FEDERAL COURT OF AUSTRALIA

Lamb (Trustee), in the matter of Ariss (Bankrupt) v Ariss [2006] FCA 582

PRACTICE AND PROCEDURE – mandatory injunction obtained ex parte upon giving of undertaking as to damages – injunction discharged for non-disclosure – whether discharge interlocutory or final – relevance of assessment of damages pursuant to undertaking

PRACTICE AND PROCEDURE – mandatory injunction obtained ex parte – injunction discharged for non-disclosure – application for leave to appeal, if leave be required, from discharge and stay pending appeal – whether leave should be granted – extent of obligation of party seeking order ex parte to make disclosure

Held: Discharge of mandatory injunction for non-disclosure interlocutory, leave to appeal refused

Lamb v Ariss [2006] FMCA 510 cited
Thomas A Edison Ltd v Bullock (1912) 15 CLR 679 cited
Milcap Publishing Group AB v Coranto Corporation Pty Ltd (1995) 32 IPR 34 followed
Hall v Nominal Defendant (1966) 117 CLR 423 applied
Licul v Corney (1976) 180 CLR 213 applied
City of Camberwell v Camberwell Shopping Centre Pty Ltd [1994] 1 VR 163 distinguished
Décor Corporation Pty Ltd v Dart Industries Inc (1991) 33 FCR 397 applied
Re South Downs Packers Pty Ltd [1984] 2 Qd R 559 cited
Re Bayliss (1987) 15 FCR 167 cited
Applicant VMAO v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 427 cited
Alexander v Cambridge Credit Corporation Ltd (rec apptd) (1985) 2 NSWLR 685 cited
Stirling Harbour Services Pty Ltd v Bunbury Port Authority [2000] FCA 87 cited

IN THE MATTER OF MARIA OLGA ARISS (A BANKRUPT); KENNETH WAYNE LAMB (AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF MARIA OLGA ARISS) v STEPHEN GORDON ARISS and SIRA PROPERTIES PTY LTD (AS TRUSTEE OF THE SIRA PROPERTY TRUST)

VID 416 OF 2006

SUNDBERG J
BRISBANE (HEARD IN MELBOURNE)
18 MAY 2006

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY **VID 416 OF 2006**

IN THE MATTER OF MARIA OLGA ARISS (A BANKRUPT)

BETWEEN:	**KENNETH WAYNE LAMB (AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF MARIA OLGA ARISS)** **Applicant**
AND:	**STEPHEN GORDON ARISS** **First Respondent**
	SIRA PROPERTIES PTY LTD (AS TRUSTEE OF THE SIRA PROPERTY TRUST) (ACN 007 339 460) **Second Respondent**

JUDGE:	**SUNDBERG J**
DATE OF ORDER:	**18 MAY 2006**
WHERE MADE:	**BRISBANE (HEARD IN MELBOURNE)**

THE COURT ORDERS THAT:

1. The application for leave to appeal be dismissed.
2. The order of Sundberg J of 12 May 2006 extending the stay of certain of the orders of McInnis FM of 13 April 2006 until further order be discharged.
3. The applicant pay the respondents' costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

GENERAL DISTRIBUTION

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY **VID 416 OF 2006**

IN THE MATTER OF MARIA OLGA ARISS (A BANKRUPT)

BETWEEN:	**KENNETH WAYNE LAMB (AS TRUSTEE IN BANKRUPTCY OF THE ESTATE OF MARIA OLGA ARISS)**
	Applicant
AND:	**STEPHEN GORDON ARISS** **First Respondent**
	SIRA PROPERTIES PTY LTD (AS TRUSTEE OF THE SIRA PROPERTY TRUST) (ACN 007 339 460)
	Second Respondent

JUDGE:	**SUNDBERG J**
DATE:	**18 MAY 2006**
PLACE:	**BRISBANE (HEARD IN MELBOURNE)**

REASONS FOR JUDGMENT

INTRODUCTION

1 On 23 December 2005, McInnis FM ordered the respondents to deliver up to the applicant, or cause to be so delivered up, certain property (the mandatory injunction). The mandatory injunction was granted after a hearing ex parte and upon the applicant giving an undertaking as to damages (the undertaking).

2 On 13 April 2006, the Magistrate discharged the mandatory injunction and related orders on the ground that the applicant's solicitor had failed to act with the requisite candour when seeking an order ex parte: see *Lamb v Ariss* [2006] FMCA 510 (the Magistrate's reasons).

3 The applicant applies for leave to appeal, if it be required, from the discharge of the mandatory injunction. (A notice of appeal has been filed.) The applicant also moves the Court for a stay of the proceeding before the Magistrate pending the hearing and determination of the appeal.

ISSUES

4 Three issues arise for determination by me:

(a) whether leave to appeal is required;

(b) if leave is required, whether leave should be granted; and

(c) if no leave is required or, if leave is required, leave is granted, whether the applicant is entitled to the stay.

BACKGROUND

5 The applicant is the trustee in bankruptcy of the estate of Maria Olga Ariss (the bankrupt). The first respondent is the bankrupt's former husband, Stephen Gordon Ariss. Mr Ariss is a director of the second respondent.

6 On 23 December 2005, the applicant commenced a proceeding in the Federal Magistrates Court against Mr Ariss and the second respondent (the FMCA proceeding) by way of an "Application" based on a standard form issued by the Federal Magistrates Court (the FMCA application). The form requires the person completing it to specify the "final orders sought" and any "interim or procedural orders sought". The FMCA application was silent as to final orders sought and, as to interim or procedural orders sought, specified the mandatory injunction.

7 As the applicant's solicitors claimed that the obtaining of the mandatory injunction was a matter of urgency, the FMCA proceeding was brought on for hearing before McInnis FM on the day it was commenced.

8 Before McInnis FM, the applicant relied upon an affidavit affirmed by Alexander William King of the applicant's solicitors. That affidavit was largely based on Mr King's "information and belief". Mr King deposed that:

(a) The bankrupt was made bankrupt on her own petition on 6 May 2003.

(b) Her statement of affairs disclosed "no interests of substance in any jewellery".

(c) She was examined before a Registrar of this Court, pursuant to s 81 of the *Bankruptcy Act 1966* (Cth), on 19 September and 22 December 2005.

(d) Mr Ariss was examined by a Registrar of this Court on 22 November 2005.

(e) Information obtained by the applicant disclosed that twelve items of ladies' jewellery were insured in the names of the bankrupt and the respondents for $226,755.00 (the listed items).

(f) In the course of the bankrupt's second examination, she said that (a) the listed items "were gifts to her, and at the time each was gifted to her she believed it was hers and hers forever", (b) two of the listed items (a gold Rolex watch and a three stone diamond ring) were gifted to her after her bankruptcy, (c) she last saw the listed items at premises at Port Douglas where she had lived with Mr Ariss – from whom she was now separated. (At his examination, Mr Ariss said that the separation had taken place on 17 July 2005.)

(g) In course of that examination, the bankrupt also said "in substance in relation to the [listed items]: 'He [(ie Mr Ariss)] gave them to me as a gift, they were mine'." She also said that she had asked Mr Ariss for the listed items "but that he had said that [they] were the property of [the second respondent] and that she could not have them."

(Mr King's affidavit also noted that a transcript of the bankrupt's second examination was not yet available.)

9 After the mandatory injunction was granted, the respondents filed a "Response" in the Federal Magistrates Court. The Response sought orders that the mandatory injunction and related orders "be set aside on the basis that they were obtained irregularly because … the applicant failed to bring to the notice of the Court all facts material to his right to the orders" and/or the FMCA application did not specify any final orders sought.

10 In support of the Response, Mr Ariss swore an affidavit. An extract of the transcript of the hearing before McInnis FM on 23 December 2005 was exhibited to that affidavit. Notwithstanding that he eventually did so, that extract shows that the Magistrate was obviously reluctant to grant the mandatory injunction ex parte.

11 Mr Ariss deposed that during his examination he said that the listed items belonged to the second respondent – of which the applicant omitted to inform the Magistrate on 23 December 2005. Mr Ariss also deposed that during her examinations the bankrupt "gave evidence that conflicts with any claim" that she owned the listed items – of which the applicant also omitted to inform the Magistrate on 23 December 2005. Mr Ariss then sets out seven

examples of such evidence. Rather than recite them, I will set out what I consider to be the relevant parts of the transcripts of the bankrupt's examinations. The following exchange took place during the first examination:

> *"THE APPLICANT: Now you just said that the jewellery didn't belong to Mr and Mrs Ariss?---No.*
>
> ***Well, who did it belong to?---Well, it was either Stephen – it definitely wasn't mine, because, if it was mine, I would have it. …"***
>
> *…*
> *So when you say your husband took your jewellery when you went bankrupt, is that for safe keeping?---No, I actually said, quite a while before I went bankrupt. No, because we were having marital problems then. It was all a matter of money, and I said I didn't want it, so he took it.*
>
> *So you gave that away then, did you?---No, I gave it to him.*
>
> *Well, that is giving it away, isn't it?---I gave it away.*
>
> *Okay. But you didn't say that on your statement of affairs?---Well, you never asked, I gave a lot of things away.*
>
> ***It said "Did you make any gifts?"---Well, it wasn't a gift. It wasn't mine to give. They weren't mine to give. They are not in my name.***
>
> ***THE DEPUTY DISTRICT REGISTRAR: You've said that you gave, or that your husband – your husband took them, or you gave them. I mean - - -?---We had a fight, about six months before I went bankrupt. There was a real issue about money and jewellery and what a kept woman I was, so I said to him to have it. It wasn't in my name. I believe the jewellery is either in his name or a company name, so I had no claims to it, anyway, because we were looking at separating then.***
>
> *…*
> ***When Mr Ariss gave you that jewellery, what did you consider, that it was just yours to wear for show? Is that what you considered?---No. My husband was very – always very – after his business went – liquidated, we went through a very difficult period and – when he lost everything, so he had nothing in – and it was me that they attacked, so he had nothing in my name. Now, the jewellery was never in my name and I know that for a fact.***
>
> *It's not a question of whether it's in your name. That's not the question I'm asking you Mrs Ariss, I'm asking you - - -?---No. I thought it was forever.*
>
> *- - - how did you think about the jewellery - - -?---I thought it was mine.*
>
> *- - - when it was given to you, and you wore it?---I thought - - -*
>
> ***How did you think about it?---I thought it was mine, forever.***

Okay?---And it wasn't.

So you gave it – what happened? What - - - ?---We had a - - -

You didn't consider that you were giving the jewellery back when you gave it back to your husband?---I threw it at him. I didn't want it. I gave it all to him. I didn't want him.

[The applicant's] question, then, you see, really actually goes, then, to your statement of affairs where you're asked, "Did you give anything away before your bankruptcy, within the last five years", and he's wondering why you didn't say, "Yes, I gave my jewellery"?---I didn't really think of that. Well, I had – you know, I had, you know, a Guess watch. I had – I've got, like, cosmetic jewellery that I would wear that I had. I didn't really think about it and, if I made a mistake, I'm sorry. I didn't think about it. I didn't think about it.

…

THE APPLICANT: Now, Mrs Ariss, this is an insurance for, if you look down the bottom of this document - - - ?---Mm.

- - - it makes reference to a 'Boujais Cartier gold watch, $18,000'?---Mm.

…

Who owned that?---That was owned by Sira Properties.

And how do you know that? Because I know, because – I just know – that watch. I remember the watch. It was owned by Sira Properties.

Okay. If you knew that, why did you sign a Sira Properties trust balance sheet that made no reference to jewellery whatsoever?---Well, it could have been that, at the time, it wasn't owned by that, and that watch went missing."

The following exchange took place during the second examination:

MR DELANY SC: Now, on the last occasion you gave evidence to the effect that you thought the jewellery might be the property of Sira Properties?---That is correct.

Well, perhaps you can tell the Registrar what facts or circumstances you say cause that evidence to be true? In other words, how is it that you can say Sira Properties owned the jewellery?---Because when I left I asked what I could take, what was mine, and he told me that the jewellery was never mine in the first place.

I see. So the only thing - - - ?---And he told me - - -

- - - you rely on in relation to – sorry, I will start again. ***So when you said on the last occasion that you believed, or that the jewellery was Sira Properties' jewellery, or that it was the owner, that was solely on the basis of what your husband told you. Is that right?---No. Yes and no. There was – on the insurance documents it was always under Sira Properties. Now, just because it was under Sira Properties I still felt it was mine. He gave them to***

me as a gift. They were mine. But – but they weren't. They were owned by Sira Properties.

Well, we have been through the insurance documents and what they tell us is that initially you and your husband were listed as the sole owners of the household contents, including the jewellery. Then … suddenly you and your husband cease to be the insured persons and Sira Properties became the insured person, and then when you had moved to [Port Douglas] there was notification that you and your husband were about to go back on the list?---That is what that – I don't think that is correct though. We changed insurance brokers there. It was always Sira Properties. I was never under the impression it was mine legally. But emotionally, it should have been mine.

…
So you asked, did you, or you went to take some jewellery when you were leaving [Port Douglas]?---Yes. I asked - - -

And what happened?---I asked him for it.

Yes?---And he said it is not mine. It is – that it wasn't mine to take. It belonged to Sira Properties, and I said, 'It is beside the point it is Sira Properties. It is still – you gave it to me. It should be mine. I should be able to take it.'

And he declined to give it to you?---Correct.

Now, so that is one thing you have relied on when you gave your evidence on the last time, that your husband told you it was Sira Properties?---I saw it on the insurance documents."

(Though the emphases in both of the passages quoted above are mine, they roughly correspond with the seven examples referred to earlier.)

THE MAGISTRATE'S REASONS

12 The Magistrate's reasons bear repetition to some extent:

> *"31. In my view, it is perfectly clear from a reading of the transcript of the Registrar's examination which took place on 22 December 2005 that the bankrupt had stated a belief that the jewellery was given to her as a gift and, as she described it, "They were mine." But also it is equally clear that she immediately proceeded to say "But – but they weren't" and that "They were owned by Sira Properties". Elsewhere in the material, it is clear that the bankrupt confirmed that on the previous occasion when she gave evidence, the evidence was to the effect that the jewellery might be the property of Sira Properties.*
>
> *32. Whilst the court is prepared to make due allowance for the fact that when the application was made before this court on 23 December*

> *2005 the transcript of the previous day's examination was not available, the fact remains that both senior counsel and Mr King were present both on 22 December 2005 before the Registrar and before this court upon the hearing of the urgent ex parte application on 23 December 2005."*

The Magistrate then quoted from *Thomas A Edison Ltd v Bullock* (1912) 15 CLR 679 at 681-682 and *Milcap Publishing Group AB v Coranto Corporation Pty Ltd* (1995) 32 IPR 34 at 36. He went on to say:

> *40. In my view, the making of ex parte orders by any court is a significant and serious process to be undertaken, and it should be undertaken with due care. Applying [Thomas A Edison] to the present case, it is clear in my view having regard to a comparison between the first King affidavit [(ie the affidavit described at [8])] and in particular paragraph 11 thereof [(ie the paragraph where what is set out in the first sentence at [8](g) appears)] and the limited extract of the evidence of the bankrupt that* ***the court was not at the ex parte hearing provided with all the evidence which was then known to either the deponent and/or his client****, and indeed counsel who appeared both before this court and the s.81 examination.*
>
> *41. For a bankrupt's evidence to be limited in the way it is sought to be limited in the first King affidavit, in my view can only result in the court being misled. It is the responsibility of parties seeking to make an ex parte application, to bring to the notice of the court all facts material to the determination of the right to that order and I accept that it is no excuse for any party to indicate that he or she was not aware of the importance of the material.*
>
> *42. As indicated by the High Court in [Thomas A Edison], uberrima fides is required. If a party induces a court to act in the absence of another party, and in doing so fails in its obligation, in my view, to paraphrase the words of the High Court, unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application.*
>
> *43. It seems logical to me and irresistible that if the bankrupt or indeed if the First Respondent had been present upon the hearing of the application by this court on 23 December 2005, then the complete extract of the bankrupt's evidence would have been referred to along with other extracts during the course of the examination before the Registrar, indicating that a concession was made by the bankrupt that the jewellery was owned by the Second Respondent, even though the bankrupt believed the jewellery had been a gift and that it belonged to her or, to use her words, was "mine".*
>
> ...
>
> *48. The decision to proceed on an ex parte basis is a significant decision which should not be regarded as a decision to be taken lightly by legal*

practitioners. In this instance, the proceedings commenced arguably on the wrong form, failed to seek substantive relief, and more significantly relied upon what I find to be inadequate and misleading affidavit evidence in relation to the full extent of the evidence given concerning a crucial issue of significance to the court's deliberation, based upon the bankruptcy evidence of the previous day's section 81 examination.

49. Having embarked upon the ex parte urgent application, then the Applicant does so at the Applicant's peril. The duty to act with utmost good faith is a significant duty, and for the reasons stated I am satisfied in this instance that that duty has not been discharged. In my view it follows that the orders made by the court on 23 December 2005 should therefore be discharged.

50. That leaves the question of whether the court should in the circumstances grant leave to the Applicant to now amend the [FMCA] application retrospectively, to replicate the orders sought as interim orders in that part of the [FMCA] application referring to final orders. In my view, in the exercise of the discretion, whilst the court from a practical point of view may be tempted to permit the amendment, it would seem to be unfair and contrary to the interests of justice to permit an Applicant who has failed to exercise the utmost good faith in bringing an ex parte application to then convert that application, flawed as it clearly has been found to be, to an application for substantive relief. In my view the proper course is to refuse the application to amend and to simply dismiss the [FMCA] application and otherwise discharge the orders made by the court on 23 December 2005."

(The emphasis is mine.)

13 The judgment reflected in the Magistrate's reasons was delivered on 13 April 2006. Apart from the discharge of the mandatory injunction and related orders, the Magistrate's orders were that:

(a) the FMCA application be dismissed;

(b) the applicant return to the respondents' solicitors any property held pursuant to the mandatory injunction;

(c) the respondents file and serve affidavits in support of a claim for damages arising from the undertaking;

(d) the applicant file and serve any affidavits in reply;

(e) the respondents file and serve submissions as to costs;

(f) the applicant file and serve submissions as to costs;

(g) there be liberty to apply; and

(h) the hearing of the claim for damages and costs be fixed for 25 May 2006.

By order of this Court, the orders in sub-paras (b), (d) and (f) have been stayed until further order.

IS LEAVE TO APPEAL REQUIRED?

14 The applicant seeks to appeal the Magistrate's orders as set out at [13] (including the discharge of the mandatory injunction and related orders). The first question is whether those orders are interlocutory or final. If the former, leave to appeal those orders is required. If the latter, an appeal from those orders lies as of right.

15 The Magistrate's orders of 13 April 2006 are interlocutory. They do not finally determine the rights of the parties. See *Hall v Nominal Defendant* (1966) 117 CLR 423 and *Licul v Corney* (1976) 180 CLR 213.

16 All that was determined by the granting and discharge of the mandatory injunction was who should have custody of the property the subject of the mandatory injunction **for the time being**. The mandatory injunction compelled Mr Ariss and the second respondent to deliver up to the applicant, or cause to be so delivered up, certain property. The discharge of the mandatory injunction compelled the applicant to return to Mr Ariss and the second respondent any property so delivered up. That is, the discharge of the mandatory injunction simply restored the status quo ante.

17 Notwithstanding that restoration, the real issue between the parties – namely, who owns the property the subject of the mandatory injunction – has not been finally determined. On its own, the discharge of the mandatory injunction does not preclude the applicant from:

- moving the Federal Magistrates Court (or, indeed, this Court) for another mandatory injunction in the same terms; or
- commencing a proceeding in this Court claiming ownership of the property the subject of the mandatory injunction.

Indeed, the applicant has taken the latter course of action – though in that proceeding he also claims ownership of additional property not the subject of the mandatory injunction.

18 The fact that the Magistrate dismissed the FMCA application is irrelevant to determining whether leave is required.

19 Further, the fact that the Magistrate determined that there should be an assessment of damages to be paid pursuant to the undertaking does not support the contention that leave is not required. The applicant relied on the decision of the Full Court in *City of Camberwell v Camberwell Shopping Centre Pty Ltd* [1994] 1 VR 163 at 173-175 as authority for that proposition. I cannot see how *City of Camberwell* can be so relied upon. In that case, the trial judge, by agreement with the parties, decided liability before assessing damages. He decided that the defendant was indeed liable to the plaintiff. Though he did not make orders to that effect, a "judgment" that "the issues of liability raised by the [defendant] are not to be resolved in favour of the [defendant] and it is appropriate therefore to turn to the issues between the parties as to damages" was authenticated. Marks and Gobbo JJ (Fullagar J dissenting) said at 174-175 that:

> *"The circumstances are, in our opinion, analogous to those in Hall [v Busst (1960) 104 CLR 206] and such that it may fairly be said that the determination of the learned [trial] judge was intended as a judgment for [the plaintiff] for damages to be assessed and that therefore it is final, if not, a determination as to liability to pay damages which is final. Thus the appeal is as of right from 'a determination' within the meaning of s 10(2) of the Supreme Court Act 1986 (Vic)."*

Needless to say, the circumstances in this case are quite different to those in *City of Camberwell*. Further, the assessment of damages in this case results not from a decision on the merits as to liability (as in *City of Camberwell*) but automatically upon the discharge of the mandatory injunction which was granted upon the giving of the undertaking.

SHOULD LEAVE TO APPEAL BE GRANTED?

20 The question whether leave to appeal should be granted falls to be determined according to the criteria set down by the Full Court in *Décor Corporation Pty Ltd v Dart Industries Inc* (1991) 33 FCR 397. First, whether the impugned decision is attended with sufficient doubt to warrant its reconsideration. Secondly, whether substantial injustice would result if leave were not granted, supposing that the impugned decision was wrong.

21 The applicant, by his submissions, contends that:

> *"9. … The proposition that [the second respondent] and/or Mr Ariss could have been expected to contend for, if present before the [Federal Magistrates] Court, namely, that they or one of them was the true owner of the jewellery, was clearly articulated as was the basis upon which they might seek to rely to establish such a claim:*
> *(a) there was express disclosure that [the second respondent] and*

Mr Ariss were persons named as insureds in relation to the jewellery;

(b) there was express disclosure that the bankrupt gave evidence that when she asked her husband (ie, Mr Ariss) for the jewellery, he said the jewellery was the property of [the second respondent] and that she could not have it;

(c) there was express disclosure that when the husband had been examined pursuant to s81 of the Bankruptcy Act, he asserted that he had given certain items of the jewellery to one or both of this daughters, consistent with ownership of the jewellery by him or [the second respondent];

(d) there was express disclosure that the bankrupt expressed the opinion that some of the house contents, the subject of the same policy of insurance, might be owned by [the second respondent] although, like the jewellery, such items of contents were not disclosed as an asset in the balance sheet of [the second respondent].

10. In order to determine whether or not there was 'material' non-disclosure, it is necessary to have regard to the evidence of the bankrupt as a whole. It is asserted that the fact she had earlier given evidence contrary to the proposition the jewellery was hers was not disclosed. What the transcript of the evidence given by the bankrupt on 22 December 2005 discloses is that she did on occasion give contrary evidence. That is, on occasion she gave evidence that she thought that the jewellery was either that of Mr Ariss or [the second respondent]. However, what is critical is that she was examined as to why she might hold to that view. She said in evidence that she held that view for two reasons, namely:

(a) because those persons were named as insureds in relation to the jewellery; and

(b) her husband had told her that the jewellery was the property of [the second respondent] or of himself.

Both considerations which had led [the bankrupt] to on occasion state that the jewellery might be the property of [the second respondent] or of Mr Ariss were disclosed on the ex parte application, as was the fact there was evidence consistent with such potential claims.

11. The cases establish that, on an application made ex parte, there must be disclosure of material facts. The material facts which were required to be disclosed here were:

(a) that [the second respondent] and Mr Ariss were persons who were named as persons having an insured interest in relation to the jewellery. This was disclosed in the King ... affidavit and the relevant insurance documents were exhibited;

(b) that Mr Ariss, currently the sole director of [the second respondent], held the view that the jewellery in question was either his or [the second respondent's]. This was also disclosed.

> *12. The best evidence that Mr Ariss and/or [the second respondent] would claim to be the owners of the jewellery, and the basis of that claim, was before the Federal Magistrates Court. There was direct evidence, of which the Court was informed, that Mr Ariss asserted the jewellery was his or [the second respondent's] and, on that basis, refused to return it to his wife. In those circumstances, the fact there was additional evidence from the bankrupt that, on the basis of the insureds' interest and on the basis of what her husband told her, she believed that the jewellery may be his or [the second respondent's] jewellery, was not material. ...*
>
> ...
>
> *17. The King ... affidavit disclosed that [the second respondent] or Mr Ariss would assert an entitlement to the jewellery. The ... Magistrate knew that was the case they would make and knew there was documentary evidence in support of that case, at least as to an arguable insurable interest, notwithstanding none of the jewellery appeared on the balance sheet of [the second respondent]."*

22 The proposition in the first sentence of para 11 in the passage quoted at [21] is correct. A party seeking an order ex parte must disclose all **material** facts. However, as Campbell CJ said in *Re South Downs Packers Pty Ltd* [1984] 2 Qd R 559 (Full Court) at 560:

> *"What is material in any case depends, in the first instance, upon the nature of the case sought to be made out and, to that end, must be viewed in the context of all the relevant circumstances."*

23 The applicant has taken far too narrow a view of what constituted material facts that should have been disclosed to the Magistrate. His submissions quoted at [21] are, to a large extent, beside the point. A reasonable person in the Magistrate's position who had the benefit of the transcript of the bankrupt's second examination (or an accurate summary thereof) would readily discern that the bankrupt was saying **that though she did not own the jewellery in question, and that it was owned by the second respondent**, she thought she was "emotionally" or, indeed, morally entitled to it. Mr King's affidavit did not disclose this to the Magistrate. That was a serious omission for an affidavit that purported to give an accurate account of the evidence given by the bankrupt at her second examination. Nor was that omission rectified before the Magistrate.

24 In *Milcap Publishing*, Davies J said at 35:

> *"When an ex parte order is sought, the person seeking the order must be frank and disclose to the court all the matters which, if put before the court, **might** have an effect upon the court's decision. The facts that should be disclosed go both to matters of liability and matters of discretion. If a fact is material in*

> *that it would be a matter to be taken into account by a court in the making of the decision to grant an injunction or in the formulation of an order that is to be made, it is a matter that ought to be disclosed."*

(The emphasis is mine.) I think it clear that that test has been satisfied. A reasonable person in the Magistrate's position would have taken into account what the bankrupt was in fact saying at her second examination in deciding whether or not to grant the mandatory injunction. Undoubtedly, that information might have affected that decision.

25 The applicant contended that the Court should apply the test in *Re South Downs Packers*. In that case, Connolly J said at 566 that "[a] non-disclosure will not be material unless it be **likely** to influence the court in acceding to the application". (The emphasis is mine.) Though I prefer to follow *Milcap Publishing* as it is a decision of this Court, the application of the test in *Re South Downs Packers* would not lead to a different result.

26 The applicant also contended that the Magistrate erred when he said at para 40 of his reasons (see the second passage quoted at [12]) that "the court was not … provided with **all** the evidence which was then known to either the deponent and/or his client". (The emphasis is mine.) His Honour posited and said he would apply the tests found in *Thomas A Edison* and *Milcap Publishing*. A fair reading of his reasons discloses that, notwithstanding the language of para 40, the Magistrate correctly applied those tests. At para 35, his Honour said that the respondents had contended that a **comparison** between Mr King's affidavit and the transcript of the bankrupt's second examination showed that the court "was clearly misled in relation to what could be described as a crucial issue" leading to the granting of the mandatory injunction. The "crucial issue" to which his Honour referred is that highlighted at [23]: that the bankrupt had conceded that she did not own the jewellery in question. The Magistrate's reference to "all the evidence" was a reference to all the evidence going to the "crucial issue". The comparison shows that the concession was not disclosed by Mr King's affidavit. The Magistrate's reference to "all the evidence **then known**" (emphasis added) shows that the Magistrate was engaging in the comparison. That is further shown by his statements that the material before him on 23 December 2005 was:

- "incomplete and … had the effect of misleading the court **in relation to the true state of the evidence which had been given by the bankrupt on the previous day**" (para 44); and
- "inadequate and misleading … **in relation to the full extent of the evidence given**

> **concerning a crucial issue of significance to the court's deliberation**, **based upon the … evidence of the previous day's … examination**" (para 48).

(The emphases are mine.) Further, the Magistrate said at para 43 that:

> *"It seems logical to me and irresistible that if the bankrupt or indeed if the First Respondent had been present upon the hearing of the application by this court on 23 December 2005, then the complete extract of the bankrupt's evidence would have been referred to along with other extracts during the course of the examination before the Registrar, indicating that a concession was made by the bankrupt that the jewellery was owned by the Second Respondent, even though the bankrupt believed the jewellery had been a gift and that it belonged to her or, to use her words, was 'mine'."*

In each of the two paras preceding the one I have just quoted, the Magistrate said that the obligation of a party seeking an order ex parte was to bring forward all material facts. Clearly, the Magistrate was of the opinion that all material evidence on the crucial issue equated with all the evidence on the crucial issue. He was correct in that opinion.

27 Finally, the notice of appeal referred to at [3] says that the Magistrate erred in "failing to have regard to, or to apply, the decision in *Re Bayliss* (1987) 15 FCR 167 to which he was referred, to the case before him". Though the applicant's submissions mention *Re Bayliss*, the applicant's counsel did not mention it before me. In any case, I cannot see how *Re Bayliss* could have advanced the applicant's case as it stands for a proposition of a highly general nature. I can see no circumstance in this case that makes that proposition of especial significance.

28 The Magistrate's decision is not attended with sufficient doubt to warrant its reconsideration. I do not think it necessary to go on to consider whether substantial injustice would result if leave were not granted, supposing that the Magistrate's decision was wrong. The two limbs of the test in *Décor Corporation* cannot be considered in isolation from one another: see *Décor Corporation* at 398-399. The prospect that an appeal, if leave were granted, would be successful is so remote that it would be artificial to suppose that the decision below is wrong. See *Applicant VMAO v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 427 at [22].

IS THE APPLICANT ENTITLED TO A STAY?

29 The applicant has also sought a stay of the FMCA proceeding on the basis that, without it, the appeal would be rendered nugatory. That assumed that I would decide either that leave to appeal is not required or that leave is required and is granted. In the events that have

occurred, no stay is sought.

30 Further, if I am incorrect and the Magistrate's orders of 13 April 2006 are final rather than interlocutory, I would nonetheless refuse to grant a stay. For the same reasons that I refused to grant leave to appeal, I would hold that the applicant has not demonstrated "a reason or an appropriate case to warrant the exercise of the discretion in his favour": *Alexander v Cambridge Credit Corporation Ltd (rec apptd)* (1985) 2 NSWLR 685 (Full Court) at 694 (and see *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 87 at [13] per French J) or that he has a serious case to be tried and that the balance of convenience favours the granting of the stay: *Stirling Harbour Services* at [15].

CONCLUSION

31 The application for leave to appeal is dismissed. The stay of certain of the Magistrate's orders of 13 April 2006 referred to at [13] is discharged. The applicant must pay the respondents' costs.

I certify that the preceding thirty one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Sundberg.

Associate:

Dated: 18 May 2006

Counsel for the Applicant:	J Delany SC and P Fary
Solicitor for the Applicant:	Arnold Bloch Leibler
Counsel for the Respondents:	S Rosenzweig
Solicitor for the Respondents:	Charles Fice
Date of Hearing:	12 May 2006
Date of Judgment:	18 May 2006