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How Judges Shape the Law - The Mareva
Injunction

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HOW JUDGES SHAPE THE LAW - THE MAREVA INJUNCTIONIntroduction

"The development of the law relating to Mareva injunctions is an example of the flexibility and adaptability of the common law - the judge-made law. Although judges adopt the fiction that the new law has been "found" (that is, that it was always there, but has only been revealed by the diligent application of the courts), the reality is that the judges have moulded the law, albeit based on long-standing principles, to evoke a new remedy to meet a newly-found deficiency in the old law."⁽¹⁾

Prior to 1975 the only pre-judgment remedy available in New Zealand affecting the property of a debtor was contained in rule 314 of the Civil Code of Procedure. Australia and England had no equivalent to Rule 314. In those jurisdictions therefore the creditor simply could not prevent a debtor transferring his assets out of the jurisdiction before judgment.

Now in 1983 in England, Australia⁽²⁾ and in New Zealand the creditor may apply to the court for an order restraining the defendant from taking assets out of the jurisdiction or otherwise dealing with them pending the outcome of a suit. It is an order designed to stop defendants dissipating or otherwise dealing with their assets thereby rendering a future judgment practically futile.

In 1975 in two decisions the Court of Appeal in England⁽²⁾ held that an injunction would be granted to restrain the foreign defendants from removing their assets out of the jurisdiction since there appeared to be a danger that

~~they might do so in order to avoid the consequence of~~
judgment in the pending claim. These two decisions represent the beginnings of a judge-made law. Lord Denning said in 1975:

"We are told that an injunction of this kind has never been done before. It has never been the practice of the English courts to seize the assets of a defendant in advance of judgment, or to restrain the disposal of them.... It seems to me that the time has come when we should revise our practice. There is no reason why the High Court or this Court should not make an order such as is asked for here." (4)

The new law was "found" by Lord Denning and in Rasu Maritima S.A. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina) and Government of Indonesia (as interveners) he said: (5)

"It is said that this new procedure was never known to the law of England. But that is not correct. In former times it was much used in the City of London by a process called foreign attachment."

In the beginning the Mareva injunction was not well defined, its limitations were not defined and the nature and effect of a Mareva order could not easily be divined. But now only eight years later the judges "have moulded the law" (6) case-by-case and these matters have largely been defined. The judges in adapting the law have had to pay heed to both the interests of creditors and of debtors and have had to balance both sets of rights.

As has already been said in some cases a debtor

~~will be prevented from transferring his assets out of~~
the jurisdiction or disposing of his assets within the jurisdiction otherwise than in the normal course of business. This will prevent a debtor removing his assets or passing them to another person who could send them out of the jurisdiction. The judges in balancing the rights of creditors and debtors have not seen fit to interfere with the "right" of debtors to deal with their assets without constraint until judgment is entered against them. Where therefore there is no risk of the assets being dissipated or removed from the jurisdiction, the creditor must obtain judgment and follow the normal processes of execution. This debtor's right was commented on in Third Chandris Shipping Corp. v. Unimarine S.A.⁽⁷⁾

" [the 'domestic' defaulter] may try to dissipate his assets, he may succeed to some extent but retribution in the form of either bankruptcy or liquidation will probably come about one day".

The Mareva injunction provides a limited exception and ameliorates the position of the creditor where a debtor is able to transfer his assets overseas. It is not inconceivable that an injustice to the debtor may arise but it is hoped that in the "diligent application"⁽⁸⁾ of the balance of convenience test the judiciary will correctly apportion the rights of both creditors and debtors.

This paper will examine how judges in New Zealand, Australia and England have "moulded the law" and since 1975 shaped a new form of interlocutory relief in what

has been termed a "growth industry".⁽⁹⁾

Part One

1. The "Growth Industry" in England.

Traditionally, the English courts did not have a power to grant an injunction restraining a defendant from freely using his assets before judgment.⁽¹⁰⁾ The two ex parte injunctions granted by the English Court of Appeal in the Karageorgis⁽¹¹⁾ and Mareva⁽¹²⁾ which naturally presupposed such a power sent a shock-wave around legal and commercial circles and was soon challenged in the Rasu Maritima⁽¹³⁾ case. The jurisdiction was affirmed by the Court of Appeal in that case and Lord Denning made reference to long-forgotten customs such as the doctrine of foreign attachment (similar to pre-trial orders prevalent in many European countries).⁽¹⁴⁾ In addition he said in The Siskina⁽¹⁵⁾ "Now that we are in the Common Market it is our duty to do our part in harmonising the laws of the nine⁽¹⁶⁾..." illustrating what he saw as part of the judicial function in "moulding the law" - his judicial duty to harmonise the laws of the European Economic Community.

Lord Denning's view of the judicial function was rejected by the House of Lords.⁽¹⁷⁾ Lord Diplock refuted the idea that harmonisation was to be effected by individual member states⁽¹⁸⁾ and Lord Hailsham said "the process of harmonisation is one which leaves comparatively small scope for judicial inventiveness and discretion in individual cases".⁽¹⁹⁾

Having "found the new Law" Denning said "It is a field of law reform in which the judges can proceed step

by step. They can try out a new procedure and see how it works. That is better than long drawn out discussions elsewhere"⁽²⁰⁾. The validity of the new practice and Lord Denning's statement on its future direction by judicial moulding has not been challenged in England.⁽²¹⁾ The basis of the jurisdiction was founded on s.45 of the Supreme Court of Judicature (Consolidation) Act 1925 (U.K.) which re-enacted the provisions of s.25(8) of the Supreme Court of Judicature Act 1873(U.K.)⁽²²⁾ S.45(1) of the 1925 Act permitted inter alia, an injunction to be granted in all cases in which it appeared to the court to be "just or convenient".⁽²³⁾

In the earlier decisions the principle was restricted to defendants outside the jurisdiction presumably to justify its jurisdiction (no other remedy being available to redress this imbalance of rights between debtor and creditor) but later on as illustration of the case by case flexibility of common law this restriction was removed.⁽²⁴⁾

While the Rasu Maritima case established the jurisdiction it was still not beyond doubt. The House of Lords in The Siskina⁽²⁵⁾ discharged the injunction before it on the grounds that the English courts were unable to determine the substantive questions involved. Later in Third Chandris Shipping Corporation v. Unimarine S.A. Lord Denning said of that decision⁽²⁶⁾

"Two years ago, the House of Lords had this procedure

procedure under close consideration. It was in The Siskina. If the House had any doubts about our jurisdiction in the matter, I should have expected them to give voice to them, rather than let the legal profession continue in error. But none of their Lordships did cast any doubt on it.... The only reservations made by their Lordships were as to restrictions to be put on it or the modifications to be made on it.... So I take it as established that the High Court has jurisdiction to grant a Mareva injunction in appropriate cases... "

It seemed unlikely that the procedure would be judicially overturned in the House of Lords especially when almost all the injunctions requested were being granted.(27)
In any event Judge-made law was statutorily recognised in s.37(3) of the Supreme Court Act 1981(U.K.)

2. The "Growth Industry" in Australia.

The ability of a plaintiff to obtain a Mareva injunction in Australia varies from state to state and has recently been the subject of discussion in the New South Wales Court of Appeal in Riley McKay Pty. Ltd. v. McKay and Anor.⁽²⁸⁾ In that case, the Court examined the development of the Mareva injunction in England and its availability in five of the six Australian states and in New Zealand. The jurisdiction was accepted in Victoria in Praznovsky v. Sablyack.⁽²⁹⁾ and in Western Australia in Steamship Co. Ltd. v. D.C. Commodities Pty. Ltd.⁽³⁰⁾ The jurisdiction was rejected in South Australia in Pivovarovoff v. Chernabeff⁽³¹⁾ Until the Riley McKay decision⁽³²⁾ the position in New South Wales was in some doubt the jurisdiction having been accepted in Balfour Williamson Pty. Ltd. v. Douterluingue⁽³³⁾ and rejected in Re Hunt.⁽³⁴⁾

In light of the increasing acceptance of the Mareva injunction in the other states it is perhaps most interesting to look at the reasons for its rejection in the state of South Australia. In Pivovarovoff v. Chernabeff⁽³⁵⁾ Bray C.J. gave the following reasons for the courts rejection of the jurisdictional basis.

1. [T]here is a strong current of authority in general and unqualified terms that...'you cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property'....
2. [I]t seems to me that to depart from these authorities so as to introduce, in however

modified a form, some version of the European practice of Suisie conservative is to tread on legislative ground. It is, I think, for Parliament, not for the Court....to invent for the first time a process of anticipatory execution ...

3. [A]ustralia has not joined the Common Market and is not bound by the Treaty of Rome ...
4. [T]he source of the power to grant the injunction in question was found by the Court of Appeal in the nippon Yusen case in s.45 of the English Supreme Court of Judicature (Consolidation) Act, 1925 ... It has, however, for long been accepted that that section is purely a machinery section ...
5. The exercise of a discretion is not to be fettered by rigid rules ... but the ambit of a discretion is confined within the words of the statute granting it. And the words of this section have been construed for at least a century so as not to authorise an order of the type we are considering.
6. [T]he problem of the absconding debtor has not escaped the attention of the legislature ...

None of these criticisms are particularly weighty and now that the Court of Appeal of New South Wales in Riley v. McKay has confirmed an inherent jurisdiction and rejected Bray C.J. reservations in Pivovarovoff v. Chernabeff⁽³⁷⁾ in favour of the decisions in Balfour Williamson (Australia) Pty.Ltd. v. Douterluingne and Anor⁽³⁸⁾, Turner v. Sylvester⁽³⁹⁾, and Bank of New South Wales v. Churchill⁽⁴⁰⁾. In balance the weight of Australian authority supports

the approach of the English courts with the exception of the South Australian aberration but lacks statutory recognition of the jurisdiction to issue.

(3) The "Growth Industry" in New Zealand.

New Zealand has no equivalent to s.45(1) of the Supreme Court of Judicature Act 1925(U.K.). Our courts cannot look to any statute expressly allowing them to grant interlocutory injunctions wherever it would be "just and convenient to do so".

The jurisdiction was accepted without question in Systems and Programs (NZ) Ltd. v. P.R.C.Public Management Services and Others. (41)

In Mosen v. Donselaar (William J. said: (42)

"It may be regarded as implicit in what he says that the present statutory provision is only declaratory of the jurisdiction of the Court of Chancery. The jurisdiction of the Supreme Court of New Zealand is set out in s.16 of the Judicature Act: "16. General Jurisdiction - The Court shall continue to have all the jurisdiction which it had on the coming into operation of this Act and all judicial jurisdiction which may be necessary to administer the laws of New Zealand...Section 16 is sufficiently wide to include an inherent jurisdiction to make the kind of orders which the Court of Chancery could have made and it therefore seems that there is no jurisdictional bar to the making in New Zealand of a Mareva order."

That there is no jurisdictional bar has twice been affirmed by Barker J. (43). In Hunt v. B.P. he addressed the question whether the Mareva Injunction was an instance of the exercise of the Court's general jurisdiction or was legislating in Parliament's domain, (44) and concluded

that it was the former and that the judiciary were not legislating in an area forbidden to them. The link between the old procedure, (namely foreign attachment) and the new (namely the Mareva Injunction) is tenuous. Foreign attachment acts in rem. and the Mareva Injunction in person. As the Court has inherited the powers of the Court of Chancery it hardly seems necessary for the courts to have established such an ancestor as foreign attachment for the Mareva Injunction. This aberration aside the judges have reached a fine result.

Given the status that Mareva Injunctions had attained in the United Kingdom before the 1981 Act and the decisions in Mosen⁽⁴⁵⁾, Hunt,⁽⁴⁶⁾ and Dowler⁽⁴⁷⁾ it hardly seems likely that the Court of Appeal would deny the existence of the jurisdiction.

PART TWO

1. Guidelines for Requirements to Issue.

"The discretion should not be fettered by rigid rules. It should be exercised when it appears to the Court to be just and convenient ..." (48)

Because of the discretionary nature of the remedy the courts cannot promulgate a set of fast rules determining applicability in any particular set of circumstances but they can and have set out guidelines. To ascertain these guidelines and determine the Mareva Injunction's limitations we must trace the case by case approach that the judiciary has adopted towards this remedy.

1. A Cause of Action which is justiciable within the Jurisdiction.

A prerequisite to the grant of a Mareva Injunction is that a cause of action must exist which is justiciable within the jurisdiction. In The Siskina⁽⁴⁹⁾ the House of Lords held that since the action itself could not be tried in England the House was barred from granting an injunction by the Rules of the Supreme Court O llr (1)(i). The plaintiffs contended that if the action was permitted to proceed, it would support a claim for a Mareva Injunction and that this was sufficient to bring the case within Order 11 Diplock L.J. held that:⁽⁵⁰⁾

" ... a right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an

invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."

To fall within the ambit of Ollr (1) (i) then the injunction sought had to be part of the substantive relief to which the plaintiff's cause of action entitled them and clearly it was not. The injunction granted by the Court of Appeal was therefore rescinded.

Four years later this is still a major pre-requisite for the exercise of the jurisdiction in England but the position is not so clear in one state of Australia, namely New South Wales.⁽⁵¹⁾

In Riley McKay Pty.Ltd. v. McKay and Another⁽⁵²⁾ the claims which the plaintiff was trying to protect by means of a Mareva Injunction were in two aspects only contingent claims and not claims from which an immediate substantive action would arise. The motion for the injunction was filed at a time when no winding-up order had been made in respect of the plaintiff company. The claim by the liquidator that certain payments to the second defendant were preferences was as a result contingent on a winding

up order being made. In addition the claim by the liquidator that the first defendant may be held liable for debts under s.374D of the Companies Act was contingent upon the outcome of criminal proceedings against the first defendant under s.374C and an order being made by the Judge in those criminal proceedings. The Court of Appeal held that so far as the first claim was concerned the question was theoretical because a winding-up order had been made between motion and hearing. As far as the second claim was concerned they said:

"The plaintiff has a claim which may at some time in the future become available against the first defendant under s.374D of the Companies Act. The evidence is simply insufficient to justify the making of an order in respect of this head of claim even if the existence of a vested cause of action is not essential to jurisdiction."⁽⁵³⁾

In New Zealand, as Cain points out⁽⁵⁴⁾ the position is slightly different by virtue of R 48(d) the equivalent of Order 11. However it seems unlikely that the New Zealand Courts (in accepting The Siskina case in principle) would come to a different decision.

The Reciprocal Enforcement of Judgments Act 1934(N.Z.) provides a limited exception to the requirement of a cause of action which is justiciable within the jurisdiction. In Hunt v. B.P.⁽⁵⁵⁾ it was argued that the Act does not confer on the court jurisdiction to register a foreign judgment. Barker J. rejected this argument and said ⁽⁵⁶⁾

"The fact that the debtor is not within the jurisdiction of this Court was obviously not considered important.

In practice the Act would normally be applied to

~~debtors with assets within the jurisdiction,~~
although there do not need to be assets within the jurisdiction."

As the court may register the foreign judgment regardless of whether or not the defendant is in the court's jurisdiction there is no need for the plaintiff to obtain leave from the court to serve a writ of summons out of the jurisdiction. The requirements of R 48 therefore need not be complied with, so that a substantive cause of action justiciable within the jurisdiction is thus not applicable where the plaintiff is able to register a foreign judgment under the Act.

Because the Mareva Injunction is a form of interlocutory relief it will not usually issue where the plaintiff is able to levy execution. Once a foreign judgment has been registered, execution may be effected against any assets within the jurisdiction. This is however subject to certain qualifications⁽⁵⁷⁾, one of which is that:

Execution shall not issue on the judgment so long as, under this part of this Act ... it is competent for any party to make an application to have the registration of the judgment set aside, or, where such an application is made, until after the application has been finally determined.⁽⁵⁸⁾

Where execution could not issue Barker J. in the Hunt v. BP case found that the registered judgment acted as "a provisional judgment and not a final one"⁽⁵⁹⁾. BP was therefore found to be unable to issue a charging order as if after judgment, but was granted interlocutory relief in the form of a Mareva order. While the issue of a Mareva

Injunction after registration of a foreign judgment

may appear to be rather anomalous, it is submitted that a party registering a judgment but unable to levy execution has as good a claim to interlocutory relief as a plaintiff with a good arguable case justiciable within the jurisdiction. In fact the party registering a foreign judgment may be seen to be in a stronger position than the usual Mareva applicant, as instead of merely presenting a good arguable case the "foreign judgment" applicant is able to present a case decided in his favour.

2. A GOOD ARGUABLE CASE.

Once it has been established that a cause of action justiciable within the jurisdiction exists then the plaintiff must show the required strength of evidence in applying for a Mareva Injunction. The standard not unnaturally has developed as the cases have been decided and is a good example of the flexibility and adaptability of judge-made law.

In the first of the decided cases Karageorgis the Court of Appeal found that "a strong prima facie case" was sufficient to allow a Mareva injunction to be granted.⁽⁶⁰⁾ In the Mareva case itself Lord Denning M.R. said the evidence would be sufficient "if it appears that the debt is due and owing".⁽⁶¹⁾ Yet another standard was proposed by Denning L.J. in Rasu Maritima ⁽⁶²⁾ when he stated that the plaintiff needed to show "a good arguable case". That standard more than the previous proposals had the advantage of being

"...in conformity with the test as to the granting of injunctions whenever it is just and convenient as laid down by the House of Lords in American Cyanamid Co. v. Ethicon Ltd. 1975 1 All ER 504".⁽⁶³⁾

In the case of Z Ltd. v. A - Z and AA - LL⁽⁶⁴⁾ the English Court of Appeal held that an injunction should only be granted where it appears "likely" that the plaintiff will recover judgment against the defendant for a certain or approximate sum.

In Australia the judiciary have begged the question. In Riley McKay the New South Wales Court of Appeal held that:

"the Court will be concerned to evaluate whether the

the plaintiff has made out a sufficiently strong case to justify the grant of the interlocutory remedy; the Court will be concerned to evaluate the balance of convenience; and the Court will ultimately be concerned with general discretionary considerations.⁽⁶⁵⁾

But what actually amounts to a "good arguable case" has never been judicially determined.

In Allen v. Jambo Holdings Limited⁽⁶⁶⁾ the Court of Appeal granted a Mareva Injunction. The plaintiffs - the widow, children and executors of a man who was killed by the propellor of one of the defendants planes, obtained an injunction to prevent the plane returning from England to Nigeria. It was not clear on the facts whether the owners of the aircraft were liable, even in part, for the death of the deceased. Lord Denning said:⁽⁶⁷⁾

"The real difficulty is that we do not know the rights or wrongs of this accident ... There are the two sides. It cannot be decided today. It has to be decided in the action. As the Judge says, it may be that the owners of the aircraft are wholly liable, or it may be that Mr. Harry Allen was wholly liable; or it may be half and half."

It is submitted that this decision rather than allowing "an indication (to the test of a "good arguable case") (to) be ascertained" confuses the issue⁽⁶⁸⁾. The widow did not really have a "good arguable case" and although justice may have been done in that particular case, the remedy was too readily given. In view of the considerable inconvenience which would result from a restraint on the disposition of assets, it is submitted that the requirement of a good arguable case serves a useful purpose and should not be too readily satisfied in the eyes of the court.

3. Assets in the jurisdiction.

~~The plaintiff will need to supply some evidence~~
that the defendant has assets within the jurisdiction as the courts not unnaturally are loath to make orders against defendants who can ignore the courts directions.

Although the Karageorgis and Mareva cases (69) concerned the freezing of assets in bank accounts the remedy has not been restricted to assets of that type alone.

The Rasu Maritima case established that the remedy could be applied to goods also. Lord Denning said in that case:

" ... I would not limit the new procedure to money.

Money can easily be changed into pictures, or diamonds, or stocks and shares or other things.

The procedure should apply to goods also"(70)

Allen v. Jambo Holdings Ltd. is a good example of the flexibility of this principle. In that case an aeroplane was frozen.(71) In the Rasu Maritima case an

injunction was sought to prevent equipment for a fertilizer plant being removed from the jurisdiction. On the facts the application was refused, inter alia, because the worth of the equipment as scrap was US\$350,000 only a small percentage of the plaintiffs' total claim.

Maxton argues:-

"the proposition may be advanced that the comparative difference between the amount it is sought to freeze and the amount claimed may be a relevant consideration".(72)

The injunction applies equally to movable and immovable

assets. In Hunt v. BP⁽⁷³⁾ the injunction applied to a farm. Presumably the principle behind Barker J.'s decision was that immovable assets can often be just as easily sold and the proceeds sent out of the jurisdiction so as to defeat attempts to enforce judgment.

Specific assets need not be identified before the injunction is granted. In Cretanor Maritime v. Irish Marine Buckley L.J. said (74)

" ... the injunction related either wholly or in part to specified assets. In some it applied either wholly or in part to a body of unspecified but ascertainable assets which might increase during the life of the injunction, such as all the assets of the defendant within the jurisdiction.... Where the injunction refers to a body of unspecified assets it must be capable of having an ambulatory effect so as to apply to all the assets of the defendant which at any time while the injunction remains on foot may be within the jurisdiction."

And in Third Chandris Shipping Co. v. Unimarine Mustill J. (whose decision was upheld on appeal by the Court of Appeal) said.(75)

" one must begin by asking whether there is sufficient evidence that there are assets available within the jurisdiction ... the existence of such evidence is a precondition for the exercise of the Mareva jurisdiction ... I do not however believe that [earlier cases require] the plaintiff to produce concrete proof of precisely what assets are present within the jurisdiction To require such a standard of proof would be to put

Mareva relief out of reach in most cases. Since the defendant is ex-hypothesi a somewhat elusive character it will usually be impracticable to establish exactly what assets he has available. All that can reasonably be asked, where moneys are the subject-matter of the attachment, is that a prima facie case is made out inferring that such moneys exist and where they may be found. For this purpose the plaintiff need, in my view do no more than point to the existence of a bank account which denotes the existence of funds."

This case therefore lessened the test for proof of existence of assets within the jurisdiction. Lord Denning ruled that the plaintiff need only "give some grounds for believing that the defendants have assets here". Although in this case the plaintiffs had merely demonstrated the existence of an overdrawn bank account it was held that:

"It does not follow that the existence of an overdraft establishes that there are no assets within the jurisdiction. Large overdrafts, such as commercial undertakings have, are almost always secured in some way. The collateral security may represent substantial assets."(76)

And earlier he stated:

"If nothing can be found out about the defendant, that by itself may be enough to justify a Mareva injunction."(77)

This judgment appears to give the following faulty reasoning judicial support namely that: where the debtor is ordinarily resident and has owned property or has carried on some kind of business in the country in which the creditor is proceeding

to judgment, it is a legitimate inference that he will

have somewhere funds available which may be ultimately
available for satisfaction of judgment.

This it is submitted represents too healthy a readiness
to grant the remedy without concomitant safeguards for
the debtor.

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4. RISK OF ASSETS BEING RENDERED UNAVAILABLE AFTER JUDGMENT.

"The heart and core of the Mareva injunction is the risk of the defendant removing his assets from the jurisdiction and so stultifying any judgment given by the courts in the action." (78)

The belief in such a risk must be stated in the affidavit in support and also belief in a consequent risk of the assets being rendered unavailable after judgment must also be stated in the affidavit in support. Without there being this twin danger intervention before judgment cannot be justified. Obviously what constitutes a danger of this nature will vary from case to case and whether the plaintiff has made out a sufficiently strong case will largely depend on the circumstances. Although no hard and fast test has been formulated the courts will not accept that a sufficiently strong case has been proven unless a certain amount of investigation has been carried out.

Lord Denning in Third Chandris Shipping v. Unimarine (79) said at p.985:

"In his affidavit the plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied. The mere fact that the defendant is abroad is not by itself sufficient. No one would wish any reputable foreign company to be plagued with a Mareva injunction simply because it has agreed to London arbitration. But there are some foreign companies whose structure

invites comment. We often see in this Court a corporation which is registered in a country where the company law is so loose that nothing is known about it, where it does no work and has no officers and no assets. Nothing can be found out about the membership, or its content, or its assets, or the charges on them. Judgment cannot be enforced against it. There is no reciprocal enforcement of judgments. It is nothing more than a name grasped from the air as elusive as the Cheshire Cat. In some cases the very fact of incorporation there gives some ground for believing there is a risk that, if judgment or an award is obtained, it may go unsatisfied. Such registration of such companies may carry many advantages to the individuals who control them, but they may suffer the disadvantage of having a Mareva injunction granted against them. The mere fact that a defendant having assets within the jurisdiction of the Commercial Court is a foreigner or a foreign corporation cannot, in my judgment, by itself justify the granting of a Mareva injunction In my judgment an affidavit in support of a Mareva injunction should give enough particulars of the plaintiff's case to enable the Court to assess its strength and should set out what enquiries have been made of the defendants business and what information has been revealed, including that relating to its size, origins, business domicile, the location of its known assets and the circumstances in which the dispute has arisen. These facts should enable a commercial Judge

to infer whether there is likely to be any real risk of default. Default is more unlikely if the defendant is a long-established, well-known foreign corporation or is known to have substantial assets in countries where English judgments can easily be enforced either under the Foreign Judgments (Reciprocal Enforcement Act 1933) or otherwise. But if nothing can be found out about the defendant, that by itself may be enough to justify a Mareva injunction."

Bridge L.J. in Montecchi v. Shimco⁽⁸⁰⁾ preferred another test. He considered that the creditor must prove that there is "a real reason to apprehend that if the injunction is not made the intending plaintiff in this country may be deprived of a remedy against the... defendant whom he seeks to sue".

Therefore the onus in either of the two decisions had to be on the plaintiff who had to show some evidence for his belief that the defendant is likely to remove his assets from the jurisdiction pending judgment in the claim. The degree of moveability of the assets, the information discovered as to the defendant's history and reputation in the business world, the location of his interests in countries outside the reach of reciprocal enforcement agreements and his intentions in respect of these assets must all fall to be considered. It is clearly not sufficient simply to state that the defendant is foreign based or is himself abroad.

In Rahman (Prince Abdul) bin Turki al Sudairy v. Abu-Taha Lord Denning said in the Court of Appeal⁽⁸¹⁾

" I would hold that a Mareva injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding or a danger of the assets being removed out of the jurisdiction or disposal of within the jurisdiction or otherwise dealt with so that there is a danger that the plaintiff if he gets judgment will not be able to get it satisfied."

This has now been given statutory recognition in s.37 (3) Supreme Court Act 1981.

In Australia, the New South Wales Court of Appeal did not in Riley McKay v. McKay make any pronouncement on whether or not there must be a threat to remove the defendant's assets overseas or whether there must be a threat to dissipate the assets at all. However the pronouncement by the Court of the nature of the remedy and the mischief sought to be prevented by it would permit the wider application which the English Court of Appeal has given in Third Chandris. Neither was there anything said which would differ from the English position that the plaintiff must show positively that there is a risk of the defendants assets being dissipated. Nothing was said by the New South Wales Court which could be taken as limiting the remedy to a threat to remove assets overseas. The best account of what the plaintiff needs to show to the Court is contained in Lawton

L.J.'s decision in the Third Chandris and applied by
Rogers J. in Turner v. Sylvester as follows:⁽⁸²⁾

"In my judgment an affidavit in support of a Mareva injunction should give enough particulars of the plaintiff's case to enable the court to assess its strength and should set out what inquiries have been made about the defendants business and what information has been revealed, including that relating to its size, origins, business domicile, the location of its known assets and the circumstances in which the dispute has arisen. These facts should enable a commercial judge to infer whether there is likely to be any real risk of default. Default is most unlikely if the defendant is a long established, well known foreign corporation or is known to have substantial assets in countries where English judgments can be easily enforced either under the Foreign Judgments (Reciprocal Enforcement) Act 1933 or otherwise. But if nothing can be found out about the defendant that by itself may be enough to justify a Mareva Injunction."

In New Zealand the requirement that there be a risk of removal was accepted by Barker J. in the Hunt case.⁽⁸³⁾ Judgment had been entered in England against the defendant Hunt for the equivalent of NZ\$33,890 871.74. Hunt was domiciled in Texas, with which state neither England nor New Zealand has any arrangement for the reciprocal enforcement of judgments. The

judgment was registered in New Zealand where the defendant had assets worth about 2.8% of the judgment. Hunt applied to set aside registration, but produced no "concrete" evidence as to his willingness to pay the English judgment if his appeal failed. The plaintiff (B.P.) "submitted that a transfer of the assets in New Zealand could be very easily made and pointed out that there had been no affidavit evidence of his willingness to pay in the event of his being adjudged liable to pay ..."(84) Barker J. correctly it is submitted, inferred "all in all ... there [was] a danger that the assets [would] be taken out of New Zealand."(85) Whether Lord Denning's dicta in Rahman v. Othman(86) namely "disposed of within the jurisdiction or otherwise dealt with so that there is a danger that the plaintiff if he gets judgment will not be able to get it satisfied approved in Z Ltd. v. A-Z and AA-LL [1982] WLR 288 will be adopted in New Zealand remains to be seen.

Thus the onus is on the plaintiff to offer some evidence for his belief that the defendant is likely to remove his assets from the jurisdiction pending judgment in the claim. The degree of moveability of the assets, the information discovered as to the defendant's history and reputation in the business world, the location of his interests in countries outside the reach of reciprocal enforcement agreements and his intentions in respect of those assets must fall to be considered. It is clearly not sufficient simply to state that the defendant is foreign based or is himself abroad.

In Dowler v. Carbines⁽⁸⁷⁾ Barker J. dealt swiftly with the plaintiff's lack of investigation into the defendant's affairs. In that case the plaintiff claimed, inter alia, a Mareva injunction to freeze the assets of the defendants (a house and surrounding section) pending the trial of the action - The plaintiff alleged that her property had subsided because of the defendants' excavation work on their property. She sought compensation from the defendants who were now in Australia. There was evidence that the defendants were in arrears with their mortgage on the property in question and that it was now on the market. Barker J. dismissing the application for a Mareva injunction said:

"I acknowledge immediately that most "Mareva" cases deal with commercial situations; even so I consider that in the present case there should have been more enquiries made concerning the defendants, their ability to pay damages and their willingness to at least commence a dialogue with the plaintiff over possible remedial action. There is no evidence that they have ever been asked to join in any such dialogue I consider too that there is not enough evidence to justify my inferring that the defendants will default on any obligation and that they will seek to spirit the proceeds of sale of their house out of the country. It is true ...that the defendants would appear to be in some financial difficulty in this country: it does not necessarily follow that they are in financial difficulty in Australia."

Closely linked to the danger of removal of assets is the question of whether the judgment will yet remain

unsatisfied. In Hunt⁽⁸⁸⁾ Barker J. emphasised the latter considerably. Maxton argues "that unless the plaintiff can satisfy the Judge that the assets might be removed from the jurisdiction then the defendant's willingness to pay in any event does not arise".⁽⁸⁹⁾ She bases her argument on the question of the burden of proof. The proof of the danger of removal lies on the plaintiff, - "if insufficient evidence is adduced to support the contention for the danger of removal then it would seem contrary to the usual principles of proof to call upon the defendant to evidence his willingness to pay in any event."

In Third Chandris Mustill J. indicated guidelines as to how a defendant might evince proof that the plaintiff's judgment will be satisfied despite a danger having been shown that his assets might be removed from the jurisdiction. He said that a defendant could for example:⁽⁹⁰⁾

"point to the existence of valuable tangible assets abroad in places where English judgments or awards can be enforced" or produce " a balance sheet which shows large cash or investment balances; or a profit and loss account, demonstrating a consistently profitable business; all with a view to showing that it will not be necessary or worth their while for them to default on an adverse judgment".

In most cases where a Mareva injunction is obtained it will follow that damages would have been an ineffective remedy if the injunction was refused because they, like the original judgment, would not be satisfied. In such cases this aspect of the relief is subsumed in the foregoing

consideration. However, situations may be envisaged where the inadequacy of damages does not simply relate to their likely irrecoverability: e.g. priceless antiques or jewels disappearing outside the jurisdiction when their ownership is to be disputed by action.

5. THE RELEVANCE OF THE FOREIGN-BASED DEFENDANT.

The English courts when they first formulated the Mareva injunction sought to justify its application by limiting it to situations where the debtor was foreign-based. This distinguished it from the normal debtor/creditor situation and was based on the supposed advantage that a foreign-based defendant had in the ease of removing his assets from the jurisdiction, compared to a locally based defendant. It therefore became debatable whether the Mareva procedure could be invoked against a defendant who was a national or based within the jurisdiction. It seemed odd that plaintiffs with foreign defendants were in a more advantageous position vis a vis Mareva injunctions than plaintiffs with defendants who were home based or nationals.

The earlier authority limiting the application of the Mareva Procedure to foreign defendants was also recognised by Lord Hailsham in The Siskina. He prophetically said⁽⁹¹⁾

"Either the position of a plaintiff making a claim against an English based defendant will have to be altered or the principle of the Mareva cases will have to be modified."

Lord Hailsham's suggestion was taken up to a degree in Chartered Bank v. Daklouché ⁽⁹²⁾. In that case a Mareva injunction was obtained against a Lebanese citizen in England whose departure was imminent. Lord Denning held that:⁽⁹³⁾

"Even where a defendant may be present in this country and is served here, it is quite possible that a Mareva Injunction can be granted."

It is doubtful whether it established that the Mareva jurisdiction extended to home based defendants.

Instead it can be seen as grounds for a foreign defendant to be restrained while within the jurisdiction.

However, in Barclay-Johnson v. Yuill⁽⁹⁴⁾ and Rahman (Prince Abdul) bin Turki al Sudairy v. Abu-Taha and Anor⁽⁹⁵⁾ the English courts decided that the defendant need no longer be foreign-based. In the latter case Denning L.J. said:⁽⁹⁶⁾

"So I would hold that a Mareva injunction can be granted against a man even though he is based in this country if the circumstances are such that there is a danger of his absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied."

This statement clearly indicated a willingness on the part of Lord Denning to widen the Mareva jurisdiction even further. This principle was expressly adopted by the Court of Appeal.⁽⁹⁷⁾ In that case the Court of Appeal held that not only is a Mareva injunction available against locally-based defendants, but also that it is not restricted to situations where there is a threat or danger that the defendant's assets will be removed from the jurisdiction. The Court held that an injunction can also be granted if there is a danger that the assets will be dissipated locally.

Adding even more to the injunctions stature is

s.37(3) of the Supreme Court Act 1981 and its interpretation in Z.Ltd. v. A-Z⁽⁹⁸⁾ although the provision was not actually in force when the case was decided.

S.37(3) gives statutory force with these words:

"The power of the High Court ... to grant an interlocutory injunction restraining any party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within that jurisdiction shall be exercisable in cases where that party is as well as in cases where he is not, domiciled, resident or present within the jurisdiction."

The Australian courts have made no express pronouncement on this question. In Riley McKay⁽⁹⁹⁾ the New South Wales Court of Appeal granted an injunction against a defendant who, although he had been overseas, had returned to Australia and who must be taken to have been locally based. The Court of Appeal made no express pronouncement on the issue of whether the defendant must be foreign-based or not, but the result of the case, coupled with the reference to the English cases must be taken as following the current English position that the defendant can be foreign or locally-based.

Whether Lord Denning's exposition in the Rahman case,⁽¹⁰⁰⁾ now affirmed in Z.Ltd. v. A-Z⁽¹⁰¹⁾ and statutorily recognised in s.37(3) of the Supreme Court Act 1981 is recognised in New Zealand remains to be seen.

Cato has suggested that "it would appear entirely possible that Mareva will be extended to cover resident

debtors and thereby abrogate the long established principle in Lister v. Stubbs . . ." (102) It is submitted that Cato is correct in stating that

"There is no reason to distinguish the foreign debtor from the residential debtor. What is crucial is that the evidence establish that a debtor is likely to remove or there is a danger that his assets if any will be removed from this country." (103)

An extension of the Mareva procedure to cover resident debtors need not entirely abrogate the old rule. The situation described by Megarry V.C. in Barclay-Johnson v. Yuill (104) is to be preferred. The Lister principle should be regarded as remaining the rule and the Mareva doctrine as being a limited exception to it.

In the Mosen case (105) Quilliam J. refused a Mareva injunction on the now discredited ground that there was insufficient evidence of an existing specific asset against which an order could be made. While the point was not argued, the judge did remark that he was inclined to the view that the jurisdiction should be limited to the case of a defendant who is out of the country. (106)

It is submitted there is no logical distinction between resident and foreign debtors. Where such a distinction is drawn, the anomalous situation exists whereby a plaintiff suing a foreign based defendant is often in a far more favourable position than a comparable plaintiff with a claim against a resident debtor. A plaintiff suing a New Zealand resident and forced to rely on R.314 of the Code of Civil Procedure would be at a considerable

disadvantage to a creditor who could satisfy the requirements of R.48 and obtain a Mareva injunction against a foreign based defendant. Under R.314 of the plaintiff must be able to identify the assets of the debtor and supply reasonable proof that the debtor is "about to quit New Zealand with intent to defeat his creditors".⁽¹⁰⁷⁾ As the requirements for a Mareva injunction are generally less stringent, the unacceptable situation could arise where it would be easier to sue a foreign-based defendant than a resident.

As stated previously it is submitted Z.Ltd. v. A-Z⁽¹⁰⁸⁾ should be adopted in New Zealand, it seems unlikely that it will not.

6. "JUST AND CONVENIENT"

The test for the granting of a Mareva injunction is "in conformity with the test as to the granting of injunctions whenever it is just and convenient as laid down by the House of Lords in American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All E.R. 504."(109)

The need for the balance of convenience to be in favour of the injunction confers a very wide discretionary power on the court⁽¹¹⁰⁾ and means that any decision on whether an injunction should be granted will depend very largely on the facts before the court.⁽¹¹¹⁾ Such is the importance of this dependence on the facts of the particular case that Kerr J. has commented that

"The essence of the jurisdiction to grant or refuse injunctions is its flexibility according to the circumstances."⁽¹¹²⁾

Without significantly reducing the flexibility of the remedy, various decisions have illustrated the factors most likely to be significant to the balance of convenience. While Lord Denning recommended attention to the above factors, he emphasised that they were only guidelines and that the discretion should not be fettered by rigid rules.⁽¹¹³⁾

The discretion in the court to refuse to grant an injunction may be influenced by a number of factors outside the facts of the substantive case. In Negocios Del Mar S.A. v. Doric Shipping Corporation S.A. (The Assios)⁽¹¹⁴⁾, the buyers obtained a Mareva injunction prior to the completion of a sale, but did not inform the sellers until after the completion. The documents

of delivery were handed over in exchange for money which the sellers then found they could not freely deal with. Mocatta J. discharged the injunction on the ground that the buyers had not made proper disclosures to him of the plan proposed. The Court of Appeal refused to grant leave to appeal, upholding the trial judge's decision. Lord Denning added that:

"while supporting the Mareva procedure whole-heartedly for all proper cases, we must be careful it is not extended too far." (115)

The need for the plaintiff to make "full and frank disclosure of all matters in his knowledge which are material for the judge to know" was later confirmed in Third Chandris. (116)

Delay may also influence the court in the exercise of its discretion. While Jeffries J. cited delay as one of the factors influencing his decision in the Systems and Programs case, (117) it seems unlikely that delay will prove a frequent barrier to "Mareva" applicants.

Another factor which will influence the courts decision is the likely harm to the defendant. The potential for lasting harm will, in virtually every case, be considerably reduced by the applicants undertaking in damages. (118) This undertaking may not always suffice to persuade the court that the defendant will not be unduly prejudiced. The potential for hardship to the defendant was considered by Mustill J. in Third Chandris. While the blocking of a defendant's bank account was a very serious matter Mustill J. pointed out that the incidence of applications to discharge Mareva

was "remarkably small" and found no "clear signs that the Mareva injunction jurisdiction has proved a source of real hardship." (119) In Barclay-Johnson v. Yuill Megarry V.C. explained that if the Mareva injunction was likely to affect the defendant seriously, then the defendant was "entitled to have this put into the scales against the grant of the injunction".(120) Thus while the defendant may suffer considerable harm, it is still possible for a Mareva injunction to be granted to a sufficiently deserving applicant.

As was indicated by Barker J. in Hunt v. B.P. hardship to the defendant may be alleviated by a variation of the order.(121) This ability to vary the order enables orders appropriate to the circumstances to be issued, and allows the court to grant an injunction in the knowledge that if the order causes hardship it can be altered relatively easily.

Allied to the refusal of the Courts to grant an injunction where the harm to the defendant far outweighs the benefit to the plaintiff, is the reluctance of the courts to grant an order when reciprocal enforcement is available where the assets are to be moved to. There are two possible reasons. First it may be argued that it is an abuse of the court's process to seek its aid unnecessarily. Second the defendant should not be inconvenienced without reason. It seems reasonable that the creditor too should not be unnecessarily inconvenienced.

Beyond the interests of the plaintiff and the defendant, the court may take into account the interests of third parties.

~~The various factors discussed above have been shown to~~
be significant in the reputed cases to date. There remains an infinite variety of possible circumstances which a court may view as important in determining where the balance of justice and convenience lies.⁽¹²³⁾ Admittedly this may leave some potential applicants unsure of their chances of success, but this is a necessary corollary of the Mareva injunctions - flexibility.

A summary of all the preceding requirements to issue is easily obtained from Lord Denning's remarks in Third Chandris.⁽¹²⁴⁾

- "(i) The plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the Judge to know...
 - (ii) The plaintiff should give particulars of his claim against the defendant stating the ground of his claim and the amount thereof, and fairly stating the points made against it by the defendant...
 - (iii) The plaintiff should give some grounds for believing that the defendants have assets here...
 - (iv) The plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award is satisfied...⁽¹²⁵⁾
 - (v) The plaintiffs must, of course, give an undertaking in damages...."
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PART THREE:- FORM AND SCOPE.

1. The Form of the Order

A. In the Cretanor Maritime case (126) Buckley L.J. stated:-

" In Nippon Yusen Kaisha v. Karageorgis an injunction was granted...restraining the defendants 'from disposing of or in anyway selling, mortgaging, pledging or dealing with any assets they or either of them may have within the jurisdiction of this Honourable Court. In The Mareva an injunction was granted but it seems that the order was never formally drawn up... The injunction was in a form restraining the defendants 'from disposing of their property within or from removing such property outside the jurisdiction'. In Rasu Maritima S.A. v. Dertamina an injunction was granted (but was subsequently discharged...) ...[restoring] the defendants ...from removing or taking any steps to remove any assets from within the jurisdiction of this Court or otherwise disposing of the same and in particular restraining them from removing any assets from the West Gladstone Dock Liverpool or transferring the same to anyone ..."

This dicta illustrates the form of the orders granted in the three earliest 'Mareva' cases. On analysis there are two principal elements contained in each order:-

a) a prohibition against the removal of assets from the jurisdiction; and b) a prohibition against the disposition of assets within the jurisdiction. (127)

Both elements are essential to the implementation of the spirit behind the new procedure. Some argue that

"there is no reason to prevent the defendant disposing of his assets within the jurisdiction since the consideration

for the disposal will become available to the plaintiff by way of execution of his judgment".(128) It is submitted that in order to prevent the abuse of the courts power, the second element should continue to be permitted as an exception to the general rule that a defendant is not to be prevented from dealing with his assets within the jurisdiction. Where undesirable consequences may result, the courts have shown a willingness to vary the orders. In addition, if payments are to be made in the "ordinary course of business, they are (prima facie at least) permitted.(129)

The plaintiff may be called on to reimburse the defendant for expenses associated with varying an unduly harsh order, and may himself suffer if the order is not sufficient properly to restrain the defendant, care should be taken in drafting the order. The importance of precise drafting was emphasised by Buckley L.J. in the Cretanor decision.(130) He indicated that an injunction should make clear whether it referred to specific assets, or to unspecific but ascertainable assets which could increase during the life of the injunction. If a body of unspecified assets was referred to, the injunction must be capable of having an ambulatory effect so as to be applicable to all assets of the defendant within the jurisdiction at any time when the injunction was in force.(131) Where an injunction only requires assets up to a stated value to be kept within the jurisdiction, assets in excess of that value may be safely removed from the jurisdiction without the terms of the injunction being breached. In England the need for precision is now expressed in The Supreme Court Practice 1979(132)

This states that:

" [a] real care and precision are necessary in drawing the terms of such an injunction, so as to particularise the fund, the monies, the account, the goods or the other assets affected thereby and so as to avoid placing innocent third parties, such as banks, at the risk of being in or committing a contempt of court if they should perhaps unwittingly commit a breach of the injunction. A Mareva injunction should by its terms be free from doubt and should be clear, precise and definite in its operation".

In Searose Ltd. v. Seatrain(U.A.Ltd. (133) a Mareva injunction was granted on the condition that the plaintiff undertook to pay the reasonable costs incurred by any person (other than the defendants) to whom notice was given, in ascertaining whether any of the defendants assets were within his possession or control. In other words if put to expense on behalf of a plaintiff, an innocent third party is entitled to recoup the amount expended and be indemnified for any liability incurred. (134)

B. Variations affecting the scope of injunction during its operation have included a) a variation allowing the defendant brokers to repay money advanced to the defendants by the interveners (135) and b) a variation allowing the defendant's stud farm to operate effectively and in particular to allow the sale of yearlings at the Trentham horse sale. (136)

There have also been indications that the injunction may be continued after judgment. The original formulation by Lord Denning in the Mareva case was that a Mareva

injunction was applicable where "the debtor may dispose of his assets so as to defeat it before judgment".⁽¹³⁷⁾

This formulation was repeated in the Rasu Maritima case⁽¹³⁸⁾

In the Angel Bell case Goff L.J. stated that ⁽¹³⁹⁾

"the fundamental purpose of the Mareva jurisdiction is to prevent foreign parties from causing assets to be removed from the jurisdiction in order to avoid the risk of having to satisfy any judgment which may be entered against them in pending proceedings in this country".

In Stewart Chartering Ltd. v. C. & O. Managements S.A.⁽¹⁴⁰⁾

Goff L.J. was faced with a situation where the plaintiff had already obtained a Mareva injunction, and the defendant defaulted at the trial of the action. The plaintiff could not sign a judgment for default without relinquishing its injunction because a default judgment can only be signed where the only claim is for liquidated damages and not where there is also a claim for injunctive relief. Goff L.J. held that:-⁽¹⁴¹⁾

"The solution to this problem lies, in my judgment, in the inherent jurisdiction of the Court to control its own process, and in particular to prevent any possible abuse of that process. If the plaintiffs were unable to obtain a judgment in the present case without abandoning their Mareva injunction, it would be open to a defendant to defeat the very purpose of the proceedings simply by declining to enter an appearance. Such conduct would be an abuse of the process of the court; and in my judgment the court has power to take the necessary steps, by virtue of

its inherent jurisdiction, to prevent any such abuse of its process. The appropriate action to be taken by the court in such circumstances is, in my judgment, to grant leave to the plaintiffs, in an appropriate case to enter judgment in default of appearance, notwithstanding that the writ is endorsed with a claim for an injunction. If the court so acts it can also order that the Mareva injunction continue in force after the judgment, in aid of execution. The purpose of a Mareva injunction is to prevent a defendant from removing his assets from the jurisdiction so as to prevent the plaintiff from obtaining the fruits of his judgment; from this it follows that the policy underlying the Mareva injunction can only be given effect to if the court has power to continue the Mareva injunction after judgment, in aid of execution."

This principle already seems quite healthily established in Australia. Although the New South Wales Court of Appeal made no direct comment on whether a Mareva injunction is available after judgment in Riley McKay⁽¹⁴²⁾ they did refer without comment to the United Kingdom Report of the Committee on the Enforcement of Judgment Debts (The Payne Committee Report) which recommended that:

"power should be conferred on the Court to enjoin a debtor, either before or after judgment, from making any disposition or to transfer out of the jurisdiction or otherwise deal with any property so as to defeat a creditor's claim"

In Bank of New South Wales v. Churchill⁽¹⁴³⁾ when Yeldham J. granted an application for summary judgment four days after Helsham C.J. had granted a Mareva injunction in the same

case, Yeldham J. ordered that the injunction be continued until the asset had been sold to satisfy the judgment or until further order. Also, in Balfour Williamson (Australia) Pty. Ltd. v. Douterluingne & Anor. (144) Sheppard J. granted a Mareva injunction post-judgment without any comment about whether it was a pre - or post-judgment remedy.

Although this point has not been canvassed in New Zealand it is unlikely should it be raised that it will be treated differently for the basis of the courts jurisdiction to grant an injunction is to prevent an abuse of the process of the court and that abuse is equally offensive whether it occurs before judgment or between judgment and execution.

- C. A defendant may apply to have the injunction discharged. As the "whole point of Mareva jurisdiction is that the plaintiff proceeds by stealth". (145) The defendant will frequently not have been heard when the injunction is first applied for. In the interests of natural justice then the defendant must be allowed to have the opportunity to apply to have the injunction discharged. Where any of the pre-requisites mentioned earlier (146) are not fulfilled the defendant may apply to have the injunction discharged. A failure to fulfil one of the prerequisites may not however prove fatal to the order, as the court may decide that the failure is not sufficient e.g. in Hunt Barker J. held "non-disclosure of the New South Wales proceedings was not sufficiently material to operate as a sole ground to abort the injunction". (147)

2. Ancillary Relief.

The basic effect of the Mareva injunction to protect the plaintiff has recently been abused by dishonest debtors who have refused to supply details of their assets so that the assets cannot be specified in the order for an injunction. The Court's power to order discovery or the administration of interrogatories may in some cases be an essential form of ancillary relief, adjunct to the Mareva injunction for without such an order it may be impossible for the plaintiff to discover the location, nature and amount of the defendant's assets over which an injunction is sought.

The jurisdiction of the court to make such orders was first recognised in London & County Securities Ltd. v. Caplan⁽¹⁴⁸⁾ where an order for discovery was made not against the defendant personally, but against a bank in which it was believed the defendants assets were held. In Mediterranea Raffinaia Sicilian Petroli S.P.A. v. Wabanaff GmbH⁽¹⁴⁹⁾ the Court of Appeal having affirmed the granting of a Mareva injunction over the defendant's assets ordered that the directors and an employee of the defendant company should make full disclosure of certain specified facts on affidavit and directed that one of them should file an affidavit of documents relevant to the case.

In A. v. C⁽¹⁵⁰⁾ the plaintiffs alleged that they had been defrauded by the first five defendants, all of whom were resident outside the jurisdiction. Because the case involved several defendants, the plaintiffs sought an order for discovery of documents or for administration

of interrogatories so as to establish how much money was standing in the identified bank account. If the account was found to be unencumbered and in excess of the plaintiff's claim, the Mareva injunction could then be restricted to that amount. Robert Goff J. held that the court had power to make such an order where it was necessary to do so for the proper and effective exercise of the Mareva injunction.

The decision in A. v. C. was subsequently approved by the Court of Appeal in Bankers Trust Co. v. Shapiro⁽¹⁵¹⁾ and the jurisdiction was extended to order discovery where the defendant had not been served with the notice of motion as he was unavailable for service. They also held that discovery would be ordered against an admittedly innocent bank, even though compliance with the order would involve a breach of confidence by the bank of its banker/customer relationship.

A.J. Bekhor v. Bilton⁽¹⁵²⁾ illustrates the limitations of the courts jurisdiction to order discovery or administration of interrogatories. The plaintiff sought to recover a debt from the defendant who had entered an apparently arguable defence. The defendant, a bit of a rogue, realised some of his assets and when the plaintiff heard of this she obtained a Mareva injunction. The defendant sought two variations the first successful, the second unsuccessful. In both affidavits in support he had sought living expenses but the statements in each were inconsistent with each other showing that he had deliberately misled the court. The plaintiff then sought an order for interrogatories requiring the

defendant to disclose the following:- a) the value of his assets within the jurisdiction at certain dates, b) the nature of those assets c) the location of those assets, d) details of any change or disposal of the assets e) verifying documents relevant to their value. While the application was granted at first instance it was overturned in the Court of Appeal. The Court of Appeal held that as the power to order discovery or interrogatories was ancillary to the jurisdictional basis for the injunction it could only be exercised where it was necessary for the enforcement of the injunction itself. In this case the injunction prevented the removal of assets up to \$500,000 dollars and the defendant had assets only totalling much less within the jurisdiction. Therefore the court said the order was not made so as to enable the plaintiff to pick and choose assets but rather it will be confined to exercising it only if it is necessary for the preservation or enforcement of the injunction. The power in the court to order discovery or interrogatories has recently been affirmed by the Court of Appeal in Z Ltd. v. A-Z and AA-LL (153) where Lord Denning said:

"In order to make a Mareva injunction fully effective, it is very desirable that the defendant should be required in a proper case to make discovery. If he comes on the return day and says that he has ample assets to meet the claim, he ought to specify them. Otherwise his refusal to disclose them will go to show that he is really evading payment. There is ample power in the Court to order discovery:"(154)

The exercise of the power to order discovery and interrogatories has been confined to orders of the interpartes type⁽¹⁵⁵⁾ and must be distinguished from orders of the Anton Piller type.⁽¹⁵⁶⁾

[Orders ancillary to a Mareva injunction are not made to prevent the immediate removal of evidence in the form of assets from the jurisdiction - that is the function of the Mareva injunction itself. They do however show yet again the courts flexibility in dealing with a plaintiff seeking to gain adequate security without unnecessary inconvenience to third parties and a defendant who may be suffering from undue restraint.]

The most recent case in this field CBS UK Ltd. v. Lambert⁽¹⁵⁷⁾ emphasises the discretionary nature of the injunction and the courts ability to make ancillary orders in respect of it. The Court of Appeal laid down guidelines to be followed for the delivery up of chattels after the grant of a Mareva injunction. The plaintiffs had an interest in safeguarding their copyrights in musical recordings. The defendant was a record pirate who had in his possession quantities of equipment used to make illicit recordings. He also owned expensive motorcars and other assets which could easily be hidden from creditors and disposed of for cash should the need arise. This the defendant apparently intended to do if his illegal activities were discovered so that the plaintiff copyright owners would not be able to enforce any judgment against him. From information the plaintiffs obtained from the police they surmised that

the defendant was involved on a large scale in the production, distribution and sale of counterfeit cassettes the result of which if proved at trial would entitle the plaintiff to damages in conversion of about £105,000. The plaintiffs therefore decided to bring proceedings against the defendant but in the meantime applied ex parte for an order restraining the defendant from selling or disposing of any assets used in the illicit recordings, from removing any assets from the jurisdiction and requiring the defendant to disclose the full value of his assets and to deliver up the motorcars in his possession. In making an order on the application the Judge refused to order discovery of the assets or the delivery up of the cars. On appeal to the Court of Appeal the appeal was allowed and the order sought was granted. Lawton L.J. giving the judgment of the Court emphasised at p.242 of the judgment:

" A jurisdiction to grant Mareva injunctions .. is not likely to be of any use to a plaintiff who believes that he is suing a defendant who intends to deal with his assets in such a way as to deprive him of the fruits of any judgment he may obtain unless there is some means of making the defendant disclose what his assets are and whereabouts they are to be found."

His Lordship continued that in the opinion of the Court there was a clear case for making the order sought. He accepted however that in other cases "the evidence may not be so clear" and, therefore, indicated guidelines for the making of orders for the delivery up of chattels.

Obviously it is of major import that the defendant is ~~likely, unless restrained by the order, to dispose~~ of or otherwise deal with his chattels in order to deprive the plaintiff of the fruits of any judgment he may obtain. Moreover, the court should be slow to order the delivery up of property belonging to the defendant unless there is some evidence or inference that the property has been acquired by the defendant as a result of his alleged wrongdoing. Assets used in everyday life ought to be exempt from the order. Even "rogues have to live" his Lordship acknowledged. And the order itself should be so phrased that all chattels subject to it are clearly identifiable.

In seeking the property which the order specifies, plaintiffs are not authorized to enter on the defendant's premises or to seize his property without his permission. However Lord Denning in Anton Piller K.G. v. Manufacturing Processes Ltd.⁽¹⁵⁸⁾ offered some solace to plaintiffs who have been granted such an order:

"... It does not authorise the plaintiffs' solicitors or anyone else to enter the defendant's premises against their will.... It only authorises entry and inspection by the permission of the defendants. The plaintiffs must get the defendants' permission. But it does do this: it brings pressure on the defendants to give permission. It does more. It actually orders them to give permission - with, I suppose, the result that if they do not give permission, they are guilty of contempt of court."

As a safeguard, the Court included as a guideline
that no order should be made for delivery up to
anyone other than the plaintiff's solicitor or a receiver
appointed by the High Court. With regard to chattels
in the possession, custody or control of third parties
the guidelines in the Z Ltd. case were expressly approved
in so far as they were applicable. Finally, his Lordship
stated, provision should always be made for liberty
to apply to stay, vary or discharge the order.

3. Third Parties and their Protection

In Rasu Maritima Lord Denning described Mareva as a modern form of foreign attachment. The foreign attachment process operated originally as a seizure of specified assets to satisfy a prospective judgment. If the Mareva injunction was a form of foreign attachment, it would take precedence over a secured claim. The argument that the Mareva injunction operated as a remedy in rem was dismissed by the English Court of Appeal in the Cretanor Maritime⁽¹⁵⁹⁾ case, where the relationship between the claim of a secured creditor and the claim of a successful Mareva applicant fell to be considered. An Irish Charter company had executed a debenture secured by a floating charge which was duly registered. The debenture was guaranteed subsequent to the execution of the debenture, a Mareva injunction was granted to the ship-owners in respect of assets owned by the charterers. Although judgment was obtained in respect of the substantive claim, it was never fulfilled and the injunction remained in force. The guarantor of the debenture appointed a receiver who applied to discharge the injunction. Insufficient assets remained to satisfy either the judgment debt or the guarantor's claim. The question therefore arose as to which claim had priority, the answer depending on the nature of the injunction. Buckley L.J. stated that:⁽¹⁶⁰⁾

"Lord Denning was not, I think, saying that the Mareva injunction was capable of operating as a form of attachment, but that, applying the principles which underlay the old practice of foreign attachment, English courts should now employ the remedy of an interlocutory injunction to achieve a broadly similar result. Indeed it is, I think manifest that a Mareva injunction cannot operate as an attachment."

The debenture holders could apply to discharge the injunction, as their right to the assets dated from the issue of the debenture. By joining the debentureholder as a party the receiver was able to have the injunction discharged.

As Powles notes⁽¹⁶¹⁾ the Cretanor decision usefully limits the rights granted to the plaintiff over the defendants goods. The priority of other debtors is not affected by the grant of a Mareva injunction. In the Angel Bell case⁽¹⁶²⁾ Goff J. agreed with the Court of Appeal in the Cretanor case that a Mareva injunction is not a form of pretrial attachment but rather a form of relief in personam.

In Z Ltd. v. A-Z and AA-LL⁽¹⁶³⁾ the English Court of Appeal specified what orders should be contained in a Mareva injunction to be served on a bank with which the defendant has money on deposit. The plaintiffs in this case were an overseas company with their head office abroad and an office in London. They were defrauded of some £2,000,000 by forged telexes and cables purporting to come from their head office

authorising transfers of money to London for payments to alleged suppliers of goods. The moneys were believed to have been paid into accounts at various London Banks. Before issue of a writ, the Judge at first instance granted the plaintiffs Mareva injunctions against the 36 defendants to stop any dealing with the assets, except in so far as they exceeded £2,000,000. The plaintiffs then issued a writ against the 36 defendants. Although the action was settled, the clearing banks appealed for an elucidation of the law regarding the position of innocent third parties who are served with notice of a Mareva injunction.

The Court held that the order should specify the assets affected as clearly as possible and should specify as precisely as possible what the third party is ordered to do or not to do. Upon service of the injunction on a third party the third party was bound to do what could "reasonably" be done to preserve the assets concerned, and was prohibited from assisting in any way in the disposal of the assets. All three Judges (Lord Denning M.R., Eveleigh L.J., Kerr L.J.) emphasised that knowledge of the issue of a Mareva injunction against a defendant imposes on a third party a duty to preserve the asset as far as is reasonable. Lord Denning said: (164)

" [O]nce a bank is given notice of a Mareva injunction affecting goods or money in its hands, it must not dispose of them itself, nor allow the defendant or anyone else to do so - except by the authority of

the Court. If the bank or any of its officers should knowingly assist in the disposal of them, it will be guilty of a contempt of court. For it is an act calculated to obstruct the course of justice."

Following Searose Ltd. v. Seatrain U.K. Ltd. (165) [1981] 1 WLR 894 a bank (or other non-interested third party) should be given precise notice of what it is required to do. If put to expense on behalf of a plaintiff, an innocent third party is entitled to recoup the amount expended and be indemnified for any liability incurred, Lord Denning said:-

"This is because when the plaintiff gives notice of the Injunction to the bank or innocent third party, he implicitly requests them to freeze the account or otherwise do whatever is necessary or reasonable to secure the observance of the injunction. This implied request gives rise to an implied promise to recoup any expense and to indemnify against any liability:" (166)

Undertakings in damages will usually be given by the plaintiff not only to the defendant but also to the bank or other innocent third party to pay any expenses reasonably incurred by them. Any expenses which could have been reduced by the defendant or third party taking reasonable steps will not be recoverable. Smith v. Day (1882) 21 Ch D 421 Allen v. Jambo Holdings Ltd. (167)

When the plaintiffs claim is limited to a certain amount, it is usual to restrict the injunction to a sum of that amount especially when the defendants assets exceed the amount claimed. In such circumstances it is quite

possible that a bank may find itself in particular difficulty where it holds more than one account of the defendant or it may even be unaware of what assets the defendant holds elsewhere. The court did not reach a definitive conclusion on how to resolve the difficulties mentioned above but did give support to the principle of granting "maximum sum" orders rather than freezing the defendants assets in toto.

"There are two obvious reasons for this preference. First it represents no more than what a plaintiff can justifiably request from the Court. Secondly, an order which freezes all assets is, in the ordinary case, bound to lead to an outcry from the defendant and to the need for an adjustment at any rate if he is resident or carries on business within the jurisdiction. Further such an order cannot in my view be justified in principle, save in wholly exceptional cases unless it is clear that (a) his assets within the jurisdiction are insufficient to meet the claim and (b) he is neither resident nor carries on business within the jurisdiction. It therefore follows, in my view, that the norm should be the "maximum sum" order, and that an order applying to all assets should be the exemption."(168)

Lord Denning M.R. however thought that no harm would come from granting an unlimited injunction as the defendant could apply for any excess to be released after he had disclosed to the court the amount and whereabouts of his assets. Failure to make such disclosures might well indicate the lack of such excess and the bank could safely refuse to deal with any of the defendant's assets.

~~A bank on which notice of an injunction has been~~
served, may clearly be in a difficult position in making dispositions from any of the defendants' accounts to which third parties have an undeniable claim and when to fail to do so would involve the bank in liability towards such third parties. Consequently the court directed that sums payable in respect of bills of exchange already accepted, banker's documentary credits and cheques guaranteed by a bank card should be honoured even though this might be inconsistent with the injunction. Lord Denning said: (169)

"If it is thought that the defendant may have moneys in a joint account, with others, the injunction shall be framed in terms wide enough to cover the joint account - if the Judge thinks it desirable for the protection of the plaintiff."

Where the plaintiff's account is held jointly with another only the form of the order can make the bank's position clear. If the existence of such an account is disclosed to the court then it may if it is just and equitable be made subject to the injunction. In the absence of any order directed specifically at a joint account however a bank will not be bound by an injunction in respect of assets of a defendant held in a joint account.

The freezing of assets is not strictly applied where it is thought necessary to allow the defendant "normal living expenses". In such cases a specified amount from the frozen sum may be released to the defendant for this purpose.

~~Negocios Del Mar S.A. v. Doric Shipping Corporation S.A.~~

is authority for the principle that plaintiffs where third parties are involved should secure the defendant straight away so that he can apply to discharge the injunction if so advised.

In Australia the Court of Appeal in Riley McKay did not decide whether a Mareva injunction is an order in rem or personam. Tedeschi says⁽¹⁷¹⁾ however that the decision follows the view that it is an order in rem. The Court said:⁽¹⁷²⁾

"It is necessary for the administration of justice in this state that the Court should have power to prevent a defendant who would otherwise have assets to satisfy a judgment from setting the Court and its procedures at naught."

It seems unlikely that the New Zealand judges would swim the tide against such persuasive authority as the cases discussed above and find that a Mareva injunction acts in rem.

4. Limits on Operation of the Mareva Injunction.

The main limit on the jurisdiction to grant a Mareva injunction is that it must be exercised in circumstances which are significantly different from the ordinary creditor/debtor relationship. It must be limited to a situation where there is a risk of the defendant dissipating his assets and it should not be debased into a process to obtain security for a judgment in advance or to pressure the defendant into settlement.

These abuses and others were discussed by Kerr L.J. in Z Ltd. v. A-Z and AA-LL.⁽¹⁷³⁾ In his opinion the following situations amounted to abuse. Firstly where there may be no actual danger of the defendant dissipating his assets but the plaintiff is seeking to obtain security in advance for any judgment which he may obtain - the effect and design really being to exert pressure on the defendant to settle the action. Secondly, behaviour akin to that of the plaintiffs in The Assios⁽¹⁷⁴⁾ where the procedure is used as a means of enabling a person to make a payment under a contract where he regards the demand for the payment as justifiable or even when he believes it to be unlawful and where he obtains a Mareva injunction ex parte in advance of the payment which is then secured and has the effect of "freezing" the sum paid over. Thirdly, where the injunction serves as an unjustifiable act of interference with the business of a third party. This third abuse was demonstrated most clearly in the recent case Galaxia Maritime S.A. v. Mineralimportexport.⁽¹⁷⁵⁾

In this case the shipowner/plaintiff obtained a Mareva injunction to restrain the defendants from disposing of or dealing with their assets within the jurisdiction, in this case a cargo of coal loaded on a vessel belonging to another shipowner, so as to reduce assets below the value of the plaintiff's claim . The plaintiff had given undertakings to compensate the port authority and to pay the reasonable costs of third parties complying with the injunction. The effect of the injunction on the third party shipowner on whose boat the cargo was loaded was to upset his trading activities by detaining him in port longer than he had accounted for and to upset the personal arrangements of his crew. The shipowner applied to have the injunction discharged. His application was refused at first instance on the basis that he had been indemnified by the plaintiff for any loss or damage suffered by him resulting from the grant of the Mareva injunction. The Court of Appeal allowed the appeal and discharged the injunction. The Court held it was an abuse of the Mareva procedure to grant an injunction which would interfere substantially with an innocent third party's freedom of action generally or freedom to trade. Kerr L.J. said: (176)

"To allow a plaintiff to serve a Mareva injunction on a shipowner in relation to cargo, which is owned or alleged to be owned by the defendant and which is on board pursuant to a voyage charter concluded between the shipowner and the defendant, in order to seek to prevent the ship from sailing out of the

jurisdiction with the cargo, appears to me to be a clear abuse of this jurisdiction, because it involves an unwarrantable act of interference with the business of the third party, the shipowner. A plaintiff seeking to secure an alleged debt or damages due from the defendant, by an order preventing the disposal of assets of the defendant, cannot possibly be entitled to obtain the advantage of such an order for himself at the expense of the business rights of an innocent third party, merely by proffering him an identity in whatever form.

In this connection, it is crucial to bear in mind not only the balance of convenience and justice as between plaintiffs and defendants but above all also as between plaintiffs and third parties. Where assets of a defendant are held by a third party incidentally to the general business of the third party (such as the accounts of the defendant held by a bank, or goods held by a bailee as custodian, for example in a warehouse) an effective indemnity in favour of the third party will adequately hold this balance, because service of the injunction will not lead to any major interference with the third party's business. But where the effect of service must lead to interference with the performance of a contract between the third party and the defendant which relates specifically to the assets in question, the right of the third party in relation to his contract must clearly prevail over the plaintiff's desire to secure the defendant's assets for himself against the day of judgment.

In this case the effect of the service of the injunction prevents the third party from sending its ship on a voyage out of the jurisdiction under a previously concluded contract between the third party and the defendants. In my view, this is a clear case of an abuse of this jurisdiction".

In adopting the fiction that new law has been found the Judges were initially very anxious to provide a service to the commercial community which was sensitive to its particular needs but increasingly they are finding that (since most Mareva injunctions affect third parties who are unrepresented at the hearing of the initial application) third parties are being adversely affected by abuses of the procedure. This is an area which best exemplifies the case by case method adopted by the Judges and the resulting evolution of definition.

CONCLUSION

The emergence of the Mareva Injunction in the English Courts, the Australian Courts and in our own is an exceptional example of judicial lawmaking and shows (177) "equity is far from being past the age of "child-bearing". The Mareva Injunction has been described as "an established feature of English law"(178) - only eight years after its inception. Although the judges argue it was "finding law" rather than "making law".(179)

A learned writer has described the Mareva Injunction as "a copybook example of the consequences of the judicial invention of a new doctrine" (180) and has drawn an analogy between it and the use in 1848 of the rule in Tulk v. Moxhay(181) concerning the binding effect of restrictive covenants on successors in title. "In both instances, the seeds of the doctrine as first shown have, by force of judicial scrutiny and fostering, produced plants and fruits of a character unpredictable at the date of the original sowing".

The birth of the Mareva Injunction has done much to provide an appropriate balance between the interests of debtors and creditors prior to judgment. The Mareva doctrine has been imbued with a degree of flexibility which has enabled it to be applied to many widely varying circumstances. It has also enabled the courts to develop the procedure in accordance with the policy considerations relevant to the point at issue.

The evolution of this remedy on policy grounds has caused one scholar to write:

"It is difficult to assail a judicial remedy which responds to the urgency of the plaintiff's predicament

while adequately safeguarding the defendants legitimate interests".(182)

The successful accommodation of the interests of both creditors and debtors is not easy but with the recent developments in protection of third party interests we can see the court's commitment to updating the remedy in accordance with prevailing conditions - in this "flexibility" and "adaptability".

Although the remedy has been statutorily recognised in the United Kingdom⁽¹⁸³⁾ and there has been a call for the same to occur in Australia⁽¹⁸⁴⁾ the writer has attempted to prove that this matter can be left in the equitable jurisdiction of the court, and the calls for further regulation resisted.

FOOTNOTES

1. M. Tedeschi "The Mareva Injunction" (1983) 11 A.B.L.R.
187 at p. 204.
2. However in only 5 of the 6 states is the jurisdiction recognised.
3. Nippon Yusen Kaischa v. Karageorgis [1975] 3 All ER 282 and Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. [1975] 2 Lloyd's Rep 509; [1980] 1 All E.R. 213
4. Karageorgis Case supra n.3 p. 283
5. [1978] Q.B. 644 [1977] 3 All E.R. 324, 331
6. supra n.1
7. [1979] Q.B. 645 671 per Lawton J.
8. supra n.1.
9. Dowler v. Carbines (1982) Unreported, Auckland Registry A 1017/82. Barker J.
10. Unlike N.Z. Rule 314
11. supra n.3
12. supra n.3
13. supra n.5
14. [1977] 3 All E.R. 324, 331
15. [1977] 3 All E.R. 803, 813
16. "Signatories to the Treaty of Rome".
17. [1979] A.C. 210, 252
18. Ibid. 259
19. Ibid. 262
20. Rasu Maritima [1977] 3 All E.R. 324, 334
21. In the only case which has so far reached the House of Lords "The Siskina" the existence of the power to grant such injunctions was not contested in argument. Since the appeal against the injunction ordered by the Court of Appeal was allowed it became unnecessary for counsel for the appellant shipowners to attack the correctness of the Mareva case.
22. supra n.20
23. Rasu Maritima [1978] Q.B.644, 660 - 663
24. Barclay-Johnson v. Yuill [1980] 3 All E.R.190,195
25. [1979] A.C.210
26. [1979] 1 Q.B. 645, 666

27. Ibid. 650 per Mustill J.

28. [1982] 1 N.S.W.L.R. 264
29. [1977] V.R. 114
30. [1980] W.A.R. 51
31. (1978) 16 S.A.S.R. 329
32. supra n.28
33. [1979] 2 N.S. W.L.R. 884
34. [1979] 2 N.S.W.L.R. 406
35. supra n.31 338-340
36. supra n.28
37. supra n.31
38. supra n.33
39. [1981] 2. N.S.W.L.R. 295.
40. Unreported decision 15th. January 1982.
41. [1980] 1 N.Z.L.R. 104, 118 Jeffries J.
42. (1978) Unreported, Wellington Registry A 325/75
43. Hunt v. B.P. Exploration Company (Libya)Ltd. [1980] 1 N.Z.L.R. 104 and Dowler v. Carbines supra n.9
44. Ibid 117
45. supra n.42
46. supra n. 43
47. supra n.9
48. Rasu Maritima [1977] 3 All E.R. 324,336 per Denning J.
49. [1979] A.C.210
50. Ibid. 256
51. Riley McKay Pty. Ltd. [1982] 1 N.S.W.L.R. 264
52. Idem
53. Ibid. 277
54. [1978] N.Z.L.J. 301
55. [1980] 1 N.Z.L.R. 104,107.

56. Ibid 112
57. ~~Section 4 (2) Reciprocal Enforcement of Judgments Act.~~
58. Proviso to Section 4 (2)
59. [1980] 1 N.Z.L.R. 104, 122
60. [1975] 3 All E.R. 282, 283
61. Mareva Compania S.A. v. International Bulk Carriers
[1980] 1 All E.R. 213, 215
62. [1977] 3 All E.R. 324
63. Ibid. 334 per Denning J.
64. [1982] 2 W.L.R. 264, 276
65. [1982] 1 N.S.W.L.R. 264, 276
66. [1980] 2 All E.R. 502
67. Ibid 504
68. as advocated by Julie Maxton in her article
"Mareva Injunctions: Recent Developments"
[1983] N.Z.L.J. 142
69. Nippon Yusen Kaischa v. Karageorgis [1975] 3 All E.R. 282
and Mareva Compania Naviera S.A. v. International
Bulkcarriers S.A. [1975] 2 Lloyd's Rep 509; [1980]
1 All E.R. 213
70. [1977] 3 All E.R. 324, 334
71. [1980] 2 All E.R. 502
72. [1983] N.Z.L.J. 142, 143
73. [1980] 1 N.Z.L.R. 104
74. [1978] 3 All E.R. 164, 169
75. [1979] Q.B. 645
76. Ibid 988 per Lawton L.J.
77. Ibid 987
78. Barclay-Johnson v. Yuill [1980] 3 All E.R. 190, 194
per Sir Robert Megarry V-C
79. supra n.75
80. [1979] 1 W.L.R. 1180, 1183
81. [1980] 1 W.L.R. 1268
82. [1981] 2 N.S.W.L.R. 295, 306

83. [1980] 1 N.Z.L.R. 104
84. Ibid. 119-120
85. Ibid. p.120
86. supra p.29
87. (1982) Unreported. Auckland Registry A1017/82
88. [1980] 1 N.Z.L.R. 104/121
89. [1983] N.Z.L.J. 142,145
90. [1979] 2 All E.R. 972,979
91. [1979] A.C. 210,261
92. [1980] 1 All E.R. 205
93. Ibid. 210
94. [1980] 1 W.L.R. 1259
95. [1980] 1 W.L.R. 1268
96. Ibid 1273
97. In Z Ltd. v. A-Z and AA-LL [1982] W.L.R. 288
98. Idem
99. [1982] 1 N.S.W.L.R. 264
100. supra n.95
101. supra n.97
102. Cato "The Mareva Injunction and its Application in New Zealand" [1980] N.Z.L.J. 276,272
103. Cato loc.cit 273
104. supra n.94
105. (1978) Unreported, Wellington Registry A325/75
106. supra pp 9-10
107. Rule 314 Code of Civil Procedure
108. supra n.97
109. Rasu Maritima [1977] 3 All E.R. 324,334 per Denning L.J.
110. Rasu [1978] 1 Q.B. 644, 659-660
111. Powles "The Mareva Injunction" [1978] J.B.L. 11,16
112. Kerr loc. cit. 12

113. supra n.110
114. [1979] 1 Lloyd's Rep.331
115. Ibid, 334
116. [1979] 2 All E.R.972
117. [1978] New Zealand Recent Law 264
118. Etablissement Esefka v. Central Bank of Nigeria
[1979] 1 Lloyd's Rep. 445
119. [1979] 1 Q.B. 645,654
120. [1980]3 All E.R. 190,195
121. [1980] 1 N.Z.L.R. 104,120
122. These will be discussed elsewhere .
123. See for example Goode, "The Autonomy of the Credit and the Mareva Injunction". 1980 J.B.L. 378, 381.
124. supra n.116
125. supra 3. See discussion on dissipation of assets within the jurisdiction.
126. Cretanor Maritime v. Irish Marine Management
[1978] 3 All E.R. 164,168-169.
127. Prince Abdul Rahman v. Abu Taha 1980 3 All E.R. 409,412
128. See Calnan (1981) 9 N.Z.U.L.R.
129. A. v. C. [1980]2 All E.R. - 347; TheTatiangela
1980 2 Lloyd's Rep. 193-195.
130. supra n.126
131. See also Third Chandris Shipping v. Unimarine
[1979] 2 Q.B. 645, 651 - 652.
132. Paragraph 29/1/ 11E
133. [1981] W.L.R.894
134. More detailed discussion of 3rd. party rights elsewhere.
135. Angel Bell [1980] 1 All E.R. 480-484
136. Hunt v. B.P. [1980] 1 N.Z.L.R. 104,107,120
137. [1980] 1 All E.R. 480,484

138. [1978] 1 Q.B. 644
139. [1980] 2 W.L.R. 488,493
140. [1980] 1 W.L.R. 460
141. Ibid. 461
142. [1982] 1 N.S.W.L.R. 264,275
143. Unreported decision on 19th. January 1982.
144. [1979] 2 N.S.W.L.R. 884
145. Third Chandris [1979] 2 Q.B. 645,653 per Mustill J.
146. supra 2
147. Hunt v. B.P. 1980 1 N.Z.L.R. 104,120
148. 1978 Unreported cited [1980]1 W.L.R. 128
149. Idem.
150. [1980] 2 Lloyds Rep. 200.
151. [1980] 1 W.L.R. 1274
152. [1981] 2 W.L.R. 601
153. [1982] W.L.R. 288
154. Ibid p. 299
155. Bekhor v. Bilton supra n.152
156. [1976] 1 All E.R. 799
157. [1982] 3 All E.R. 237
158. [1976] 1 All E.R. 779 at 782-783
159. [1978] 3 All E.R. 164, 169-170
160. Ibid.170
161. Powles, "limitations on the Mareva injunction
[1980] J.B.L. 59,61 and "The Mareva Round-Up - 1"
[1982] J.B.L. 383 as to further discussions
of limitations nature and form.
162. [1980] 2 W.L.R. 488
163. [1982] W.L.R. 288
164. Ibid. p.296
165. [1981] 1 W.L.R. 89

166. Z Ltd. v. A-Z. [1982] W.L.R. 288,297
167. Smith v. Day (1882) 21 Ch.D 421 and Allen v. Jambo Holdings
168. Z.Ltd. v. A-Z [1982]W.L.R. 288,310 per Kerr L.J.
169. Ibid. 299
170. [1979] 1 Lloyd's Rep. 331
171. op. cit. p.199
172. op. cit. [1982] 1 N.S.W.L.R. 264,276
173. [1982] W.L.R. 288,306
174. [1979] 1 Lloyd's Rep. 331
175. [1982] 2 All E.R. 796
176. Ibid 799-800
177. [1982] A.L.J. Vol. 56 p.268
178. per Lord Denning in Z Ltd. v. Z and AA-LL [1982] 288 at 293
179. Barker J. in Hunt 104,118 said " I for one do not always agree with judicial "law making" of Lord Denning; on this occasion I think he has legitimately spelt out the jurisdiction of the Court and has updated old but useful procedures aimed at enabling the law to deal with commercial realities of modern business."
180. Guest (1979) 95 L.Q.R. at 474-475
181. 1848 2.P 774, 41 E.R. 1143
182. "The Mareva Injunction: Australian Equity" Hetherington (1980) 18 Law Society Journal (N.S.W.) 55
183. s.37 (3) of the Supreme Court Act 1981 (U.K.)
184. Tedeschi. " The Mareva Injunction" (1983)11 A.B.L.R. 187 at p.204

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