Neutral Citation Number: [2010] IEHC 533

THE HIGH COURT

[2007 No. 6605P]

BETWEEN

JOANNE CALDWELL, RYAN O'HARA, FIONA MALONE, GARY MALONE, MARTIN O'REILLY, MIRIAM O'REILLY, KEVIN DAWE, MARK FORAN AND JOHN FORAN

PLAINTIFFS

AND

DAVID TRACEY AND DTS INTERNATONAL PROPERTY SERVICES

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 16th day of April, 2010.

1. The application

1.1 This application arises out of an order made on the 7th September, 2007 (the interim order) by this Court (Birmingham J.), which was an interim Mareva type injunction granted on an *ex parte* application made on behalf of the plaintiffs. At the time, the title of the proceedings, which had been initiated by plenary summons which issued on the previous day, 6th September, 2007, suggested that there were two distinct defendants in the proceedings, that is to say, David Tracey and DTS International Property Services (DTS), although it has since become clear that there was, in fact, only one defendant, namely, David Tracey, who traded in sourcing international property as "DTS International Property Services". By virtue of the interim order the defendants and each of them by themselves, their servants or agents or any person acting on his or their behalf, or any person having knowledge of the making of the order or otherwise, were restrained from "removing or in any way disposing of, reducing, transferring, charging, diminishing the value thereof or otherwise dealing with all or any of his or their assets wheresoever situate save and insofar as the value of the said assets shall exceed the sum of €268,710.69 until such time as the Court shall deem meet or until further order". Further, in the interim order, the plaintiffs' solicitors were given liberty to notify and serve the order on the defendants and to notify "any financial institutions of the making of this Order forthwith by telephone and fax". It was also expressly provided that the defendants had liberty on twenty four hours notice to the plaintiffs to move to set aside the order or apply for an order in relation to living and business expenses. The order records that the plaintiffs gave an undertaking as to damages to the Court in the following terms:

> "And the plaintiffs jointly and severally by said counsel undertaking to abide by any Order which this Court may hereafter make as to damages in the event of this Court being of opinion that the defendants shall have suffered any damage by reason of this Order which the plaintiffs ought to pay ...".

1.2 On this application, which was initiated by a notice of motion dated 11th May, 2009, the defendant seeks an order directing an inquiry into the damages sustained by the defendant as a result of the grant of the interim order and, further, or in the alternative, an order enforcing the plaintiffs' undertaking as to damages given on the granting of the interim order.

1.3 The circumstances in which the defendant has come to seek that relief at this juncture are of significance.

2. The history of the interim order

2.1 Contemporaneously with the making of the interim order, the plaintiffs were given leave to issue a motion for an interlocutory injunction returnable for 14th September, 2007.

2.2 The interim order was made on a Friday afternoon during the long vacation. On that evening, the plaintiffs' solicitor notified seven financial institutions of the making of the order. Seven more financial institutions were notified during the afternoon of the following Monday, 10th September, 2007, of the making of the order. A copy of the order was sent to all of those institutions on Monday evening. On the afternoon of Tuesday, 11th September, 2007, the defendant was personally served with the pleadings and affidavits and with a copy of the interim order. In his affidavit grounding this application, the defendant has averred that he first heard of the making of the order when he received a telephone call from the manager of his bank advising him of its existence. Strangely, the defendant has not deposed to when he received that call.

2.3 On the return date for the interlocutory application, 14th September, 2007, that application was adjourned on consent at the request of the defendant to 2nd October, 2007 on the basis that the interim order would continue.

2.4 On 1st October, 2007 a replying affidavit sworn by the defendant was furnished to the plaintiffs. In that affidavit, which was expressed to be made to contest the order sought on the plaintiffs' motion, after stating that, on advice, he was not answering each allegation of the plaintiffs in their grounding affidavits on the motion although the defendant was not to be taken as accepting them and his intention was to vigorously defend the proceedings, the defendant -

> (a) confirmed that he was the owner of DTS and fully responsible for any action taken in its name, although the affidavit suggests that DTS was merely a trade name,
>
> (b) asserted that he had substantial assets in the State, that there was no basis for the alleged fear that the plaintiffs might not recover any monies allegedly due and owing to them, and that there was no evidence whatsoever that he was a person who would try to remove his assets from the jurisdiction in order to avoid any judgment that might be made against him,
>
> (c) averred that as a gesture of goodwill he had informed the plaintiffs "that, notwithstanding the existence of the contracts, [he] was willing to refund all deposits subject only to the payment of some expenses incurred to all but the seventh, eighth and ninth" plaintiffs and in this connection he referred, *inter alia*, to the letter of 27th August, 2007, the contents of which are outlined later in detail in paragraph 3.10 et. seq.,

(d) asserted that the interim order had caused him extreme embarrassment and professional difficulty and resulted in the freezing of his client account in which was lodged monies belonging to clients of his auctioneering practice,

(e) accused the plaintiffs of acting in a precipitous and peremptory manner in obtaining the interim order *ex parte*, stating that he would have given an undertaking not to reduce his assets below €267,710.89 pending the resolution of the proceedings if requested to do so, and that he was willing to provide such an undertaking to the Court,

(f) averred, as evidence of his bona fides, that he had lodged bank drafts representing the gross amount of the plaintiffs' claims with his solicitors, who were instructed to place the monies on deposit in a separate solicitors' account pending the resolution of the proceedings, copies of the demand bank drafts, which were dated 1st October, 2007, being exhibited.

2.5 On 2nd October, 2007, an undertaking in the terms proffered was given by the defendant to the Court. The interim order then lapsed. The costs of the interim and interlocutory applications were reserved by consent of the parties. Liability for those costs remains to be determined. Further, the parties agreed the terms of a letter of notification for the financial institutions which had been notified of the making of the interim order, informing them that the interim order had lapsed and that the order of 2nd October, 2007 had been made. Letters in the agreed form were dispatched on 9th October, 2007.

2.6 The plaintiffs' substantive action then proceeded to plenary hearing in the ordinary way and came on for hearing on 18th March, 2009.

3. The substantive action

3.1 The substantive proceedings related to seven contracts entered into by the plaintiffs, as buyers, with the defendant, who was named as the seller, for the purchase of apartments in a development in Las Vegas, Nevada called Borgata Condominiums. Two contracts were entered into by the first and second plaintiffs. One contract was entered into by the third and fourth plaintiffs, the third plaintiff being an aunt of the first plaintiff. One contract was entered into by the fifth and sixth plaintiffs. One contract each was entered into by the seventh plaintiff, who is an accountant, and by the eight plaintiff and the ninth plaintiff, the eight and ninth plaintiffs being clients of the seventh plaintiff. The four contracts entered into by the first and second plaintiff, by the third and fourth plaintiff and by the fifth and sixth plaintiff were entered into in December, 2006. Each of the seventh, eight and ninth plaintiffs had entered into contracts in September 2006.

3.2 In total, the plaintiffs paid deposits aggregating €268,710.69 on foot of the seven contracts. Under the contract documents the deposits ("Earnest Money") were expressed to be payable to DTS and the funds were to be deposited in an insured escrow account. In fact the deposits paid by the seventh, eight and ninth plaintiffs on foot of their contracts were paid by bank transfers to "David Tracey & Sons Client Account". At the material time, the defendant was trading as an auctioneer under that name and he held an auctioneer's licence.

3.3 The relief which the plaintiffs were seeking in the substantive proceedings was the return of the deposits paid by them. The case made by the plaintiffs was that at all times they were told by the defendant's employees that their deposits would be fully refundable. Each of the contracts contained a clause dealing with "sale contingencies", which was, in essence, what in this jurisdiction is known as a "subject to loan" clause. There was a clause in relation to "removal of contingencies", which made provision for cancellation of the contract if loan approval was not obtained by the "required date" and thereafter and "until the contingency is removed" by either party on written notice to the other. In that case, the defendant seller was obliged to return the deposit or to authorise the escrow agent to do so. The position of the plaintiffs was that it was the defendant who was responsible for arranging the finance to enable the plaintiffs to complete the purchases.

3.4 In broad terms, the plaintiffs entered into the contracts for investment purposes. The basic structure of the investment was that on each contract the plaintiff buyer or buyers would pay a deposit in the region of 20% of the purchase price and the defendant would arrange finance for the remaining 80% through a U.S. financial institution. The intention was that the plaintiff buyer or buyers would let the relevant apartment unit so as to cover the cost of the finance. It was envisaged that the properties' capital values would appreciate over a reasonably short period of time.

3.5 In the events, the defendant did not succeed in raising the finance for the plaintiff buyer or buyers. The following is a generalised and truncated version of the long saga which the plaintiffs endured in relation to the defendant's attempts to raise the finance for them.

3.6 In the case of the seventh, eighth and ninth plaintiffs, matters came to a head in early February 2007. Having been informed in late December 2006 that the arrangement with the original proposed mortgage provider had been cancelled, in February 2007 these plaintiffs were informed that the defendant was not proceeding with the second proposed mortgage provider and was seeking yet another lender. At this point, these plaintiffs decided not to proceed any further with the investment and, by fax of 8th February, 2007, sought the return of their deposits. They persisted in that position in a letter dated 16th February, 2007 signed by each of these plaintiffs. In response, each of these plaintiffs received a letter dated 13th March, 2007 from an employee of DTS stating that their deposits had been used "to secure" the properties and that considerable legal and other fees had accrued on their accounts, the defendant's commitment in respect of each property being estimated at being in excess of $15,000. The letter concluded by stating that, if the plaintiffs insisted on withdrawing, the defendant would "make every possible attempt to accommodate" them and would engage with the developer to see if the deposits could be recovered, but suggested alternative approaches: that each of these plaintiffs might wish to provide an "alternate purchaser" or DTS "could also offer the unit back into the market" on his behalf. However, by a further letter of 21st March, 2007, having stated that he had paid "substantial amounts per unit to keep these contracts open for you", the defendant, as DTS, advised these plaintiffs that their deposits would be forfeited unless they co-operated with the new finance provider and the contracts were closed within 21 days.

3.7 After attempts to secure the return of the deposits failed, the seventh plaintiff had a meeting with the defendant at the offices of DTS in Dublin in June 2007. The position of the defendant at that meeting was that, on the basis of legal advice, he considered that the deposits had been validly forfeited. These plaintiffs then sought legal advice. Their then solicitors, Gallen Alliance, sought return of the deposits by letter dated 5th July, 2007, in which they threatened proceedings. The thrust of the defendant's response in letters of 8th August, 2007 and 8th August, 2007 was that these plaintiffs were in breach of contract, their deposits were forfeited, and that the matter would be defended fully. On 4th September, 2007 Gallen Alliance wrote a further letter on behalf of these plaintiffs seeking return of their deposits or, alternatively, requesting the defendant to confirm and verify that the deposits were still held in escrow and that the funds would be preserved and placed on joint deposit pending the determination of the proceedings these plaintiffs intended to issue.

3.8 In late January 2007 the first, second, third and fourth plaintiffs were informed that the defendant did not intend to use the

original proposed finance provider and was seeking an alternative. When these plaintiffs sought the return of their deposits at that stage, they were told they were not entitled to cancel their contracts and that they could not get their money back. Similarly in February 2007 the fifth and sixth plaintiffs were informed that there had been a change in the finance provider. At that stage, Lloyds TSB, Isle of Man, came on the scene as the alternative finance provider, but was dropped by the defendant some three to four months later. A third finance provider, Brentwood Mortgage Services, contacted each of these three sets of plaintiff buyers in July 2007 in relation to the financing options. Throughout the process the terms on which finance would be made available to these plaintiff buyers was a "moveable feast" in relation to the level of finance available, the term of the loan and the rate of interest payable on the loan. That continued to be the case until these plaintiffs decided to withdraw.

3.9 By 16th July, 2007 the first and second plaintiffs had enough and informed the defendant that they were withdrawing from the contract and seeking a return of their deposit. The third and fourth plaintiffs held out until 26th July, 2007. Then, on the basis of the most recent offer of finance, they decided to withdraw from the contract and seek a return of their deposit, which they did by letter of that date. The fifth and sixth plaintiffs, who had co-operated with Brentwood Mortgage Services, learned on 21st August, 2007 that that firm's dealings with the defendant had ceased. On 27th August, 2007 they wrote to the defendant seeking a return of their deposit.

3.10 As I have set out earlier, the solicitors for the seventh to ninth plaintiffs, Gallen Alliance, were engaged in correspondence with the defendant from 5th July, 2007. On 15th August, 2007, Gallen Alliance, on behalf of the first to fourth plaintiffs, wrote to the defendant in similar terms to their later letter of 4th September, 2007 on behalf of the seventh to ninth plaintiffs, that is to say, requesting the return of their deposits or, alternatively, the placing of the relevant sums on joint deposit, and threatening proceedings if there was no satisfactory response by 17th August, 2007. The defendant's response, by letter dated 27th August, 2007, which was signed by the defendant "for and on behalf of DTS", *inter alia*, stated:

> "Your clients' Euro deposits and attached closing costs were transferred into USD on the 11th January, 2007 at a rate of $1.2928 and sent to Borgata Developments LLC with their knowledge and approval. The developer is taking a hard line that as loan offers were made, specifically through Lloyds' Bank and refused on the basis of an eight week draw down period and we were then instructed by these clients to seek an alternative lender."

In the affidavits grounding the application for the interim order, it was averred by the plaintiff deponents that these plaintiffs were completely shocked at the suggestion that their deposits had been paid over to a third party developer with whom they had no legal contract whatsoever. They averred that they were never advised that the deposits would be paid away prior to completion.

3.11 In the letter of 27th August, 2007 the defendant also referred to-

> (a) fees and charges, which were itemised and which aggregated $1,670 on a "per unit basis", which had been paid or were due; and
>
> (b) other "penalties and expenses" attached to the transaction totalling in excess of $8,560 per unit, which he was advised could be deemed as "contentious" in a court of law and which he would "refrain from including at this time, subject to clarification by our advisers", whatever that means.

In the affidavits grounding the application for the interim order, these plaintiffs averred that they were never advised that, if they wished to cancel the contracts with the defendant, they would have to bear losses.

3.12 The two final paragraphs of the letter of 27th August, 2007 were in the following terms:

> "Clearly, if your clients wish to withdraw from their contracts at this late stage and are taking an informed decision about these losses we will facilitate their exit at the earliest opportunity.
>
> You might therefore clarify your claim amounts less these deductions by return and we will make our best efforts to facilitate the matter as expediently as we can."

On this application, counsel for the defendant characterised that letter as a negotiation letter. It was also suggested that its thrust was that the defendant would give the plaintiffs their deposits back less deductions. In my view, the letter cannot be construed as conveying that message.

3.13 In the case of the fifth and sixth plaintiffs, the solicitors, Gallen Alliance, requested the return of their deposit by letter dated 4th September, 2007, which was similar to the letter referred to earlier written on that day on behalf of the seventh to ninth plaintiffs. Prior to that letter, these plaintiffs had formally requested return of their deposit by letter sent by them to the defendant on 27th August, 2007.

3.14 In their letters of 4th September, 2009 on behalf of the fifth to ninth plaintiffs, the close of business on the following day, 5th September, 2007, was stipulated by Gallen Alliance as the time by which a response was required from the defendant to avoid proceedings. There was no such response. The plenary summons was issued on 6th September, 2007. The application for the interim order was made and acceded to on the following day.

3.15 The evidence of the defendant at the trial was that he did not receive the letters of the 4th September, 2007 through the post until 10th September, 2007, subsequent to the making of the interim order. His evidence at the trial was that he did not receive those letters by facsimile transmission. However, on this application the plaintiffs' solicitors have exhibited copies of the fax log which shows that letters were faxed to the defendant's fax number at 7.56pm on 4th September, 2007. In any event, by letter dated 10th September, 2007, which was headed in relation to the seventh to ninth plaintiffs and was expressed to refer to the letter of 4th September, 2007, which contained two and a half lines and, apparently, was dispatched before the interim order was served on the defendant, the defendant persisted that the deposits paid by the seventh to ninth plaintiffs had been forfeited. As I have outlined, in his affidavit of 1st October, 2007, the defendant averred that "at no time prior to the commencement of these proceedings did the plaintiffs, or any of them, seek my undertaking not to reduce my assets below" €268,710.09 and he accused the plaintiffs of having acted in a precipitous and peremptory manner in obtaining the interim order on an *ex parte* application and stated that, if he had been asked, he would certainly have given such an undertaking "pending the resolution of the issues".

3.16 Even if the faxed letters of 4th September, 2007 did not find their way to the defendant and he was unaware of the contents of those letters until 10th September, 2007, his response of that date undermines his contention that he would have given an undertaking to the seventh to ninth plaintiffs to avoid an injunction. So does his reaction to the letter of 15th August, 2007 on behalf

of the first to fourth defendants. He apparently did not respond to the letter of 4th September, 2007 on behalf of the fifth and sixth plaintiffs.

4. The trial

4.1 When the substantive action came on for hearing on 18th March, 2009, in the course of the opening of the case by counsel for the plaintiffs, when a question arose as to whether the defendant was pursuing his counter-claim for damages for damage to his reputation against the plaintiffs, counsel for the defendant indicated that the defendant was not, but that he intended to apply for an inquiry as to damages arising from the plaintiffs' undertakings as to damages given when the interim order was made. That was the first occasion on which the issue as to the enforcement of the undertaking and an inquiry as to damages had been raised.

4.2 Counsel for the defendant also indicated that the defendant was no longer contesting the right of the first to sixth plaintiffs to return of their deposits, although this would be subject to the appropriate deductions claimed by the defendant, which would have to be quantified. In the event, the only evidence led on behalf of the defendant in relation to expenses which were recoverable by the defendant from the plaintiffs related to a sum of €424 payable by the fifth and sixth plaintiffs, representing the mortgage appraisal and application fee, which they accepted they had agreed to pay.

4.3 The focus of the trial, accordingly, was on the claim by the seventh to ninth plaintiffs for the return of the deposits paid by them. The seventh plaintiff gave evidence of his own dealings and that of his clients, the eight and ninth plaintiffs. It was common case that the contracts were governed by the law of the State of Nevada. Two attorneys practising in Las Vegas gave evidence as to the law of the State of Nevada, one having been called by the plaintiffs and the other by the defendant. The defendant also gave evidence. During the cross-examination of the seventh plaintiff, when he was being questioned as to the damage the interim order had on the defendant's reputation, the Court ruled that the defendant could raise the issue of enforcing the undertaking at the end of the trial.

4.4 At the end of the hearing on 20th March, 2009 I delivered an ex tempore judgment. I found that, in accordance with the law of the State of Nevada, as I understood it, each of the seventh to ninth plaintiffs had a reasonable time after the expiry of the period provided for in the "sales contingencies" clause in the contract for securing of finance within which to withdraw from the contract and I also found that each of the seventh to ninth plaintiffs did withdraw within a reasonable time and were entitled to return of their deposits.

4.5 Evidence which emerged at the trial, which I described as "somewhat disturbing" when delivering judgment, disclosed that the defendant had removed the funds which represented the plaintiffs' deposits, which, under the contracts, were to have been held in escrow, so as to complete a deal with the developer, Borgata Developments LLC, for five condominiums, in circumstances where this entailed the defendant releasing the main contract between the developer, as seller, and the defendant, as buyer, which covered in addition to those five units, other units including the units which the plaintiffs had contracted to purchase. In other words, the main contract supporting the seven sub-contracts entered into by the plaintiffs with the defendant was released. My note of the evidence of the defendant is that the settlement with the developer was reached in early March 2007 and the sales of the five condominiums to the defendant were completed in mid-April 2007. The basis on which the defendant sought to justify the use of the deposits provided by the seventh to the ninth plaintiffs to pay for the five condominiums was that he was advised by a lawyer in Las Vegas that he was entitled to forfeit those deposits. The lawyer, Zachariah Larson, who did not testify at the hearing of the substantive action, in an affidavit sworn on this application averred that he had advised the defendant that the plaintiffs (without distinguishing between the seventh to ninth plaintiffs, on the one hand, and the first to sixth plaintiffs, on the other hand) "were not entitled to cancel their Agreements with the Defendant, nor retain any of their deposit money". It was also suggested at the hearing that the defendant could have secured the apartments which were released under the settlement with the developer and which he had contracted to sell the plaintiffs, at a later stage.

4.6 Following judgment, the defendant was given leave to bring a motion seeking to enforce the undertaking, which resulted in the notice of motion dated 11th May, 2009.

5. The law

5.1 There was broad agreement between the parties as to the principles applicable when the Court is considering whether to enforce an undertaking as to damages given by a plaintiff on the grant of an interim or an interlocutory injunction, although, predictably, they diverged on the application of those principles to the facts of this case.

5.2 As both sides pointed out, in *Estuary Logistics v. Lowenergy Solutions Ltd* [2008] 2 I.R. 806, Clarke J., having stated that there did not appear to be any direct authority in this jurisdiction on the issue as to the enforcement of an undertaking as to damages, referred with approval to the decision of the Court of Appeal in England and Wales in *Cheltenham & Gloucester Building Soc. v. Ricketts* [1993] 1 W.L.R. 1545, where, at p. 1551 and 1552, Neill L.J. set out the following guidance which can be extracted from earlier authorities on the history of what are referred to as "cross-undertakings" in the United Kingdom and their method of enforcement, which was quoted by Clarke J. and is worthy of being quoted again:

> "(1) Save in special cases an undertaking as to damages is the price which the person asking for an interlocutory injunction has to pay for its grant. The court cannot compel an applicant to give an undertaking but it can refuse to grant an injunction unless he does. (2) The undertaking, though described as an undertaking as to damages, does not found any cause of action. It does, however, enable the party enjoined to apply to the court for compensation if it is subsequently established that the interlocutory injunction should not have been granted. (3) The undertaking is not given to the enjoined but to the court. (4) In a case where it is determined that the injunction should not have been granted the undertaking is likely to be enforced, though the court retains a discretion not to do so. (5) The time at which the court should determine whether or not the interlocutory injunction should have been granted will vary from case to case. It is important to underline the fact that the question whether the undertaking should be enforced is a separate question from the question whether the injunction should be discharged or continued. (6) In many cases injunctions will remain in being until the trial and in such cases the propriety of its original grant and the question of the enforcement of the undertaking will not be considered before the conclusion of the trial. Even then, as Lloyd L.J. pointed out in *Financiera Avenida v. Shiblaq*, The Times, 14 January 1991; Court of Appeal (Civil Division) Transcript No. 973 of 1990 the court may occasionally wish to postpone the question of enforcement to a later date. (7) Where an interlocutory injunction is discharged before the trial the court at the time of discharge is faced with a number of possibilities. (a) The court can determine forthwith that the undertaking as to damages should be enforced and can proceed at once to make an assessment of the damages. It seems probable that it will only be in rare cases that the court can take this course because the relevant evidence of damages is unlikely to be available. It is to be noted, however, that in *Columbia Pictures Inc. v. Robinson* [1987] Ch. 38, Scott J. was able, following the trial of an action, to make an immediate assessment of damages arising from the wrongful grant of an *Anton Piller* order. He pointed out that the evidence at the

> trial could not be relied on to justify ex post facto the making of an *ex parte* order if, at the time the order was made, it ought not to have been made: see p. 85H. (b) The court may determine that the undertaking should be enforced but then direct an inquiry as to damages in which issues of causation and quantum will have to be considered. It is likely that the order will include directions as to pleadings and discovery in the inquiry. In the light of the decision of the Court of Appeal in *Norwest Holst Civil Engineering Ltd. v. Polysius Ltd.*, The Times, 23 July 1987; Court of Appeal (Civil Division) Transcript No. 644 of 1987 the court should not order an inquiry as to damages and at the same time leave open for the tribunal at the inquiry to determine whether or not the undertaking should be enforced. A decision that the undertaking should be enforced is a precondition for the making of an order of an inquiry as to damages. (c) The court can adjourn the application for the enforcement of the undertaking to the trial or further order. (d) The court can determine forthwith that the undertaking is not to be enforced. (8) It seems that damages are awarded on a similar basis to that on which damages are awarded for breach of contract. ..."

5.3 The foregoing guidance was outlined in the context of an appeal to the Court of Appeal against an order of the High Court made in January 1991. The High Court had discharged injunctions, which had been obtained in August 1990 by the plaintiff *ex parte* based on an assertion that the defendants were believed to have committed a mortgage fraud on the plaintiff building society by overvaluing properties and obtaining mortgages using false names, the injunctions being a Mareva type injunction and an order which restrained the defendants from dealing with or disposing of any assets which were derived or partly derived from monies advanced by the plaintiff building society. The order discharging the injunctions had been made on the application of the defendants and the High Court also ordered an inquiry as to damages suffered by the defendants in consequence of the grant of the injunction. The plaintiff building society's appeal was against the Judge's order for an inquiry as to damages; there was no appeal against the discharge of the injunction. The focus of the decision in the factual context, in reality, was on the application of the seventh proposition in the guidance. The appeal was allowed, Neill L.J., holding that the application to enforce the undertaking should be adjourned for hearing at the conclusion of the trial, emphasising the nature of the building society's case based on fraud and stating (at p. 1554):

> "The trial judge will be in a position to see the picture as a whole. He will be able to decide what weight, if any, to attach to the absence of documents which are in the hands of the police. He will be able to decide whether the discharge of the injunction in January 1991 was justified on the facts as now known. In particular he will be able to decide whether it would be right to enforce the undertaking having regard to all the circumstances of the case and in particular the risk, if any, which faced the building society in August 1990 and the proved conduct of the first and fourth defendants. The enforcement of the undertaking is itself a form of equitable relief and should be considered on equitable principles."

5.4 In the *Estuary Logistics* case, Clarke J. was dealing with an analogous issue, namely, at what stage the Court should consider whether the undertaking as to damages should be enforced, although in circumstances which were distinguishable on the facts from the *Cheltenham & Gloucester Building Soc*. case. In the *Estuary Logistics* case the plaintiff had obtained an interlocutory injunction, which had the effect of mandating the continuance of the supply of a product from the first defendant to the plaintiff. Clarke J. found that the plaintiff had acted in a manner which amounted to an abuse of process. He discharged the interlocutory injunction, emphasising, however, that it was discharged, not because it should not have been granted in the first place, but rather because, having obtained it, the plaintiff abused its position (*cf* p. 813). One of the determinations which Clarke J. had to make related to which of the choices set out in the seventh proposition of Neill L.J. should be followed. The choice he opted for was to postpone the determination as to whether the undertaking as to damages should be enforced to the trial Judge. In doing so, he noted that, while the events giving rise to the discharge of the injunction were discrete and were unconnected with the underlying merits or otherwise of the substantive proceedings, the losses claimed in respect of the undertaking as to damages were intimately connected with the issues which arose in the substantive proceedings, which was a distinguishing feature, on which he commented as follows (at p. 815):

> "In that regard, this case is very different from one where the damages claimed in respect of an undertaking as to damages are wholly separate from the underlying issues which would be debated at the trial. For example, in circumstances where a *Mareva* type injunction is given at an interim stage, but is discharged by virtue of, for example, inadequate disclosure, the losses attributable to the existence of the *Mareva* injunction are likely to be wholly separate from whatever claims might fall to be disposed of at the trial. Even in those circumstances it is clear from *Cheltenham & Gloucester Building Soc*. ... that the court might, at least in some cases, properly postpone a consideration of the enforcement of the undertaking as to damages concerned until the trial. It is clear that if the trial judge were satisfied that fraudulent activity had, in fact, occurred, same might be an appropriate factor to set against inadequate disclosure in considering whether to enforce the undertaking as to damages."

While the observations in the last two sentences in that quotation were obiter, I respectfully agree with them, because, when determining whether to enforce an undertaking as to damages, the Court is exercising its equitable jurisdiction.

5.5 The reference in the seventh proposition put forward by Neill L.J. to the decision of Scott J. in the *Columbia Pictures Inc*. case requires to be considered against those observations. That case concerned video piracy. A number of orders had been made on 18th June, 1982 on foot of an *ex parte* application, including an *Anton Piller* order. The *Anton Piller* order was executed on the 21st June, 1982. On the return date, 25th June, 1982, the defendants did not seek to have the *Anton Piller* order set aside. However, they subsequently brought a motion in February 1984 to have it set aside. The observations of Scott J., which are referred to in the seventh proposition, were made in the context of consideration of that application and the remedy which the defendants were seeking, an inquiry as to damages pursuant to the plaintiffs' cross-undertaking as to damages, which was heard at the trial of the action. Scott J. was very critical of both the manner in which the *Anton Piller* order had been sought and also the manner in which it had been executed. In stating that evidence at the trial could not be relied on to justify *ex post facto* the making of an *ex parte* order if, at the time that the order was made, it ought not to have been made or to excuse breaches of duty which attended on the obtaining of the order, Scott J. was addressing a submission on behalf of the plaintiffs on the narrow question whether the *ex parte* order should be set aside, the submission being that it should not, because the evidence at the trial had established that the defendant was in fact a video pirate and was in fact the sort of person who might have been expected to destroy relevant evidence of his wrongdoing.

5.6 However, the overarching principle, when an application is made to a Court to enforce an undertaking as to damages, as Peter Gibson L.J., pointed out in his judgment in the *Cheltenham & Gloucester Building Soc*. case (at p. 1555) is that the power to enforce the undertaking being incidental to the power to grant an injunction, the discretion will be exercised in accordance with ordinary equitable principles.

Peter Gibson L.J. set out the law as it was stated by Lloyd L.J. in *Financiera Avenida v. Shiblaq*, referred to by Neill L.J. in his sixth proposition, as follows:

> "Two questions arise whenever there is an application by a defendant to enforce a cross-undertaking in damages. The

> first question is whether the undertaking ought to be enforced at all. This depends on the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff at the trial, the subsequent conduct of the defendant and all the other circumstances of the case. It is essentially a question of discretion. The discretion is usually exercised by the trial judge since he is bound to know more of the facts of the case than anyone else. If the first question is answered in favour of the defendant, the second question is whether the defendant has suffered any damage by reason of the granting of the injunction. Here ordinary principles of the law of contract apply both as to causation and as to quantum: ..."

5.7 Peter Gibson L.J. pointed out that, in the *Financiera Avenida* case, a Mareva injunction had been obtained by a plaintiff on the basis of claims which at the trial either were abandoned or failed, as distinct from a case where an interlocutory injunction was discharged before trial, but as the following comments (at p. 1555) indicate, he did not consider that distinction of significance:

> "Nevertheless it is also clear that [Lloyd L. J.] considered that the court had a general discretion whether to enforce the undertaking, and that this required consideration of all the circumstances of the case."

5.8 The judgment of Peter Gibson L. J. also throws light on the circumstances of the *Norwest Holst* case referred to by Neill L. J. in the seventh proposition. In that case a Mareva injunction had been granted to the plaintiff but within a few days it was set aside by consent. There then was an application by the defendant for an inquiry as to damages under the plaintiffs cross-undertaking. The Judge held that the injunction had been correctly granted and refused the application. The Court of Appeal allowed the appeal on the grounds that one of the necessary conditions for the grant of a Mareva injunction had not been made out at the time the injunction had been granted, namely, that there was a real risk that the defendant would dissipate its assets so as to defeat the ends of justice. Although that was a case in which the merits of the claim had yet to be decided, Peter Gibson L.J. pointed out that it was a "decision on its own facts" and was not to be taken as establishing a general proposition that once it has been found that a Mareva injunction should not have been granted, an inquiry as to damages must be ordered if there is any possibility of damage having been suffered.

5.9 In *Gee on Commercial Injunctions* (5th Ed., 2004), at para. 11.021, the effect of the *Norwest Holst* case is put somewhat differently, in that it is stated that, once it is clear in a Mareva case that there was not a sufficient risk of dissipation of assets, the Court "may enforce the undertaking and direct an inquiry, even if the merits of the claim have not yet been decided". However, Gee goes on to state:

> "In considering whether to enforce the undertaking in damages, two of the important factors are whether the claimant has succeeded on the merits of his claim, and whether there was a real risk of dissipation of assets. If the discretion is being exercised after judgment, then if the claimant has succeeded in his claim and there was a real risk of dissipation, then ordinarily the Court will not enforce the undertaking: ...".

5.10 There is one further passage from the judgment of Peter Gibson L. J., a passage relied on by counsel for the plaintiffs, to which I consider it appropriate to refer. Having outlined the argument of counsel for the defendants, Peter Gibson L. J. stated (at p. 1558):

> "I do not doubt that the fact that the more important of the two injunctions granted [on the *ex parte* application at first instance] was a Mareva injunction is a significant factor to be taken into account, but in my judgment it is only one factor and its discharge is not conclusive of the question whether an inquiry ought to be ordered at that stage. The court will of course first consider whether or not the injunction was wrongly granted, and in so doing it will confine itself to the facts available at the time of the order. But all the circumstances of the case must, in my judgment, be considered when the court decides whether to exercise its discretion as to the enforcement of the undertaking. If there are matters on which the court cannot yet make a final determination, but which would be material to the question whether it is just to enforce the undertaking, then the court should not take the decision at that stage ...."

5.11 The thrust of that passage, in my view, represents the law in this jurisdiction. Accordingly, in the case of an order such as the interim order in this case, which was granted *ex parte,* the first step in the process of seeking to enforce an undertaking as to damages given by a plaintiff on the grant of an injunction is for the Court, at the request of the party against whom the order was made, to determine whether the order should have been made. That determination must be based on the evidence which was before the Court when the order was made, as Scott J. stated in the *Columbia Pictures Inc*. case. However, in practical terms, the assessment of that evidence will include consideration of the defendant's challenges to it and the responses which the plaintiff puts forward to those challenges, where the defendant contends that the plaintiff did not make full and frank disclosure of material facts on the *ex parte* application. If the Court finds that the order should not have been made, then the second step in the process is to determine whether the undertaking as to damages should be enforced. That determination is made having regard to all the circumstances of the case and in accordance with equitable principles. As counsel for the plaintiff pointed out, in reliance on a passage in Gee (*op. cit*.) at para. 11.024, delay in seeking to enforce the undertaking is a factor which the Court may take into account in determining whether it would be equitable to enforce the undertaking. Finally, if the Court holds that the undertaking should be enforced, it then proceeds to the inquiry as to damages, which is an assessment which is concerned with matters of causation and quantum only.

5.12 Indeed, counsel for the defendant acknowledged that the first issue in this case is whether the interim order should have been granted and, in that connection, he submitted that the test which the plaintiffs should have satisfied, but did not satisfy, was the test for the grant of a Mareva injunction laid down by the Supreme Court in *O'Mahony v. Horgan* [1995] 2 I.R. 411, as applied by this Court (Clarke J.) in *Tracey v. Bowen* [2005] 2 I.R. 528. He also acknowledged that there was a second step in the process in that, even if the interim order should not have been made, the Court has a discretion as to the enforcement of the undertaking. As the notice of motion on this application envisaged, the defendant's position is that, if the Court should determine that the undertaking should be enforced, the Court should direct an inquiry as to the damages.

5.13 A point emphasised by counsel for the defendant in this case was that, while the fact of the making of the interim order may not have itself caused the defendant loss, or at least, not substantial loss, the scope of the order and, in particular, the notification of the making of the order to all of the major banks and building societies in the State had catastrophic repercussions for the defendant. It was submitted on behalf of the defendant that, even if the making of some type of order restraining the defendant from reducing his assets would have been justified, if the scope of the actual order made was excessive, then an order in those terms ought not to have been granted and the undertaking as to damages should be enforced. In this connection, counsel for the defendant referred to the decision of the High Court of England and Wales in *Universal Thermosensors Ltd. v. Hibben* [1992] 1 WLR 840.

5.14 The *Universal Thermosensors* case concerned, *inter alia*, the scope of an interlocutory order sought and obtained by the plaintiff. The plaintiffs complaint was that the defendants, former employees of the plaintiff, when leaving the plaintiffs employment,

took with them documents, including information about customers, from the plaintiffs premises. The plaintiff obtained an *Anton Piller* order and executed it, but the claims by the defendants in relation to the execution of the *Anton Piller* order against the plaintiff and its solicitors were settled in the course of the trial. Some months later, the plaintiff also obtained an interlocutory injunction restraining the defendants from soliciting, or entering into, or fulfilling, contracts with any of the plaintiffs customers referred to in the documents removed by them when leaving the plaintiffs employment. The judgment of the Court was concerned with only two issues remaining: the plaintiffs claim for damages for misuse of confidential information, the plaintiff having before the trial disclaimed its intention of seeking injunctive relief; and the defendants' claim for damages pursuant to the plaintiffs undertaking given when the interlocutory injunction was granted. On the latter point, the defendants claimed that the injunction was too wide and had resulted in the collapse of their business. It was held by the High Court (Sir Donald Nicholls V-C) that protection given to the plaintiff by the injunction went beyond that required for the proper protection of its legitimate rights and put the plaintiff in a better position than if there had been no misuse of the information. On that basis, it was held that the defendants were entitled to damages under the plaintiffs undertaking. That they had consented to the granting of the interlocutory injunction was irrelevant. On this point the Vice-Chancellor stated (at p. 857):

> "The defendants consented to the making of the order which included an undertaking in damages by the plaintiff as one of its terms. The plaintiffs position is no better, and the defendants' position no worse, than would be the case if the hearing of the motion ... had run its full course and the judge had then made an order on the terms in question without the defendants' consent. It must be remembered that the question before a court at the interlocutory stage is different from the question now before me. At that stage the court is faced with conflicting affidavit evidence and the need to apply *American Cyanamid* principles. It would be altogether wrong if, by consenting to the making of an interlocutory injunction, a defendant was to be regarded as prejudicing his entitlement to claim damages under the plaintiffs undertaking."

Counsel for the plaintiffs submitted that the decision on the defendants' claim there has to be viewed in the context that the plaintiffs claim, with one small exception, had failed. In my view, the decision turns very much on its own facts.

5.15 What the authorities illustrate is the variety of circumstances which may exist in which the issue as to the enforcement of an undertaking as to damages given on the grant of an injunction may arise. These include circumstances where -

> (a) the injunction has continued to the trial of the action either on foot of a determination by the Court on an application for an interlocutory injunction or, as happened in the *Universal Thermosensors* case, on foot of a consent order which included the undertaking; and
>
> (b) the injunction has been discharged before the trial either by order of the Court, as happened in the *Cheltenham & Gloucester Building Soc*. case, or by consent of the parties, as happened in the *Norwest Holst* case.

What happened in this case, it seems to me, is more in line with the following passage from Gee (at para. 11.025):

> "If there has been a compromise agreement in respect of the continuance of the injunction, it is a matter of interpretation of that agreement whether the parties have agreed that no claim is to be made to enforce the cross undertaking. Where the agreement is silent on this it is a question of inferring whether the parties intended that the respondent abandoned the right to make such a claim."

As authority for that proposition, Gee cites *Cornhill Insurance Plc v. Barclay*, Court of Appeal (Civil Division) Transcript No. 948 of 1992, where the parties came to an agreement for the discharge of the Mareva relief, which halted the pending discharge application before the Judge, and it was held that the defendants by implication abandoned all their rights in connection with their discharge application, which had itself been compromised.

6. The issues

6.1 The Court had the benefit of very thorough and comprehensive written submissions from both sides, supplemented by oral submissions. On the basis of the authorities which I have outlined, the issues which arise for determination, in my view, are the following:

> (a) Has the defendant established that the interim order should not have been granted or, alternatively that the plaintiffs should not have been given liberty to notify financial institutions of the making of the order?
>
> (b) If it has been established that the interim order should not have been granted or was too wide in scope or implementation, should the Court exercise its discretion to enforce the undertaking as to damages?
>
> (c) In so far as it is relevant, how does the defendant's interaction with the plaintiffs from the making of the order up to and including 2nd October, 2007 affect his entitlement to enforce the undertaking?

7. Should the interim order have been granted?

7.1 In submitting that the interim order should not have been granted, counsel for the defendant focused on two elements of the test to be satisfied for the grant of a Mareva type injunction as laid on by the Supreme Court in *O'Mahony v. Horgan*: that there is evidence which gives grounds for believing that there is a risk of the defendant removing assets or dissipating assets; and that the plaintiff should make full and frank disclosure of all matters in its knowledge which are material for the Judge to know. It was surmised by counsel for the defendant that the basis upon which the plaintiffs proceeded on the *ex parte* application in relation to the first element was that the defendant had already been guilty of such acts of dishonesty, so that the Court should infer that, if he became aware of the proceedings, he would remove his assets from the jurisdiction. Having outlined the evidence on which it was assumed the plaintiffs sought to rely to raise that inference, it was submitted that the entitlement to a Mareva type injunction on the basis of that evidence was at best borderline. However, the nub of the defendant's argument that the interim order should not have been made was that the plaintiffs did not make full and frank disclosure of all material information which they had in their possession. If they had, it was submitted, it would be impossible to infer that there was a risk that the defendant would dissipate assets so as to avoid judgment. Five aspects of the affidavit evidence which was before the Court on ih September, 2007 were relied on as evidence of material nondisclosure.

7.2 First, attention was drawn to the fact that both the first plaintiff and the third plaintiff in the affidavits sworn by them to ground the application for the interim order, had averred that they were unaware that they might be liable for expenses incurred in the event that they withdrew from the contracts. It was submitted that those averments were incorrect, because, in his opening at the hearing

of the action, counsel for the plaintiffs had accepted that the plaintiffs would have to discharge any expenses incurred on their behalf. It was further submitted that the fact that the defendant was unable at the trial to prove that he had incurred any expenses on behalf of the first to fourth plaintiffs did not render the withholding of the information at the *ex parte* stage immaterial, because the Court might have been reluctant to grant the interim order if it had appreciated that all that might well lie between the first six plaintiffs and the defendant was the matter of some relatively small amounts of expenses.

7.3 In my view, the defendant has not established that there was any material non disclosure on the part of the plaintiffs, having regard to the averments of the first and third plaintiffs that he relied on. The affidavits in question, which were sworn on 6th September, 2007, were very comprehensive and exhibited all relevant documentation, including the letter of 27th August, 2007 from the defendant to Gallen Alliance, the contents of which I have outlined earlier. Having regard to the contents of that letter, there was no basis on which the Court could have concluded that the dispute between the first to fourth plaintiffs and the defendant only related to a relatively small amount of expenses, given that the defendant had given figures in that letter from which the addressee was entitled to deduce that liability in excess of $10,000 could ultimately arise in respect of the withdrawal from a contract in relation to a unit. That was the information which was before the Court on 7th September, 2007. As a result of what happened at the hearing of the action, the reality of the situation is that the first to fourth plaintiffs had no liability whatsoever for costs, fees, charges, penalties, expenses or losses.

7.4 The defendant's second complaint is that the plaintiffs gave the Court a wrong impression of DTS and its relationship to the defendant. It was submitted that the plaintiffs sought to create the impression that the defendant was some form of "flyby-night" operator, using a false business name. This complaint is aimed in particular at the seventh plaintiff who had previous business dealings with the defendant.

7.5 In my view, that complaint is wholly unsustainable. As I stated at the outset, as originally initiated, the title to these proceedings suggested that there were two distinct defendants. In fact, in the grounding affidavit sworn on 6th September, 2007 by the first plaintiff the difficulty encountered by the plaintiffs in identifying DTS, which was referred to as the second named defendant, was deposed to in some detail. The first plaintiff averred that there was confusion as to what precise legal entity it was and what precise relationship the defendant had with it. She averred that her solicitor had advised her that there was no company or business name registered under that name. In the circumstances, she assumed it must be a trading name used by the defendant or a partnership in which he was involved. She also averred that the defendant had registered "David Tracey & Sons" as a business name. The first plaintiff exhibited all of the relevant documentation in which DTS was referred to. Nowhere in the documentation is there any reference to the fact that the defendant was an auctioneer who was licensed to carry on business in the State. The letter heading used in most of the dealings with the plaintiffs refers to "International Property Services" and "David Tracey & Sons" as parts of a logo. There is then reference to "DTS International Property Services" with a postal address in Dublin 4. Most of the early correspondence was signed by employees of DTS. However, the letter of 27th July, 2007 directly to the first and second plaintiffs was signed by the defendant, who was described as follows under the signature: "David Tracey, Senior Partner, DTS International Property Services". As I have already indicated, the letter of 27th August, 2007 to Gallen Alliance was signed by the defendant "for and on behalf of' DTS. That the plaintiffs were confused as to the status of DTS is wholly understandable. In my view, that confusion was caused by the defendant and his affidavit of 1st October, 2007 did nothing to dispel the confusion.

7.6 The third complaint is that in their affidavits the plaintiffs sought to give the impression that the defendant might not be a legitimate business man. Again, it is the seventh plaintiff who is the main focus of that complaint. From an objective perspective, in my view, the other dealings of the seventh plaintiff with the defendant could not be regarded as being material to issues arising from sales by the defendant of the units in Las Vegas the subject of the substantive action, which were exclusively marketed and sold by him trading as DTS. In reaching that conclusion, I have applied the test as to materiality set out by this Court (Clarke J.) in *Bambrick v. Cobley* [2006] 1 ILRM 82 (at p. 87).

7.7 The fourth complaint, which was emphasised as being of significance, was that the plaintiffs did not disclose to the Court that none of them had sought to make contact with Mr. Larson, the attorney in Las Vegas to whom they had given a power of attorney in relation to the transactions. It was submitted that this omission was material because Mr. Larson was bound to act on their behalf and the Court did not know what advice he might have given them in respect of Nevada law, what he might have done on their behalf, and whether he had given any advice to the defendant. It was submitted that the seventh plaintiff, in particular, should have realised the relevance of ascertaining the position under the law in the State of Nevada.

7.8 That complaint, in my view, is wholly without foundation. I am satisfied that full disclosure was made by the plaintiffs of the material facts in relation to the transactions with the defendant in relation to the apartments in Las Vegas. This can be illustrated by reference to the affidavit of the first plaintiff. The first plaintiff exhibited the two contracts (referred to as Residential Purchase Agreements) executed by the first and second plaintiffs. She itemised in her affidavit all of the material clauses of the contracts, including the clause in each which provided that it was governed by the laws of the State of Nevada. She also averred that she and the second plaintiff were given Power of Attorney documents in connection with the contracts, which would allow a Las Vegas lawyer, Mr. Larson, to act on their behalf in connection with the transactions and that they had attended at the US Embassy to get the documents witnessed by a notary public or consul. A copy of the relevant Power of Attorney was exhibited, as was an additional document furnished to the first and second plaintiffs by the defendant, being a document entitled "Waiver of Conflict of Interest", which was intended to allow Mr. Larson to act in common on behalf of the defendant and the first and second plaintiffs in the sale and purchase of the two apartments. In my view, the Court was apprised of all of the material matters in relation to the involvement of Mr. Larson.

7.9 The fifth complaint, which was emphasised as being the most important complaint, was that the seventh plaintiff was not only fully aware of who the defendant was but was also aware of him by reputation and of the implications of obtaining a Mareva type injunction against a person in his line of business and on his reputation and, more particularly, of notifying all financial institutions in the State of the making of the order.

7.10 In his affidavit grounding the application for the interim order, which was also sworn on 6th September, 2007, the seventh plaintiff outlined his dealings, on his own behalf and on behalf of the eight and ninth plaintiffs, with the defendant and DTS in relation to the purchase of the units in Las Vegas in detail. As the following summary of some of the detail illustrates, the level of detail given meets not only the fifth complaint but also the other four complaints which I have addressed earlier:

> (a) From the outset the seventh plaintiff dealt with an employee of DTS whom he knew "quite well", as the employee had worked for his accountancy firm previously.
>
> (b) The seventh plaintiff stressed that it was clearly understood by the seventh to ninth plaintiffs at all times that DTS was going to organise the necessary finance for the purchases and that these plaintiffs had no role except to provide the

necessary personal information.

(c) The contracts were exhibited and also the transfer records in relation to the transfer of the deposits to client accounts of David Tracey & Son.

(d) Correspondence and e-mails from 20th December, 2006 to 21st March, 2007, the effect of which I have outlined earlier in paragraph 3.6 of this judgment, were exhibited.

(e) The seventh plaintiff deposed to the fact that he considered the contents of the letter of 13th March, 2007 from DTS to be "completely unacceptable". The deposits of the seventh to ninth plaintiffs had been transferred into client accounts, where they should have remained until completion of the transactions. He expressed the opinion that the suggestion the deposits had already been paid to the developer was "fraudulent".

(f) The seventh plaintiff deposed to the fact that he had hoped that it would not be necessary to "go legal" in seeking the return of the deposits. He had a final meeting with the defendant in June 2007 at the offices of DTS in Dublin. He averred that the defendant refused to return any of the monies paid over by the seventh to ninth plaintiffs. He expressly averred that the defendant had "insisted that he had taken legal advice and that our deposits were validly forfeited". It was at that stage that the seventh plaintiff concluded that he had no option but to seek legal advice.

(g) The seventh plaintiff averred that he had received certain information from another employee of DTS with whom he had dealt, who was no longer an employee of DTS, in relation to the assets of the defendant. The information, as set out, was as follows: that the defendant had purchased five units in Borgata Condominiums in January 2007; that €1m was being held in Berlin in connection with a property deal which had not closed, as the defendant was having difficulty raising the finance; that the defendant had recently sold a property on the Grand Canal; and that the defendant had warehouses in Ashbourne and in JFK Industrial Estate in Walkinstown. The seventh plaintiff disclosed that there was a dispute between his informant and the defendant over outstanding payments and that in early August 2007 the Gardai had arrived at the informant's residence to recover items including a laptop, which it was suggested belonged to the defendant.

(h) The seventh plaintiff addressed the identity of DTS in the same manner in which it had been dealt with by the first plaintiff in her affidavit but he added that he had some belief that DTS "may be a partnership with a silent partner involved", but he had been advised that the matter would require to be addressed by raising particulars or interrogatories.

(i) The seventh plaintiff averred that he believed that the defendant had no intention of returning the deposits paid by the seventh to ninth plaintiffs or applying any of his assets to the reduction of their claim. He further expressed the belief that, unless restrained, the defendant would seek to transfer their deposit monies and his assets outside of their reach or otherwise dissipate the funds and the assets, so that the plaintiffs would be unable to enforce any judgment obtained.

7.11 By way of general observation, the evidence put before the Court on the plaintiffs' application for the interim order was very comprehensive. I am satisfied that the defendant has not established that there was any withholding of material information from the Court by the plaintiffs. Indeed, I would go so far as to say that the defendant's contention is fanciful and unreal. This is particularly so, when the correspondence between Gallen Alliance and DTS between 5th July, 2007 and 4th September, 2007 is considered.

7.12 There is evidence before the Court that the notification of the making of the interim order to the financial institutions was detrimental to the ability of the defendant to obtain work as an auctioneer expert in the area of corporate insolvency in the form of an affidavit by Julian Caplin, a partner in the accountancy and taxation firm FGS, who averred that he ceased discussions with the defendant regarding a business relationship when he was informed by the defendant of the notification of the making of the interim order to the financial institutions, although he has no doubts about the honesty and integrity of the defendant. *Prima facie*, this evidence satisfies the requirement that, on an application for an inquiry, the applicant should adduce some evidence to show an arguable case that he suffered loss falling within the undertaking as to damages (*cf*. Gee, *op. cit*., at para. 11.021).

7.13 It was submitted on behalf of the defendant that it was utterly unjustified and unconscionable for the plaintiffs to notify the financial institutions and, in particular, to do so before they notified the defendant of the making of the order, thus nullifying his ability to move to have the interim order set aside before his banks were notified. It was alleged that the plaintiffs' action, given the state of knowledge of the seventh plaintiff, was a deliberate and calculated act to destroy the reputation and commercial interest of the defendant.

7.14 Counsel for the plaintiffs referred the Court to a statement in Bean on *Injunctions* (9th Ed., at p. 137) to the following effect:

> "Banks are very frequently affected as third parties by the grant of freezing injunctions and it is essential to notify the defendant's bank of a without notice order concerning a specified account before notifying the defendant himself."

The good sense of that proposition is obvious, and it brings to mind the old adage about "closing the stable door after the horse has bolted". Counsel for the plaintiff acknowledged, with the benefit of hindsight, that it was probably only necessary for the plaintiffs to notify the two banks in which the defendant maintained his accounts which were known to the plaintiffs. However, I am of the view that the plaintiffs were acting in accordance with normal practice in obtaining leave to notify, and notifying, financial institutions of the making of the interim order.

7.15 Accordingly, I have come to the conclusion that the defendant has singularly failed to establish that the interim order in the form in which it was made should not have been granted.

8. Exercise of the Court's discretion to enforce the undertaking as to damages

8.1 Strictly speaking, as I have found that the defendant has not established that the interim order should not have been granted, it is not necessary to address this issue. Nonetheless, I think it is appropriate to make the following points.

8.2 The defendant was unsuccessful on the merits at the trial of the action. He defended the claim of the seventh to ninth plaintiffs but they succeeded in their claim. As regards the first to sixth plaintiffs, he conceded their entitlement to the return of the deposits paid by them less expenses for which they were responsible. In the event, he was unable to establish that any expenses should be deducted from their deposits except for the sum of US$424 deductible from the deposit paid by the fifth and sixth defendants.

8.3 The evidence which emerged at the trial, had it been available to the plaintiffs in August and September 2007, would have

strengthened their case for a Mareva type injunction order against the defendant's assets. In his dealing with the developer in March and April 2007, on any objective view of the matter, the defendant had exposed the plaintiffs to total loss of their deposits and had eliminated their prospect of being in a position to complete the acquisition of the units in Las Vegas. In short, the defendant used the plaintiffs' deposits to acquire units other than the seven units which the defendant had contracted to sell to the plaintiffs and he had released the main contract which had supported their contracts with him. Not only that, but the defendant wholly mislead the plaintiffs as to the true position. In mid-March 2007 he had not "secured" the units which the seventh to ninth plaintiffs had contracted to purchase nor had he kept their contracts "open". In the case of the first to sixth plaintiffs, they were strung along by the defendant until late August 2007 in the belief that their contracts were enforceable in relation to the units they had contracted to purchase on the basis of misrepresentations by the defendant and his agents. To suggest, as was suggested in the letter of 27th August, 2007 to Gallen Alliance, that the developer in Las Vegas was "taking a hard line" could not be true because the defendant no longer had a contractual relationship with the developer in relation to the units which these plaintiffs had agreed to purchase. The suggestion in the defendant's replying affidavit of 1st October, 2007 that the contracts of the first to sixth plaintiffs still existed, implying that they could be completed, was wholly misleading, given that the contract between the developer and the defendant, out of which the plaintiffs' contracts were carved, no longer existed.

8.4 If it were the case that the defendant had established that the interim order should not have been granted, it is true that, on the authorities set out in Gee (*op. cit.)* at para. 11.023, the Court would be likely, in determining whether to enforce the undertaking to consider whether the plaintiffs could establish "special circumstances", although the fundamental principle is that the Court has a discretion which is to be exercised by reference to all of the circumstances of the case. However, I am satisfied that the interim order was properly made. Therefore, the plaintiffs do not have to establish special circumstances. Apart from that, their success at the trial and the evidence which emerged at the trial as to the conduct of the defendant clearly establishes that equity is on their side.

9. Implications of what happened between 7th September and 2nd October, 2007
9.1 Although, having found that the interim order was properly granted, the issue as to the implications of what happened between the grant of the interim order and its lapse are not relevant to the determination of this application. I consider it appropriate to make the following observations, which are prompted by what I perceive to be the unsatisfactory manner in which the Court was confronted with the issue as to whether the undertaking as to damages should enforced.

9.2 As I have outlined at the outset, while the interim order was made on the *ex parte* application on behalf of the plaintiffs, the interim order expressly provided that the defendant was at liberty, on notice to the plaintiffs, to move to set it aside. Even in the absence of such an express provision, the defendant would have been entitled to move to set it aside under Order 52, rule 3 of the Rules of the Superior Courts 1986. The defendant did not move to set aside the interim order, although he could have done so, after he became aware of it (either when he was informed by his bank manager of its existence, or after he was served on 11th September, 2007, whichever occurred first) prior to the return date, or on the return date, 14th September, 2007. Not only did he not seek to have the order set aside, but it was at his request that it was continued by consent of the parties from 14th September, 2007 to 2nd October, 2007. Of even more importance is the fact that, although he had an opportunity to file a replying affidavit, and an affidavit was eventually sworn by him on 1st October, 2007, the affidavit did not make out the case for a finding that the interim order should not have been granted on the factual basis relied on on this application. In any event, the defendant did not seek to have the interim order set aside, nor did he seek to have the entitlement of the plaintiffs to an interlocutory injunction determined by the Court on 2nd October, 2007. Instead, on that day, he gave an undertaking which afforded to the plaintiff’s even better protection than an interlocutory order in the terms of the interim order would have afforded them. On that basis, the interim order lapsed and the plaintiffs did not pursue the application for the interlocutory injunction because they had the benefit of the more valuable undertaking given by the defendant, which was fortified by the bank drafts held by the defendant's solicitors pending the trial of the action.

9.3 The defendant first indicated an intention to seek to have the plaintiffs undertaking as to damages enforced at the trial of the action during the opening of the case by counsel for the plaintiffs, albeit against the background of the defendant abandoning the counter-claim for damage to his reputation. At that stage, the interim order had ceased for more than a year and a half. The fact that there was no order to discharge at that juncture, of itself, does not constitute good reason for not entertaining the defendant's application to enforce the undertaking. However, the fact that the defendant had not at any time prior to the trial intimated an intention to seek to enforce the undertaking might be significant in interpreting the effect of what happened on the 2nd October, 2007 on the enforcement of the undertaking, if it were an issue. The actions of the defendant, and, more significantly, his silence and inaction as to his intentions, in my view, could be open to the inference that the defendant was abandoning his right to make a claim on the undertaking as to damages given by the plaintiffs to the Court on 7th September, 2007 and continued until the interim order lapsed on 2nd October, 2007.

9.4 However, that point is academic, because I have held that the interim order was properly granted. I have referred to it because it is unsatisfactory, and rather invidious, for the trial Judge to have to consider whether a Mareva injunction granted two years previously was properly granted after the conclusion of the trial. Where the parties compromise an application for an interlocutory injunction following the grant of an *ex parte* interim injunction, or an application for the discharge of an interim injunction granted *ex parte*, the prudent course is to expressly address, and apprise the court, as to the status of the undertaking as to damages. In circumstances where the defendant indicates that he is reserving his position on the undertaking, the court will be in a position to decide whether the issue as to the propriety of the grant of the interim injunction, as distinct from the issue whether the undertaking as to damages should be enforced, should be tried separately from, and prior to, the trial of the action. The court having such an option, in my view, is likely to lead to a more satisfactory outcome, in terms of justice, costs, and court time.

Order
10. There will be an order dismissing the defendant's application.