company.

I accept Mr Duguid's submission that the allegations in the Writs are not supported by these last 2 affidavits. However, I do not accept that the results of the investigations carried out by the liquidator (see par2 of Mr Nourse's affidavit) are not capable of supporting an inference that 3 of the applicants, Dionisia Agapitos, Maria Passas and Cleo Ginnis, were involved in a "dishonest design" as regards the company's funds.

Having regard to the affidavit material relied on by both parties, and the outcome of the investigatory work carried out by Mr Nourse, I reject Mr Duguid's submission that the defendant has failed to establish, for the purposes of dealing with this application, an arguable case that three of the applicants (D. Agapitos, M. Passas and C. Ginnis) come with "unclean hands". To the contrary: for the purposes of

this application, I consider that an arguable case to that effect is established.

(C) Has there been unjustified delay by the liquidator in pursuing the applicants?

In *Lloyds Bowmaker Ltd v Britannia Arrow Holdings Pty Ltd (Lavens, Third Party)* [1988] 3 All E R 178, Glidewell LJ said at pp185-6:-

> "A Mareva injunction, as Sir John Donaldson MR said [in *Bank Mallet v Nikpour*] [1985] FSR 87 at 92], is a draconian remedy. It is intended as an adjunct to the action itself, not as a substitute for relief to be obtained on trial. In other words, a plaintiff who succeeds in obtaining a Mareva injunction is in my view under an obligation to press on with his action as rapidly as he can so that, if he should fail to establish liability in the defendant, the disadvantage which the injunction imposes on the defendant will be lessened so far as possible." (emphasis mine)

Dillon LJ commented in similar terms at 188:-

> "- - - where a party has obtained a Mareva injunction, the party is bound to get on with the trial of the action, not to rest content with the injunction. The injunction is merely ancillary to the trial of the action to hold the position until the action comes on for trial". (emphasis mine)

In that case the plaintiff had issued its Writ in May 1984 before obtaining the Mareva injunction in August; their Honours' remarks were to the effect that the plaintiff had to "get on" with bringing its (already existing) action to trial.

These views were reiterated in *Town and Country Building Society v Daisystar Ltd and Raja* (supra) at 1563, where the Writ had also issued before the Mareva injunction was obtained. In the present case the Mareva injunction was obtained *before* Nikolaos Agapitos or the applicants were sued;

that gives rise to the additional obligation to institute the action promptly, as well as the obligation to press it on to trial.

I respectfully agree with their Lordships' approach, and apply it in this case. Whether the injunction of 13 March 1990 should be discharged because of subsequent delay by the liquidator, is a discretionary matter to be determined in the light of all the circumstances including the following:-

(1) Whether there has been delay as a result of a deliberate decision by the liquidator;

(2) The length of the delay;

(3) Any explanation put forward by the liquidator for the delay;

(4) The degree of prejudice liable to be caused to the liquidator if the injunction were discharged;

(5) Whether the liquidator has sought to rectify the position and proceed with his actions, or whether the delay was still continuing at the time of hearing the application to discharge the injunction;

(6) The degree of prejudice likely to be caused to the applicants as a result of the delay which has occurred; and

(7) Whether the applicants have through their conduct either caused the delay or contributed to it.

See generally S. Gee: "Mareva Injunctions and Anton Piller Relief" (2nd ed., 1990) p233.

Mr Duguid submitted that, in light of his affidavit of 26 August 1992, in particular Annexures "E", "I", "J", "K" and "L", the application of these 7 criteria lead to the conclusion that the injunction should be discharged, and that it should not be renewed in any other proceeding.

He submitted as follows. The liquidator made a deliberate decision not to take action promptly against Nikolaos Agapitos or the applicants. The delay was substantial, some 2½ years from the injunction of 13 March 1990 until Writs issued in September 1992 against the applicants, and some 2 years until he sued Nikolaos Agapitos. The explanation for that delay, in essence, appeared to be that the liquidator thought it was just "too hard" to commence proceedings. The contents in the containers are worthless in a commercial sense and therefore any prejudice liable to be caused to the liquidator or the plaintiff if the restraining order were discharged, would be minimal. The prejudice caused to the applicants by the injunction is considerable.

Ms Kelly submitted that there was no "unjustified delay" by the liquidator in pursuing the applicants and Nikolaos Agapitos, for some 7 reasons, viz:-

1. The decision not to proceed expeditiously against them was not deliberate. The delay was caused by the following factors, inter alia:

(i) it was the plaintiff who had obtained the injunction on 13 March 1990, not the liquidator;

(ii) the liquidator considered that he had no role to play in relation to the injunction: see Ms Kelly's affidavit of 24 September 1992, annexure "C"; and

(iii) the liquidator had had many matters to consider when deciding whether to institute proceedings against the applicants and Nikolaos Agapitos.

2. It was conceded that the length of the delay before issuing Writs was substantial.

3. The explanation for that delay was that the liquidator sought to have the solicitors for the applicants accept service of the Writs, but they would not do so; see also the factors listed in 1. above.

4. The degree of prejudice liable to be caused to the liquidator if the injunction were discharged would be substantial, as the applicants have no other known assets in the jurisdiction.

5. The degree of prejudice likely to be caused to the applicants as a result of the delay which has occurred is the same as when the injunction was ordered on 13 March 1990.

6. The defendant had in fact issued Writs against the applicants and had applied for substituted service of those Writs, as at the time of the hearing of this application.

7. The applicants had caused or contributed to the delay by placing themselves and their assets beyond the jurisdiction.

Ms Kelly submitted that the facts relevant to this application distinguished it from the decisions in cases such as *Lloyds Bowmaker* (supra) and *Country Building Society*(supra); in each of those cases the plaintiff instituted its action, subsequently obtained a Mareva injunction, knew the whereabouts of the defendant, but did not proceed expeditiously in bringing its action to trial; in this case the liquidator had not known the whereabouts of the applicants and consequently could not institute proceedings until either their whereabouts overseas was ascertained or substituted service on them could be effected.

I note that annexure "C" to Ms Kelly's affidavit and annexure "L" to Mr Duguid's affidavit establish that the liquidator's attitude during the relevant period was that "the injunction [was] really none of his business" (as Ms Kelly put it in annexure "C"); he had no role to play in that regard, relying on legal advice that he was "under no obligation to do anything" (see annexure "K" to Mr Duguid's affidavit).

As noted earlier (p9), on 3 March 1992 the liquidator commenced proceedings no.55 of 1992 against Nikolaos Agapitos for repayment of an alleged debt, and

damages for conversion; on 10 September 1992 be issued Writs nos. 343 and 344 of 1992 against the applicants. On 18 September 1992 he instituted proceedings no.250 of 1992 against Nikolaos Agapitos Pty Ltd as Trustee of the Nikolaos Agapitos Family Trust. These various proceedings to enforce the company's rights against Nikolaos Agapitos and the applicants were instituted some 21 to 27 months after the liquidator's appointment on 14 June 1990.

Lloyds Bowmaker (supra) and *Country Building Society* (supra) establish that it is a question of fact in each case whether delay was unjustified. I observe that in the fairly common case such as this where a Mareva-type injunction was sought before a Writ issued, an undertaking should normally have been obtained to issue a Writ forthwith; see, for example, the Practice Note at [1983] 1 All ER 1119 and *Siporex Trade S.A. v Comdel Commodities Ltd* (supra). The Rules contain provision akin to O.29 r1(3) of the Rules of the Supreme Court 1965 (U.K.); see r38.01 read with r4.08. See also the form of order for a Mareva injunction at (1983) 59 ALJ 31. To determine whether the delay was unjustified, I proceed to consider the submissions relating to the 7 factors set out at pp27-28.

(1) Delay by deliberate decision of the liquidator

The injunction was granted by Asche CJ on 13 March 1990. At the same time a provisional liquidator was appointed. His primary duty was to preserve the status quo with the least possible harm to all concerned, so as to enable the Court to decide after a proper and final hearing whether

or not the company should be wound up: see *Re Carapark Industries Pty Ltd* (1967) 86 WN (Pt.1) (NSW) 165 at 171. On 14 June 1990 the Court ordered that the defendant be wound up and appointed a liquidator. His duty was to administer the winding up on the Court's behalf, and, in doing so, to act impartially as between the parties interested in the winding up.

The period between 13 March 1990 and 14 June 1990 should not be taken into account, when ascertaining if there was an "unjustified delay"; the provisional liquidator was not in a position to pursue Nikolaos Agapitos or the applicants.

In my opinion, the affidavit material (Mr Nourse's affidavit pars3-6, Mr Duguid's affidavit and Ms Kelly's affidavit) establishes that the liquidator's decision from 14 June 1990 until 3 March 1992 not to sue Nikolaos Agapitos and until 3 September 1992 not to sue the applicants, was a considered decision, for most of that period. The liquidator had power to institute such proceedings in the name and on behalf of the company; see s377(2)(a) of the Companies Code. He had already taken some action in relation to the containers on 19 June 1990; see p9.

I consider that the liquidator did not institute action against the applicants or Nikolaos Agapitos earlier than he did, for a combination of reasons. He considered that he had no role to play in respect of the Mareva injunction, relying on legal advice to that effect; see p31. However, he also needed to investigate the company's affairs: this

included interviewing the plaintiff. He examined the plaintiff and 5 others in court under s541 of the Companies Code in November 1990; see par 2 of Mr. Nourse's affidavit of 18 September 1992 and annexure "K" to Mr. Duguid's affidavit of 26 August 1992. I reject Mr Duguid's submission that the liquidator thought it was just "too hard" to decide whether to proceed against the applicants. I think the better view is that he considered he was unable effectively to pursue the applicants until his investigations were sufficiently advanced; his decision was "deliberate", in that sense.

(2) The length of the delay

The affidavits of Ms Kelly and Mr Nourse establish that the liquidator issued Writs against the applicants some 2 years and 3 months after he was appointed. Clearly this was a substantial period of delay and a factor to be weighed when considering whether or not the Court should exercise its discretion to discharge the injunction.

(3) Explanation for the delay

It is to be noted that the liquidator as an officer of the Court was required to preserve and collect the company's assets as expeditiously as possible. When he was appointed, the Mareva injunction of 13 March 1990 over certain assets was already on foot. That fact meant that it was the liquidator's duty to decide very expeditiously whether an action should be brought against the applicants who had claimed on 6 April 1990 to be the owners of the container contents; and if so, to pursue it as rapidly as he could. See the citation from *Lloyds Bowmaker Ltd* (supra) at p26. He

could not simply rest on the Mareva injunction. As noted earlier (p31) the liquidator considered he had no role to play in relation to the injunction. His legal advice to that effect appears to have been received before 26 June 1991. That advice was incorrect, in my opinion. To the contrary, if he wished not to proceed expeditiously, his duty was to apply to have the injunction discharged.

(4) Prejudice to the liquidator if injunction discharged

I accept Ms Kelly's submission that the contents of the relevant containers are the only assets of the applicants remaining in Australia, and the discharge of the injunction would prejudice the liquidator, in the sense that if he recovers judgment against the applicants in proceedings nos 243 and 244 of 1992, there is a serious risk that enforcement of that judgment would be frustrated by the absence of any other assets of the applicants within Australia. The question to be resolved, is the extent of that prejudice. As to that, there is contradictory evidence as to whether the contents of the containers are commercially valuable or not.

Having regard to the affidavit material (in particular the insurance policy at annexure "F" to Mr Duguid's affidavit showing a total insurable value of $10,000), and though the value of the contents is not large in a commercial sense, I consider that it is such that if the injunction were discharged a degree of prejudice would be suffered by the liquidator.

(5) Action by the liquidator to rectify the delay

I accept Ms Kelly's submission that at the time of hearing the application of 25 August 1992 the liquidator had taken action to rectify the delay, by instituting proceedings against the applicants in this Court: see her affidavit of 24 September 1992.

(6) Prejudice to the applicants caused by the delay

If the injunction is not discharged then the applicants will be prejudiced in that they will lose the use of the contents of the containers.

(7) Whether the applicants have contributed to the delay

I accept Ms Kelly's submission that the applicants have in part contributed to the liquidator's delay by placing themselves and their assets beyond Australia.

Weighing up all these factors, I consider that in all the circumstances of the case, there was an unjustified delay by the liquidator in instituting action against the applicants, bearing in mind what is required of a plaintiff in that regard when a Mareva-type injunction is on foot; see *Lloyds Bowmaker* (supra) and *Town and Country Building Society* (supra), at pp26-7.

The conclusion at p26 as to the applicants arguably coming with "unclean hands" makes it necessary to deal with Mr Duguid's submission (2)(b) at pp11-12 that that conclusion does not automatically debar them, and that since the liquidator did not pursue the applicants as expeditiously as required, the Court should in the exercise of its inherent

jurisdiction discharge the injunction, notwithstanding the applicants' "unclean hands". I turn to that submission.

(D) Should the injunction be discharged, in the exercise of the Court's inherent jurisdiction?

Just as the Court has inherent jurisdiction to grant a Mareva-type injunction, so it has inherent power to discharge it. To ascertain if the Court should do so in the exercise of its inherent power, it is necessary to balance the equities involved.

In *Commissioner for Corporate Affairs v Harvey* [1980] VR 669 at 691, Marks J explained the general duties of a liquidator appointed in a compulsory winding up in the following terms:

> "The duties of the liquidator need to be clearly understood. Fundamentally, he must administer the estate strictly in accordance with the duties and obligations specifically imposed on him by the Companies Act and its Rules. It is obvious that everything to be done in a competent administration is not and cannot be specifically prescribed. Preserving the assets, giving proper attention to the administration, acting with due dispatch and ensuring adequate knowledge and understanding of the affairs of the companies are matters of common sense. If there is a difficulty at any stage of the administration then it is the clear duty of the liquidator to inform the Court and take directions." (emphasis mine)

See generally his Honour's observations at pp691-696. See also Lipton and Hertzberg "Understanding Company Law" (4th ed.), pp580-587; H.A.J. Ford "Principles of Company Law" (4th ed.), pp648-651; and J. O'Donovan (ed) "Law of Company Liquidation" (3rd ed., 1987), Chapter 8.

In this case the liquidator was obliged, in discharging his duties and responsibilities, to proceed

expeditiously against Nikolaos Agapitos, if he wished to maintain the Mareva injunction. At the time he was appointed (14 June 1990) the plaintiff (then a director of the company) had obtained a Mareva injunction for the purpose of protecting the enforcement of any judgment the company might secure against Nikolaos Agapitos. After the liquidator was appointed, only he could pursue Nikolaos Agapitos. In that respect he had unjustifiably delayed taking action, as far as the maintenance of the injunction was concerned. The fact that he acted on erroneous legal advice in that regard, is not to the point.

It is necessary to balance the equities in the case, and make an order which attempts to do justice between the interested parties. In my opinion, the liquidator's delay requires that the injunction of 13 March 1990 should be discharged: see *Town and Country Building Society v Daisystar Ltd* (supra) and *Lloyds Bowmaker* (supra). Should it be discharged unconditionally as regards all the applicants? Or unconditionally only as regards A. and T. Agapitos, and conditionally in respect of D. Agapitos, M. Passas and C. Ginnis? Before answering this question, it is necessary to ascertain if the Court has the power to discharge the injunction conditionally.

E. Whether the Court has power to discharge the injunction conditionally

The application of the maxim "he who comes into equity must come with clean hands" to the circumstances of this case would prevent the 3 applicants from obtaining the

relief they seek: see *Attorney General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (supra) at 383 and *FAI Insurances Ltd v Pioneer Concrete Services Ltd* (supra) at 557-561.

However, application of the maxim "he who seeks equity must do equity", would enable the 3 applicants to be granted the relief they seek subject to certain conditions. In *Langman v Handover* (supra) Rich and Dixon JJ observed at pp351-352:

> "The maxim, he who seeks equity must do equity, is not, according to Knight Bruce L.J., always easy to understand or apply *(Gibson v Goldsmid* (1854) 5 DeG. M. & G. 757, at p760; 43 E.R. 1064), but it does not substitute moral for legal standards in the determination of the conditions of relief. The true meaning of the maxim is that one who seeks the aid of a Court of equity to enforce a claim, must be prepared to submit in that suit to any directions which the known principles of a Court of equity may make it proper to give *(Colvin v Hartwell* (1837) 5 Cl. & F. 484, at p522; 7 E.R. 488. "The rule, certainly, does not go so far as to entitle the Court arbitrarily to impose terms upon a plaintiff, who may be driven to ask for its assistance. It is restricted in its operation, and the true meaning of it, as I apprehend, is this, that those who ask for the assistance of the Court must do justice as to the matters in respect of which the assistance is asked" (per Turner L.J., *Gibson v Goldsmid* (1854) 5 DeG. M. & G., at p765; 43 E.R. 1064. (emphasis mine).

See also *Hanson v Keating* (supra) at p539 and *United States of America v McRae* (supra) at 89.

It is clear, I think, that the Court has power to grant relief to the 3 applicants (D. Agapitos, M. Passas and C. Ginnis), conditionally; I reject Mr Duguid's submission that the power is only to decide if the injunction is appropriate or not.

Conclusions

For the purposes of this application, I have made the following 4 findings:

(1) The 5 applicants have established a good arguable case that they own the contents of the containers in question. Therefore they had standing to apply to this Court for the relief they seek: see p19.

(2) There is an arguable case that three of the five applicants (D. Agapitos, M. Passas and C. Ginnis) come to the Court with "unclean hands"; that is, that they were involved in a "dishonest design" as regards the company. See p26.

(3) It is not established that two of the five applicants (T. and A. Agapitos) have "unclean hands"; Ms Kelly rightly conceded that no allegation in that regard was made against either of them.

(4) The delay by the liquidator pursuing the applicants was an "unjustified delay", in terms of what is required of a plaintiff seeking to rely on a Mareva-type injunction. See p35.

It can be seen that the entire basis on which the Mareva injunction was obtained in March 1990, has disappeared. No longer is it suggested there is evidence that the contents of the containers belonged to Nikolaos Agapitos. In all the circumstances, and particularly in view of the extraordinary

nature of a Mareva injunction, I consider the appropriate order is that the injunction of 13 March 1990 should now be discharged unconditionally as regards all 5 applicants.

Costs

The applicants also seek that the company or its liquidator pay the applicants' costs of and incidental to the application, to be taxed on the indemnity basis in r63.27. In support, Mr Duguid relied on *Project Development Co. Ltd S.A. v K.M.K. Securities Ltd* [1982] 1 W.L.R. 1470. In that case the intervener was a bank, an innocent third party subject to a Mareva injunction; it successfully applied to have the injunction varied, and sought its costs on an indemnity basis.

Parker J said at pp1471-2:-

> "In my judgment an innocent third party affected by a Mareva injunction ought, if he has to apply to the Court for variation of the order and is successful in so doing, to have all costs incurred so long as they are not unreasonable in amount or unreasonably incurred; and a plaintiff who resorts to the draconian remedy of a Mareva injunction should expect to pay such costs.
>
> It appears to me that whilst the successful third party intervener should be allowed all his reasonable costs, it is right that he should have to establish, as he does on the common fund basis, the reasonableness of the costs for which he is contending.
>
> - - -
>
> I am concerned only to see that the result of taxation is that the intervening third party has those costs which I have indicated it appears to me in *Mareva* cases, save in exceptional circumstances, he ought to have.
>
> It should, I think, be stressed that a plaintiff who resorts to the Mareva injunction must expect to pay, and should in justice pay, all reasonable expenses and all reasonable costs to which innocent third parties may be put by his actions - - -."

I respectfully agree with these observations. However, 3 of the applicants cannot properly be regarded, in my opinion, as in the category of innocent third parties; the other 2 are. The costs of the applications are in the discretion of the Court; see r63.03(1). I consider that 2 of the applicants, T. and A. Agapitos, should have their costs on the indemnity basis provided for by r63.27, except that in case of doubt they should bear the onus of establishing that the costs were reasonably incurred or were reasonable in amount. The remaining 3 applicants should have their costs on the standard basis provided for in r63.28.

Orders

The orders of the Court are as follows:-

1. The injunction of 13 March 1990 herein, is dissolved.
2. The applicants should have their costs of the application, in manner indicated above.