ITAR-TASS RUSSIAN NEWS AGENCY and TEN OTHERS v. POGREBNOY, RUSSIAN KURIER INCORPORATED and HORIZON INCORPORATED

SUPREME COURT (Pizzarello, A.J.): May 22nd, 1998

Injunctions—Mareva injunction—court's discretion to grant injunction—wide discretion to enjoin assets transferred to third party controlled by principal defendant if at risk of dissipation—no separate cause of action against third party necessary since injunction ancillary to cause of action against principal

Injunctions—Mareva injunction—non-disclosure—defendant entitled to discharge of injunction only if non-disclosure deliberate and material to exercise of court's discretion

Civil Procedure—service of process—service out of jurisdiction—action to enforce foreign judgment against funds in third party's Gibraltar bank account may be "claim to declare, assert or determine proprietary or possessory rights in or over movable property" under Rules of Supreme Court, O.11, r.1(1)(i)—not "action to enforce any judgment or arbitral award" within meaning of r.1(1)(m), since "judgment" must be against same party

Injunctions—Mareva injunction—security for costs—enjoined assets not to include sum representing security for plaintiff's costs of action—Mareva relief in respect of costs available only if costs order already made

The third defendant applied for the discharge of an injunction.

The plaintiffs, all of them foreign news agencies, publishers and distributors, obtained judgment against the first and second defendants, a Russian newspaper and its owner, for infringement of copyright in the United States. Unable to obtain execution of the judgment there, the plaintiffs brought proceedings in the Supreme Court to enforce the judgment and joined the third defendant, a Caribbean company whose Gibraltar bank account allegedly held the proceeds of the infringement.

The defendants were served outside the jurisdiction and the court granted a *Mareva* injunction restraining them from dealing with their Gibraltar assets in the amount of the US judgment, and the plaintiffs' anticipated costs. The plaintiffs gave an undertaking in damages. The third defendant applied for the discharge of the injunction or, alternatively, for an increase in security under the undertaking, including as to

costs, and a reduction in the enjoined amount representing the plaintiffs' costs.

It submitted that (a) the plaintiffs had stated no existing cause of action against it to support an injunction, since their claim was against the first and second defendants from whom it was a separate corporate entity; (b) there was no evidence that any legal or beneficial interest in moneys transferred to its account remained with the first and second defendants under a constructive trust or otherwise, and indeed there was documentation showing that those defendants had intended to pass title to it; (c) as a third party, it should not have been served with proceedings outside the jurisdiction save for the purpose of enforcing a Gibraltar judgment; (d) the plaintiffs had failed to disclose when obtaining the injunction that the absence of any business explanation for the transfer in the documents relied on in the US court was fully to be expected, given the incomplete nature of those documents; (e) once a third party asserted title to assets which were the subject of a *Mareva* injunction, the court was not at liberty to investigate the issue of ownership as between the third party and the plaintiff but must discharge the injunction; and (f) no injunction was necessary against it, since there was no risk that the funds would be dissipated.

The plaintiffs submitted in reply that (a) in order to ensure that a judgment in favour of the plaintiff did not remain unsatisfied, the court's power to grant an injunction under the Supreme Court Act 1981, s.37(1) was a wide and flexible one, and the rule that a pre-existing cause of action must exist against the holder of the enjoined assets applied only where there was a single defendant and not where the proposed injunction was ancillary to the main cause of action; (b) the third defendant had been properly joined as a party to the action, since it was effectively controlled by the first defendant (his common-law wife being the authorized signatory for the bank account) and held the moneys as nominee for the first and second defendants, although legal title to them remained in the transferors; (c) the documents now produced by the defendants to explain the transfers had been falsified; (d) the court had properly given leave to serve the third defendant outside the jurisdiction under O.11, r.1(1)(i) and (m) of the Rules of the Supreme Court, since their claim was made "to assert, declare or determine proprietary or possessory rights" and "to enforce any judgment (the US judgment) or arbitral award"; and (e) the court was not precluded from examining the question of title to the assets and could try the matter as a preliminary issue.

Held, making the following orders:

(1) A *Mareva* injunction could be granted whenever it would be just and convenient to do so, including when there was no separate cause of action against a third party joined in the proceedings, if the injunction was ancillary to a claim against other defendants. Without the benefit of a full trial it was not possible to come to a conclusion as to the nature of the transfer of funds or the veracity of each party's allegations but in view of

the court's wide jurisdiction under s.37(1) of the Supreme Court Act 1981, the fact that the third defendant was a separate corporate entity was not crucial. Nor was it relevant, provided that the rules as to service outside the jurisdiction had been complied with, that the third defendant was not situated in Gibraltar. The plaintiffs had shown a good arguable case on the pleadings that the first defendant had channelled moneys from his newspaper company to the third defendant prior to proceedings being commenced in the US court, and both the second and third defendants were one-man companies effectively controlled by the first. Furthermore, if the plaintiffs' allegations were true, there was every danger that the assets would be dissipated (page 308, lines 21–36; page 310, line 31 – page 311, line 16; page 315, line 23 – page 316, line 21).

(2) The court would be obliged to discharge the injunction only if the plaintiffs were found to have made deliberate and material non-disclosure in obtaining it, and since the Court of Appeal had held that there were issues to be tried, such non-disclosure as was alleged was immaterial (page 316, lines 22–34).

(3) The court had properly given leave to serve the third defendant with the writ outside Gibraltar, since the action fell within the definition of a claim "to assert, declare, or determine proprietary or possessory rights . . . in or over moveable property . . . situate within the jurisdiction" for the purposes of O.11, r.1(1)(i), although r.1(1)(m) did not apply to the action, since that paragraph referred to enforcement of a judgment, whether foreign or domestic, against the same defendant (page 316, line 38 – page 317, line 11).

(4) The court would order that the plaintiffs' undertaking in damages be increased in accordance with the third defendant's request and that security for the third defendant's costs be given in the sum requested (page 317, lines 12–18).

(5) The enjoined amount would be reduced by the sum which represented the plaintiffs' prospective costs of obtaining judgment in Gibraltar. It was wrong in principle for them to be given security for their costs, since until judgment was given in their favour there was no debt due. The power to grant *Mareva* relief in respect of costs existed only if a costs order had already been made (page 317, line 30 – page 318, line 45).

Cases cited:

(1) *Hess* v. *Line Trust Corp. Ltd.*, 1997–98 Gib LR 270.
(2) *Jet West Ltd.* v. *Haddican*, [1992] 1 W.L.R. 487; [1992] 2 All E.R. 545, distinguished.
(3) *Lister & Co.* v. *Stubbs* (1890), 45 Ch. D. 1; [1886–90] All E.R. Rep. 797, *dicta* of Cotton, L.J. applied.
(4) *Mercantile Group (Europe) A.G.* v. *Aiyela*, [1993] F.S.R. 745.

(5) *Panton (Faith) Property Plan Ltd.* v. *Hodgetts*, [1981] 1 W.L.R. 927; [1981] 2 All E.R. 877, distinguished.
(6) *S.C.F. Fin. Co. Ltd.* v. *Masri*, [1985] 1 W.L.R. 876; [1985] 2 All E.R. 747, considered.
(7) *Silvera* v. *Faleh* (1993), English Court of Appeal, unreported, considered.
(8) *Steamship Mutual Underwriting Assn. (Bermuda) Ltd.* v. *Thakur Shipping Co. Ltd.*, [1986] 2 Lloyd's Rep. 439, considered.
(9) *T.S.B. Private Bank Intl. S.A.* v. *Chabra*, [1992] 1 W.L.R. 231; [1992] 2 All E.R. 245, applied.
(10) *Williams* v. *Natural Life Health Foods Ltd.*, [1997] 1 BCLC 131; [1997] BCC 605; on appeal, [1998] 1 W.L.R. 830; [1998] 2 All E.R. 577, *dicta* of Sir Patrick Russell applied.

Legislation construed:
Rules of the Supreme Court, O.11, r.1(1): The relevant terms of this sub-rule are set out at page 312, lines 9–19.

H.B. Eder, Q.C. and *A. Christodoulides* for the plaintiffs;
I.A. Milligan, Q.C. and *A.E. Dudley* for the third defendant.

PIZZARELLO, A.J.: A notice of motion dated November 21st, 1997 came before me and the third defendant ("Horizon") applied for an order—

25 "2. That the injunction granted herein on July 1st, 1997 be discharged as against the third defendant;

3. In the alternative, that the plaintiff's security, as ordered in the sum of £10,000 pursuant to the aforesaid order of July 1st, 1997, be increased within 21 days to US$140,000 or such other amount as the
30 court shall deem fit, and that in the meantime all further proceedings as against the third defendant be stayed;

4. The plaintiffs do within 21 days give security for the third defendant's costs in such amount as the court shall deem fit, and that in the meantime all further proceedings as against the third
35 defendant be stayed;

5. Such order as to costs as the court shall deem just."

In addition, three further applications were made and all three have been dealt with by consent. These were:

1. A summons dated April 21st, 1998 whereby the plaintiffs applied for
40 an order that leave be granted to amend the writ of summons and statement of claim pursuant to O.25, r.5 in the terms of a draft attached thereto, in which two further defendants were added and the statement of claim was expanded.

2. A second summons dated April 21st, 1998 seeking the attendance of
45 Nikolai Kakosha and Pavel Radayev.

3. A summons dated April 15th, 1998 seeking the attendance of Nicolai Kokosha for cross-examination on his affidavit sworn on December 19th, 1997.

I shall return to the first of these later. The latter two summonses were adjourned to chambers on a date to be fixed.

There are five distinct grounds on which Horizon sought to have the injunction discharged, namely:

(a) the plaintiffs had not asserted any cause of action against Horizon which could support the injunction;

(b) the plaintiffs had no cause of action which they could assert against Horizon which would support the injunction;

(c) the plaintiffs did not have a good arguable case that the two payments credited to Horizon's bank account on which the injunction was founded were assets of the first or second defendant;

(d) there had been material non-disclosure by the plaintiffs; and

(e) there was no evidence of risk of dissipation of the assets by Horizon as opposed to the first and second defendants.

I will not rehearse the facts of this case. Mr. Milligan, Q.C. called to my attention the affidavit of Nicolai Kokosha of December 19th, 1997 (which had been placed before me as an unsworn statement dated November 24th, 1997 when the matter originally came before me) and the exhibits thereto. I pause to record that Mr. Eder, Q.C. pointed out that the originals of exhibit NK–8 to that affidavit had not been produced despite a request to examine them. Mr. Milligan also referred to (i) the affidavit of Miss Grech sworn on November 26th, 1997 in which, he submitted, she misstated Nevis Law by not paying sufficient regard to s.99 of the Nevis Business Corporation Ordinance 1984, (ii) the affidavit of Victoria Kupchinesky of November 25th, 1997, (iii) exhibit AED–1 referred to in the affidavit of Anthony E. Dudley sworn on November 21st, 1997 and (iv) the voluntary particulars supplied by the plaintiff under para. 9 of the statement of claim.

As for (a), "no cause of action asserted," Mr. Milligan submitted that the plaintiffs' claim against Horizon was no more than an assertion that the property belonged to the first and second defendants, and no cause of action was shown. That was the tenor of my judgment in this court and also the judgment of the Court of Appeal delivered by Neill, P. And that, he submitted, must be right because (a) the plaintiffs could not establish that the first and second defendants retained a legal or equitable interest in the property, and (b) the plaintiffs did not have a claim to the property itself as against Horizon; their claim was against the first two defendants and Horizon was a different entity. It was a corporate body incorporated in Nevis and though it had been struck out, it might be restored administratively. By virtue of s.99 of the Nevis Business Corporation Ordinance 1984, there is no dissolution process until three years after being struck out, so the striking out made no difference in this case. The company

might carry on business. The legal interest was in Horizon and any equitable interest which the other two defendants might have was non-existent because they had intended to pass property to Horizon when the transfers were made.

5 As for (b), "no action possible against Horizon," he submitted that was because the plaintiffs could never have, and did not claim to have, any proprietary interest in the assets of Horizon. If the plaintiffs were right then a plaintiff would always be able to enjoin, by *Mareva* injunction, debts due to a third party before the enforcement stage, thus realizing the fears 10 expressed by Donaldson, M.R., in *Steamship Mutual Underwriting Assn. (Bermuda) Ltd.* v. *Thakur Shipping Co. Ltd.* ([1986] 2 Lloyd's Rep. at 440):

> "What the club really wants is security for a future cause of action—a cause of action which will give rise to entitlement to monetary relief. I think that that would be contrary to a long line of 15 authority which says that s.37 is to be used in support of an existing legal or equitable right. I furthermore think that if we extended it to this case, even assuming that we have jurisdiction to do so, it would be difficult to see what possible limits there could be to the *Mareva* jurisdiction, since whenever it was apprehended that someone was 20 likely in the future to commit a breach of contract, and it was further apprehended that if they did and if judgment were given against them they might be unable to meet the judgment debt, it would follow that the fearful plaintiff was entitled to a *Mareva* injunction. That plainly is not the case."

25 And he also referred to Gee, *Mareva Injunctions & Anton Piller Relief*, 4th ed., at 225 (1998):

> ". . . [I]f the third party cannot be served within the jurisdiction and there is no substantive claim against him, there is no mechanism for obtaining leave to serve him out of the jurisdiction prior to judgment 30 against the defendant."

And O.11, r.1(1)(m) did not help the plaintiffs because the reference to judgment in sub-para. (m) is referable only to a judgment obtained against Horizon in this jurisdiction.

As for (c), "no arguable case," Mr. Milligan submitted that there were 35 two matters to consider here, namely, the law relating to the transfer of property and the evidence relating to that transfer. The plaintiffs, he submitted, had to show that the property remained in the first two defendants and, on their pleadings, the legal title to the chose in action, that is the balance of account, vested in Horizon, and unless there was a 40 beneficial interest retained by the first two defendants they had no cause of action. In law and as pleaded on the plaintiffs' own case, the first two defendants and Horizon had intended the beneficial interest to pass to Horizon and it was for the plaintiffs to show that the first two defendants had a good arguable case that these funds were the property of the first or 45 second defendant.

What had been produced so far, apart from the latest affidavit of Julian Lowenfeld of April 1998, which was not credible, amounted to this: There was nothing produced in the New York proceedings to suggest any business reason for Kurier to make payments to Horizon. But that did not amount to a good arguable case that those two sums remained the property of both or either of the first two defendants. The test they had to meet was: Could they show that they had a good arguable case? The court had to make some provisional assessment to ensure that the claim had a certain strength.

The exhibit NK–8 suggested that in so far as Horizon was concerned there was a perfectly good commercial transaction, though Mr. Milligan conceded that the originals had not been brought to this court and that Mr. Eder might properly make such comment as he wished on that aspect. If the documents were genuine it was clear that that it was intended that the property should pass to Horizon legally and beneficially. That would end the case. Even if the documents were a sham, there would be no impact on the proprietary interest since (a) the intention between the first two defendants and Horizon had been to pass ownership and (b) it was for the plaintiffs to show that the documents were a sham.

There was sufficient evidence to show that the documents were, on the face of them, good documents, because the signature of the first defendant was attested by Karl Schwarzmer, a notary public in New York, and had all the appearance of being valid and there was no suggestion that Mr. Schwarzmer was party to a fraud. As far as David Sagbir, who attested the signature of Pavel Radayev, was concerned, it might be that he was later disbarred and that his commission had expired but there was no suggestion that he had not witnessed the signature to the document. It was not a matter of discredit that his address was the same as the second defendant. It was, as a matter of fact, his address.

As for (d), "non disclosure," Mr. Milligan submitted that all that was disclosed to the court when the injunction was obtained was the affidavit of Mr. Isaac Marrache, who affirmed that there was no business reason for Kurier to make payments to Horizon. But he knowingly failed to disclose that there was no reason to expect the records produced by Kurier during the deposition process in New York to disclose any business reason for the payments to be made, especially as the first two defendants' records were haphazard and far from complete. That, according to Mr. Milligan, was a fatal flaw, as was the omission to bring to the court's attention that there was, at the very least, the possibility that there was no jurisdiction to join Horizon as a defendant because there was no cause of action and because there was no power, in the circumstances of this case, to serve proceedings outside the jurisdiction.

Given that the only evidence adduced was that of Mr. Marrache, the omissions were clearly material and the injunction should be discharged.

The voluntary particulars did not help the plaintiffs because they really added nothing.

As for (e), "no risk of dissipation," Mr. Milligan submitted that there was a distinction to be drawn between the first two defendants and Horizon. There was no suggestion that the assets of Horizon would be dissipated.

If the court were not minded to discharge the injunction, then Mr. Milligan submitted that it should consider the following:

1. It would be appropriate to increase the security to $140,000, being an estimate of the loss of interest which Horizon would suffer as a result of the injunction.

2. Security for costs should be given in the sum of £29,100.

3. The sum enjoined included a sum of $50,000 which had been added in respect of the plaintiffs' costs. The plaintiff had no order for costs in his favour. Mr. Milligan submitted that this was an unusual extension in a *Mareva* injunction and was wrong in law and asked that the sum enjoined should be only in respect of the two payments, namely, $500,000 and $360,398.52.

Mr. Eder began his reply by submitting that Mr. Milligan was wrong to say that my judgment said that there was no cause of action. He submitted that there were issues to be tried and the Court of Appeal had made that plain. While the court had been critical of the pleadings, Neill, P. had said that the facts relied on should be "stated more clearly than at present," hence the voluntary particulars which were delivered under para. 9 of the statement of claim, and a draft statement of claim was served on Horizon.

The case of the plaintiffs was simple, submitted Mr. Eder: As against all three defendants the money in Horizon was simply held by Horizon as nominee and the moneys remained legally the property of Pogrebnoy or Kurier or were held beneficially for them. It was a principle of agency. The plaintiffs alleged that the first two defendants stole their property and that they hid their assets and the question was (a) Could a *Mareva* injunction be granted against Pogrebnoy and Kurier in terms wide enough to bite against a third party? or (b) Could a *Mareva* injunction be granted directly against the third party? Mr. Eder submitted that even if the third party were not named, the court may join a defendant where there is no direct link, since otherwise the court's power would be severely undermined. There was authority which showed that the plaintiffs could get an injunction against a third party. He referred to *S.C.F. Fin. Co. Ltd.* v. *Masri* (6) and *T.S.B. Private Bank Intl. S.A.* v. *Chabra* (9). In the *Masri* case, Lloyd, L.J. said ([1985] 1 W.L.R. at 879):

> "The matter came before Hirst J. on 3 September 1984. He only had a day available for the hearing. It was obvious from the number of affidavits filed on both sides that the hearing would take a great deal longer than a day. So Mr. Carr suggested that the court decide first a preliminary point of law. What happens when there is a

dispute between the plaintiff and a third party as to the ownership of assets within the jurisdiction? What happens if the plaintiff says that the assets belong to the defendant, and the defendant says that they do not? Or if a third party claims they belong to him? Mr. Carr submits that it is sufficient if the third party *claims* the assets. Unless the claim is obviously unsustainable, the court is then bound to give effect to that claim, without further inquiry. Hirst J. has rejected that submission. He has held that it will be necessary to have a lengthy hearing to determine the beneficial ownership of the £400,000. The question for this court is whether he was right."

He continued (*ibid.*, at 880–881):

"[Mr. Carr] submits that once a third party raises an issue as to the ownership of assets which are the subject of a *Mareva* injunction, by asserting a claim to those assets, then the court cannot investigate the correctness of the assertion. It must give effect to the assertion forthwith. There is no room for the trial of an issue between the plaintiff and a third party as to the ownership of the assets. The interests of the third party must in all cases prevail without question over the interests of the plaintiff.

I should myself be very reluctant to lay down any such rule as Mr. Carr suggests. The *Mareva* jurisdiction is now firmly based on section 37 of the Supreme Court Act 1981, which enables the court to grant a *Mareva* injunction wherever it is just and convenient to do so. Even if the jurisdiction is no longer in its infancy, it is still not much more than a stripling. The principles on which a *Mareva* injunction will be granted or withheld are gradually being worked out by the courts.... It is important that the jurisdiction should be kept flexible, so that the courts can continue to do what is 'just and convenient' in any given case. The discretion of the court should not be hedged about with too many rules.

. . . It is true that the third party may be put to some inconvenience. But where the assets appear to belong to a third party, the court will not have granted the order in the first place without good reason. Moreover, the third party who applies successfully to have the injunction discharged will be protected by the plaintiff's undertaking in damages . . . ."

And further, (*ibid.*, at 881): "Every consideration of policy and convenience points, in my view, against the principle which Mr. Carr asserts."

He concluded (*ibid.*, at 884):

"For the reasons that I have given I would hold that there is no such rule or principle as that for which Mr. Carr contends. It follows that this appeal must be dismissed. For convenience I would summarise the position as follows: (i) Where a plaintiff invites the court to include within the scope of a *Mareva* injunction assets which appear on their face to belong to a third party, e.g. a bank

account in the name of a third party, the court should not accede to the invitation without good reason for supposing that the assets are in truth the assets of the defendant. (ii) Where the defendant asserts that the assets belong to a third party, the court is not obliged to accept that assertion without inquiry, but may do so depending on the circumstances. The same applies where it is the third party who makes the assertion, on an application to intervene. (iii) In deciding whether to accept the assertion of a defendant or a third party, without further inquiry, the court will be guided by what is just and convenient, not only between the plaintiff and the defendant, but also between the plaintiff, the defendant and the third party. (iv) Where the court decides not to accept the assertion without further inquiry, it may order an issue to be tried between the plaintiff and the third party in advance of the main action, or it may order that the issue await the outcome of the main action, again depending in each case on what is just and convenient. (v) On the facts of the present case the judge was in my view plainly right to hold that he could not decide the matter without further inquiry; for the reasons I have already mentioned he was not obliged to decide in favour of the second defendant, without further inquiry, by any rule or principle such as that suggested by Mr. Carr."

Mr. Eder referred to the judgment of Mummery, J. in the *Chabra* case (9), in which he said ([1992] 1 W.L.R. at 241–242):

"All these points made by Mr. Mitchell were, however, preliminary to his main submission that the court simply has no jurisdiction to make a *Mareva* injunction against the company, because the plaintiff has admitted that it has no cause of action against the company. In considering this submission I bear in mind four preliminary but important points. I first take note of the wide terms of section 37(1) of the Supreme Court Act 1981 which empowers the court to grant an injunction in all cases where it appears to the court to be just and convenient to do so. Secondly, the whole basis of the *Mareva* jurisdiction is that, where a plaintiff has shown a good arguable case, the court, in order to protect the plaintiff's interests, has jurisdiction in a proper case to grant an interlocutory injunction restraining a defendant from disposing of or dissipating his assets, where the refusal of such an injunction would involve a real risk that a judgment obtained by the plaintiff would be stultified and remain unsatisfied.

Thirdly, the jurisdiction of the court should be exercised with caution and great care should be taken not to be oppressive to the persons restrained, either in the carrying on of a business or in the conduct of everyday life.

Fourthly, the practice of the court on the grant of *Mareva* injunctions is an evolving one which has to remain flexible and adaptable to meet new situations as and when they arise.

With those points in mind, I turn to Mr. Mitchell's important submission. He sought to bolster it by reference to the decision of the House of Lords is *Siskina (Owners of cargo lately laden on board) v. Distos Compania Naviera S.A* . . . . He submitted that that case supported the proposition that an interlocutory injunction can only be made against a defendant against whom the plaintiff has a cause of action. He referred to . . . where Lord Diplock said in his speech:

'A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action.'

It is important to note that in that case there was only one defendant and it was held that, as there was no cause of action against the sole defendant which was justiciable in the High Court and enforceable by final judgment, the court had no jurisdiction to make an interlocutory injunction against the defendant restraining the removal of assets in England: see also *Steamship Mutual Underwriting Association (Bermuda) Ltd. v. Thakur Shipping Co. Ltd* . . . ."

He continued (*ibid.*):

"In the present case there are two defendants. There is one defendant, Mr. Chabra, against whom the plaintiff undoubtedly has a good arguable cause of action: the claim on the guarantee. That is justiciable in the English court; Mr. Chabra is amenable to the jurisdiction of the English court to make a final judgment against him on the guarantee. The claim for an injunction to restrain disposal of assets by Mr. Chabra is ancillary and incidental to that cause of action. In my judgment, the claim to a similar injunction against the company is also ancillary and incidental to the claim against Mr. Chabra and the court has power to grant such an injunction in an appropriate case. It does not follow that, because the court has no jurisdiction to grant a *Mareva* injunction against the company, if it were the sole defendant, the court has no jurisdiction to grant an injunction against the company as ancillary to, or incidental, to the cause of action against Mr. Chabra: see for example, *Vereker v. Choi* . . . . I agree that such a course is an exceptional one, but I do not accept that it is one that the court has no jurisdiction to take.

The company is a party to this action. It is properly a party to this action under R.S.C., Ord. 15, r.6. There is a cause of action against

Mr. Chabra. Although there is no cause of action against the company, there is credible evidence, not contradicted by evidence from Mr. Chabra, that assets apparently the property of the company may, in fact, be assets of Mr. Chabra and therefore available to satisfy a judgment obtained against him. In these circumstances, if an injunction against Mr. Chabra is inadequate to protect the plaintiff from the risk that assets vested in the company may become unavailable to satisfy the judgment obtained against Mr. Chabra, an injunction should be made against the company to prevent it from dissipating assets. An injunction against Mr. Chabra alone, either in relation to his own assets or the company's assets, is inadequate. He is out of the jurisdiction: the court does not know what personal assets he has. It is no safeguard to the plaintiff to have an injunction against Mr. Chabra restraining him from directing or procuring the company from disposing of its assets when it may turn out that the plaintiff has no means of enforcing such an injunction against Mr. Chabra.

Likewise, I am of the view that there is no practical protection to the plaintiff in restraining the company from aiding and abetting Mr. Chabra to act in breach of the order against him. There may be circumstances in which the company could aid and abet the breach of such an order without there being any effective sanction against it.

In brief, the most realistic and practical form of relief in this case is to restrain the company from disposing of, or dealing with, assets until it is established whether the plaintiff is entitled to a judgment against Mr. Chabra and until it is established which, if any, of the assets apparently vested in the company are available to satisfy any judgment obtained against Mr. Chabra.

In my judgment, I have jurisdiction to grant an injunction against the company and it is appropriate to grant it in support of the existing legal right claimed by the plaintiff against Mr. Chabra. The injunction which I grant, though made against a party against whom there is no cause of action, is in support of and in respect of that cause of action against Mr. Chabra.

Mr. Mitchell prayed in aid the *Masri* procedure . . . but I repeat that I do not think that the procedure laid down by the Court of Appeal in that case precludes the court, in an appropriate case, from making an injunction direct against a person occupying the third party position."

Mr. Eder submitted that the situation in the present case was stronger than those two cases. First, it was on all fours with the judgments in those two cases and he submitted that *Mercantile Group (Europe) A.G.* v. *Aiyela* (4) enforced the point, and secondly, there were judgments against the first two defendants. As for the *Steamship Mutual* case (8), he accepted that decision but argued that it was restricted to cases where there is one plaintiff and one defendant only.

Mr. Eder then dealt with the point raised by Mr. Milligan that Horizon was out of the jurisdiction. It was not a valid point, said Mr. Eder. To start with, the court had already given leave to serve out of the jurisdiction. Horizon was properly before the court and no application had been made to the court to set aside the order for service out of the jurisdiction. In any case, there was provision for service out of the jurisdiction to cover this case in O.11, r.1(1)(i) and (m).

Order 11, r.1(1) states:

"... [S]ervice of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ—

...

(i) the claim is made for a debt secured on immovable property or is made to assert, declare or determine proprietary or possessory rights or rights of security, in or over movable property, or to obtain authority to dispose of movable property, situate within the jurisdiction;

...

(m) the claim is brought to enforce any judgment or arbitral award."

Mr. Eder submitted that "judgment" referred to in para. (m) includes the judgment obtained in New York, and referred to 1 *The Supreme Court Practice 1997*, para. 11/1/25, at 92. That, he submitted, put paid to the defendant's submission that the court might not give leave to serve a writ out of the jurisdiction on Horizon.

As for there being no proprietary claim to the assets by the plaintiff, the plaintiffs said that the *Chabra* case showed that that was not necessary in proper circumstances. There the plaintiff had no proprietary claim to the assets which were in the company and this was confirmed in *Aiyela.*

As for there being no good arguable case, what was the test? Pogrebnoy and Kurier stole copyright and made money out of it. Their monetary gains, the plaintiffs claim, were channelled into Horizon. There was no doubt that Pogrebnoy is the *alter ego* of Kurier. The *Mareva* injunction was sought and was granted in respect of the claim by the plaintiffs against Pogrebnoy and Kurier and the allegations of the plaintiff raised the question of whether their assets and the assets of Horizon were one and the same.

Of course, the court had to be satisfied that there was a case and there were plenty of factors which added up to an arguable case. There was the judgment of the New York court in which they admitted that they stole on May 13th, 1995. That court had issued a preliminary injunction and shortly afterwards there was the payment out made by Kurier. Pogrebnoy and Kurier were one and the same.

Pogrebnoy was described as a less than credible witness. He did say when threatened with a suit: "Go ahead, you'll never get a penny!" When a representative of Itar-Tass called on Pogrebnoy, Pogrebnoy allegedly responded that "we [the plaintiffs] could take any steps we found fit, but

it will get us nowhere and we will not get a penny." Pogrebnoy then conveniently disappeared from New York and went to California where he teamed up with one Vitaly Matusov to start afresh: Vitaly was reported to have said in the "New World," March 14th, 1997:

> "There has never been any question of our paper's closing, even in the most heated days of litigation. So we are fined, so what? None of us is planning to pay anything so far. After all, if we even pay just so much as one dollar we'll have to pay all the rest. But look at Simpson. He was adjudged as having to pay a fine, but he's long ago hidden all his money away safely."

Furthermore, at a pre-trial hearing there was nothing in the records of Kurier produced during the deposition to suggest any business reason for Kurier to make payments to the Horizon account at Banco Atlantico and if Kurier had any obligation to Horizon that would have been disclosed by Pogrebnoy as part of the disclosure process. If they were not disclosed this showed a lack of *bona fides* on the part of Pogrebnoy and that he was evasive.

Now that was the background outlined by Mr. Eder in which Horizon received the moneys from Kurier. They seem to be voluntary payments and while exhibit NK–8 appeared to provide a substantial commercial base, the originals were not presented, although they had been requested. In the meantime, Horizon was a struck-off company which Kokosha had stated that he would restore and had not. Kokosha was the only legal and beneficial owner of the shares in Horizon and his affidavit was not credible. It was riddled with inconsistencies and the assertions contained in it were not substantiated by proper documentation.

The latest affidavit of Mr. Lowenfeld, who gave his sources, suggested that Kokosha was a dummy for Pogrebnoy and that the signatory for the Horizon account, who was not Mr. Kokosha, was one Olga, who is the sister of Irina Subacheva (Pogrebnoy's common-law wife and companion for more than 10 years and who had borne him a child) and who herself might have been one of Pogrebnoy's mistresses. This was information gathered from one Peter Petrovich who lives in the former residence of Irina Subacheva with Mariana Zontak, who was formerly Pogrebnoy's personal secretary. All that was strong evidence that Pogrebnoy was hiding his money away and sending money to Horizon as his nominee and amounted to a good arguable case.

Mr. Milligan replied. He pointed to the corporate status of Horizon. As for the principal point that there was no cause of action, Mr. Eder's case was that a cause of action against Horizon was a completely new case. This was a new way of putting his case but it did not found jurisdiction. He referred to Gee, *Mareva Injunctions & Anton Piller Relief*, 4th ed., at 225 (1998):

> "*Category (2)*
>
> There is no difficulty if the third party can be served within the jurisdiction. But if the third party cannot be served within the jurisdiction and there is no substantive claim against him, there is no

> mechanism for obtaining leave to serve him out of the jurisdiction prior to judgment against the defendant."

And the third paragraph of that section (*op. cit.,* at 226) is not relevant in this case. That reads:

> "Once a judgment has been obtained against the defendant the involvement of the third party will be in proceedings to execute or enforce the judgment. Article 16(5) of the Conventions covers proceedings to enforce that judgment. In such proceedings there may well be issues concerning third parties' rights which have to be resolved. Proceedings under Article 16(5) can be served without leave under RSC Ord. 11, r.1(2)(a). The third party can also be served with proceedings in relation to the enforcement of the judgment under RSC Ord. 11, r.1(1)(m)."

Under O.11 one must have a cause of action and once judgment is obtained the plaintiff is in a position to follow that judgment in the jurisdiction where the judgment was obtained. That did not refer, Mr. Milligan submitted, to the American judgment. It referred to the judgment against Pogrebnoy and Kurier and it was only in relation to execution that Horizon could be brought in. Order 11, r.1(1)(m) was to enforce the judgment against the first and second defendants. The *Chabra* case (9), Mr. Milligan suggested, was not on all fours with the instant case because there the company was within the jurisdiction, and therein lay a great difference. On the matter of a good arguable case, *Silvera* v. *Faleh* (7) is good law. There Nolan, L.J. said :

> "Secondly, I do not accept that the phrases 'good arguable case' and 'good reason' present a real difficulty in this connection. They are not terms of art. The key to their meaning is to be found in the purpose which they are designed to serve, which is that the O.11 jurisdiction and the *Mareva* jurisdiction should be exercised with caution. Of the former, Lord Justice Lloyd said in *Seaconsar Far East* v. *Bank Markazi Jomhouri Islami Iran* . . . :
>
> > 'To require a foreigner to answer a claim in our Courts it is not enough that the claim, if sound, can conveniently, or most conveniently be tried in England. Nor is it enough that the conditions of O.11, r.1 are satisfied. The claim itself must be of a certain strength.'
>
> As Lord Justice Mustill put it in *Société Commerciale de Reassurance* v. *Eras International Ltd* . . . : 'If the claim is too weak it would be wrong to put the foreigner to the trouble and expense of coming to England to answer it.'"

The question is: Have the first and second defendants retained an interest in the account? If one took the analogy of a parked car on a neighbour's property, the plaintiffs' case was that Pogrebnoy was the controller of Horizon but that divested him from the property unless and until the transaction were set aside, and it was wrong to say that if a person is a

mere nominee, that leaves the legal and beneficial title in the transferor, since the nominee has the legal title. If it is a case of principal and agent, the agent has title and that is why the voluntary particulars were not relevant even if it is a sham.

5 Mr. Milligan submitted that the proposed draft amendment also did not give the plaintiffs a good arguable case. That draft was divided into three parts: (a) a new para. 9 which gave no new rights under O.11; (b) paras. 12–26, which added nothing, and no application had been made to set aside the alleged fraudulent documents; and (c) paras. 27–48.

10 The allegation of a sham document at para. 38 served no purpose at all because even if the documents were a sham and the court set aside the injunction on one of the other grounds, the sham had not played a part, and if the court did not set it aside, the sham had caused no damage. That was no good ground for giving leave for the proposed amendment. And 15 Mr. Milligan turned to consider the evidence on the affidavits and repeated paras. 17, 29 and 34 of the Marrache affidavit and the affidavit of Victoria Kupchinesky that exhibit NK–8 was known, and was critical of Lowenfeld's affidavit of April 1998 and pointed to the various discrepancies which, he submitted, made it difficult to accept. As regards the 20 defendant's affidavit, one could not doubt that he had attended the consul and was identified. He repeated the argument which I have set out earlier in this judgment.

I began by considering whether the plaintiffs had shown a good arguable case on the pleadings. I was of the opinion that they had and it 25 was strong enough to allow me to let it proceed against Horizon. The factors outlined by Mr. Eder and pleaded in the voluntary particulars, if proved, were sufficient at the very least to allow a court to draw the necessary inferences to enable it to hold that Horizon was no more than a cover for Pogrebnoy. Both counsel attacked the affidavits produced by the 30 main players on the other side and submitted that they were not credible. Well, so be it. The court has a duty to look critically at the affidavits and I saw the force of those criticisms, but it seemed to me that it was not possible to come to any determinate conclusion on any provisional basis. The court must, I agree, sift out any "cock and bull story" which may be 35 alleged. It must remember that a *Mareva* injunction is draconian and it must remember that a foreigner must not be forced to come to this court without good reason.

The most that I could consider was whether that meant that in this case the plaintiffs had not crossed the threshold of a good arguable case. 40 Because I did not think I could deal properly with that aspect at this stage—as it would be a matter at the trial for the court to evaluate where the truth lay—so my view, having considered these matters, remained unchanged. And so, yes, there was an arguable case. I also saw the force of Mr. Milligan's contention that Horizon was a different entity, but that 45 distinction on which much of Mr. Milligan's arguments rested ought not

to carry much weight in the circumstances of this case where the court was dealing with what was just and convenient.

In a small one-man company, which Horizon is in relation to Kokosha and Kurier to Pogrebnoy, "the managing director will almost inevitably be the one possessed of qualities essential to the functioning of the company," as was said by Sir Patrick Russell, dissenting, in *Williams* v *Natural Life Health Foods Ltd.* (10) ([1997] 1 BCLC at 156) and quoted with approval in the speech of Lord Steyn on allowing the appeal ([1998] 2 All E.R. at 584–585). I lifted this reference out of context but it encapsulates entirely my view of the relationships as they appeared to be at this point in time in the instant case of Pogrebnoy, Kurier, Kokosha and Horizon.

If, indeed, there was truth in the plaintiffs' allegations then the court should not allow the assets within the jurisdiction to be dissipated, as undoubtedly they would be if the allegations were true, and there was hardly any need for anyone to say so when that was so palpably obvious. If there was a good arguable case then it seemed to me that *Chabra* (9) filled the situation neatly (subject to O.11 considerations) notwithstanding the strictures of Donaldson, M.R. in *Steamship Mutual Underwriting Assn. (Bermuda) Ltd.* v *Thakur Shipping Co. Ltd.* (8) and on this aspect of the matter the injunction should stand.

What of the submission regarding non-disclosure? That would give grounds for the discharge of the *Mareva.* If the non-disclosure were innocent the court would have a discretion to allow it to remain. If it were not, and I understood the tenor of Mr. Milligan's argument to be that it was not, then the court should normally resolutely set it aside. In any case, it seemed to me that the non-disclosure had to be relevant and since the Court of Appeal had, in my view, contrary to the submission of Mr. Milligan, certainly held that there was a cause to be tried, any failure, assuming there was failure, was irrelevant. It is true that the matter has to be judged at the time when the application for the *Mareva* injunction is made, but if the point had been raised it would have been dealt with and at that date I considered it would be wrong for me to have disallowed the action, so the omission is not material. As for the failure to draw attention to the unlikelihood that the Kurier documents would include exhibit NK–8, with respect to Mr. Milligan's arguments, I failed to see how that was relevant.

The last hurdle to consider was the procedural arguments concerning O.11. Mr. Milligan was right, I think, to suggest that para. 11/1/25 of 1 *The Supreme Court Practice 1997* might not be apposite in respect of O.11, r.1(1)(m). That makes reference to a foreign judgment, but there was no judgment either in New York or Gibraltar against Horizon so, in my view, service out of the jurisdiction might not be effected under this paragraph unless one could look behind the corporate veil.

However, Mr. Eder relied also on r.1(1)(i):

"(i) the claim is made for a debt secured on immovable property or is made to assert, declare or determine proprietary or possessory rights, or rights of security, in or over movable property, or to obtain authority to dispose of movable property situate within the jurisdiction . . . ."

I concluded that this action fell within the meaning of the expression "is made to assert, declare or determine proprietary rights in or over moveable property situate within the jurisdiction." So I reached a provisional conclusion that at this stage in the proceedings service on Horizon out of the jurisdiction had been properly effected and the *Mareva* injunction should stand.

Regarding an undertaking as to damages, Mr. Milligan sought an order or undertaking for $140,000. Mr. Eder suggested that the claim for $140,000 was too much but Mr. Milligan's application had some support in the figures produced and it seemed to me to be a principled approach and I acceded to his request.

As for costs, Mr. Milligan sought £29,100 and Mr. Eder accepted whatever the court might fix. Again, I acceded to Mr. Milligan's request.

Mr. Milligan also asked that the enjoined amount be reduced by $50,000, which was a sum in respect of the plaintiffs' anticipated legal costs and expenses. He submitted that the plaintiffs had no cause of action for that sum (see *Thakur* (8)). It was not within his experience for a court to add any amount to cover a plaintiff's costs. Mr. Eder, on the other hand, asserted that that was a usual addition in a *Mareva* order and I have to say that that has been my practice, having been persuaded in the past that it was proper so to do and, apart from this case, such orders have not been challenged. My recollection is that such provision is included in one of the standard draft forms of order. However, Mr. Milligan raised the point and I had to consider it.

I am of the opinion that Mr. Milligan is right. A cause of action for costs arises when there has been judgment to that effect, not before. It is wrong in principle for the plaintiff to get security for his costs before that event because until that time it is not a debt due. Interestingly, I had occasion to look at *Lister & Co.* v. *Stubbs* (3) referred to in another context and cited with approval in *Hess* v. *Line Trust Corp. Ltd.* (1). In *Lister*, Cotton, L.J. said (45 Ch. D. at 13):

"I know of no case where, because it was highly probable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by judgment or decree."

Furthermore, my research led me to consider *Faith Panton Property Plan Ltd.* v. *Hodgetts* (5) in which *Lister & Co.* v. *Stubbs* was considered by Waller, L.J. and he had this to say ([1981] 1 W.L.R. at 933): "The principle in *Lister & Co*. v. *Stubbs* depends on there being no order or

judgment. In this case there is a judgment which cannot be enforced for some months because of the difficulties of taxation."

So there was an order as to costs there. I also considered *Jet West Ltd.* v. *Haddican* (2), where again there had been an order for costs. Lord Donaldson, M.R. said ([1992] 1 W.L.R. at 489):

> "The question then arose of whether there was a reasonable prospect, or perhaps even the slightest chance, that the plaintiffs would meet that order for costs, it being, of course, an order for the payment of costs in the usual way, namely costs to be agreed or, failing agreement, to be taxed. The defendants said that they would like a *Mareva* type injunction in aid of execution of that order, that execution to follow once the costs were taxed.
>
> The judge came to the conclusion that there was no legal or equitable cause of action available to the defendants at that stage and that they would have to wait until the costs had been taxed, and then they could apply for a *Mareva* injunction. He expressed, not surprisingly, great regret that that should be, as he saw it, the position in law. As I have already said, he was in error and I can justify that, first of all, in terms of principle and, secondly, in terms of authority.
>
> In terms of principle the *Mareva* injunction was introduced in the 1970s because the courts held that they must necessarily have jurisdiction and did have jurisdiction to prevent parties to actions frustrating their orders by moving assets out of the jurisdiction, or dissipating assets in one way or another, with a view to making themselves proof against a future judgment. Where you have someone who is already subject to a money judgment, including an order for costs, the same principle applies, namely that the courts will not allow people to set their orders at nought simply by removing assets from the jurisdiction. There are assets within the jurisdiction at the moment, albeit perhaps not very large assets, and therefore in principle there is no reason why the judge should not have made an order for a *Mareva* type injunction."

And in so far as the *Faith* case is concerned, he said (*ibid.*, at 490):

> "In so far as *Faith Panton Property Plan Ltd. v. Hodgetts* is considered, or may be considered, not to be an authority which is directly in point, it is clearly persuasive authority and, for my part, I would, as I have already said, uphold Robert Goff J.'s judgment and therefore produce direct authority that a *Mareva* injunction can be granted or can be continued in support of any judgment or order of the court for the payment of money, whether or not the exact sum which will be payable has been quantified at the date of the order and the date at which the *Mareva* injunction is sought."

The position was different in the instant case and so I acceded to Mr. Milligan's request that the sum enjoined be reduced, but I shall hear

counsel on this matter if they wish to be heard before the order is drawn up.

In the above circumstances I returned to the summons dated April 21st, 1998 referred to at the beginning of this judgment and gave leave for the
5 writ to be amended in the form of the draft that had been produced to me with leave to add the two new parties.

Orders accordingly.