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89/8

ROYAL COURT

8th February, 1989

Before: Commissioner P.R. Le Cras, and
Jurats Vint and Orchard

Between	Numbers Twelve and Thirteen Britannia Place Limited	Plaintiff
And	J. & G. (Property) Limited	First Defendant
And	St. Aubin's Finance Holdings Limited	Second Defendant
And	Lazard Brothers & Co. (Jersey) Limited	Third Defendant
And	Jacques Pierre Labesse & others, exercising the professions of Advocate and Solicitor under the name and style of Bois & Bois, Perrier & Labesse	Party Cited
And	Her Majesty's Attorney General (by original action)	Party Intervening

And

Between	Lazard Brothers & Co. (Jersey) Limited	Plaintiff

And | Numbers Twelve and Thirteen Britannia Place Limited (by counterclaim) | Defendant

Interlocutory applications:-

(1) By the first and second defendants for an order that the Order of Justice in in the above original action be struck out and/or the interim injunction contained therein lifted, on the following grounds -

(a) THAT the Order of Justice disclosed no reasonable cause of action; or

(b) THAT the Order of Justice was scandalous, frivolous or vexatious; or

(c) THAT the Order of Justice might prejudice, embarrass or delay the fair trial of the action;
or

(d) THAT the Order of Justice was otherwise an abuse of the process of the Court; or

(e) THAT the plaintiff failed to make full and frank disclosure of all material facts when the Order of Justice was presented for signature to the Deputy Bailiff.

(f) THAT the plaintiff had failed to comply with the principles underlying the Mareva injunction; and

(g) THAT the balance of convenience justified the lifting of the injunction; and

(2) By the plaintiff for an order that:-

(i) the action be stayed pending the outcome of the proceedings threatened to be brought by the third defendant against the plaintiff's counsel;

(ii) the action should be adjourned in any event; and

(iii) the costs of the plaintiff's application be paid by the third defendant.

Advocate D.F. Le Quesne for the plaintiff (the plaintiff in these proceedings was originally represented by Advocate R.A. Falle, who withdrew

when the third defendant commenced a separate action against Messrs. Bois & Bois, Perrier and Labesse).

Advocate R.J. Renouf for the first and second defendants.

Advocate J.G. White for the third defendant.

n.b. Party cited previously excused from further appearance.

JUDGMENT

COMMISSIONER LE CRAS: This is an application to raise an interim injunction. The injunction was imposed by virtue of the service of an Order of Justice signed on the 20th November, 1987, brought by Numbers Twelve and Thirteen Britannia Place Limited (the plaintiff) against J. & G. (Property) Limited (the first defendant), St. Aubin's Finance Holdings Limited (the second defendant), Lazard Brothers & Co. (Jersey) Limited (the third defendant) and a firm of solicitors, Messrs. Bois & Bois Perrier & Labesse (the party cited).

The history of events may be briefly summarised as follows:-

On the 25th November, 1985, at the request of the developer, Mr. Wright sent what he described as brief details of the Britannia Place development to Mr. Bale, who we understand through counsel to be the beneficial owner of the plaintiff company. These brief details showed Number 13 Britannia Place as having some 2,645 sq. ft. of net office area.

In March, 1987, an agreement was entered into between J. & G. (Property) Limited, (the Vendor), of the first part; St. Aubin's Finance Holdings Limited, of the second part; Twelve and Thirteen Britannia Place Limited (the Purchaser), of the third part and Lazard Brothers & Co. (Jersey) Limited, of the fourth part. The preamble to the agreement included, _inter alia_ the following recital:-

"WHEREAS:-

(A) By deed passed before the Royal Court of Jersey on the eighth day of June One Thousand Nine Hundred and Seventy-Three the Vendor purchased from St. Aubin's Motor Coach & Car Company Limited the property generally known as St. Helier Garages, Bath Street, comprising garage, showroom offices, flats and appurtenances, situate in Bath Street, in the said Parish of St. Helier.

(B) The Vendor is a wholly owned subsidiary of St. Aubins.

(C) The Vendor intends to demolish certain of the existing buildings referred to in Recital (A) hereof and St. Aubins for and on behalf of the Vendor has entered into a Joint Contracts Tribunal form of building contract dated the Ninth day of October One Thousand Nine Hundred and Eighty-five (hereinafter called "the building contract") with the limited liability company known as Charles Le Quesne (1956) Limited of First Tower, St. Helier, Jersey (hereinafter called "the Contractor") to erect nine shop/office units (hereinafter called "the units") on the site thereof.

(E) St. Aubins has agreed to finance and to manage the development referred to in Recital (C) hereof for and on behalf of the Vendor".

The agreement contained, further, the following provisions:-

"1. The Vendor hereby agrees to sell and convey unto the Purchaser which hereby agrees to take and purchase a certain property consisting of the site and the building being erected thereon (hereinafter "the property") comprising unit number 13 which is shown for identification purposes only on the site plans attached as the First Schedule to this Agreement ...."

2. The said sale and conveyance of the property shall be substantially in the terms of the draft deed or contract of sale attached as the Second Schedule to this Agreement but subject always to the terms of Clause 6 hereof (hereinafter called "the draft contact").

3. The Vendor and St. Aubins hereby agree and undertake to

complete the construction of the property generally in accordance with the building contract and drawings numbers 381.10.K, 381.11.K, 381.12.G, 381.15.D, 381.38.A, 381.48.A, 381.50.A and 381.51.A..... with such variations thereto as may be required by the States of Jersey Island Development Committee or other authorities in the said Island of Jersey in relation to the development, or otherwise agreed in writing with the Purchaser, it being understood and agreed that the Purchaser shall have the right during the course of construction of the property to inspect the development in consultation with the Architects and the Contractor.

4. The sale is made for and in consideration of the sum of Three Hundred and Ten Thousand Pounds (£310,000) (hereinafter called "the consideration") which shall be payable by the Purchaser to Lazards (as stakeholder) in cash in the manner following ....."

5. The Purchaser and Lazards hereby covenant with the Vendor that each of the payments made to Lazards shall be held by Lazards in accordance with the terms and conditions set out in this Agreement and that all interest on such payments will accrue to the benefit of the Vendor and Lazards shall only release payments made to Lazards by the Purchaser as follows:-

(a) To the Vendor or to such other persons as shall be necessary to release any charges secured against the property in accordance with sub-clauses (b) and (c) of Clause 12 hereof ten days after the passing before the Royal Court of Jersey of the contract of sale of the property in accordance with the provisions of Clauses 10 or 13 hereof, or

(b) Otherwise under the provisions of Clause 11 hereof.

10. The Vendor and the Purchaser bind themselves to pass before the Royal Court of Jersey a contract or deed of sale and conveyance of the property in conformity with the terms of the draft contract and the provisions of this Agreement within fourteen days of the date upon which the Vendor shall notify the Purchaser that the Architects shall have issued a Certificate of Practical Completion for the unit hereby agreed to be sold, it being understood and agreed that the Architects shall give prior notice in writing to the Purchaser of the

intention of the Architects to issue the Certificate of Practical Completion and the Purchaser shall be granted a period of fourteen days from the date of receipt of the said notice in which to inform the Architects in writing of any representation which the Purchaser wishes to make and prior to issuing the Certificate of Practical Completion the Architects shall have regard for but shall not be bound by any such representation.

11. Should either the Vendor or the Purchaser fail, refuse or neglect to pass the contract of sale of the property in accordance with the provisions of Clause 10 hereof then the party failing, refusing or neglecting so to do shall pay as agreed liquidated damages to the persisting party the sum of Seventy-seven Thousand Five Hundred Pounds (£77,500), that is to say twenty-five per cent (25%) of the consideration, which agreed liquidated damages are accepted by the Vendor and the Purchaser as the amount of liquidated damages which should be paid to the persisting party as representing a reasonable assessment of the actual damage to be suffered in that event and shall not itself be open by either the Vendor or the Purchaser to challenge or dispute and:-

(a) If the Purchaser shall be the defaulting party then the deposit payable by the Purchaser under the provisions of sub-clause (a) of Clause 4 hereof shall be applied by Lazards as part payment to the Vendor of the agreed liquidated damages and Lazards shall thereupon be released from all its obligations under this Agreement.

(b) If the Vendor shall be the defaulting party the deposit payable by the Purchaser under the provisions of sub-clause (a) of Clause 4 hereof shall be repaid by Lazards to the Purchaser without interest thereon and subject always to Lazards fulfilling its undertaking to the Purchaser in accordance with the provisions of sub-clause (d) of Clause 12 hereof Lazards shall be released from all its obligations under this Agreement.

12. Lazards hereby undertake to the Purchaser:-

(a) That St. Aubins and the Vendor shall make payment to the

Contractor of all sums properly due under the building contract as certified by the Architects under the provisions thereof.

(b) That Lazards shall be a party to the contract of sale of the property in accordance with the provisions of Clause 10 hereof to release all and any charges Lazards may hold secured against the property.

(c) That Lazards shall procure the discharge ten days after the passing before the Royal Court of Jersey of the contract of sale of the property in accordance with the provisions of Clause 10 hereof of all and any other charges which may be secured or registered against the property.

(d) That Lazards shall guarantee payment by the Vendor to the Purchaser of the amount of liquidated damages referred to in Clause 11 hereof should the Vendor be the defaulting party".

We note that the contract which was attached to the agreement (which we understood to be the same as in the final form which was passed) made no reference to a plan, contained no area measurement, but did contain, inter alia, the following clauses. I refer to clauses on page 8 of the contract which are in the following terms:-

"LE TOUT tel qu'il est avec tout et autant d'autres murs, mitoyennetés,

jointures, droits, appartenances et dépendances comme peuvent en appartenir et dans l'état où se trouve ladite propriété avec tous ses vices apparents ou cachés s'ils existent situé en la Paroisse de St. Hélier dans la Vingtaine du Mont-au-Prêtre".

......

"LADITE VENTE héréditaire faite pour et en considération de la somme de DEUX CENT CINQUANTE MILLE LIVRES STERLING que ladite Société Acquéreuse paiera en espèces à ladite Société Venderesse dix jours après la passation du présent contrat devant Justice, moins la somme de VINGT-CINQ MILLE LIVRES STERLING, déjà payée par voie de dépôt."

The contract also contained a provision on page 9 whereby Lazards, abandoned the judicial "hypothèques" which they had obtained. That clause is in the following terms:-

"ET ETAIT A CE PRESENT Monsr. , un des Procureurs dûment fondés de la Société à responsabilité limitée dite "LAZARD BROTHERS & CO. (JERSEY) LIMITED" comme paraît par Procuration scellée et signée à St. Hélier. en cette Ile de Jersey, l'an mil neuf cent quatre-vingt-quatre, le deuxième jour de Novembre, et insinuée au Registre Public de cette Ile; laquelle Société obtint trois hypothèques judiciaires sur les héritages de ladite Société Venderesse, savoir:- (a) la première en vertu de l'enregistrement au Registre Public de cette Ile de certain Acte de la Cour Royale en date du quatorze Mai, mil neuf cent quatre-vingt-deux (ledit Acte remis au Registre Public de cette Ile le vingt-quatrième jour du Juin, mil neuf cent quatre-vingt-deux); (b) la deuxième en vertu de l'enregistrement au Registre Public de cette Ile de certain Acte de la Cour Royale en date du quinze Juillet, mil neuf cent quatre-vingt-trois; et (c) la troisième en vertu de l'enregistrement au Registre Public de cette Ile de certain Acte de la Cour Royale en date dudit jour quinze Juillet, mil neuf cent quatre-vingt-trois; lequel Procureur DECLARA pour et au nom de ladite Société "Lazard Brothers & Co. (Jersey) Limited" et pour ses successeurs qu'elle ne se prévaudra pas de ses droits d'hypothèque ainsi obtenus au préjudice du présent contrat et DECLARA DE PLUS dégrever ladite propriété présentement vendue desdites hypothèques ainsi obtenues; partant ladite propriété est et demeurera affranchie et dégrevée desdites hypothèques comme si elle n'en avait jamais été grevée à fin d'héritage".

On the 21st September, 1987, Mr. Wright wrote to Mr. Carter, for the plaintiffs, as follows:-

"Dear Colin,

Re: Units 12/13 Britannia Place.

Further to our recent telephone conversations regarding the above, I am enclosing photocopies of plans - prepared earlier by the Architect for attachment to the Agreements of Sales - which have been amended

to comply with site dimensions.
Unfortunately I am not in a position to indicate to you the various floor areas, but I would suggest that to avoid any future misunderstanding you obtain this information by instructing a competent surveyor/architect to provide them for you direct and to your satisfaction.
I am instructed by my client to advise you that if for whatever reason you are unhappy about your proposed acquisition, he is prepared to release you from your obligation to purchase.
The foregoing is subject to your confirmation of that intent by close of business on Tuesday 22nd September, 1987, at which time your deposit will be immediately returned.
I await your response.
Yours sincerely,
John D. Wright".

Other correspondence followed and on the 29th September, 1987, Mr. G. Trevor of Messrs. Gothard & Trevor wrote to Mr. Carter to confirm the measurements:

"Dear Colin
UNITS 12 & 13 BRITANNIA, BATH STREET, ST HELIER
I refer to our telephone conversation on Thursday and write to confirm that the above properties were re-measured by my assistant prior to our producing our letting details, a copy of which is enclosed herewith. The dimensions shown on our details are, I believe, accurate. However if it would be helpful to you and the developers I should be only too pleased to meet a representative from the development company with a view to re-measuring the property and producing a set of agreed floor areas.
I look forward to hearing from you again in due course if I can be of any further assistance to you or should you require any additional information.
Yours sincerely
For GOTHARD & TREVOR
GERALD TREVOR".

The relevant part of the 'letting details' referred to by Mr. Trevor in his letter was in the following terms:-

"A self-contained office building within walking distance of the town centre. The property is currently under construction and should be ready for occupation by the end of October this year.

12 and 13 BRITANNIA PLACE, ST HELIER

Briefly the accommodation comprises (all measurements being approximate) ------

<u>Unit 13</u>

GROUND FLOOR

Offices	988 sq ft
W.C.'s	56 sq ft
FIRST FLOOR	
Offices	1130 sq ft
W.C.'s	56 sq ft
TOTAL	2118 sq ft".

On the 22nd October the Architects confirmed the dimensions were correct when they wrote to Mr. Wright. The Certificate of Practical Completion showing the completion of the works was achieved on Saturday the 24th October, 1987, and was issued by the Architects on the 29th October, 1987. On the 23rd October, 1987, Mr. Bisson of Messrs. Bois & Bois Perrier & Labesse (as they were then) wrote to Advocate Voisin of Messrs. Michael Voisin & Co., complaining about the area and suggesting a dimunition in price. That letter read as follows:-

"Dear Advocate Voisin,

<u>12/13 BRITANNIA PLACE</u>

I refer to your recent letter, the contents of which were duly communicated to our client Company.

The potential purchase of the two properties is one that it wishes to push forward with all speed, but a matter has arisen of fundamental importance in relation to the transaction, which I must put before you for your proposals.

You will recall that Agreements of Sale were entered into by the parties some time ago, and they set out the basis upon which the buildings would be constructed. These Agreements were entered into by my client on the specific understanding that there would be a minimum floor area available in each building. Those floor areas were in fact stipulated in enclosures to a letter of 25th November, 1985, addressed by the Vendors' Agents to Mr. Roger Bale.

It now transpires that number 13 Britannia Place has not been built in accordance with the agreed specification, as the floor area available is manifestly not that which was represented to my client Company, and upon which representation, further evidenced by the specification within the Agreement, it contracted to buy.

If we were talking about a small area, there would I think be little difficulty. Unfortunately however, we are talking about a very substantial area indeed.

On my instructions, the net office area available in Number 13 is 2118 sq. feet, and the Agreement of Sale envisaged an area of 2645 sq. feet.

My client Company has agreed in principle, a letting of both properties it is to buy, and and their onward sale. The expected sale price is of course tied directly to the return, which in itself is tied to the area available to let. My client Company is consequently looking at a loss of some tens of thousands of pounds.

I would suggest the easiest way that this matter could be resolved is that a reduction should be made in the purchase price of Number 13 from your client Company, equivalent to the loss that my client Company will suffer on its sale-on by virtue of the fact that its building is not as large as it contractually should be, and consequently fetches a reduced price.

I would be obliged if you would take instructions in the matter, and return to me at your earliest convenience.

Yours sincerely,

BOIS & BOIS PERRIER & LABESSE

J Le C Bisson".

On the 30th October, 1987, Advocate M.M.G. Voisin of Messrs. Michael Voisin & Co replied, denying any liability for his clients on account of the dimunition of the area, and stating on the second page of his letter:-

> "Pursuant to Clause 10 of the Agreement of Sale, your client company is under an obligation to complete the purchase of these two properties within fourteen days of the issue of the Architects' Certificate and accordingly I would agree that the Contract should be passed on the 13th November, 1987.
> Entirely without prejudice, I am instructed by my client company that it would agree to release your client company from the obligations under the Agreement and to return the deposit (without any interest thereon) should your client company wish to withdraw from this transaction. This offer is open for acceptance until close of business on Wednesday, 4th November, failing which my client company will seek to enforce the terms of the Agreement of Sale against your client company.
> Will you either, therefore, by the 4th November confirm that your client company will proceed with the purchase of these two properties on the 13th November or, alternatively, indicate that it wishes to be released from its obligations under the Agreement".

As to what transpired subsequently, we have had the advantage of hearing Mr. Bisson's evidence. On the previous day he had told Mr. Kendall of Messrs. Michael Voisin & Co that notwithstanding previous correspondence he was on instructions unlikely to litigate. On the 13th November, however, the beneficial owner had called upon him at about 2 p.m. on that Friday afternoon and had insisted not only on purchasing the property, but on litigating in respect of what he considered to be a shortfall. Mr. Bisson told us that he informed Mr. Kendall, returned to his office and brought down with him a letter which he handed to Mr. Kendall prior to the passing of the contract. That letter reads:-

> "Dear Sirs,
> <u>12 and 13 Britannia Place</u>

We refer to the contract for the purchase of numbers 12 and 13 Britannia Place which is to be passed this afternoon. In accordance with the terms of previous correspondence we have told you that we believe the vendor is fundamentally in breach of the terms of the Agreement for the sale of number 13 in that the building is not of the size agreed to be built.

In these circumstances our clients in taking conveyance in the usual form this afternoon do so without prejudice to all their rights under the Agreement and in particular the right to seek a remedy for the breaches already indicated to you".

At some point Mr. Kendall replied. We are unsure at exactly what point he did so, but his letter was dated the 13th November, 1987, and was in the following terms:-

"Dear Mr. Bisson,

Re: 12 and 13, Britannia Place

I refer to the sale of the above properties by our client Company "J. & G. (Property) Limited" to your client Company "Numbers 12 and 13 Britannia Place Limited" due to be passed before Court this afternoon and write to confirm that those obligations contained in the Agreements of Sale, signed up between the parties on 11th March, 1987, which are of a continuing nature will remain in full force in accordance with the terms of the Agreements until such time as determined thereby".

The contract, whether before or after Mr. Kendall's letter, but certainly after Mr. Bisson's letter, was then passed. Mr. Bisson could not, he said, be sure whether the possibility of obtaining an injunction over some of the monies had been discussed that afternoon prior to passing contract, although it certainly was so that day. He had, he said, previously given advice on litigation. His instructions were to preserve the plaintiff purchaser's position so far as possible and this he attempted to do although he did not think it necessary to spell this position out.

The injunction imposed by the Order of Justice is in the following terms:-

> "**THAT** service of this Order of Justice on any of the partners of the party cited shall operate as an Immediate Interim Injunction restraining the said party cited from paying out to the Defendants or any one of them or in any way disposing of the said consideration monies until further order of this Court **PROVIDED ALWAYS** that the interim injunction herein contained shall not apply to the said consideration monies to the extent that the said monies shall exceed the sum of SEVENTY-SEVEN THOUSAND FIVE HUNDRED POUNDS (£77,500) STERLING together with interest that may accrue thereon from time to time".

By consent, this has now been amended inasmuch as after the words "disposing of" the words "the said consideration" have been crossed out and the words "held for the plaintiff" have been added. The injunction therefore now restrains the party cited from paying out to the defendants or any one of them or in any way disposing of the monies held for the plaintiff by it until further order. At the same time, by agreement, the "fins" of the actions were amended so as to provide either for the purchase consideration to be diminished, or for damages.

The first Order of Justice was accompanied by an affidavit sworn by Mrs. McKellan to the effect that she was duly authorised to make the affidavit, that she had read the draft Order of Justice and that to the best of her knowledge, information and belief, the facts alleged therein were true. An application was then brought for the injunction to be raised. Prior to the hearing of that application a further affidavit was sworn by Mr. Bisson and this was before us when the defendants came to Court to seek to raise the injunction.

In summary, the grounds on which they rely are these: that no or no sufficient material was put to the learned Deputy Bailiff in the original application for the injunction; that Mr. Bisson's affidavit does not cure these defects; that there are material omissions therein; and that the affidavit is wholly inadequate. The case put was that the duties include the heavy duty

of candour and care, that there was no mention of the bank's position and that there was no mention of the state of mind and timing at the time that the injunction was sought. It was further put that the plaintiff does not need to injunct itself and that in effect, in passing the contract as they did, they were setting a trap in that the bank was induced to give up its charge and the vendor was induced to pass the contract at a time when he expected to receive the whole of the proceeds. A further ground put forward was that the plaintiff is doing no more than seeking security for his claim.

Against this, Advocate Le Quesne argued that justice and convenience require that the injunction should remain on, as otherwise it may well be that his claim is worthless. In paranthesis, we may say that in considering his submissions, we accept that this may well be so.

The principles on which the Court has exercised its discretion when dealing with injunctions of this sort are well known. First, there is the case of Third Chandris Shipping -v- Unimarine SA, (1979) 2 A.E.R. 972 at p.984 where the guidelines are given. I read the following passage:-

> "Much as I am in favour of the Mareva injunction, it must not be stretched too far lest it be endangered. In endeavouring to set out some guidelines, I have had recourse to the practice of many other countries which have been put before us. They have been most helpful. These are the points which those who apply for it should bear in mind. (i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know: see The Assios. (ii) The plaintiff should give particulars of his claim against the defendant, stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant. (iii) The plaintiff should give some grounds for believing that the defendants have assets here".
>
> I go on:-
>
> "(iv) The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied".

And then:-

"(v) The plaintiffs must, of course, give an undertaking in damages, in case they fail in their claim or the injunction turns out to be unjustified".

We will return to points (i), (ii) and (iv) later. These guidelines were adopted in the case of Johnson Matthey Bankers Limited -v- Arya Holdings Limited and National Westminster Bank Plc., (1985-86) JLR 208, and I refer to the passage at p.212 where the learned Bailiff said:-

"Looking at the law as I understand it - certainly in England and I have no doubt, here, because we have applied the English principles when we come to consider interlocutory injunctions ...."

He then went on to address the matters which the Court has to consider, referring to 'The Niedersachsen'. At p.213 appears the following passage:-

"We have looked at the requirements of Mareva injunctions and the guidelines which have to be followed by an applicant before a court can be persuaded to exercise its discretion to grant such an injunction. They are referred to in 37 Halsbury's Laws of England, 4th ed., para 362, at 264:

"The guidelines to be observed on an application for a Mareva injunction are (1) the plaintiff must make full and frank disclosure of all matters in his knowledge which are material for the judge to know [I have already said that we think that has been done by Mr. Harper's affidavit]; (2) he must give particulars of his claim against the defendant, stating the ground of his claim and its amount, and fairly stating the points made against it [There is not much said about what might be the defence but where there is a straight guarantee and a straight debt it is possible that there is no defence - but one must balance that against the other matters]; (3) he must give some grounds for believing that the defendant has assets within the jurisdiction [That was done]; 4) he must give some grounds for believing, beyond the mere fact that the defendant is abroad, that there is a risk of the assets being removed before the judgment or the arbitral award is satisfied; and (5) he must give an undertaking as to damages" [The latter was done]".

The principles were again dealt with in the case of Trasco International A.G. -v- R.M. Marketing Limited & Others, an Unreported Judgment of the Royal Court given on the 29th October, 1986, which had a similar original affidavit. We have to say that in our opinion it is quite clear that the information before the Deputy Bailiff when he signed the original Order of Justice whereby the injunction was imposed, was grossly inadequate. We think it wrong to say, at paragraph 11 of the Order of Justice, that the plaintiff was required to complete. When the plaintiff says, at paragraph 12, that it had given notice to the defendants of its claim and had invited them to complete the said contract of sale and purchase of the said building subject to compensation by way of a dimunition of price or lost profits, but that the first defendant refused and refuses to agree any compensation at all and required the plaintiff to complete the contract sale and conveyance at the price stipulated in the agreement of sale this does not in our view give a fair indication of the actual position. So far as we can see, no indication of the possible defences was included in the Order of Justice. It is also our view that no proper particulars of loss were laid before the learned Deputy Bailiff.

Some six months later, on the 1st June, 1988, Mr. Bisson swore an affidavit and sought to cure this. It is quite clear that whatever the original information before the Court, we have a discretion to continue the injunction. We have to say that serious omissions were alleged against the affidavit - in particular against paragraphs 7, 8, 10 and 11 (the first five lines), 14 and 15 (the first five lines). In paragraph 14, Mr. Bisson admitted that the outstanding Order of Justice at paragraph 12 (whereby he had contended that notwithstanding the formality of passing a contract before Court through their lawyers, the plaintiff and first defendant had an effective understanding which properly enabled the plaintiff to preserve its rights to take proceedings on the first defendant's breach of warranty) "wrongly implied that after signing the Agreement the Plaintiff was obliged under penalty to complete the contract of sale and conveyance and omitted to note that the Plaintiff had been offered the right to be released from its obligations under the said Agreement".

This was criticised, in particular by Mr. Renouf. He claimed that there were material omissions inasmuch as that in paragraph 7 the plaintiff stated that he had found tenants but that there was no explanation as to how

the plaintiff's loss would have been exacerbated had it withdrawn and had the deposit returned. He enquired as to whether the plaintiff was under penalty and claimed there was no evidence of damage. He claimed that paragraph 8 referred to mitigating a loss by which it meant not making the profit which they thought they might make. For the first time, he says, it refers to the offers to withdraw but the affidavit does not say why they chose to pass the formal contract. In paragraph 10 Mr. Bisson claims that the contract was passed on the understanding that they would seek a remedy for breaches but he does not deal there with the obvious defence open to the defendant, namely that of the "passation du contrat". There is no indication of the stage at which it was decided to seek an injunction. He put it: "Was there a scheme to pass the contract and then to injunct?" - and that the plaintiff must put forward full reasons for wishing to act contrary to the oath by which it was bound. He then went on to claim that a Mareva injunction should not be used to prevent creditors being paid in the usual way. This, however, is a point to which we will return.

It is clear to us that this affidavit was not sufficient, especially after six months during which consideration must have been given to this claim. There was still no treatment of the defences which by that time had been put in and no full explanation of the reasons for which the contract was passed and the injunction was then immediately sought. The duty of candour has been dealt with in the case of Brinks Mat Limited -v- Elcombe & Others, C.A. (Civil Division), 12th June, 1987. I refer to the passage at p.18 (and in particular to paragraph (v) thereof), that is the passage put to us both by Mr. Renouf and Mr. White, which reads:-

> "In considering whether there has been relevant non-disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following:
> (i) The duty of the applicant is to make "a full and fair disclosure of all the material facts": Kensington Income Tax Commissioners (1917) 1 KB 486: per Scrutton LJ at page 514.
> (ii) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his

legal advisers: see Kensington Income Tax Commissioners case per Lord Cozens Hardy MR, citing Dalglish v Jarvie, 2 Mac & G 231, 238; Browne-Wilkinson J, Thermax Ltd v Schott Industrial Glass Ltd (1981) FSR 289 at 295.

(iii) The applicant must make proper inquiries before making the application: Bank Mellat v Nikpour (1985) FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicants but also to any additional facts which he would have known if he had made such inquiries.

(iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including (a) the nature of the case which the applicant is making when he makes the application; and (b) the order for which application is made and the probable effect of the order upon the defendant: see, for example, the examination by Scott J of the possible effect of an Anton Pillar order in Columbia Picture Industries v Robinson (1986) 3 WLR 542, (1986) 3 All ER 338; and (c) the degree of legitimate urgency and the time available for the making of enquiries: see per Slade LJ Bank Mellat (1985) FSR 87 at pages 92/93.

(v) If material non-disclosure is established the court will be "astute to ensure that a plaintiff who obtains ... an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty ...": per Donaldson LJ: Bank Mellat v Nikpour (1985) FSR 87 at page 91 citing Warrington LJ in the Kensington Income Tax Commissioners case.

(vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends upon the importance of the fact to the issues which were to be decided by the judge upon the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty upon the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(vii) Finally "it is not for every omission that the injunction will be automatically discharged. A locus poenitentiae may sometimes be afforded": per Lord Denning MR: Bank Mellat v Nikpour at page 90.

The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms. "Where the whole of the facts, including that of the original non-disclosure are before (the court), it may well grant a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed": per Glidewell LJ: Lloyds Bowmaker Ltd v Britannia Arrow Holdings PLC (unreported): Court of Appeal: 18th March, 1987, page 126".

In our view, neither the first nor the second affidavit contained sufficient information, nor did Mr. Bisson's evidence go so far as to cure the defects which were claimed. We have to say that here we take leave from Advocate Le Quesne's submission which we set out in more detail infra and that on these grounds alone we would have felt it right to exercise our discretion to raise the injunction.

However, in addition, further points were urged by the defendants; they contended that the Mareva process is not there to secure priority for the plaintiff. In spite of what Mr. Le Quesne urged for us this morning, we find that this is precisely what the plaintiff is attempting to do. I now refer to the case of Ninemia Maritime Corp -v- Trave Schiffahrtsgesellschaft mbH & Co KG (The Niedersachsen), the headnote to which reads as follows:-

"The test to be applied by the court when deciding to exercise its statutory discretion to grant a Mareva injunction to a plaintiff pursuant to s.37 of the Supreme Court Act 1981 whenever it 'appears to the court to be just and convenient to do so' is whether, after the plaintiff has shown that he has at least a good arguable case and after considering the whole of the evidence before the court, the refusal of a Mareva injunction would involve a real risk that a judgment or award in the plaintiff's favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction (see p.415 b d e, p.419 e to j and p.422 d to f, post).

A Mareva injunction will not be granted merely for the purpose of providing a plaintiff with security for a claim, even when it appears likely to succeed and even when the granting of the injunction will not cause hardship to the defendant (see p.419 c d and p.422 f g, post)".

I refer also to the passage starting at p.411:-

"Second, it is contended for the sellers that the present case is an abuse of the Mareva procedure. The matter arose in this way. As I have said, the first ex parte application was made before the sale was completed. The affidavit of Mr. Nott-Bower disclosed the intent to apply the injunction to the purchase price. After completion, the application was renewed. At this time, reference was made to Negocios del Mar -v- Doric Shipping Corp SA., The Assios [1979] 1 Lloyd's Rep 331. This was a case in which the vendors of a ship had obtained a Mareva injunction in advance of completion without disclosing their intention to employ it for the retention of the purchase price. The Court of Appeal upheld the decision of Mocatta J., who discharged the injunction on the ground that the court should have been informed of the vendor's intention. This decision was plainly distinguishable in the present instance, since full disclosure was made in Mr. Nott-Bower's affidavit. There was, however, another authority on the question, which was not before the court when the ex parte injunction in the present case was granted, namely Z Ltd -v- A [1982] 1 All E.R. 556, [1982] Q.B. 558. In the course of the judgment, to which I have already referred, Kerr L.J., said ([1982] 1 All E.R. 556 at 571-572, [1982] Q.B. 558 at 585):

> 'The second, and fortunately much rarer, illustration of what I would regard as an abuse of this procedure, is where it is used as a means of enabling a person to make a payment under a contract or intended contract to someone in circumstances where he regards the demand for the payment as unjustifiable; or where he actually believes, or even knows, that the demand is unlawful; and where he obtains a Mareva injunction ex parte in advance of the payment, which is then immediately served and has the effect of "freezing" the sum paid over. Thus, we were told by counsel for the plaintiff that payments are sometimes made for premiums which are required illegally on the assignment of leases, and which are then "frozen" immediately as soon as the payment has been made. In effect, this amounts to using the injunction as a means of setting a trap for the payee. A reported instance of such a case (though not in a

> context of alleged illegality) is The Assios [1979] 1 Lloyd's Rep 331, where the injunction was set aside because the plaintiff had not disclosed to the court that he intended to use the order for this purpose. However, in my view even the disclosure of the intention should not suffice to obtain the injunction in such cases. If a person is willing to make such a payment, appreciating the implications, the courts should not assist him to safeguard the payment in advance by means of a Mareva injunction'.

I do not know what effect a citation of this judgment, that is, the judgment of Kerr LJ, would have had, if made at the stage of the ex parte application. Quite possibly, I would have acceded to the argument now advanced for the buyers, that Kerr LJ was dealing only with applications made in advance of payment; and I would no doubt have been impressed by the information, furnished on the present hearing, that the plaintiffs in The Assios had, notwithstanding the decision of the Court of Appeal, obtained an injunction once the price had been paid.

The matter has now been argued out in full, at the inter partes hearing. I have found it difficult. Counsel for the buyers pointed out, rightly, as it seems to me, that there is no logic in a rule which would prevent a plaintiff from enjoining the disposal of an asset, simply because the asset took the shape of moneys paid to the defendant by the plaintiff himself. Nor would a rule be workable, if it precluded an application for Mareva relief within a reasonable time of the asset having been paid by the plaintiff to the defendant. The only solution, counsel for the buyers contended, is to treat sums paid by the plaintiff on the same footing as any other asset.

While I see the logic of this, it is not compelling. There is something unattractive about the idea of a buyer, who is ostensibly paying the full price of a chattel, preparing himself behind the seller's back to deprive him of part of the price. This gives the buyer the best of both worlds. He is spared the awkward decision whether to reject the res vendita, with the possible commercial loss to himself from not having the chattel, coupled with the risk of an action by the seller for non-acceptance. Instead, he gets the res vendita, avoids an

action, and can secure himself for a cross-claim in damages, pursued in his own good time. I am very doubtful whether this is a proper use of the Mareva jurisdiction. On the other hand, how is the judge to identify the cases where relief should be refused? I believe that the answer may, and I emphasise 'may', be that it will normally be an abuse of the procedure for a seller to restrain the dispersal of the purchase price where (a) the claim on which the injunction is founded is itself based on the contract of sale and (b) the court can infer that the seller knows of the facts on which his claim is based before the sale is completed".

I refer also to the following passage at p.416:-

"Thirdly, there was the fact that the buyers were proposing to use the machinery of a Mareva injunction in order to freeze the price of the vessel as soon as it was paid over, unbeknown to the sellers. In this connection the judge referred to a passage in my judgment in Z Ltd -v- A [1982] 1 All E.R. 556 at 571-572, [1982] Q.B. 558 at 585, with which Eveleigh L.J., agreed ([1982] 1 All E.R. 556 at 571, [1982] Q.B. 558 at 584) and expressed reservations about this conduct on the part of the buyers even though their intentions in this regard had of course been fully disclosed in Mr. Nott-Bower's affidavit. However, given the fact that a plaintiff's intention in this regard is fully disclosed to the court, as it must be, we do not think that it would be desirable to express any views about this aspect. We agree with the judge when he said (at p.412, ante):

> 'There is something unattractive about the idea of a buyer, who is ostensibly paying the full price of a chattel, preparing himself behind the seller's back to deprive him of part of the price. This gives the buyer the best of both worlds'.

This factor should certainly be borne in mind by the court when it arises, and it may well militate against the exercise of the discretion to grant the injunction in such cases. However, in other cases the circumstances might well be such as to justify a Mareva injunction even in the face of this factor. In our view it would not be appropriate to seek to lay down any guidelines about it."

Here, as Mr. White pointed out, the plaintiff had knowledge of a number of factors. It knew that it was getting less space than it had originally thought and it is quite clear that it had been advised with regard to litigation prior to passing the contract. Withdrawal had been offered but notwithstanding that, the plaintiff chose to proceed, as Mr. Bisson made quite clear, and to litigate. It also chose to proceed the day after Mr. Bisson had told the respective vendor that it was extremely unlikely there would be litigation, giving only the warning which was in Mr. Bisson's letter to the vendors and, for the purpose of these proceedings, to Lazards.

The effect of passing a contract was dealt with in Basden Hotels Limited -v- Dormy Hotels Limited, (1968) J.J. 911, first at p.919 where it was stated:-

> "But we cannot leave this matter without referring to another maxim. It is the often quoted maxim "La convention fait la loi des parties". Like all maxims it is subject to exceptions, but what it amounts to is that courts of justice must have high regard to the sanctity of contracts and must enforce them unless there is a good reason in law, which includes the grounds of public policy, for them to be set aside".

The court then returned to this at p.921:-

> "We come to the conclusion therefore that no grounds exist to make unenforceable the contract freely entered into between Major Stewart and the plaintiff company by which he bound not only himself, but also his heirs and his successors in title (the term "heirs" would have been sufficient). Title was accepted in full knowledge of the obligations and we repeat that it is against the public interest that a person accepting property should be allowed to avoid obligations attaching to it unless there is good reason in law for doing so. In an orderly community, faith in the word of contracting parties is essential and it is for the party who wishes to avoid his undertaking to show cause why the undertaking is unenforceable".

Mr. Le Quesne quite properly laid before us the dictum of the Privy Council in Godfray -v- Godfray III Moore N.S. 316 - p.p. 121 to 132, and that we have very much in mind. Against that, Mr. White urged us to take notice of the case of Thomas Joseph Burke -v- Sogex International Limited, 3rd November, 1987 - Unreported Jersey Judgment 87/71. He referred first to p.17 where he cited a long extract from the case of Nova (Jersey) Knit Ltd. -v- Kammgarn Spinnerei GMGH(1977) 2 A.É.R. 463 and contended that the authority made it clear that where a bill of exchange is tendered and there is a counterclaim or crossclaim, the claim under the bill will not be stayed while the counterclaim is determined. He further contended that this goes to the root of the present case. The plaintiff here is claiming that notwithstanding that it has agreed to pay the bank, as it has a claim against the first and second defendants this gives it a right to withhold part of the consideration. The bank relied on the plaintiff's promise to pay as an unconditional promise in the contract. We have to say that we think that the effect of the contract is that this is an unconditional promise to pay, from which the purchaser can only be relieved in the most exceptional circumstances.

We find the behaviour of the purchaser extremely unattractive and it is our view that the delivery of the letter by Mr. Bisson (which was never agreed by the other parties) gave no fair warning of the intention of the purchaser to withhold the funds. It is also our view that this was, as was put to us, little more than setting a trap. The following passage part of which has been cited supra from the case of Z Limited -v- A and others, (1982) All E.R. 556, at p.571, bears particular relevance to this point:-

> "However, the jurisdiction must not be abused. In particular, I would regard two types of situations as an abuse of it. First, the increasingly common one, as I believe, of a Mareva injunction being applied for and granted in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself 'judgment-proof'; where it may be invoked, almost as a matter of course, by a plaintiff in order to obtain security in advance for any judgment which he may obtain; and where its real effect is to exert pressure on the defendant to settle the action. The second, and fortunately much rarer, illustration of what I would regard as an abuse

of this procedure, is where it is used as a means of enabling a person to make a payment under a contract or intended contract to someone in circumstances where he regards the demand for the payment as unjustifiable; or where he actually believes, or even knows, that the demand is unlawful; and where he obtains a Mareva injunction ex parte in advance of the payment, which is then immediately served and has the effect of 'freezing' the sum paid over. Thus, we were told by counsel for the plaintiff that payments are sometimes made for premiums which are required illegally on the assignment of leases, and which are then 'frozen' immediately as soon as payment has been made. In effect, this amounts to using the injunction as a means of setting a trap for the payee. A reported instance of such a case (though not in a context of alleged illegality) is The Assios [1979] 1 Lloyd's Rep 331, where the injunction was set aside because the plaintiff had not disclosed to the court that he intended to use the order for this purpose. However, in my view even the disclosure of the intention should not suffice to obtain the injunction in such cases. If a person is willing to make such a payment, appreciating the implications, the courts should not assist him to safeguard the payment in advance by means of a Mareva injunction. However this is a special type of situation, and, like all others in this field, ultimately a matter for the discretion of the judge to whom the application is made. Accordingly, I say no more about it.

It follows that in my view Mareva injunctions should be granted, but granted only, when it appears to the court that there is a combination of two circumstances. First, when it appears likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum. Second, when there are also reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him".

The defendants, in addition, put to us the 'Angel Bell' principle which was established in the case of PCW (Underwriting Agencies) Ltd -v- Dixon and another, (1983) All E.R. 158, the headnote to which reads as follows:-

"The plaintiffs were a company which acted as the managing agent for numerous insurance underwriting syndicates. The defendant was a director and major shareholder of the plaintiffs. The plaintiffs brought an action against him claiming that reinsurances effected on behalf of the syndicates had been arranged with reinsurers in which the defendant had beneficial interests and on terms which were bound to result in substantial profits to the reinsurers so that the defendant had made secret profits from the plaintiffs' affairs. The plaintiffs obtained, inter alia, a Mareva injunction over the whole of the defendant's assets within the jurisdiction save that he was permitted to draw reasonable living expenses not exceeding £100 per week. The defendant maintained that he needed £1,000 per week for reasonable living expenses and that he also needed to have access to £77,500 to meet oustanding debts and pay legal expenses incurred in defending the action. He applied for a variation of the injunction on those terms. The plaintiffs contended that the existing injunction could be justified on the established principles applicable to Mareva injunctions or, alternatively, on the wider ground that the plaintiffs were laying claim to a trust fund which should be preserved so that if the plaintiffs were successful in the action they could have recourse to that fund by tracing in equity.

Held -(1) The sole purpose of a Mareva injunction was to prevent a plaintiff being cheated out of the proceeds of an action, should it be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction. The remedy was not intended to give a plaintiff proirity over those assets, or to prevent a defendant from paying his debts as they fell due, or to punish him for his alleged misdeeds, or to enable a plaintiff to exert pressure on him to settle an action. Applying those principles to the facts, the injunction would be varied to allow the defendant sufficient funds to meet his reasonable living expenses, pay his outstanding debts and defend himself in the proceedings brought by the plaintiffs (see p 162 d to p 163 d, p 164 e f and p 165 b c, post); Iraqi Ministry of Defence v Arcepey Shipping Co SA, The Angel Bell [1980] 1 All ER 480 and dicta of Lord Denning MR and Kerr LJ in Z Ltd v A [1982] 1 All ER at 561, 571 applied; A v C (No 2) [1981] 2 All ER 126 distinguished.

(2) Moreover, the injunction could not be maintained in its original form on the wider ground that the plaintiffs were laying claim to a trust fund, since it was unlikely that the whole of the defendant's assets coulld be a trust fund. Even if all his assets could be subject to a trust, injunctions were a discretionary remedy and in the exercise of its discretion the court would not continue the injunction in its original form because to do so would cause injustice to the defendant by (a) compelling him to reduce his living standards, (b) preventing him from paying his bills and (c) denying him the means to defend himself properly (see p 164 g to j and p 165 b c e, post); A v C [1980] 2 All ER 347 and Chief Constable of Kent v V [1982] 3 All ER 36 distinguished."

At p.162 we find the following passage:-

"What should be the correct approach for the court to take in these circumstances? The first reported case in which a similar question was considered is Iraqi Ministry of Defence -v- Arcepey Shipping Co SA, The Angle Bell [1980] 1 All E.R. 480, [1981] Q.B. 65. In that case Robert Goff J., held that it was consistent with the policy underlying the Mareva jurisdiction that the defendant should be allowed to pay his debts as they fall due. The purpose of the jurisdiction is not to secure priority for the plaintiff; still less, I would add, to punish the defendant for his alleged misdeeds. The sole purpose or justification for the Mareva order is to prevent the plaintiffs being cheated out of the proceeds of their action, should it be successful by the defendant either transferring his assets abroad or dissipating his assets within the jurisdiction: see Z Ltd v. A [1982] 1 All E.R. 556 at 561, 571, [1982] Q.B. 558 at 571, 584 per Lord Denning M.R. and Kerr L.J.

I am not going to attempt to define in this case what is meant by dissipating assets within the jurisdiction or where the line is to be drawn; but wherever the line is to be drawn this defendant is well within it. It could not possibly be said that he is dissipating his assets by living as he has always lived and paying bills such as he has always incurred. I say nothing about the cost of defending himself in these proceedings. The Mareva jurisdiction was never intended to prevent expenditure such as this or to produce consequences such as would inevitably follow if this ex parte order is upheld".

Finally, Mr. White put to us the case of Avant Petroleum Inc. -v- Gatoil Overseas Inc., (1986) Lloyd's Law Reports 236. We refer to the following passage which begins on p.241:-

> "(2) Having shown at least a good arguable case, the plaintiffs must further satisfy the Court that the refusal of a Mareva injunction would involve a real risk that a judgment or award in their favour would remain unsatisfied. (See The Niedersachsen (sup.) at p.617). It is to be noted, however, that the jurisdiction cannot be invoked solely for the purpose of providing plaintiffs with security for their claims, even where there is no reason to suppose that an injunction or the provision of some substitute security would cause any real hardship to the defendants. (See ibid.)
>
> (3) As the ultimate test is whether it appears to the Court to be just and convenient to grant an injunction (see s.37 (1) of the 1981 Act), the conduct of the plaintiffs may be material, as may be the rights of any third parties who may be affected by the grant of an injunction. Moreover, if and to the extent that the grant of a Mareva injunction inflicts hardship on the defendants, their legitimate interests must prevail over those of the plaintiffs, who seek to obtain security for a claim which may appear to be well-founded, but which still remains to be established at the trial. (See The Niedersachsen at p.620.)
>
> (4) The Mareva jurisdiction is not to be used so as to prevent the payment of trade creditors in the ordinary course of business. (See, for example, The Angel Bell, [1980] 1 Lloyd's Rep. 632; [1981] Q.B. 65 and p.p. 637 and 73.) But where the party enjoined seeks the discharge or variation of a Mareva injunction to pay trade creditors or to discharge other obligations, he will have to satisfy the Court that the order sought will not conflict with the policy underlying the Mareva injunction. In many, if not in most, cases the party enjoined will therefore have to show that he has not other free assets which can be used to make the relevant payments. (See for example A & B v. C (No. 2) [1981] 1 Lloyd's Rep. 559).
>
> However, for my part I would be very reluctant to lay down any inflexible rule which makes such disclosure obligatory. Thus there may well be cases where it can be demonstrated that certain debts are in

the ordinary course discharged out of a particular fund, and in such circumstances the bona fides of the payments could, I apprehend, be established without a full disclosure of assets. Moreover, it is always to be remembered that there exists a risk that a party may seek to invoke the Mareva jurisdiction as an instrument of oppression or in order to effect the settlement of an action".

In the course of an extremely interesting and well thought out address, Mr. Le Quesne, who came into this case at a late stage, urged us that the plaintiff is entitled in law to pass the contract while reserving his rights to sue for the breach and that on the facts alleged by the plaintiff there lies a good cause of action. He further argued that if the injunction is lifted the money will pass from the control of the first defendant, which will have no assets left; that there are substantive matters raised in the pleadings in this case and in the pleadings in the action against Bois & Bois Perrier & Labesse; that some of these issues are quite complicated and require lengthy submissions and proper consideration by the Court and that the Court must maintain a fair equilibrium until the substantive matters are argued. He has urged very strongly that we should look at the degree of hardship and the nature of the injury his client will suffer if the injunction is raised. The hardship to the defendant, he says, is negligible; the burden of proof (which we accept) lies on the applicants and we should not overlook the practical realities of the case, not least that the substantive hearing is due very shortly and that if a good arguable case is shown and the action has been allowed to proceed, then the balance of convenience would support a ground for continuation of the interlocutory injunction. Further, he criticised the vendors behaviour alleging that without this the situation would never have arisen. It is just and convenient, he says, that the injunction should be maintained.

We have to say that although we have listened very carefully to his submissions and have weighed them with great care, we disagree with them. We have no hesitation in exercising our discretion in favour of the defendant applicants and this on each ground that they have brought forward, namely that there is a failure to disclose sufficient material information; that there was, in effect, a trap, and that the plaintiff is, in effect, seeking security. In our view any of these grounds would have been sufficient in itself. We

therefore exercise our discretion in favour of the defendants on all the grounds urged by them. The injunction is therefore raised.

(Indistinct application by the plaintiff for leave to appeal and, in the event that leave be granted, a stay of the present order pending appeal).

COMMISSIONER LE CRAS: We refuse leaved to appeal Mr. Le Quesne.

(Indistinct submissions by the first, second and third defendants on the matter of costs).

COMMISSIONER LE CRAS: In the exercise of our discretion, we find that there are sufficient special and unusual circumstances in this case, inasmuch as the injunction should never have been sought and the Court has found that it was an abuse of process, to enable us to award costs on a full indemnity basis to the first, second and third defendants, of and incidental to the application.

(Indistinct submission by the advocate appearing on behalf of the Attorney General on the matter of costs).

COMMISSIONER LE CRAS: I regret to say that once again I disagree with you, Mr. Le Quesne. The test, when exercising our discretion in this matter, is whether the Attorney General has acted reasonably in intervening. This was clearly a matter of concern to the Attorney. He made a submission which, in some ways, reinforced the submissions already made. In our view he is, in these circumstances, entitled to have his taxed costs of and incidental to his intervention.

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