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Unsatisfactory Aspects of the Mareva Order and the Anton Piller Order

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Unsatisfactory Aspects of the Mareva Order and the Anton Piller Order

Abstract

[extract] '[S]peed is of the essence' of the Mareva order, and of the Anton Piller order. So, in an application for either of those orders '[e]x parte is of the essence.' 'If there is a delay, or if advance warning is given, the assets may well be removed before the injunction can bite.' Lord Denning had claimed that both of those orders were 'equally beneficial'. However, he added with insight (not to mention foresight) that the benefits conferred by those orders would continue only for 'so long as the judges exercise[d] a wise discretion so as to see that [those] procedure[s] [were] not abused'.

Keywords

Mareva order, Anton Piller order

UNSATISFACTORY ASPECTS OF THE MAREVA ORDER AND THE ANTON PILLER ORDER

By Denis Ong¹

‘[S]peed is of the essence’² of the Mareva order, and of the Anton Piller order. So, in an application for either of those orders ‘[e]x parte is of the essence’³. ‘If there is a delay, or if advance warning is given, the assets may well be removed before the injunction can bite.’⁴ Lord Denning had claimed that both of those orders were ‘equally beneficial’.⁵ However, he added with insight (not to mention foresight) that the benefits conferred by those orders would continue only for ‘so long as the judges exercise[d] a wise discretion so as to see that [those] procedure[s] [were] not abused’.⁶

The Mareva Order

What is a Mareva order? A Mareva order is an order ‘that restrains someone from removing assets from Australia or dealing with assets either in or out of Australia’.⁷

Scope of the Mareva Order

When will a Mareva order be issued? In *Jackson v Sterling Industries Limited*⁸ (hereinafter *Jackson*) Wilson and Dawson JJ, in adopting the analysis made of the Mareva order by Ackner LJ in *AJ Bekhor & Co Ltd v Bilton*,⁹ stated:¹⁰

1 Associate Professor of Law, Bond University.

2 *Third Chandris Shipping Corporation v Unimarine SA* [1979] 1 QB 645 at 669 (per Lord Denning MR).

3 *Ibid.*

4 *Ibid.*

5 *Ibid.*

6 *Ibid.*

7 *Uniform Civil Procedure Rules*, r 260(1). The Mareva order derives its name from the second case in which such an order was issued: *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd’s Rep 509. The first such case was *Nippon Yusen Kaisha v Karageorgis* [1975] 2 Lloyd’s Rep 137. See *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 411 (per Kirby J). However, note that r 257 of the *Uniform Civil Procedure Rules* provides:

‘This part [Part 2 of Chapter 8] is not intended to impede the development of the law relating to injunctions and similar orders including orders of the type mentioned in rules 260 [Mareva orders] and 261 [Anton Piller orders].’

8 (1987) 162 CLR 612.

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... [T]he Mareva injunction¹¹ represents a *limited exception* to the general rule that a plaintiff must obtain his judgment and then enforce it. He cannot *beforehand* prevent the defendant from disposing of his assets *merely because he fears* that there will be nothing against which to enforce his judgment nor can he be given a *secured* position against other creditors. ...

What is the measure of the 'limited exception'¹² described by Wilson and Dawson JJ in *Jackson*?¹³ In *Mareva Compania Naviera SA v International Bulkcarriers SA*¹⁴ (hereinafter *Mareva*) Lord Denning MR observed:¹⁵

...[The] principle [of the Mareva order] applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it *appears*¹⁶ that the debt is due and owing – and there is a *danger* that the debtor may dispose of his assets *so as to* defeat it before judgment – the Court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets. ...

The words 'so as to' used by Lord Denning MR in *Mareva*¹⁷ and by Deane J in *Jackson*¹⁸ were described as 'equivocal'¹⁹ by Lindgren J in *Hayden v Teplitzky*²⁰

9 [1981] QB 923 at 941-942.

10 (1987) 162 CLR 612 at 618. Emphasis added. In *Lister & Co v Stubbs* (1890) 45 Ch D 1 at 13, Cotton LJ said:

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

See also *Mills v Northern Railway of Buenos Ayres Company* (1870) LR 5 Ch App 621 at 628 (per Lord Hatherley LC); *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 at 624-626 (per Deane J).

11 In *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 401 [42] the High Court (per Gaudron, McHugh, Gummow and Callinan JJ) said that it was preferable to call the Mareva injunction the Mareva order.

12 (1987) 162 CLR 612 at 618.

13 (1987) 162 CLR 612.

14 [1975] 2 Lloyd's Rep 509.

15 *Ibid* at 510. Emphasis added. See also *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 at 625 where Deane J said:

... [The purpose of the Mareva order] is to prevent a defendant from disposing of his actual assets (including claims and expectancies) *so as to frustrate the process of the court* by depriving the plaintiff of the fruits of any judgment obtained in the action. ... (Emphasis added.)

16 Lord Denning was there referring to the establishment of a *prima facie* claim by the plaintiff.

17 [1975] 2 Lloyd's Rep 509 at 510.

18 (1987) 162 CLR 612 at 625.

because ‘they may refer to the *purpose* or the *effect* of frustration’²¹ of the process of the court. The resolution of the equivocality inherent in the words ‘so as to’,²² as they appear in the phrase ‘*so as to frustrate* the process of the court’,²³ is crucial to the determination of the scope of the Mareva order.

If the Mareva order is available to a plaintiff only if there is evidence that the defendant is about to dispose of his assets *for the purpose of*, as opposed to merely *with the effect of*, frustrating the process of the court, then the making of the order will be confined to those cases where there is evidence that the defendant is intending to act in such bad faith. By contrast, the scope of the Mareva order will be extremely wide if it is made available to the plaintiff whenever there is evidence merely that the defendant is about to dispose of his assets, and that the *effect*, although not the *purpose*, of the such an intended disposal is to frustrate the process of the court. Such an interpretation of the scope of the Mareva order will, contrary to principle, compel a defendant to *reserve* assets owned by him, at the time of the Mareva order application, for the purpose of satisfying a possible judgment in favour of the plaintiff. There is authority against the attribution of so wide a scope to the Mareva order. In *Jackson*²⁴ Wilson and Dawson JJ, in discussing the Mareva order, said:²⁵

... Its use must be *necessary* to prevent the *abuse* of the process of the court. ...

Wilson and Dawson JJ there added:²⁶

... It exists not to create additional rights but to enable a court to protect its process from *abuse* in relation to the enforcement of its orders. It is neither a species of anticipatory execution *nor* does it give a form of *security* for any judgment which may ultimately be awarded.
...

So, in *Jackson*, Wilson and Dawson JJ emphasised that the sole purpose of the Mareva order was to prevent *abuse* of the process of the court in relation to the enforcement of its orders, and that that purpose was *not* to provide the plaintiff with *security* from which to satisfy a possible judgment in his favour.

In *Jackson*, Gaudron J was equally explicit in her definition of the purpose of the Mareva order, observing:²⁷

19 (1997) 74 FCR 7 at 16.

20 (1997) 74 FCR 7.

21 Ibid at 16. Emphasis added.

22 *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 at 625 (per Deane J).

23 Ibid.

24 (1987) 162 CLR 612.

25 Ibid at 617. Emphasis added.

26 (1987) 162 CLR 612 at 619. Emphasis added.

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... An asset preservation order of the Mareva variety [is] issued *only* where the court is satisfied that a defendant is *deliberately disposing* of his assets *with the object of* defeating or frustrating the ultimate judgment of the court, ...

Thus, in *Jackson*, Gaudron J would have concluded that a Mareva order was not available to a plaintiff who was able to show merely that the *effect* of what the defendant was proposing to do with the latter's assets would be to frustrate the process of the court. This was so because such a defendant would not be disposing of his assets 'with the object of'²⁸ frustrating that process.

In *Jackson*, Brennan J shared the opinion of Wilson, Dawson and Gaudron JJ that the purpose of the Mareva order was to prevent a defendant from disposing of his assets with the *intention* of frustrating the process of the court. He stated:²⁹

... A judicial power to make an interlocutory order in the nature of a Mareva injunction may be exercised according to the exigencies of the case and, the *schemes* which a *debtor* may *devise* for *divesting* himself of assets being legion, novelty of form is no objection to the validity of such an order. ...

By referring to a debtor who devised *schemes* for divesting himself of assets, Brennan J was describing a defendant who was proposing to dispose of his assets *for the purpose of* frustrating the enforcement process of the court.

In *CSR Limited v Cigna Insurance Australia Limited*³⁰ (hereinafter *Cigna Insurance*), six³¹ justices of the High Court, in a joint judgment, cited the Mareva order as an example of 'a court's power to *prevent*³² its processes [from] being *abused*³³ 34. These six justices also cited with approval³⁵ the narrow and unequivocal definition of the scope of the Mareva order given in *Jackson* by Wilson and Dawson JJ,³⁶ Brennan J³⁷ and Gaudron J.³⁸ The six justices, in this context,

27 (1987) 162 CLR 612 at 639. Emphasis added.

28 Ibid.

29 (1987) 162 CLR 612 at 621. Emphasis added.

30 (1997) 187 CLR 345.

31 Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

32 The court's emphasis.

33 Emphasis added.

34 (1997) 187 CLR 345 at 391.

35 Ibid at footnote 109.

36 (1987) 162 CLR 612 at 619.

37 (1987) 162 CLR 612 at 621.

38 (1987) 162 CLR 612 at 639.

made no reference to the ‘equivocal’³⁹ definition of the scope of the Mareva order given by Deane J⁴⁰ in *Jackson*.

However, there are authorities which support the view that a plaintiff is entitled to a Mareva order if there is evidence merely that the defendant is intending to dispose of the latter’s assets, and that such a disposal will have the *effect* of, although it will not be made for the *purpose* of, frustrating the enforcement process of the court. In *National Australia Bank Limited v Bond Brewing Holdings Limited*⁴¹ (hereinafter *Bond Brewing*) the High Court said:⁴²

... [It is] a mistaken view that a Mareva injunction cannot be obtained in the absence of a positive intention to frustrate any judgment. ...

Nevertheless, in a later decision, *Cardile v LED Builders Pty Limited*⁴³ (hereinafter *Cardile*), the High Court, after adverting to the observation made above in *Bond Brewing*, stated that the purpose of the Mareva order was to ‘avoid *abuse*⁴⁴ of the court’s enforcement process. A disposition by a defendant of his assets with the merely fortuitous effect of disabling him from satisfying a future judgment against him does not constitute an *abuse* by him of the enforcement process of the court. It forms no part of the court’s functions to *guarantee* to a plaintiff that the defendant will have sufficient assets to satisfy any adverse judgment against him. The defendant will abuse the court’s enforcement process only if he disposes of his assets ‘in order to’⁴⁵ prevent the plaintiff from levying execution on those assets. In *Searose Ltd v Seatrain UK Ltd*⁴⁶ (hereinafter *Searose*) Robert Goff J cautioned:⁴⁷

...But care must be taken to ensure that [Mareva] injunctions are only given for the purpose for which they are intended, viz to *prevent* the possible *abuse* of a defendant removing assets *in order to* prevent the satisfaction of a judgment in pending proceedings: and likewise care must be taken to ensure that such injunctions do not bear harshly upon innocent third parties. If these principles are not observed, a weapon which was forged to *prevent abuse* may become an instrument of oppression.

The cautious approach so earnestly recommended by Robert Goff J in *Searose* in relation to the purpose of the Mareva order has not won universal judicial

39 *Hayden v Teplitzky* (1997) 74 FCR 7 at 16 (per Lindgren J).

40 (1987) 162 CLR 612 at 625.

41 (1990) 169 CLR 271.

42 *Ibid* at 277 (per Mason CJ, Brennan and Deane JJ).

43 (1999) 198 CLR 380.

44 *Ibid* at 394. Emphasis added.

45 *Searose Ltd v Seatrain UK Ltd* [1981] 1 WLR 894 at 897 (per Robert Goff J).

46 [1981] 1 WLR 894.

47 *Ibid* at 897. Emphasis added.

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acceptance. In *Northcorp Limited v Allman Properties (Australia) Pty Ltd*⁴⁸ (hereinafter *Northcorp*) the Queensland Court of Appeal held that, in an application for a Mareva order, the plaintiff did *not* have ‘to show that the *purpose* of the defendant’s disposition, occurring or apprehended, [was] to prevent recovery of the amount of any judgment’.⁴⁹ Rather, it was sufficient for the plaintiff merely to show that ‘the view was open’⁵⁰ that the defendant’s disposition of his assets ‘would have a substantial *effect* upon [the defendant’s] ability to meet a judgment’.⁵¹ The decision of the Queensland Court of Appeal in *Northcorp* is difficult to reconcile with the decision of the High Court in *Jackson*.⁵² In *Jackson*, Wilson and Dawson JJ emphasised that a plaintiff could not, before obtaining judgment, ‘prevent the defendant from disposing of his assets *merely because he* [feared] that there [would] be nothing against which to enforce his judgment’.⁵³ In contradistinction to *Jackson*, the Queensland Court of Appeal in *Northcorp*⁵⁴ permitted the plaintiff, before obtaining judgment, to prevent the defendant from disposing of his assets merely because the plaintiff feared that there would be nothing against which to enforce his judgment. In its joint judgment in *Northcorp*, the Queensland Court of Appeal did not refer to the decision of McPherson J in *Abella v Anderson*⁵⁵ where it was held that a plaintiff applying for a Mareva order had to adduce evidence that the defendant might well ‘*take steps*, by removing or dissipating his assets, to *ensure* that his assets [were] no longer available or traceable if the plaintiff [succeeded] in obtaining judgment in the action’.⁵⁶ A defendant who ‘take[s] steps’⁵⁷ to ‘ensure’⁵⁸ that his assets are ‘no longer available or traceable’⁵⁹ if the plaintiff succeeds in obtaining judgment is a defendant who disposes of his assets for the *purpose* of frustrating the court’s enforcement process, namely, he is a defendant who *abuses* the enforcement process of the court. Such a defendant deserves to be restrained by a Mareva order from so disposing of his assets. But the defendant in *Northcorp*⁶⁰ was not found to be such a defendant. Yet that defendant was restrained by a Mareva order.

In *Cigna Insurance*,⁶¹ a decision of the High Court delivered after *Northcorp*, that court affirmed (albeit obiter) the proposition that a plaintiff applying for a Mareva

48 [1994] 2 Qd R 405.

49 Ibid at 407 (per Pincus JA, Ambrose and White JJ). Emphasis added.

50 [1994] 2 Qd R 405 at 408.

51 Ibid. Emphasis added.

52 (1987) 162 CLR 612.

53 Ibid at 618. Emphasis added.

54 [1994] 2 Qd R 405.

55 [1987] 2 Qd R 1.

56 Ibid at 4. Emphasis added.

57 Ibid.

58 Ibid.

59 Ibid.

60 [1994] 2 Qd R 405.

61 *CSR Limited v Cigna Insurance (Australia) Limited* (1997) 189 CLR 345.

order had to show that the defendant was about to *abuse*⁶² the process of the court. The High Court in *Cigna Insurance*⁶³ stated that '[t]he counterpart of a court's power to *prevent*⁶⁴ its processes being *abused*⁶⁵ is its power to *protect*⁶⁶ the *integrity*⁶⁷ of those processes once set in motion',⁶⁸ citing the making of the Mareva order as an example⁶⁹ of the exercise of this power. If, as the High Court stated in *Cigna Insurance*, the Mareva order is issued only to protect the process of the court from being *abused*, then any apprehended frustration of the court's process that falls short of being an *abuse* of that process will be beyond the scope of the Mareva order. Given that the High Court delivered the relevant obiter observation in *Cigna Insurance*⁷⁰ after the Queensland Court of Appeal had decided in *Northcorp*⁷¹ that a Mareva order would be made against a defendant in relation to whom there was evidence merely that the disposal of the latter's assets would have the *effect*⁷² of frustrating the process of the court, and given the inconsistency between the earlier decision in *Northcorp* and the later obiter observation of the High Court in *Cigna Insurance*,⁷³ the decision in *Northcorp* is open to review. In *Cardile v LED Builders Pty Limited*⁷⁴ the High Court quoted⁷⁵ with approval its earlier observation in *Cigna Insurance*⁷⁶ that the counterpart of a court's power to prevent its processes being *abused* is its power to protect the *integrity* of those processes once set in motion. It may be noted that the integrity of the court's processes is not impaired merely because a judgment debtor, who has not abused that process, finds that he does not own sufficient assets to satisfy judgment.

62 Ibid at 391, footnote 109 (per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

63 (1997) 189 CLR 345.

64 The court's emphasis.

65 Emphasis added.

66 The court's emphasis.

67 Emphasis added.

68 (1997) 189 CLR 345 at 391.

69 Ibid at footnote 109.

70 (1997) 189 CLR 345 at 391, footnote 109.

71 [1994] 2 Qd R 405.

72 Ibid at 408.

73 (1997) 189 CLR 345 at 391, footnote 109.

74 (1999) 198 CLR 380.

75 Ibid at 395 (per Gaudron, McHugh, Gummow and Callinan JJ).

76 (1997) 189 CLR 345 at 391, footnote 109. See also *Patrick Stevedores Operations No 2 Proprietary Limited v Maritime Union of Australia* (1998) 195 CLR 1 at 32 [35]; *Witham v Holloway* (1995) 183 CLR 525 at 535; *Grenzservice Speditions GesmbH v Jans* (1995) 129 DLR (4th) 733 at 755, where Huddart J said, inter alia, that the Mareva order was conceived 'to protect the court's jurisdiction against defendants bent on dissipating or secreting their assets ... *in order to* render inconsequential the judicial process against them'. [Emphasis added.]

Effect of the Mareva Order

In *Mercedes Benz AG v Leiduck*⁷⁷ the Privy Council observed:⁷⁸

... [I]t is now quite clear that *Mareva* relief takes effect in personam alone; it is not an *attachment*; it gives the claimant no proprietary rights in the assets seized, and no advantage over other creditors of the defendant: ...

However, to the defendant, the practical impact of a Mareva order is less benign than its theoretical limitations would suggest. Thus, in *Cardile*,⁷⁹ the High Court stated:⁸⁰

... It has been truly said that a *Mareva* order does not deprive the party subject to its restraint either of title to or possession of the assets to which the order extends. Nor does the order improve the position of claimants in an insolvency of the judgment debtor. It operates *in personam* and not as an attachment. Nevertheless, those statements should not obscure the *reality* that the granting of a *Mareva* order is bound to have a significant impact on the property of the person against whom it is made: in a *practical sense* it operates as a very tight “negative pledge” species of security over property, to which the contempt sanction is attached. It requires a *high degree of caution* on the part of a court invited to make an order of that kind. An order lightly or wrongly granted may have a capacity to *impair or restrict commerce* just as much as one appropriately granted may facilitate and ensure its due conduct.

That said, the conceptual limitations on the Mareva order do have some effect in practice. So, in *Cretanor Maritime Co Ltd v Irish Marime Management Ltd*⁸¹ the English Court of Appeal ruled that a debenture holder with a crystallised charge on the defendant’s only asset (a bank deposit) within the jurisdiction was entitled to realise that asset to satisfy the charge, notwithstanding that the plaintiff was an unsatisfied judgment creditor who had obtained, before judgment, a Mareva order which applied, inter alia, to the defendant’s bank deposit. The plaintiff’s right, as a judgment creditor, to levy execution on the defendant’s bank deposit, despite the fact that the deposit had been frozen by a Mareva order made in favour of the plaintiff, was held to be a right which was subject to the debenture holder’s charge which had crystallised on the defendant’s bank deposit. Because the Mareva order, being no more than an order made in personam against the

77 [1996] AC 284.

78 Ibid at 300 (per Lord Mustill in delivering the advice of the Privy Council). Emphasis added, except for the word “Mareva”.

79 (1999) 198 CLR 380.

80 Ibid at 403 (per Gaudron, McHugh, Gummow and Callinan JJ). Citations omitted. Emphasis added, except for “Mareva”.

81 [1978] 1 WLR 966.

defendant, did not operate as a pre-trial attachment⁸² on the defendant's assets, the fact that the Mareva order was made *before* the crystallisation of the debenture holder's charge was of no avail to the plaintiff as against the debenture holder. The debenture holder had, by virtue of its crystallised charge, a proprietary interest in the defendant's bank deposit. The plaintiff, on the other hand, had no such interest in that deposit, its Mareva order being incapable of giving it such an interest.

Again, it was decided by Robert Goff J in *Iraqi Ministry of Defence v Arcepey Shipping Co SA*⁸³ (hereinafter *Arcepey Shipping*) that a defendant was entitled to have a Mareva order varied to enable it to pay its debts, given that a defendant who used its assets to pay its debts would not be doing so 'in order to avoid'⁸⁴ having to satisfy any judgment which the plaintiff might obtain against it. Furthermore, a Mareva order is, in accordance with the decision in *Cretanor*⁸⁵ 'not a form of pre-trial attachment but a relief in personam'.⁸⁶ Following the decision of Robert Goff J in *Arcepey Shipping*⁸⁷ the Mareva order now expressly allows the defendant to pay his debts,⁸⁸ including, it would appear, debts of honour,⁸⁹ namely, debts which it would be commercially expected of him to pay, but which, owing to some legal technicality, are legally unenforceable against him.

Burden and Standard of Proof

(i) Burden of Proof

A plaintiff who applies for a Mareva order bears the burden of proof. What ingredients must such a plaintiff prove? In *Patterson v BTR Engineering (Aust) Ltd*⁹⁰ (hereinafter *Patterson*) Gleeson CJ said:⁹¹

...[A]s a general rule a plaintiff will need to establish, *first*, a prima facie cause of action against the defendant, and *secondly* a danger that,

82 Ibid at 974 and 977 (per Buckley LJ, with whose judgment Goff LJ and Sir David Cairns concurred).

83 [1981] QB 65.

84 Ibid at 70 (per Robert Goff J).

85 *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 1 WLR 966 at 974 and 977 (per Buckley LJ).

86 [1981] QB 65 at 72 (per Robert Goff J). See also *Hayden v Teplitzky* (1997) 74 FCR 7 at 13 (per Lindgren J); *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 397 [34].

87 [1981] QB 65.

88 See, for example *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 410 [75].

89 *Iraqi Ministry of Defence v Arcepey Shipping Co SA* [1981] QB 65 at 73 (per Robert Goff J); *Hayden v Teplitzky* (1997) 74 FCR 7 at 13 (per Lindgren J).

90 (1989) 18 NSWLR 319.

91 Ibid at 321-322. Emphasis added.

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by reason of the defendant's *absconding*, or of assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with in some fashion, the plaintiff, if he succeeds, will not be able to have his judgment satisfied.

Gleeson CJ, later in his judgment, amplified the second ingredient by referring to 'a danger that the [defendant] would dispose of assets *in order to defeat* any judgment that might be obtained against him'.⁹²

The position in England is the same. In *Z Ltd v A-Z and AA-LL*⁹³ Kerr LJ said:⁹⁴

... [I]n my view *Mareva*⁹⁵ injunctions should be granted, but granted only, when it appears to the court that there is a combination of two circumstances. *First*, when it appears likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum. *Secondly*, when there are also reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part, but may well take steps *designed to ensure* that these are no longer available or traceable when judgment is given against him.

(ii) Standard of Proof

Unfortunately, the standard of proof required in an application for a Mareva order is uncertain. In *Patterson*⁹⁶ each of the three judges in the New South Wales Court of Appeal applied a standard of proof different from that of the other two. Gleeson CJ rejected the view that plaintiff had to prove the likelihood of dissipation of the defendant's assets upon a balance of probabilities, and stated that it was 'not difficult to imagine situations in which justice and equity would require the granting of an injunction to prevent dissipation of assets pending the hearing of an action even though the risk of such dissipation may be assessed as being somewhat *less probable than not*'.⁹⁷

In *Patterson*, Meagher JA disagreed with Gleeson CJ on the standard of proof required of a plaintiff in an application for a Mareva order. There Meagher JA thought that the plaintiff was required to prove 'on a balance of probabilities'⁹⁸ that there was a real risk of the dissipation of assets by the defendant. The third member of the New South Wales Court of Appeal in *Patterson*, Rogers A-JA,

92 (1989) 18 NSWLR 319 at 325. Emphasis added.

93 [1982] 1 QB 558.

94 Ibid at 585. Emphasis added. This passage from Kerr LJ's judgment was quoted with approval by Rogers A-JA in *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 329.

95 Kerr LJ's emphasis.

96 *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319.

97 Ibid at 325. Emphasis added.

98 (1989) 18 NSWLR 319 at 327.

concluded merely that the plaintiff had to show ‘a sufficient danger’⁹⁹ that the defendant was ‘*seeking* to frustrate the court’s power to grant an effective remedy’¹⁰⁰ ‘by attempting to put his assets out of reach’.¹⁰¹ Rogers A-JA rejected¹⁰² Meagher JA’s view that the relevant standard of proof was proof on a balance of probabilities.

Although Gleeson CJ and Rogers A-JA did not define the standard of proof required of a plaintiff in an application for a Mareva order, they did make it clear, by their rejection of the balance of probabilities standard proposed by Meagher JA, that such a plaintiff would *not* be required to prove that there was a greater than 50% chance that the defendant intended to dissipate his assets. Because Gleeson CJ and Rogers A-JA in *Patterson*¹⁰³ rejected the balance of probabilities standard *without* defining their own standard, and because no other court has defined the standard of proof for a Mareva order application, the standard of proof in an application for a Mareva order has become essentially *intuitive*. In short, there is no accepted judicial definition of the standard of proof required in a Mareva order application.¹⁰⁴

The Plaintiff’s reasonable costs and the Defendant’s reasonable legal expenses

In *Barclay Johnson v Yuill*¹⁰⁵ Megarry V-C held that the value of a defendant’s assets to be frozen under a Mareva order should include a reasonable sum for the plaintiff’s costs in the event of the plaintiff’s success in the action. So, for example, if the plaintiff’s claim is for a sum of \$1,000,000, and the plaintiff’s reasonable costs in the action are expected to amount to \$200,000, the value of the defendant’s assets to be frozen under the Mareva order will be *prima facie* \$1,200,000. However, this *prima facie* sum may have to be reduced to meet the defendant’s legitimate expenses, including the payment of the defendant’s debts as they become payable.¹⁰⁶ In *Cummins v Pathline Australia Pty Ltd*¹⁰⁷ Bleby J of the

99 (1989) 18 NSWLR 319 at 331.

100 *Ibid.* Emphasis added.

101 *Ibid.*

102 (1989) 18 NSWLR 319 at 327.

103 (1989) 18 NSWLR 319.

104 See, in particular, *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH & Co KG* [1984] 1 All ER 398 at 417 where Kerr LJ, in delivering the judgment of the English Court of Appeal, said:

...[W]e do not think that it would be useful to seek to lay down any *standard* of evidence which applicants for Mareva injunctions must satisfy in order to succeed on an *ex parte* application. *Bare assertions* that the defendant is likely to put any asset beyond the plaintiff’s grasp and is unlikely to honour any judgment or award are clearly not enough by themselves. *Something more is required*. ... (Emphasis added.)

Unfortunately, Kerr LJ did not proceed to indicate what that “[s]omething more” was.

105 [1980] 1 WLR 1259.

106 *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 410 [75].

107 [2004] SASC 95.

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Supreme Court of South Australia froze a sum in the defendant's bank deposit which equalled the aggregate of the plaintiff's claim and the amount of the plaintiff's reasonable costs.¹⁰⁸

However, any sum of money required for the payment of the *defendant's* 'reasonable legal expenses'¹⁰⁹ may not be frozen under a Mareva order.

Suppose a plaintiff sues the defendant for \$1,000,000. Suppose, further, that the plaintiff's reasonable costs in the action are expected to be \$200,000. Suppose, again, that the defendant's reasonable legal expenses in the action are expected to be also \$200,000. Finally, suppose that the defendant's total net assets amount to \$1,000,000 (after deductions for the defendant's legitimate business expenses and 'ordinary living expenses'¹¹⁰). In such a case, although the plaintiff's claim (including the plaintiff's reasonable costs) against the defendant amounts to \$1,200,000, and although the defendant has net assets of \$1,000,000, the Mareva order against the defendant will apply to only \$800,000 of his assets. This will be so because, in conformity with the High Court's decision in *Cardile*,¹¹¹ an amount of the defendant's assets equal in value to his reasonable legal expenses (\$200,000) may not be included in a Mareva order.

Misinterpretation of the Purpose of the Mareva order

In *Walter Construction Group v The Robbins Company*¹¹² (hereinafter *Walter Construction*) the plaintiff (Walter Construction Group) sued the defendant (The Robbins Company) for damages for breach of contract. The defendant was entitled to be paid a sum of money in New South Wales. The plaintiff sought a Mareva order against the defendant's assets in New South Wales, including the defendant's entitlement to be paid that sum of money. McDougall J accepted that the defendant was a substantial American corporation, and that there was 'no reason to think that the defendant would not pay a judgment ... if called upon to do so'.¹¹³

McDougall J noted that if the defendant received the sum of money to which it was entitled, 'it would repatriate it to America'.¹¹⁴ However, he accepted that such a remittance of the defendant's money would have occurred 'in the *ordinary course* of the defendant's business',¹¹⁵ and that it would not have been 'indicative of any

108 Ibid at [4] and [20].

109 *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 410 [75] (per Gaudron, McHugh, Gummow and Callinan JJ).

110 Ibid.

111 (1999) 198 CLR 380 at 410 [75].

112 [2004] NSWSC 549.

113 Ibid at [13].

114 [2004] NSWSC 549 at [12].

115 Ibid. Emphasis added.

scheme or intention on the part of the defendant to render itself judgment proof in Australia'.¹¹⁶

Surprisingly, McDougall J regarded as 'significant'¹¹⁷ the defendant's decision not to respond to the a letter from the plaintiff which had enquired as to 'whether the defendant would give an *undertaking* to have *sufficient assets* in the jurisdiction to *satisfy* any judgment and what arrangements the defendant would put in place to *ensure* this would be so'.¹¹⁸ McDougall J appears to have overlooked that the defendant was under no obligation to give any such undertaking to the plaintiff. There is no principle of law which requires a defendant to *guarantee* to the plaintiff that any judgment obtained by the plaintiff will be satisfied. Far from being 'significant',¹¹⁹ the defendant's refusal to respond to the plaintiff's unwarranted letter of enquiry was irrelevant to the question whether or not a Mareva order ought to have been made against the defendant.

McDougall J granted¹²⁰ a Mareva order against the defendant in respect of the relevant asset. He criticised the defendant's refusal to respond to the plaintiff's letter as follows:¹²¹

... If the defendant was seeking to persuade me that its activities and interests were sufficient to show that *it would meet its legal obligations*, one might have *expected* it to *provide assurances*, in the intervening months, in response to [the plaintiff's] letter. It has not done so.

However, a defendant in a Mareva order application does not have an obligation to persuade the court that it will be able to satisfy any judgment that the plaintiff may obtain against it. In such an application, it is for the *plaintiff* to show that the defendant is about to *abuse*¹²² the court process by *taking steps to ensure*¹²³ that it will not have sufficient assets to satisfy any judgment that may be obtained against it. In *Walter Construction*,¹²⁴ McDougall J misinterpreted the purpose of the Mareva order by requiring the *defendant* to satisfy the court that it would have sufficient assets to meet any judgment that might be made against it. A defendant is under no such obligation. A defendant's obligation to the court is not to *abuse* its process. A mere inability to satisfy judgment does not constitute an abuse of the process of the court.

116 Ibid.

117 [2004] NSWSC 549 at [34].

118 Ibid.

119 Ibid (per McDougall J).

120 [2004] NSWSC 549 at [35]-[36].

121 [2004] NSWSC 549 at [34]. Emphasis added.

122 *CSR Limited v Cigna Insurance (Australia) Limited* (1997) 189 CLR 345 at 391; *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 393.

123 *Abella v Anderson* [1987] 2 Qd R 1 at 4 (per McPherson J).

124 [2004] NSWSC 549.

It is suggested that another example of judicial misinterpretation of the Mareva order is the decision of the Queensland Court of Appeal in *Millennium Federation Pty Ltd v Bigjig Pty Ltd*¹²⁵ (hereinafter *Millennium Federation*). There the plaintiff company sued the defendants (being the plaintiff's two former directors and employees and a company formed and controlled by them) respectively for the profits made in breach of fiduciary duty and for the profits made in the giving of knowing assistance in the perpetration of that breach. The plaintiff claimed ownership of the profits, and the right to 'trace'¹²⁶ a specific part of them. Since the plaintiff was claiming to trace a specific part of the profits on the basis that it owned that part of the profits, the plaintiff would have been entitled to an injunction restraining the defendant's from dealing with it pending the determination of the case. Such an injunction would not have been a Mareva order because it would not have frozen any of the *defendant's* assets. Yet the Queensland Court of Appeal in *Millennium Federation* purported to grant a Mareva order to freeze that part of the profits which the plaintiff was claiming to trace, namely, that part of the profits which the plaintiff was claiming as its *own* property. In doing so, that court did not observe the distinction between an injunction granted to preserve assets claimed by a plaintiff to be *its own property*, on the one hand, and, on the other hand, a *Mareva* order freezing the *defendant's* assets. This distinction between the two remedies was highlighted by the Privy Council in *Mercedes Benz AG v Leiduck*¹²⁷ as follows:¹²⁸

... The courts ... always *distinguish sharply* between *tracing* and other remedies available where the plaintiff asserts that the assets in question *belong to him* and that the dealings with them should be enjoined in order to protect his proprietary rights, and *Mareva*¹²⁹ injunctions granted where the plaintiff does *not* claim any interest in the assets and seeks an inhibition of dealings with them simply in order to keep them available for a possible future execution to satisfy an unconnected claim.

Problems of Compliance with the Mareva Order

In *Cardile*,¹³⁰ the High Court, in granting Mareva orders against third parties, exempted¹³¹ their legitimate expenses from the scope of those orders. Amongst other exemptions, the High Court allowed the third parties to pay, from their otherwise frozen assets, their reasonable legal expenses,¹³² their taxation

125 [2000] 1 Qd R 275.

126 *Ibid* at 279 (per Pincus JA).

127 [1996] AC 284.

128 *Ibid* at 300. Emphasis added.

129 The Privy Council's emphasis.

130 *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380.

131 *Ibid* at 410 [75].

132 *Ibid*.

liabilities,¹³³ their ordinary and proper business expenses bona fide incurred by them,¹³⁴ and, in the case of two third parties who were natural person, their ordinary living expenses.¹³⁵

The existence of an exemption from the scope of a Mareva order, based on the defendant's¹³⁶ need to meet his legitimate expenses, raises the crucial question: what is a legitimate expense for the purpose of obtaining exemption from a Mareva order? The existence of such an exemption, sanctioned by the High Court in *Cardile*, is inconsistent with the earlier expressed view of the Queensland Court of Appeal in *Northcorp* that a plaintiff is entitled to a Mareva order if the mere *effect*¹³⁷ of what the defendant is about to do is likely to impair the defendant's ability to satisfy a possible judgment against him.

Suppose that the *effect* of the defendant's expected legitimate expenses (including his reasonable legal expenses in defending the action) is likely to prevent him from satisfying a possible judgment in favour of the plaintiff. If, as the Queensland Court of Appeal decided in *Northcorp*,¹³⁸ a Mareva order should be granted to prevent a defendant from such dealings with his assets as would be likely to have the *effect* of reducing his ability to satisfy judgment, then the defendant would have to be denied the right to use his assets even to pay for his legitimate expenses if the *effect*¹³⁹ of such payments would be likely to reduce his ability to satisfy judgment. However, the denial of such a right to the defendant would be inconsistent with the High Court's decision in *Cardile*.¹⁴⁰

Given that a defendant's legitimate expenses are excluded from the scope of a Mareva order, what is the criterion for a legitimate expense? That criterion cannot be any expense that will *not* have the *effect* of reducing the defendant's ability to satisfy judgment, because a defendant's legitimate expenses (particularly his reasonable legal expenses in defending the action) may well have *that* effect. If an item of the defendant's expenditure may constitute a legitimate expense despite its effect of reducing the defendant's ability to satisfy judgment, then a defendant should be entitled so to use his assets as to reduce his ability to satisfy judgment, provided that in so using his assets he is not *abusing*¹⁴¹ the process of the court,

133 Ibid.

134 Ibid.

135 Ibid.

136 Although the exemption in *Cardile* was given to third parties, the same exemption would apply in favour of a defendant: *Millennium Federation Pty Ltd v Bigjig Pty Ltd* [2000] 1 Qd R 275 at 279 (per Pincus and Thomas JJA and Mackenzie J).

137 [1994] 2 Qd R 405 at 408 (per Pincus JA, Ambrose and White JJ).

138 Ibid.

139 Ibid.

140 (1999) 198 CLR 380.

141 *Jackson v Sterling Industries Limited* (1987) 162 CLR 612 at 619 (per Wilson and Dawson JJ); *Patrick Stevedores Operations No 2 Proprietary Limited v Maritime Union of Australia* (1998) 195 CLR 1 at 44-45 [73] (per Brennan CJ, McHugh,

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namely, he is not reducing his assets *in order to*¹⁴² avoid satisfying judgment. Thus, it would seem that, for the purpose of determining exemption from a Mareva order, a defendant's legitimate expense is any use made by him of his assets which is not *designed* to avoid satisfying judgment. There is no exhaustive list of a defendant's legitimate expenses for the purpose of determining exemption from a Mareva order.

Assume that a Mareva order is made with specific exemptions similar to those exemptions made in *Cardile*.¹⁴³ How do those exemptions operate in practice? How, for example would the defendant's bank, to which notice¹⁴⁴ of the Mareva order would have been given, and which, on pain of contempt¹⁴⁵ of court, would have to comply with that order, be able to determine which of the defendant's proposed withdrawals from his account are intended for payment of legitimate expenses, and which of the defendant's proposed withdrawals are not so intended?

Furthermore, how does a plaintiff monitor the use of the defendant's assets to ensure that such use is made within the exemptions from the Mareva order? Who determines what are the defendant's 'reasonable legal expenses'¹⁴⁶ in defending the action, or the amount of money required to meet the defendant's 'ordinary living expenses'¹⁴⁷? How does the plaintiff, for example, monitor the defendant's entitlement 'to pay ordinary and proper business expenses bona fide incurred'¹⁴⁸ by the defendant? These questions have been left unanswered by the courts.

Suppose that a defendant has an account with Bank A, and another account with Bank B, each with a credit balance of \$1,000,000. Suppose, further, that the plaintiff has obtained a Mareva order which, subject to the usual exemptions for the defendant's legitimate expenses, freezes the entire credit balance of \$1,000,000 at Bank A (the frozen account). There is no Mareva order against the credit balance at Bank B (the free account).

The defendant needs to withdraw \$100,000 to pay the lawyers acting for him in his litigation with the plaintiff. Is the defendant entitled to withdraw this sum from the frozen account, as opposed to the free account? It is suggested that,

Gummow, Kirby and Hayne JJ); *CSR Limited v Cigna Insurance (Australia) Limited* (1997) 189 CLR 345 at 391 (per Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 393 [25] (per Gaudron, McHugh, Gummow and Callinan JJ).

142 *Iraqi Ministry of Defence v Arcepy Shipping Co SA* [1981] QB 65 at 70 (per Robert Goff J).

143 (1999) 198 CLR 380 at 410 [75].

144 *Rahman (Prince Abdul) v Abu-Taha* [1980] 1 WLR 1268 at 1273 (per Lord Denning MR); *Z Ltd v A-Z and AA-LL* [1982] 1 QB 558 at 586 (per Kerr LJ).

145 *Ibid.*

146 *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 410 [75].

147 *Ibid.* *Z Ltd v A-Z and AA-LL* [1982] 1 QB 558 at 576 (per Lord Denning MR).

148 *Ibid.*

although the defendant may choose to withdraw the sum of \$100,000 from the free account, he is under no obligation to do so. The defendant should be entitled to withdraw that sum from the frozen account, since there is an exemption in the Mareva order for the payment of his reasonable legal expenses. This will be so despite the fact that the plaintiff's claim (\$1,000,000) will then exceed the credit balance (\$900,000) in the defendant's frozen account after the defendant withdraws the sum of \$100,000 (required for the payment of his lawyers) from that account.¹⁴⁹

Conclusion

In *Mercedes Benz AG v Leiduck*¹⁵⁰ Lord Mustill, in delivering the advice of the Privy Council, expressed the following lament on the operation of the Mareva order:¹⁵¹

... Amidst all the burdensome practicalities theory has been left behind. ...

It is suggested that the attitude taken by some judges that the defendant, before judgment, has an obligation to retain sufficient assets to satisfy judgment,¹⁵² when combined with an undefined and intuitive standard of proof for the plaintiff in a Mareva order application,¹⁵³ has resulted in the granting of an excessive number of Mareva orders. It is suggested that a Mareva order should be granted only to prevent a defendant from abusing¹⁵⁴ the process of the court, and that such an order should never be granted to guarantee to the plaintiff that the defendant will have sufficient assets to satisfy judgment.

149 If, contrary to the facts in this hypotheses, it can be shown that the proposed withdrawal from the frozen account is intended to prevent the plaintiff from recovering judgment in full, then the proposed withdrawal, if it is made, will breach the Mareva order when the withdrawal is made: *A v C(No2)* [1981] QB 961 at 963 (per Robert Goff J).

150 [1996] AC 284.

151 Ibid at 299. This lament of the Privy Council was shared by the High Court in *Cardile* (1999) 198 CLR 380 at 397 (per Gaudron, McHugh, Gummow and Callinan JJ).

152 See, for example, *Walter Construction Group v The Robbins Company* [2004] NSWSC 549 at [34] (per McDougall J).

153 *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 at 325 (per Gleeson CJ); *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft mbH & Co KG* [1984] 1 All ER 398 at 417 (per Kerr LJ in delivering the judgment of the English Court of Appeal).

154 *CSR Limited v Cigna Insurance (Australia) Limited* (1997) 189 CLR 345 at 391; *Cardile v LED Builders Pty Limited* (1999) 198 CLR 380 at 393.

THE ANTON PILLER ORDER

What is an Anton Piller order? Rule 261 of the *Uniform Civil Procedure Rules* 1999 provides, inter alia:

- (1) On application, the court may make an order, without notice to the respondent, of a type requiring the respondent to permit the applicant or another person to enter the respondent's premises and inspect or seize documents or other items (an 'Anton Piller order').
- (2) An Anton Piller order may also require the respondent to disclose stated information relevant to the proceeding to which the order relates.
- (3) An Anton Piller order may also include an injunction restraining, for a stated period of up to 7 days, anyone on whom the order is served from informing anyone else the order has been made.
- (4) The court may make the order on the conditions as to the persons by whom the order is to be carried out, retention of seized items and otherwise as the court considers appropriate.
- (5) ...
- (6) The court may set aside or vary the order.

Given that an Anton Piller order is almost invariably applied for *before* the commencement of the action against the defendant, it is suggested that the phrase, in subrule (2) of Rule 261, 'relevant to the proceeding', should be amended to read 'relevant to the intended proceeding or to the proceeding'.

An Anton Piller order is normally sought by an intending plaintiff who believes that if he were to give the intended defendant notice of his intention to apply for an order of discovery, the intended defendant would either destroy or conceal evidence that is vital to the success of the case which the intending plaintiff is proposing to bring against him. It was originally intended by the courts that so '[d]raconian'¹⁵⁵ a remedy would be granted only 'in the most exceptional circumstances'.¹⁵⁶

In *Anton Piller KG v Manufacturing Processes Ltd*¹⁵⁷ (hereinafter *Anton Piller*) Ormrod JJ said of the Anton Piller order:¹⁵⁸

155 *EMI Ltd v Pandit* [1975] 1 WLR 302 at 304 (per Templeman J). This was the first reported case on the Anton Piller order, and predates the case from which the order takes its name: *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

156 *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 at 58 (per Lord Denning MR).

157 [1976] Ch 55.

... The proposed order is at the extremity of this court's powers. Such orders, therefore, will rarely be made, and only when there is no alternative way of ensuring that justice is done to the applicant.

There are three essential pre-conditions for the making of such an order, in my judgment. First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made.

The Anton Piller order is not a search warrant. It does not authorise the plaintiff to enter and search the defendant's premises. Rather, the order directs the defendant to permit the plaintiff to enter and search the defendant's premises. If the defendant refuses such permission to the plaintiff, the defendant will be 'guilty of contempt of court'.¹⁵⁹

But practice has belied theory. The Anton Piller order is no longer granted only 'in the most exceptional circumstances',¹⁶⁰ as had been the courts' original intention. The nature of the Anton Piller order has been judicially described as '[d]raconian and essentially unfair'.¹⁶¹ The practical implications of the Anton Piller order were examined by Scott J in *Columbia Picture Industries Inc v Robinson*¹⁶² (hereinafter *Columbia Picture*).

In *Columbia Picture*, Scott J made the following observations on the Anton Piller order:

(i) a defendant who is served with an Anton Piller order comes under an immediate obligation to consent to the plaintiff's entry onto and search of his premises, and the removal from his premises of material specified in the order. If the defendant does not immediately give such consent, he will thereby commit a contempt of court. A defendant who refuses to comply with an Anton Piller order is guilty of contempt of court even if the order is subsequently discharged on the ground that it was wrong to have granted it. Goulding J so decided in *Wardle Fabrics Ltd v G Myristis Ltd*.¹⁶³ Such a result is conceptually impeccable in

158 Ibid at 61.

159 [1976] Ch 55 at 60 (per Lord Denning MR). Ormrod LJ was of the same opinion (at 62).

160 *Anton Piller* [1976] Ch 55 at 58 (per Lord Denning MR).

161 *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 76 (per Scott J); *Long v Specifier Publications Pty Ltd* (1998) 44 NSWLR 545 at 560 (per Powell JA with whose judgment Meagher and Handley JJA agreed).

162 [1987] Ch 38.

163 [1984] FSR 263 at 275.

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that a court order, notwithstanding that it may be eventually proved to have been wrongly granted, must be obeyed. Nevertheless, such a result operates harshly on the defendant because the order will have been applied for, and made, 'in the absence of the [defendant] and in secret; it [will have been] served upon and executed against the [defendant] without his having any chance to challenge the correctness of its grant or to challenge the evidence on which it was granted';¹⁶⁴

(ii) the execution of an Anton Piller order, involving, as it so often does, a search of the defendant's business premises, and the removal therefrom of the defendant's 'stock-in-trade, bank statements, cheque books or correspondence'¹⁶⁵, is disruptive to the defendant's business;

(iii) if the Anton Piller order is accompanied by a Mareva order, the defendant's bank will be given notice of both of the orders, and it may then refuse further credit to the defendant on the basis that his business is, by reason of those orders, not viable¹⁶⁶;

;

(iv) there is no fair hearing in an application for an Anton Piller order because only the plaintiff is heard during such an application. The defendant is not even given notice of the plaintiff's application. Such an application infringes a 'fundamental principle'¹⁶⁷ of the common law that all parties to litigation are entitled to be heard by the court.

It is true that in the case of an Anton Piller order, as in the case of a Mareva order which is granted *ex parte*, the defendant is given liberty on short notice to apply for the order to be discharged.¹⁶⁸ However, whereas a successful application to discharge a Mareva order will reverse the initial effect of the discharged order, a successful application to discharge an Anton Piller order will not do so because the discharge of the Anton Piller order cannot reverse the *fact* that a search of the defendant's business premises has taken place, nor can such a discharge reverse the *disruption* to the defendant's business caused by the search.

Furthermore, although the solicitors and counsel acting for the plaintiff in an Anton Piller application are under a duty to the court to make full disclosure of all the facts known to them which are relevant to the application, they 'cannot be expected to present the available evidence from the [defendant's] point of view'.¹⁶⁹

Furthermore, in *Long v Specifier Publications Pty Ltd*,¹⁷⁰ a decision of the New South Wales Court of Appeal, Powell JA, with whose judgment Meagher and

164 *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 72 (per Scott J).

165 *Ibid.*

166 *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 at 72-73 (per Scott J).

167 [1987] Ch 38 at 73-74 (per Scott J).

168 [1987] Ch 38 at 71 (per Scott J).

169 [1987] Ch 38 at 75.

170 (1998) 44 NSWLR 545.

Handley JJA agreed, said that 'the *Anton Piller* procedure [lent] itself all too readily to abuse'.¹⁷¹ The criticisms of the Anton Piller order made by Scott J in *Columbia Picture*¹⁷² were endorsed by Hoffmann J in *Lock International Plc v Beswick*¹⁷³ and by Nicholls V-C in *Universal Thermosensors Ltd v Hibben*.¹⁷⁴

It is to be hoped that the courts will mitigate the inherent unfairness of the procedure in an Anton Piller order application by ensuring that such orders are granted only 'in the most exceptional circumstances'.¹⁷⁵

It may be useful to ponder the implications of the following question posed by Scott J in *Columbia Picture*:¹⁷⁶

What is to be said of the *Anton Piller* order which, on a regular and institutionalised basis, is depriving citizens of their property and closing down their businesses by orders made ex parte, on applications of which they know nothing and at which they cannot be heard, by orders which they are forced , on pain of committal, to obey, *even if wrongly made?*

171 Ibid at 548.

172 [1987] Ch 38 at 71-76.

173 [1989] 1 WLR 1268 at 1279-1281.

174 [1992] 1 WLR 840 at 859-861.

175 *Anton Piller* [1976] Ch 55 at 58 (per Lord Denning MR).

176 [1987] Ch 38 at 74. Emphasis added, except for 'Anton Piller'.