A SECOND LOOK AT THE MAREVA INJUNCTION

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AN ABSTRACT

The form of interlocutory injunction commonly called "Mareva" is a recent judicial invention. It was initially designed by the United Kingdom courts to restrain a debtor, prior to judgment, from removing his assets beyond the jurisdiction of the court so as to prevent a creditor from subsequently executing upon a judgment. Prior to 1975, this particular remedy was practically unknown to the common law and injunctions were not granted for such purposes.

In the intervening eight years, both the practice and the procedure for obtaining the injunction have been expanded and refined. The use of the injunction has spread to Canada and to other Commonwealth nations. Its legitimacy was mooted for several years following the first reported case.

The burden of this thesis is to examine the principle and the extensions authorized for its application both in Canada and abroad, to probe the sources of its invention and to reflect on its appropriate use within the Canadian context. This is done, as it were, as a second view, with the dispassion that distance in time safely allows and with regard to the learnings that extensive experience in the courts might afford.

The examination begins with a review of the law prior to Mareva, continues with the reasoning utilised by the English court in its adoption from civil law processes and questions the authenticity of the Court's logic in such a step. An extensive review is made of similar remedies available in some other jurisdictions and the thesis concludes with an analysis of the dangers inherent in simply importing the English practice to the Canadian scene, a course which ostensibly the Canadian courts have initially followed.

The law is stated as of August 1, 1983.

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CHAPTER I - INTRODUCTION

Resolution of hostility in England between the common law courts and those of equity might well have been achieved by James I after the Earl of Oxford's Case in 1615[1] but even those responsible for fusion of the two historic streams of our law with amalgamation of the courts by the Judicature Acts of 1873 and 1875 could not have foreseen the extent to which the traditional shield of equity could be conveniently converted to a legal sword in the short century which followed.

A classic eighteenth century explanation of the nature of equity was that:

> "Equity is no part of the law, but a moral virtue, which qualifies, moderates and reforms the rigour, hardness and edge of the law, and it is a universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions and new subtilties (sic), invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless: and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law."[2]

The history of English law is rife with examples where equity has intervened to correct an injustice; it is well-known that much of the statute law was developed as a result of an evolving system of strict legal principles. While developments on the one hand of new rights unknown to law, such as trusts and uses, and augmentation on the second hand of procedural deficiencies of the common law courts, such as discovery and evidence-taking, are popular examples of the benefits gained by application of equitable principles now to all legal suits, it is toward a third area of equity's fascination, the evolution of new remedies to enforce common law rights, such as specific performance and the injunction particularly, that the focus of this paper is principally directed.[3]

An injunction is an order of the court directing a party to proceedings to do or to refrain from doing a specific act. It is granted in cases in which monetary compensation affords an inadequate remedy to an injured party and arose in courts of equity as an instrument of the Chancellor and his Chancery judges to overcome the inability of common law courts to grant relief appropriate to the injury or injustice.

Jurisdiction to grant injunctive relief is now invariably statutory but, being equitable in nature, is discretionary and is exercised usually only in aid of

legal rights. While courts have identified several types of injunctions and have enunciated rules or guidelines applicable to their granting, the rules have changed from time to time as judges both clarified and adapted the remedy to changing needs and circumstances.[4] The guidelines vary plainly between interlocutory and perpetual injunctions,[5] and the phenomenon known as the Mareva injunction falls clearly in the former category. Such orders are made in advance of any formal disposition, operating only until the final trial is held or a further order is made, thereby maintaining the status quo ante bellum.[6]

Prior to 1975, it was not possible in the ordinary case to obtain an interlocutory injunction to freeze a defendant's assets before judgment was obtained against him. There were few exceptions to this general rule and they involved fraudulent transfers, where statutes specifically authorized such orders or where particular assets were the subject matter of the litigation.[7]

In that year, the United Kingdom Court of Appeal, led primarily by Lord Denning, Master of the Rolls, devised a new remedy which came to be known as a Mareva injunction[8] after one of the very earliest cases, actually the second one granted by that Court.[9] It was granted to prevent a foreign defendant from disposing of his assets in the United Kingdom so as to defeat any recovery against him.

Lord Denning, in one of his recent autobiographical reminiscences, has called the Mareva injunction the greatest piece of judicial law reform in modern times.[10] There is no doubt that in eight years it has developed into a potent and well-used sword. Shortly put, this injunction will restrain a defendant from removing his assets from the jurisdiction of the court or disposing of them within the jurisdiction or otherwise dealing with them so as to frustrate any judgment which the plaintiff may obtain against him.[11] In essence, it enables a creditor to impound property of his debtor at the outset, long before he obtains judgment against the debtor, and then to have the property or its equivalent retained as security for payment of the debt in the event he afterwards gets judgment.

In those eight years since 1975, great extensions of that principle and some limitations have been placed on the availability of this remedy. Courts in the United Kingdom and several Commonwealth countries have adopted certain rules which have grown up around the injunctions[12] and, since 1979, the remedy has been granted, albeit sparingly, by superior courts of most of the Canadian provinces.[13] The Federal Court of Canada has ruled it too has jurisdiction to grant such relief.[14]

Four respected Canadian appellate tribunals have considered the merits of this judicial invention[15] and have endorsed its application within our shores.

It is true that the British Columbia Court of Appeal has not yet had fully argued before it the merits of this procedure but while one case awaits on the hearing list, the Court in obiter dicta in another has specifically supported its adoption in this Province.[16] It is estimated from this writer's examination that something in excess of fifty such orders, many unreported, have been granted by trial judges in the Supreme and County Courts in British Columbia.

The Supreme Court of Canada recently granted leave to appeal a 1982 Manitoba Court of Appeal decision and argument may be expected in Ottawa on the case in that Court's first examination of Mareva.[17] It is clear that the procedure has become an established and effective tool to civil litigants in our jurisdiction.

It is a unique remedial form; the purpose for which it came to be promulgated, the terms under which it may be granted and the circumstances permitting its extension or limitation bear close examination for it is truly an extraordinary measure. That much has been written in the learned journals in a very short time is evidence of its novelty; that both trial and appeal courts are still defining the boundaries of its effects is corroboration of the risks still present in its application.

We will in the pages following begin such an examination. It will not be finally concluded for some years yet to come.

FOOTNOTES

CHAPTER I

1. (1615) 1 Rep. Ch. 1; 1 W. & T.L.C. 615.

2. Sir Nathan Wright in Lord Dudley and Ward v. Lady Dudley (1705) Prec. Ch. 241 and at p. 244.

3. For insight into the historical development of the injunction, see Baker, P.V. and Langan, P.S. Snell's Principles of Equity, 28th edition. London: Sweet & Maxwell Ltd., 1982, particularly at p. 9 and p. 624. After a long period of hopeless rivalry, the Common Law Procedure Act, 1854, gave the common law courts a limited power of granting injunctions and the Chancery Amendment Act, 1858, (commonly called Lord Cairn's Act) finally gave the Court of Chancery power to award damages either instead of, or in addition to, an injunction or specific performance. The root of the problem however, was not dealt with until the fusion in 1875.

4. While most current textbooks will conveniently list the general rules or requirements applicable to injunctive relief, an excellent summary can be found in Snell, supra, fn 3, beginning at p. 627.

5. See infra, Chapter VI, for the principles applicable in cases of interlocutory injunctions following the 1975 case of American Cyanamid Co. v. Ethicon Ltd. [1975] A.C. 396. An excellent article on the topic is by Gray, C. "Interlocutory Injunctions Since Cyanamid" (1980) 40 Cambridge Law Journal 307.

6. Bean, David. Injunctions. London: Oyez Press, 1979.

7. See Chapter II, infra, for a discussion of these exceptions.

8. Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. (THE MAREVA)[1975] 2 Lloyds Rep. 509, [1980] 1 All E.R. 213.

9. The first reported case was Nippon Yusen Kaisha v. Karageorgis [1975] 1 W.L.R. 1093, 2 Lloyds. Rep. 137, 3 All E.R. 282.

10. Denning, Lord Alfred Thompson. The Due Process of Law. London: Butterworths, 1980. At p. 134.

11. Stockwood, David T. "Mareva Injunctions" (1980) Journal of Business Law 415. Also see excellent article by McAllister, Debra M. "Mareva Injunctions" (1982) 28

C.P.C. 1, now printed in book form under the same title at Toronto: Carswell, 1983, describing detail of the Mareva background.

12. Australia, New Zealand, South Africa and Canada, inter alia. See Appendix I for a comprehensive compilation of decisions of the United Kingdom courts since 1975.

13. Including the Northwest Territories Supreme Court which reported one of the very first heard in this country in April, 1980. B.P. Exploration Company (Libya) Limited v. Hunt [1980] 14 D.L.R. (3d) 35, 16 C.P.C. 168 [1981] 1 W.W.R. 209. See Appendix II for a comprehensive compilation of reported Canadian decisions concerning the granting of Mareva injunctions.

14. Elseguro Inc. v. Ssangyong Shipping Co. Ltd. (THE BOOYONG) [1981] 117 D.L.R. (3d) 105, (1980) 19 C.P.C. 1, 2 F.C. 326. Although not granted in this case, Collier J. after reviewing the authorities clearly indicated the remedy was available in the Federal Court and orders have been made in other applications since this case in 1980. See for example, Alhamlima Enterprises v. The Ship ATRA and Lorac Transport Ltd. (1980) (Unreported, T-4603-80) Midland Navigation A/S v. The Owners and Others Interested in the Freight and Sub-Freights of the Vessel MOUNT RAINIER and Equity Maritime Enterprises (1981) (Unreported, T-1736-81). His Lordship earlier granted such an order in the case of Seablue Shipping & Financing Co. S.A. v. Ssangyong Shipping Corp. Ltd. (1980) (Unreported, T-3231-80).

15. The Appeal Courts of British Columbia, Manitoba, Ontario and New Brunswick. See Chapter V, infra, for discussion of the cases.

16. Dean v. Ford Credit Canada Ltd. et al (1982) 38 B.C.L.R. 145 is awaiting appeal. The Court of Appeal judgment is that of Nemetz C.J.B.C., together with Carrothers and Craig, JJ.A. concurring, in Sekisui House Kabushiki Kaisha v. Ikuo Nagashima et al (1983) 42 B.C.L.R. 1.

17. Leave to appeal to the Supreme Court of Canada was granted January 28, 1983 in the Manitoba case, Feigelman et al v. Aetna Financial Services Ltd. et al [1983] 143 D.L.R. (3d) 715, 2 W.W.R. 97.

CHAPTER II - PRE-TRIAL ATTACHMENT

A. THE TRADITIONAL RULE

Before the Mareva doctrine was enunciated in 1975, it was an established principle of law that a court would not interfere at the request of the creditor with a debtor's right to manage his affairs, including his assets, prior to a trial on the merits of the creditor's claim. An injunction would not normally be granted to assist a plaintiff to obtain what would in effect be execution before judgment.

The line of common law authorities for the proposition appears to begin with the United Kingdom Court of Appeal in 1870 in Mills v. Northern Railway of Buenos Ayres[18] through National Provincial Bank of England v. Thomas[19] to Lister & Co. v. Stubbs[20] in 1890. The latter case is often referred to in this country by quoting the following passage from the judgment of Cotton, L. J.:

> "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."[21]

In that case, the plaintiff sued a former employee whose task it was to purchase supplies for his employer. The employee received kickbacks from the supplier for purchases he had made on the plaintiff's behalf and when the latter discovered the scheme, he sought recovery of the amount of the kickbacks and damages. His interlocutory application for an injunction preventing the defendant from dealing with or disposing of his immoral gains was twice dismissed on the ground that the law required a plaintiff to first prove his claim and to secure judgment.

At about the same time and based on early authorities, Mr. Justice Drake of the British Columbia court in 1889 in Baxter v. Jacobs, Moss et al put it this way:

> "In cases where there has been no order made for the payment of money by the Court, the Court cannot restrain a man from removing his property out of the jurisdiction of the Court."22

In Baxter, the plaintiff sought an interim injunction against the defendants after one of them had breached a contract to sell all his fur seals to the plaintiff for a fixed price stated in the contract. The defendant determined instead to sell his furs to another party and the plaintiff attempted to secure an order preventing him from parting with the furs, or removing from the

jurisdiction the monies received from their sale. An order was intitially granted ex parte but was dissolved on the basis of the clear law when the merits of the order were argued.[23]

Although in many jurisdictions statutory procedures have been adopted to provide some pre-judgment remedies for unsecured creditors, until recently the common law offered little assistance before the claim was reduced to judgment form. "English law," as Dunlop has pointed out "is unique in its firm refusal to assist the unsecured creditor before judgment."[24] As we shall later see, the "discoverer" of the Mareva injunction examined several principles of foreign attachment in other jurisdictions to locate principles to be applied in the new equitable doctrine.[25]

In this country statutory garnishment procedures have been enacted in most provinces to enable a creditor, prior to judgment, to attach a debt owed to a debtor by another person but the remedy is only available in claims for liquidated sums and does not affect assets, real or personal, already in the hands of the debtor. In British Columbia, the Court Order Enforcement Act,[26] the principal statute, and the Family Relations Act[27] contain the few guidelines available in such situations.

The latter, in common with legislation in most of the provinces of Canada and although akin to the Mareva in effect, is restricted to situations involving pending litigation between husband and wife and is designed primarily to act as security for subsequent orders related to maintenance and distribution of family assets.

B. THE EXCEPTIONS

The traditional common law rule barring injunctive relief to a creditor had hitherto been varied in only two instances: in cases of fraud and for preservation of the subject matter of litigation. They are not broad exceptions and courts have in the past neither readily nor easily construed situations to allow for their application.

1. Fraud

The courts have relaxed the prohibition against restraining a debtor from disposing of his assets where a creditor can establish a prima facie case of fraud on the part of the debtor. Widely accepted as an exception to the general principle, its basis lies in the equitable doctrine of fraus et jus nunquam cohabitant. So for example, when a debtor company attempted to dispose of its goods at less than their fair market value to another company con-

trolled by the same principal, an Ontario court restrained the debtor from dealing with those goods pending the outcome of the creditor's action.[28] Or when a former employee, convicted of theft from his employer, was sued by the latter for wrongful conversion of the stolen money, the employer was entitled by the court to an interlocutory injunction restraining the defendant from dealing with the fruits of his theft.[29]

The exception has continued in the wake of the Mareva doctrine as illustrated in the 1978 case of Edward Owen Engineering Ltd. v. Barclays Bank International Ltd.[30] where referring to the traditional rule, applicable in the case before him, Lord Denning, M.R. said:

> "To this general principle there is an exception in the case of what is called established or obvious fraud...."[31]

It is clear that applicants for the injunction must prove a prima facie case of fraud and also clear implication of the debtor in that fraud.

The legislature in this Province, as in most others in Canada, has enacted a statutory remedy to set aside or reverse fraudulent transfer of property.[32] Most such remedies based on the 1570 Statute of Elizabeth[33] and the Fraudulent Conveyances Acts of 1571, 1585 and 1586[34] although statutes can be found back as far as 1376[35] which

declare void conveyances and preferences when made to escape other lawful creditors. The law for centuries has had little regard for protection of debtors who "withdraw themselves, and flee into places of holy church privileged, and there hold them a long time, and take the profit of their lands and goods so given by fraud and collusion."[36]

The British Columbia statute, until very recently, was a verbatim reproduction of part of the four hundred year old Elizabethan law.[37] But even the more modern legislation referred to, here and across Canada, can of course only be utilized once the impugned conveyance has been completed (or to prevent a subsequent transfer) and is of little avail to the creditor seeking to preserve the debtor's assets before he disposes of them. Serious problems always exist in any event in the proof of actual fraudulent intent in such cases.

This exception of fraud to the general or traditional rule continues to exist and can be utilized regardless of the future of the Mareva injunction.

2. Subject Matter

Equally of benefit to a creditor is the relief available under Rule 46 of the Rules of Court:

"46. (1)(a) The Court may make an order for the detention, custody, or preservation of any property that is the subject matter of a proceeding or as to which a question may arise."[38]

Originally part of the court's inherent equitable jurisdiction,[39] the power to restrain a defendant from disposing of a specific asset which is the very matter of the litigation has been codified here, in England and in most of the Canadian provinces as a procedural rule. Although seldom explicitly used in British Columbia,[40] the limitations of the Rule are clear from its language and, as an exception to the principle prohibiting pre-trial attachment, does not afford great scope for an anxious creditor.

Some judges have attempted a more liberal interpretation of the Rule by expanding the phrase "or as to which a question may arise" when the assets sought to be detained or impounded cannot precisely be defined as "the subject matter."[41] Another has extended the meaning of "a proceeding" to include a non-judicial claim but both criticism visited by brother judges at such obviously shabby extensions and limited applicability of the Rule as a method of pre-judgment detention of a defendant's assets render the exception unreliable.[42]

C. PRE-JUDGMENT ALTERNATIVES

As noted in the previous heading, it is not a novel step for a debtor to seek to avoid civil liability or attachment by hiding himself or his assets or by actually fleeing the jurisdiction. Garnishment, while now almost universal and the most effective means when appropriate, has its limitations in such circumstances. In most Canadian provinces, if a creditor learns in advance of a debtor's intention to abscond, he is able to have him arrested and held until civil process of suit and judgment have enabled justice to be obtained. The process, having its roots in the thirteenth century procedure known as capias ad respondendum, has continued to be available although in modern times, it is infrequently used as it is seldom known by a creditor that his debtor is about to flee.

The other early English common law remedies against absconding debtors seldom were effective either as it had for centuries been assumed that for a court to have jurisdiction over personal actions the defendant was required to make an appearance in court. It was only when devices such as outlawry[43] and foreign attachment were contrived allowing the court to take jurisdiction over assets of a debtor who had fled the country that successful pre-judgment execution arrived in England.[44]

A modest form of foreign attachment, about which more will be said later,[45] was available in certain of the borough courts of London. Its intent was to coerce a defendant absent from the city into returning to London in order to defend the plaintiff's action. The device was successful for some centuries,[46] although limited in its geographic scope,[47] but fell into disuse over a century ago. It was while in existence available primarily in cases of debt and appears never to have launched a foothold in this country by virtue of the introduction of legislation encompassing the broader attachment of debts.

It is not the intention of the writer to canvass all available procedures for attachment of debts, save as they relate to the Mareva injunction itself. They are generally well-known and much has been written of them in recent years. The Dunlop text to which earlier reference has been made together with several recent papers produced in British Columbia[48] well describe the growing armoury available to a creditor, whether secured or unsecured.

For the creditor faced with an absconding debtor, it is possible in this country to obtain a writ of attachment to sequester the defaulter's assets left behind within the jurisdiction.[49] As McAllister has pointed out however:

> "Needless to say, there will be few cases where an absconding debtor will be foolish enough to leave any exigible property behind (him)."[50]

While absconding debtor legislation is available in all other Canadian jurisdictions, it ceased to be of assistance to British Columbians with repeal of the Absconding Debtors Act in 1978 and is no longer present in this province in this form, save for the Mareva principle.[51] It was repealed following a recommendation of the British Columbia Law Reform Commission that the statute was "beyond repair and obsolete and should be repealed."[52]

The limitations inherent in most pre-trial attachment procedures, whether by way of garnishment, imprisonment, writ of attachment, absconding debtors' legislation or as exceptions to the Rule in Lister & Co. v. Stubbs, have not provided satisfactory recourse for many creditors and our law has been deficient in this regard for some time. At least one author is inclined to view the Mareva cases as a judicial cure to correct a major weakness in English debtor-creditor law.[53]

FOOTNOTES

CHAPTER II

18. (1870) 5. Ch. App. 621, especially Lord Hatherley at p. 627.

19. (1876) 24 W.R. 1013, 3 Chan. Pr. Cas. 396. See as well Robinson v. Pickering (1881) 16 Ch. D. 660, per James L.J. at p. 661.

20. (1890) 45 Ch. D. 1, [1886-90] All E.R. 797.

21. Ibid, at p.23 (Ch. D.).

22. Baxter v. Jacobs, Moss et al. (1889) 1 B.C.R. 370 at p. 372.

23. Ibid.

24. Dunlop, C.R.B. Creditor-Debtor Law in Canada. Toronto: Carswell, 1981. At p. 188.

25. See Chapter IV, infra.

26. R.S.B.C. 1979, c. 75.

27. R.S.B.C. 1979, c. 121.

28. Robert Reiser and Co. Inc. v. Nadore Food Processing Equipment Ltd. et al [1977] 81 D.L.R. (3d) 278, 17 O.R. (2d) 717.

29. City of Toronto v. McIntosh et al [1977] 16 O.R. (2d) 257.

30. Edward Owen Engineering Ltd. v. Barclays Bank International Ltd. [1978] 1 All E.R. 976.

31. Ibid, at p. 982. For further modern day illustrations of the exception to the rule, see also Mills and Mills v. Petrovic et al [1981] 118 D.L.R. (3d) 367 (theft of funds by a bookkeeper), C.D.N. Research and Development Ltd. v. The Bank of Nova Scotia [1981] 121 D.L.R. (3d) 485 (fraudulent call on letter of credit) although set aside by the Divisional Court on other grounds, see [1982] 136 D.L.R. (3d) 656, and Rosen et al v. Pullen et al [1982] 126 D.L.R. (3d) 62 (breach of contract of intended marriage.)

32. Fraudulent Conveyance Act, R.S.B.C. 1979, c. 142; Fraudulent Preference Act, R.S.B.C. 1979, c. 143.

33. 13 Eliz. 1, c. 5.

34. Particularly 27 Eliz. 1, c. 4 and 29 Eliz. 1, c. 5.

35. 50 Edw. 3, c. 6.

36. From the 1379 Statute of 2 Rich. 2, c. 3.

37. The British Columbia Fraudulent Conveyance Act, supra, fn 32, was only revised in 1979 and now more closely resembles its Canadian counterparts. The original Elizabethan Statute was repealed in 1925 and replaced by provisions contained in the Law of Property Act of that year (1925) 15 Geo. 5, c. 20, s. 172.

38. Rules of the Supreme Court, R. 46.

39. See for example, Great Western Railway v. Birmingham & Oxford Junction Railway (1848) 2 Ph. 597, 41 E.R. 1074.

40. The British Columbia Court of Appeal dealt with an earlier equivalent rule in Wheatley v. Ellis (1944) 3 W.W.R. 462.

41. See the decision of Fulton, J. in Nicoll v. Oakes (1979) 17 B.C.L.R. 356 for one very liberal interpretation.

42. For example, see comments of McEachern, C.J.S.C. in Dean v. Ford Credit Canada Ltd. et al, fn 16, supra.

43. Dunlop, supra, fn 24, p. 195.

44. Ibid. The writ ne exeat regno, restraining a defendant from leaving the country, has even more limited applicability and is directly related to evidence as opposed to execution.

45. See Chapter IV, infra.

46. See thorough article by Levy, Nathan. "Attachment, Garnishment and Garnishment Execution: Some American Problems Considered in the Light of the English Experience." (1972-3) 5 Connecticut Law Review 399, particularly beginning at p. 407.

47. Two House of Lords decisions: Mayor and Alderman of London v. Cox (1867) L.R. 2 H.L. 239 and Mayor and Alderman of London v. London Joint Stock Bank (1881) 6 App. Cas. 393, effectively terminated the procedure. See further Levy, supra, fn 46, at p. 424.

48. Dunlop, supra, fn 24. See also Continuing Legal Education Society of British Columbia, Proceedings at Seminar on Execution, held at Vancouver, B. C. on February 18, 1983.

49. See McAllister, supra, fn 11, at p. 30.

50. Ibid.

51. R.S.B.C. 1960, c. 1, repealed August 15th, 1978 by S.B.C. 1978, c. 11, s. 1.

52. See Law Reform Commission of British Columbia, Report on The Absconding Debtors Act and Bail Act: Two Obsolete Acts (1978).

53. Dunlop, supra, fn 24, at p. 197.

CHAPTER III - DEVELOPMENT OF THE CONCEPT

Against this background then emerged the Mareva doctrine in 1975. That it is a radical departure from traditional principles is obvious and reference to that heritage outlined in the previous chapter serves solely to emphasize the sharp change in direction which the common law was forced to encounter. To see the present position in clearer perspective, one must always first look back and while the leading authorities in the United Kingdom may by now be familiar to many lawyers and judges who have brushed with Mareva in her short life, so too it is helpful to examine the development of the initial concept and its accepted refinements to better understand the course ahead.

A. FORMULATION OF THE MAREVA

An unsatisfied judgment against a defendant without assets one learns from experience is but a Pyrrhic victory! With Britain's entry into the Common Market and the revitalisation of international shipping focussed in the brokerages centered in London, that City re-emerged in the years following the Second World War as a commercial hub of legitimate industry. The reputation and volume of business flourished well into the 1960's and 70's before the economic order fluttered and began to suffer in the latter part of the last decade.

Freight, currency and commodities markets all became depressed and as in such times, economic practicalities become of paramount importance for commercial men in their dealings with one another. This phenomenon is never more apparent than in the shipping industry when contracts, often involving thousands and millions of dollars, are generally made months, even years, in advance of required performance or payment.

Charters entered into by a large Japanese shipowner provided such an instance. N.Y.K. had chartered three vessels to the defendants who were Greek; some of the charter hire had been paid but as it grew uneconomic to continue to operate the vessels, the defendants ceased their payments to the owners and ultimately vanished without trace. Donaldson J. of the United Kingdom Commercial Court in London refused an ex parte application for an interlocutory injunction against the defendants, seeking to restrain them from disposing of some funds they had on deposit with a bank in London. The law we have examined was clear, and without statutory absconding debtor remedies in that country, the course was plain; the shipowner must first obtain judgment.

Instead, he appealed; the respondents were not represented at the hearing or the appeal. Within the general language of section 45 of the Supreme Court of Judicature (Consolidation) Act (U.K.), 1925, which provides

> "A mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the court in all cases in which it shall appear just or convenient...."[54]

the English Court of Appeal in Nippon Yusen Kaisha v. Karageorgis[55] in the leading judgment of the Master of the Rolls said:

> "It has never been the practice of the English Courts to seize 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."[56]

Feeling that time for change had come, the Court held than an injunction should be granted. The shipowner had shown a prima facie case that the hire was due and was unpaid and there was real fear that the defendants would move what money they had in London outside the jurisdiction, defeating for all practical purposes any subsequent judgment which could be entered against them.

The decision went relatively unnoticed until another firm of solicitors several weeks later brought a second case, also before Donaldson J. In Mareva Compania Naviera S.A. v. International Bulkcarriers S.A. (The MAREVA)[57], the plaintiff shipowners had chartered their vessel on a timecharter, hire being payable half monthly in

advance. The third instalment was not paid and the ship-owners treated this as repudiation of the contract and claimed damages for the breach. The defendants had sub-chartered the vessel to a third party who was making payments to a London bank to the credit of the defendant. The plaintiffs therefore also sought an injunction to prevent the defaulters from removing out of the jurisdiction the funds on deposit in the bank.

Mr. Justice Donaldson this time granted an interim order but only until the matter could be reviewed by the Court of Appeal, feeling himself bound by the Lister v. Stubbs earlier authorities. The order was there confirmed; the appeal judges variously distinguished the traditional rule in the Lister line or did not feel bound by it. Relying on the statutory ability to grant an injunction in cases where it appeared just or convenient, the Court in effect redefined a creditor's equitable right to be paid or secured for his debt before he had legally established this right by judgment:

> "If it appears that the debt is due and owing, and there is 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."58

Pointing vividly to the plaintiff's weak position in the situation and the fact that charterers were in sole control of the funds they had received and banked from the sub-charter, the Master of the Rolls protectively but accurately surmised that the shipowner would never see his charter hire should the monies be removed from their London depository out of the jurisdiction and concluded:

> "In face of this danger, I think the Court ought to grant an injunction to restrain the defendants from disposing of these monies now in the bank in London, until the trial or judgment in this action."59

Welcome though these decisions were, early observers were critical of such a drastic turnabout in the state of settled law. There had been no statutory change; the ostensible jurisdictional base had existed since 1873, even prior to the Lister decision,[60] and could hardly be said to be newly-discovered. As one observer commented:

> "If one ignores the court's reasoning, the decision is welcome for it shows the liberal attitude of the Court of Appeal towards a plaintiff requiring protection. If the courts, whenever a novel point came before them were to spend their time wondering whether they had jurisdiction to act, then the law would never develop; it would remain static and devoid of life."61

Whether or not on sound ground, the judgments stood and guided trial judges in England for

several years. As one of the those judges, Mr. Justice Mustill, was later to describe:

> "As a result of these decisions, the Mareva injunction was recognised as fulfilling a useful role albeit within a limited field. Where a creditor had a claim against a foreign debtor which was not disputed or was not capable of serious dispute, it frequently happened that his only practical prospect of obtaining payment was to obtain execution against an asset known to be situate within the jurisdiction.... It was to cases of this nature that Mareva relief was mainly if not exclusively applied... before the (next) decision of the Court of Appeal."62

In at least twenty-four reported cases since 1975, the Court of Appeal has had ample opportunity to refine the principle.[63] While there are another dozen reported High Court decisions involving this form of injunction, the issue reached the House of Lords in but one instance, The SISKINA[64] in 1980, and on that appeal, their Lordships, while reserving on the question of the correctness of the earlier decisions, were nevertheless prepared to assume the existence of the power in principle.

B. ITS REFINEMENT

In the refining process, the scope of Mareva has been much expanded and enlarged.[65] While initially declining to "fetter (the principle) by rigid rules

from which a judge is never at liberty to depart,"[66] Lord Denning and other members of the Court thereafter began to develop case by case some considerations for trial judges and litigants to bear in mind when seeking to apply the discretion authorised by the statute.

While we shall later review the specific guidelines which have come to be adopted in this country, it is interesting to here note the speed with which refinements to the procedure were put in place. For the first two years of Mareva evolution, most applications for the injunction were made in shipping cases, usually for breach of a charterparty, were obtained invariably ex parte, and even on the early appeals, defendants never applied to be heard.

In 1977 in Rasu Maritime S.A. v. Perusahaan et al (Pertamina),[67] both sides were heard for the first time. General Sutowo on behalf of an Indonesian state company entered into tanker charterparties when the market was at its peak. With the increase in world oil prices from 1973 onwards, the market collapsed and many charterers sought to renegotiate their contracts. The General was not successful at the task and was ousted from power.

One of the entrepreneurs who had been associated with the General had set up a Liberian company, Rasu Maritime, to act as broker for the Indonesian company

by placing orders in the world market for the hire of tankers for the Indonesians. Rasu used some of its own ships in chartering to the General and in fact, built and delivered one such vessel, the MANHATTAN DUKE, in 1976, just prior to the General's fall from power.

The hire payments to Rasu ceased and the Indonesian company's assets were rapidly being transferred to national safety back home. At the time Rasu commenced action against the Indonesians for $10,000,000.00, the combined liabilities of the company exceeded $1,000,000,000.00. There were some materials of the defendants, valued at $12,000,000. located on Liverpool docks. A Mareva was sought as well and while granted initially ex parte, was later dissolved and on appeal to restore the order, the plaintiff was unsuccessful.

For the Court, the Master of the Rolls outlined in a somewhat stronger opinion his justification for the existence of the injunction, by then simply labelled "a Mareva." Pointing primarily to the statutory discretion, Denning M.R. also found some limited historical basis which we shall later examine.[68] While declining the injunction in part on the basis of uncertainty as to ownership of the cargo on the Liverpool docks, the Court added two refinements which remain an integral part of Mareva jurisprudence.

First, the injunction should not issue unless the plaintiff can show "that he has a good arguable

case."[69] This test or onus while peculiar to instances of Mareva after the earlier decision in American Cyanamid Co. v. Ethicon Ltd.,[70] was later adopted as one of the firm guidelines.[71] Second, it was held that injunctions could be directed not only against money and bank accounts, but against goods as well.

Thereafter, "the Mareva injunction soared in popularity and became a thriving industry for Britain's commercial litigation lawyers."[72] In a series of twelve cases during the next three years,[73] the Court had concluded the major task of refinement.

While initially developed as an ancilliary proceeding as part of a claim for debt advanced against a defendant who was out of the jurisdiction but who had assets within the jurisdiction, it is clear it now includes defendants who are not foreign-based but who may be described as resident.[74] This was in fact suggested by Lord Hailsham in obiter in The SISKINA.[75]

Equally, while initially the order was to prevent removal of assets out of the jurisdiction, the scope of orders granted has been extended to include disposition of assets within the jurisdiction. It did not take long to realise that a defendant who could sell, transfer, mortgage or encumber his assets could abide the order to leave them within the jurisdiction and still

frustrate his creditor. Although on a contested application or on motion to vary the terms of a Mareva injunction a defendant will normally be allowed to deal with his assets in the ordinary course of his business,[76] it is necessary to satisfy the court that the plaintiff's position will not be jeopardized by such a variation.[77]

The injunction will issue against all assets to which the defendant has entitlement or claim whether in the nature of money, goods, real property, aircraft, vessels or most other moveables or immoveables.[78] It issues against both specific and unspecific but ascertainable assets[79] and once granted, is capable of an ambulatory effect so as to apply to subsequent additions to any class of property specified in the injunction.[80]

Actions in which the corollary Mareva can be sought, once restricted to debt claims, appear now to be unlimited and orders have been given in negligence, tort, contract, and matrimonial claims;[81] an order has been given in a claim for costs.[82]

In 1979, certain procedures were adopted by the English courts as prerequisites to the granting of a Mareva[83] and as we shall see,[84] each of the Canadian appellate courts has approved these guidelines in varying degrees. Generally, that has been true of other Commonwealth courts as the practice has spread. The only Australian

appeal court to review the doctrine, the New South Wales Court of Appeal, in Riley McKay Pty. Ltd. v. McKay and Another,[85] recently declined to formally endorse the Third Chandris guidelines observing that it was

> "...undesirable to undertake the formulation of general tests or boundary lines which might, in their very generality, preclude or distort the useful development of this new remedy."[86]

Expressing some scepticism as to the future use of the doctrine, the Australian court reflects what generally has been judicial caution against permitting possible abuse of a new and, at least in that country, not fully tested concept. In allowing the injunction to stand (as four earlier state courts had),[87] the court put into perspective the rationale for the departure from the earlier common law and confirmed the basis of the remedy as

> "...the risk that the defendant will so deal with his assets that he will stultify and render ineffective any judgment given by the court in the plaintiff's action, and thus impair the jurisdiction of the court and render it impotent properly and effectively to administer justice.... The jurisdiction to grant the injunction is not to be exercised simply to preclude a debtor from dealing with his assets.... It is directed to dispositions which... are intended to frustrate or have the necessary effect of frustrating, the plaintiff in his attempts to seek through the court a remedy for the obligation to which he claims the defendant is subject."[88]

FOOTNOTES

CHAPTER III

54. 15 & 16 Geo. 5, c. 49. This provision repeats sec. 25 (8) of the Judicature Act (U.K.) of 1873.

55. Supra, fn 9.

56. Ibid, at p. 283 (All E.R.).

57. Supra, fn 8.

58. Ibid, per Denning, M.R. at p. 215 (All E.R.).

59. Ibid, at p. 216.

60. See fn 20, supra.

61. Lazarides, M.T. "The Mareva Injunction - an Analysis" (1978) City of London Law Review 43, at p. 47.

62. In Third Chandris Shipping Corporation v. Unimarine S.A. (The PYTHIA) [1979] Q.B. 645, 3 W.L.R. 122, 2 Lloyds Rep. 184, 2 All E. R. 972, at p. 975 (All E.R.).

63. See Appendix I.

64. Ibrahim Shanker and Co. and Others v. Ditos Compania Naviera S.A. (The SISKINA) [1977] 3 W.L.R. 818, 3 All E.R. 803, [1978] 1 Lloyds Rep. 1, (1979) A.C. 210.

65. For fuller discussion, see an article by Powles, David, "The Mareva Injunction Expanded" (1981) Journal of Business Law 415.

66. [1977] 2 Lloyds Rep. 397, 3 All E.R. 324, (1978) 1 Q.B. 644, at p. 333 (All E.R.).

67. Ibid.

68. See Chapter IV, infra.

69. Pertamina, supra, fn 66, at p. 334.

70. Supra, fn 5; C.f. discussion in Chapter VI, infra, at p. 67.

71. See Chapter VI, infra, at p. 71.

72. McAllister, supra, fn 11, at p. 37.

73. Particularly: (in chronological order)

Associated Bulk Carriers Ltd. v. Koch Shipping Inc. (The FUOSHAN MARU) [1978] 1 Lloyds Rep. 24;

Citibank N.A. v. Hobbs Savill & Co. Ltd. et al (The PAN GLOBAL FRIENDSHIP) [1978] 1 Lloyds Rep. 368;

Cretanor Maritime Co. Ltd. v. Irish Marine Management Ltd. (The CRETAN HARMONY) [1978] 1 W.L.R. 966, 1 Lloyds Rep. 425, 3 All E.R. 164;

Negocios del Mar S.A. v. Doric Shipping Corp. S.A. (The ASSIOS) [1979] 1 Lloyds Rep. 331;

Montecchi v. Shimco (U.K.) Limited [1979] 1 W.L.R. 1180, [1980] 1 Lloyds Rep. 50;

Gebr. Van Weelde Scheepvaart Kantoor B.V. v. Homeric Marine Services Ltd. (The AGRABELE) [1979] 2 Lloyds Rep. 117;

Etablissement Esefka International Ansalt v. Central Bank of Nigeria [1979] 1 Lloyds Rep. 455;

Third Chandris Shipping Corporation v. Unimarine S.A. (The PYTHHA) [1979] 3 W.L.R. 122, 2 Lloyds Rep. 184, Q.B. 645, 2 All E.R. 972;

Chartered Bank v. Daklouche [1980] 1 W.L.R. 107, 1 All E.R. 205;

Allen and Others v. Jambo Holdings Ltd. and Others [1980] 1 W.L.R. 1252, 2 All E.R. 502;

Iraqui Ministry of Defence v. Arcepey Shipping Co. S.A. (Gillespie Brothers and Co. Ltd. intervening) (The ANGEL BELL) [1980] 1 Lloyds Rep. 632, 1 All E.R. 480, [1981] 2 W.L.R. 488, Q.B. 65;

Prince Abdul Rahman v. Abu-Taha and Another [1980] 1 W.L.R. 1268, 3 All E.R. 409.

74. Barclay-Johnson v. Yuill [1980] 1 W.L.R. 1259, 3 All E.R. 190. Prince Abdul Rahman v. Abu-Taha and Another, supra, fn 73, Chartered Bank v. Daklouche, supra, fn 73.

75. Supra, fn 64, at p. 9 (Lloyds Rep.).

76. See fn 77 and Chapter VI, infra, p. 79.

77. THE ASSIOS, fn 73; see also McAllister's article on point, fn 11. While the initial order is normally granted in general terms, at the request of a defendant the Court, particularly as more details of the defendant's assets become known, will often permit him to

deal with his stock in trade if sufficient other assets or security are still available for the protection of the plaintiff.

78. Rasu Maritime S.A. v. Perusahaan et al, supra, fn 66. See also Allen and Others v. Jambo Holdings Ltd. and Others, supra, fn 73.

79. Third Chandris Shipping Corporation v. Unimarine S.A. (The PYTHIA), fn 62.

80. Cretanor Maritime Co. Ltd. v. Irish Marine Management Ltd., fn 73.

81. Allen and Others v. Jambo Holdings, fn 73; Barclay-Johnson v. Yuill, fn 74; Pivoraroff v. Chirnalbaeff (1978) 16 S.A.S.R. 329; Manousakis v. Manousakis, fn 142; Quinn v. Marsta Cession, fn 235, are but examples.

82. Faith Panton Property Plan Ltd. v. Hodgetts and Another [1981] 1 W.L.R. 927, 2 All E.R. 877.

83. Third Chandris, supra, fn 62.

84. Infra, chapter VI, p. 70.

85. [1982] 1 N.S.W.L.R. 264.

86. Ibid, at p. 276.

87. See article by Hodgekiss, C.C. "Mareva Injunctions - Recent Australian Developments" (1983) 99 Law Quarterly Review 7 and also, Hetherington, M. "The Mareva Injunction: Australian Equity" (1980) 18 Law Society Journal 55 and Bowers, J. and Rosen, H., "Mareva Injunctions: Analysis of Recent Cases" (1981) New Law Journal 517 for fuller discussion of Australian and some New Zealand developments.

88. Ibid, also at p. 276.

CHAPTER IV - FOREIGN ATTACHMENT

A. EARLY ENGLAND

Early arguments found some historical justification for the Mareva order in ancient or foreign customs. As we shall see, these did not remain in England and their continuation elsewhere is doubtful. Whether it was politically or commercially appropriate to reintroduce the practice is of course a question apart from the wisdom of effecting it by judicial process.

The first cases invoking the attachment principle were invariably commercial disputes, often claims in 'Admiralty, where mercantile practices gradually found their way, with Lord Mansfield's generous help, into the common law of England. Admiralty Courts, operating quite separately until 1875, had incorporated much of civil law practice in their distinct area of jurisdiction by virtue of the Court's heritage and the genesis of its basis of substantive law.

The attachment of vessels, their cargo and freight are common steps in admiralty proceedings and attempts at extension of the principle to other commercial practices in England during the eighteenth and nineteenth centuries were not uncommon.

The early arguments relied on an old custom of the City and Port Courts of London referred to in a previous chapter as foreign attachment. While no reference was made in decisions first granting the injunction, in the later case of Pertamina,[89] Lord Denning briefly reviewed the ancient London law which permitted a plaintiff to obtain a writ to attach assets left behind by a debtor who had departed the jurisdiction.[90]

Quoting from a 1723 text by Bohun[91] and an 1842 text by Pulling,[92] the Master of the Rolls in 1977 pointed to what he described as the "customs of England":

> "...this mode of proceeding, which seems to have prevailed at a very early period in London, as in other Roman provinces, was always considered extremely important to the citizens as a commercial people, who, having given credit to a trader, might be debarred of their remedy by his going out of the jurisdiction of their courts, though at the same time he might have left ample effects behind him in the hands of third parties.... This customary mode of proceedings still exists in other ancient cities and towns in England, as Bristol, Exeter, Lancaster, as well as in Scotland, and in Jersey, and in most maritime towns on the continent of Europe.... Any kind of goods or money belonging to the defendant may be attached whether locked up in boxes or not, (for the court may order them to be opened) .... This remedy is not confined to citizens, or even residents within the city; it is a common process, open to any person when his debtor has property within the jurisdiction of the court...."[93]

There was no doubt as to its efficiency

and as Levy has reported,[94] by the close even of the fourteenth century, foreign attachment, derived from the Law Merchant, was already an ancient custom. It was clearly necessary as in every society in which credit transactions have existed, creditors have been troubled by the nefarious departure of persons to whom they have made loans or to whom they have sold goods on credit. London, as the largest of the commercial centers in the world at that time, had the greatest problem, particularly when a substantial part of the commerce was with foreigners who were more apt than local citizens to disappear without warning.

This means, developed as a method whereby local creditors could reach with despatch any assets their departed debtors might have left behind, was an early forerunner to the modern day Absconding Debtor Acts we have already discussed.[94a] Although ostensibly guaranteed as a privilege of the Port and City of London Courts by kings and parliaments from an early time,[95] the custom could hardly be said to have still been applicable in 1975 or even 1977 as a basis for its re-introduction in another guise.

Emboldened to pursue the topic further, one might suggest that three important factors respecting the practice of foreign attachment as known in England should have been considered by the Master of the Rolls. Firstly, its use was generally restricted to wholly commercial disputes involving traders and their customers, one of whom

was invariably a foreigner and beyond the normal jurisdiction of the courts. It was not a remedy available in situations involving two citizens or subjects engaged in a legal quarrel.

Secondly, after about 1750, there was a general requirement that notice be given to a defendant prior to an application for the writ of attachment by a plaintiff in London. Such writs were not available ex parte as is the Mareva and while the former loses much of the fascinating efficiency of the latter, it could not be obtained without summons and notice.[96] This change in previous practice was brought about by corollary reforms in mesne process in common law superior courts which, for example, enabled plaintiffs to obtain judgment in default of appearance[97] and introduced methods of garnishment for creditors.[98]

Lastly, and most importantly, the practice, because of its flagrant abuse, was abandoned when the House of Lords in 1867 approved a writ of prohibition against the London court from proceeding with its attachment process.[99] A second case in 1881 in the same forum provided its final death knell.[100] While Halsbury comments

> "The process of foreign attachment... though still valid, has fallen into disuse since the decision of the House of Lords in [the two cases earlier referred to]...."[101]

the better view of scholars is that the London courts then altogether ceased to exercise these ancient powers and not one modern reference can be found.[102] It is perhaps relevant to note also that no comment whatever appears in the most recent (1979) edition of Halsbury.

A century before Mareva arrived in England

> "...the time had become propitious for the jettisoning of a series of procedures which offended the modern sense of fair play more than they did the medieval attitudes, and which were thought... to be bad for business."[103]

So much for the customs of England.

(B) IN SCOTLAND

It was not unnatural since entry of the United Kingdom into the European Economic Community that reference should be had to similar laws and practices in other member nations of the Community. Comity amongst them is a contractual goal and congruence of their laws and their enforcement an admitted aim. The U.K. Court of Appeal turned to examine what are on the surface practices in some European nations based on civil law akin to the abandoned foreign attachment process in London. They did not have to look far and eyes first turned northward to Scotland.

> "Now that we have joined the Common Market, it would be appropriate that we should follow suit, at any rate in regard to defendants not within the jurisdiction. By doing so we should be fulfilling one of the requirements of the Treaty of Rome, that is the harmonisation of the laws of the member countries."104

And in a later case, Lord Denning affirms:

> "Now that we are in the Common Market, it is our duty to do our part in harmonising the laws of the country...."105

and:

> "In order to harmonise the laws of the Common Market countries, it is therefore appropriate that we should apply protective measures here so as to prevent these insurance monies being disposed of before judgment."106

Of the goal and aim of the Treaty of Rome and conventions among member nations of the E.E.C., there is no doubt. As to the role of English courts in the process, the Lords of Appeal in Ordinary in the House of Lords bluntly but fairly reminded the Master of the Rolls of the distinction between legislative and judicial functions:

> "There is little encouragement here for judges of national courts of member states to jump the gun by introducing their own notions of what would be a suitable harmonisation of laws concerning their jurisdiction and that of courts in other member states."107

Lord Diplock, whose speech was concurred with by the other four Law Lords, also pointed out that the 1968 E.E.C. Convention on Jurisdiction required original member states, such as Germany which exercised jurisdiction over a defendant based solely on existence in that country of assets belonging to him, to abolish the practise. Scots courts, by a process we shall briefly examine, are being required to do likewise:

> "Comity, therefore, ... would seem to be against a Mareva injunction as a procedural device...to adjudicate on the merits in actions against foreign defendants not ordinarily resident in England, but possessed of some assets here."[108]

The Scots practice, as with German and other European procedures referred to, is generally tied to the concept of providing the national court with jurisdiction to proceed against an absent defendant by taking jurisdiction over his chattels then present. "The arrest of moveables by a plaintiff gives jurisdiction to a Scottish court *in personam* over a defendant."[109]

The procedure, known as *arrestment ad fundandum jurisdictionem*, permits a plaintiff to arrest in the hands of a third party moveable property of commercial value, whether or not connected with the subject of the action, belonging or owed to the defendant if the defendant is otherwise beyond the jurisdiction of the Scottish court.

It is apparently a good ground of jurisdiction only in actions for debt or damages and gives to a plaintiff no right by itself to property attached.[110]

> "The effect of the arrestment is to render the subject arrested litigious, so that it is an offense for the third party to sell or otherwise dispose of the property or pay or deliver it to the debtor."[111]

As soon however, as the foreign defendant enters an appearance, the arrest ceases and

> "...the arrestee is not longer...under any obligation to retain in his hands the moveables which (the order) affected .... It does not attach to the property itself and serves primarily as notice."[112]

It is necessary for the pursuer to be successful in an action of "furthcoming" as well as his principal cause in order to secure any interest in the property initially detained. The procedure, described by the same House of Lords in a Scottish appeal in 1975 as an "exorbitant" jurisdiction,[113] was apparently originally an importation from Holland to provide an exceptional remedy "for reasons of expediency and the encouragement of trade."[114] It is supplementary to traditional forms of attachment under the Debtors (Scotland) Act, 1838, known as poinding and inhibition. It is seen that Scottish procedure

does not extend to the claims of the Mareva and in any event, may soon become extinct as the United Kingdom enters fully into its E.E.C. commitments.

(C) ELSEWHERE IN EUROPE

The custom in France appears closest to Lord Denning's initial intention. French law, with its Roman and German civil law base, authorizes creditors to attach property of their debtors when speed is important and payment of the debt is clearly endangered. Relief of a provisional nature solely, the attachment known as saisie conservatoire was until 1955 a restrictive remedy available only in commercial cases[115] but it has since been broadened somewhat to include all cases which in the common law world one would describe as debt.[116] The most extensive of the forms of pre-trial foreign attachment, it provides an ideal model for the Mareva injunction.

Available in a similar way under the Quebec Code of Civil Procedure,[117] this procedural rule enables a plaintiff to apply to a judge of the court in the area in which a defendant is normally resident or in which his assets are present, ex parte if required by the circumstances, for a provisional order preventing disposition of property until the court has heard and decided the merits of the claim. Petitioning for such an order, the plaintiff must

describe why attachment is required, provide a specific description of the property to be attached and give affirmations that his claim is well-founded and that speedy action is essential to ensure eventual payment of the judgment.[118]

Once the order is obtained, the debtor may secure its cancellation only by contesting the merits of its granting before a judge of the court or by giving security for payment of any judgment which may be recovered against him.[119] In commercial matters, if the debtor is a registered merchant, a plaintiff may also get the court's authority to register a temporary filing against the debtor's business until judgment is recovered. This latter step would appear to operate as a pre-judgment lien or notice as possession of property does not change in the procedure.[120] Attachment by saise conservatoire does not apply to real property assets.

It is not a requirement that the debtor be foreign; in fact, two further forms of attachment, saisie arret,[121] a practice akin to our garnishment proceedings, and saisie foraine[122] are also available. The last mentioned is specifically designed to attach personal property of debtors who have neither domicile nor residence where the creditor lives and is described as

> "a very expeditious procedure...,
> primarily intended to protect merchants

> who give credit to travelling salesmen and other persons spending very little time in one place."[123]

Saisie conservatoire, like early London custom, was brought about for commercial purposes, to prevent hardship; like the Mareva injunction, it is secured very quickly, in order to preserve assets and to prevent a debtor from frustrating the ends of justice. The other European practices generally have impediments not found in the current Mareva practice and are not extensively used.

German practice, criticised by the other E.E.C. participants, does not appear to be extensively called upon except in the case of absconding foreign debtors and can thus be equated to the Canadian legislation designed for the same purpose.[124] On application, supported by sworn affidavits, a local creditor is entitled to an interim order in the nature of an injunction either to arrest assets of the debtor or

> "to prevent a change of existing conditions which may render impossible or substantially more difficult the realisation of (his) rights...."[125]

The process is known as "Einstweilige Verfugung".[126]

Said to be of great practical importance in dealing with foreigners and "among the best features of

German civil procedure,"[127] the relief is to enable the creditor to obtain security for his contested claim while a lawsuit is pending, and even before it starts and is available if the creditor

> "can establish facts which lead to the assumption that the debtor, before the enforcement of any judgment against him is possible, will take steps which will render the enforcement of judgment substantially more difficult or even impossible."[128]

In the Netherlands, the rules of civil procedure enabling provisional attachment, conservatoir belag,[129] appear more restrictive, are reserved for exceptional circumstances and in the view of at least one current writer, are suspect in their future continuation because of the E.E.C. Convention of 1968 earlier mentioned.[130]

(D) IN AMERICA

A large number of American states imported the English custom of the London courts before that practice fell into disrepute and was abandoned. While it was "acted on by a number of the colonies because it suited the needs of an expanding credit economy and of a people, averse to imprisonment for debt, who travelled at will among limited sovereign states spread over a large territory,"[131] the pre-

trial attachment processes used in jurisdictions of our neighbours to the south have suffered a checkered history since enactment of the Fourteenth Amendment to the U.S. Constitution, related to due process.

The United States Supreme Court in the period from 1969 to 1975 struck down a number of existing state statutes for their failure to provide an early hearing of an attaching plaintiff's claim. Several models of foreign attachment, in much revised form, still exist, primarily on the Atlantic seaboard although they also remain in modified measure in Wisconsin, Louisiana and Georgia.

The civil practise rules of New York State, often the most criticised, will allow an instance for comparison. Article 62 of the New York Code of Civil Procedure[132] permits a plaintiff to bring an ex parte application at the commencement of an action for an order of attachment of a debtor's assets found within the jurisidiction of the state, if:

(a) the defendant is an individual non-resident or foreign corporation, organised outside the state and not doing business within, or

(b) a defendant who is domiciled in New York is about to remove his assets from the jurisdiction or there is evidence of his intention to defraud creditors by assigning or encumbering his property.[133]

Commentary on the Rules makes it plain it is both a jurisdictional and a security device directed primarily at foreign defendants and others who attempt to frustrate the enforcement of a judgment that may be rendered in favour of the plaintiff.[134] It is in the nature of providing quasi in rem jurisdiction to the court, on a temporary basis only, requiring a series of perfecting steps, not dissimilar to the Scottish device. It was most recently altered in 1977 as a result of appeal court decisions and if secured ex parte, such orders must now be confirmed by the court, with due notice to the defendant, within five days.

The plaintiff in applying by motion must provide evidence under new Rule 6212 to show that "it is probable that he will succeed on the merits of his case."[135] The burden on a plaintiff has been described as being:

> "...greater than a prima facie case and means in reality demonstrating either a combination of probable success and the possibility of irreparable injury, or ...very serious questions going to the merits and that the balance of hardships (leans) sharply in (the plaintiff's) favor."[136]

The same New York commentator expects continuing further restrictions on the availability of the interlocutory remedy in the face of additional constitutional challenges. While one might argue that American procedure codifies in major measure some of the same courses open to

Canadian litigants under absconding debtor and related legislation, the New York example does extend, albeit by a weighty burden of proof, statutory and procedural rules available in this country and in Europe prior to the arrival of the Mareva. Sequestration in matrimonial actions is permitted by the New York Domestic Relations Law under authority broadly similar to legislation now in effect in British Columbia and rapidly spreading to most other common law provinces.[137]

In conclusion, it would appear clear that the earlier English custom of foreign attachment was abandoned for commercial and practical reasons, and that laws presently in place in E.E.C. member nations are currently being dismantled on the Continent at the same time as American equivalents are under sustained attack constitutionally and suffering judicial dilution year by year. With questionable, even faulty, soundness to their legal logic, the British and now their Commonwealth cousins have resurrected the practice with remarkable daring and success. As it has come to be accepted in English and Canadian courts, it is far more than a jurisdictional, quasi in rem device but as we now see it, is a substantive new remedy and restrictions on its use are still only slowly being discovered and put in place.

FOOTNOTES

CHAPTER IV

89. Rasu Maritime S.A. v. Perusahaan et al, supra, fn 66.

90. Ibid, at p. 331 (A.E.R.)

91. Bohun, W. Privilegia Londini. 3rd ed., 1723. It is considered to be the classic text treatment of the Customs of London.

92. Pulling, Alexander. The Laws, Customs, Usages and Regulations of the City and Port of London. 2nd ed., 1854.

93. Ibid, fn 89, at p. 331 (A.E.R.)

94. Levy, supra, fn 46, at p. 405, probably one of the most thorough accounts presently available of the early custom.

94a. See supra, Chapter II (C), pp. 16-17.

95. Probably even to Magna Charta. See Chapter IX thereof guaranteeing the liberties and customs of the City of London.

96. Levy, supra, fn 46, at p. 425.

97. (1725) 12 Geo. 1, c. 29; (1732) 5 Geo. 2, c. 27 and (1832) 2 Will. 4, c. 39, inter alia.

98. See the Common Law Procedure Acts of 1852 and 1854, 15 & 16 Vict., c. 76 and 17 & 18 Vict., c. 125.

99. See supra, fn 47.

100. Ibid.

101. 25 Halsbury's Laws of England. 3rd ed., 1958, para. 1081.

102. Both R. Morris in his very thorough study of the English practice in Select Cases of the Mayor's Court of New York City (1674-1874), published in 1935, at p. 61 and Levy, supra, at p. 424 come to this same conclusion.

103. Levy, supra, fn 46, at p. 426.

104. Rasu Maritime, supra, fn 66, per Lord Denning at p. 332.

105. THE SISKINA, supra, fn 64, at p. 813.

106. Ibid, at p. 814.

107. Ibid, in the House of Lords, at p. 826 per Lord Diplock.

108. Ibid, at p. 827.

109. Walker, David M. Principles of Scottish Private Law. 3rd ed. Oxford: Clarendon Press, 1982. At p. 152.

110. Correl, J. W. and Merry, E. W. Principles and Practice of Scots Law. London: Butterworths, 1971. At p. 232.

111. Ibid.

112. North v. Stewart (1890) 17 R. (HL) 60, per Lord Watson at p. 63. Also see Craig v. Brunsgaard, Kjosterud & Co. (1896) 23 R. 500, per Lord M'Laren at p. 503.

113. Alexander Ward & Co. Ltd. v. Samyang Navigation Co. Ltd. [1975] 2 All E.R. 424, per Lord Kilbrandon at p. 435.

114. Ibid, per Lord Hailsham at p. 429.

115. Code of Civil Procedure, Article 48. For good review of the practice, see Herzog, Peter. Civil Procedure in France. Volume 3 of the Columbia University School of Law Project on International Procedure. The Hague: Martinus Nijhoff, 1967. At p. 198.

116. Ibid, at p. 235.

117. Code of Civil Procedure of Quebec, Articles 733 ff.

118. Herzog, supra, fn 115, at p. 236.

119. Article 50 of the Code of Civil Procedure.

120. Article 53 of the Code; see also Herzog, supra, fn 115, at p. 237.

121. Article 54 of the Code of Civil Procedure.

122. Articles 822-5 of the Code of Civil Procedure.

123. Herzog, supra, fn 115, at p. 237.

124. German Code of Civil Procedure (ZPO), s. 916 ff.

125. Cohn, E.J. Manual of German Law. Volume 2. London: Eastern Press, 1971. At p. 243.

126. German Code of Civil Procedure, s. 936.

127. Cohn, supra, fn 125, p. 243.

128. Ibid, at p. 244.

129. Rules of Dutch Civil Procedure (B.Rv.), Articles 727ff.

130. Stein, P.A. Introduction to Dutch Law for Foreign Lawyers. Edited by D.C. Fokkema et al for the Netherland's Comparative Law Association. Deventis: Kluwer, 1978. At p. 259.

131. Levy, supra, fn 46, at p. 401.

132. McKinney's Consolidated Laws of New York Annotated. Book 7 B on Civil Practise Law and Rules. New York, 1980.

133. See also comments of Hodgekiss, C.C. in (1982) 56 A.L.J. 310 at p. 313 on this topic.

134. McKinney's, supra, fn 132.

135. Ibid, Rule 6212.

136. Donnelly, S.J.M. "Commercial Law 1977 Review" (1978) 29 Syracuse Law Review 327, at p. 372.

137. Under ss. 233 and 243 of the New York Domestic Relations Law; also see C.P.L.R. 6201 and compare with fn 27, supra.

CHAPTER V - JURISDICTION

(A) STATUTORY BASIS

While adopting discarded practices of provisional foreign attachment as a basis for implementation of the Mareva principle may not have been wholly rational, the English court was on firmer ground with the 1925 statutory jurisdiction. As later cases have shown, the doctrine is not an attachment process at all but a prohibitory order designed to maintain the legal position of parties engaged in litigation. Viewed from that perspective, the alarum raised against its shaky early foundation is less disturbing.

Recently, perhaps for greater certainty, the United Kingdom Parliament enacted section 37(3) of the Supreme Court Act, 1981, which deals with the principle directly:

> "The power of the High Court...to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court,or otherwise dealing with, assets located within the jurisdiction shall be exercisable in cases where that party is, as well as cases where he is not, domiciled, resident or present within that jurisdiction."138

The legislation was effective from January 1, 1982 and thereby entrenched Lord Denning's invention.

Neither Canadian nor other Commonwealth authorities have yet adopted the British course of statutory clarification or amendment. As in early United Kingdom cases, legal jurisdiction for the process is only broadly encompassed by statute. Section 36 of the Law and Equity Act,[139] the British Columbia equivalent to section 45 of the Supreme Court of Judicature (Consolidation) Act (U.K.), provides:

> "36. A mandamus or an injunction may be granted or a receiver-manager appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made and the order may be made either unconditionally or on terms and conditions the Court thinks just. If an injunction is asked either before, at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, the injunction may be granted if the Court thinks fit, whether the person against whom the injunction is sought is or is not in possession under any claim or title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable."[underlining mine]

In addition to inherent jurisdiction of the Supreme Court of British Columbia as a "court of original jurisdiction... (with) complete cognisance of all pleas and ... jurisdiction in all cases, civil and criminal ...,"[140] the Rules of Court[141] provide for the granting of interlocutory injunctions in circumstances encompassing the

Mareva relief. Rules 44 and 45 contain directions applicable to all injunctions, permanent, interim, interlocutory, ex parte or contested, and their provisions in entirety apply to the Mareva situation as we shall later see.

In the first reported Canadian case to exercise Mareva jurisdiction, Manousakis v. Manousakis[142] in 1979, Mr. Justice Trainor of the British Columbia Supreme Court relied on the broad provisions of the Law and Equity Act. Nippon Yusen Kaisha v. Karageorgis,[143] the first British appellate decision, was also used as support for an order prohibiting a husband from disposing of his shares in a business pending determination of a wife's entitlement to share in their value under family law legislation.

Judges of the County Courts in British Columbia have jurisdiction to grant Mareva relief under sections 21 and 39 of the County Courts Act[144] in actions commenced in their courts and while acting as Local Judges of the Supreme Court, have by virtue of section 11(2) of the Supreme Court Act[145] the same jurisdiction under the Law and Equity Act and the Rules of Court as Supreme Court judges. Appendix III contains a listing of example cases where judges of both these courts have granted Mareva injunctions in as yet unreported decisions.

The Provincial Court of British Columbia has no such jurisdiction.

In Ontario, the enabling statute is similar[146] as are those in the remaining provinces and territories. In the four cases which have reached the appellate level in this country, the courts have consistently ruled that jurisdiction of provincial superior courts to grant Mareva relief is clear. In Humphries v. Buraglia,[147] the New Brunswick Court of Appeal said:

> "... the Courts of this Province have jurisdiction in a proper case (under section 33 of the Judicature Act R.S.N.B. 1973, c. J-2) to grant an interlocutory judgment so as to prevent the defendant disposing of assets which otherwise might be available to satisfy a judgment obtained by the plaintiff."[148]

Last winter, appeal courts in Manitoba, Ontario and British Columbia acted similarly. In Feigelman et al v. Aetna Financial Services Ltd. et al,[149] Matas J.A. speaking for the majority in the Manitoba court declared:

> "Section 59(1) of the Queen's Bench Act, R.S.M. 1970, c. C 280, is the basis of the court's authority to issue (a Mareva)...injunction."[150]

Three weeks later, MacKinnon A.C.J.O. for the Ontario Court of Appeal,[151] said in Chitel et al v. Rothbart et al:

> "...in my view,...it is a legitimate exercise of the discretion given a court under section 19(1) of the Judicature Act, R.S.O. 1980, to grant a Mareva injunction."[152]

and again:

> "The Mareva injunction is here and here to stay and properly so...."[153]

The British Columbia Court of Appeal had its first opportunity in two weeks' time in Sekisui House Kabushi Kaisha v. Nagashima et al[154] when Chief Justice Nemetz on behalf of the three man coram confirmed the authority of section 36 of the B.C. statute for issuing a Mareva injunction.[155]

As earlier mentioned, jurisdiction of the Federal Court of Canada as an original court of record[156] having limited but original powers,[157] is derived from section 44 of the Federal Court Act:

> "44. In addition to any other relief that the Court may grant or award, a mandamus, injunction or order for specific performance may be granted or a receiver appointed by the Court in all cases in which it appears to the Court to be just and convenient to do so, and any such order may be made either unconditionally or upon such terms and conditions...." [underlining mine]

In matters purely maritime, the combined effect of section 22 of the statute ("in all cases in which a claim for relief is made...") and section 2(m) ("relief includes every species of relief whether by way of damages, pyament of money, injunction....") could also be utilized

although that would probably be unnecessary in light of the broad language of section 44.[158]

Those judges of the Federal Court who have granted Mareva injunctions to this date[159] appear to have relied upon section 44 of the statute and the Rules of Court.[160] Rules 469 and 470 are substantially similar in effect to provisions referred to in the British Columbia Supreme Court Rules concerning interlocutory orders both for injunctions and preservation of property. In one important particular however, as regards ex parte Mareva injunctions, judges of the Federal Court are restricted to granting interlocutory orders only by way of interim injunction "for a period not exceeding ten days" when notice of the application has not been given to the defendant.[161] The provincial Supreme Court would not appear to have such restrictions on ex parte applications.

(B) EFFECT OF OTHER REMEDIES

The existence of attachment remedies, as an argument against importation of the Mareva principle raised by early commentators,[162] does not affect the courts' readiness to utilize Mareva. Tallis J. (as he then was) in B.P. Exploration Company (Libya) Limited v. Hunt[163] said:

> "...learned counsel also submitted that there are rules of court dealing with absconding debtors and accordingly an equitable order should not be issued which is inconsistent with such provisions. The rules of court in this jurisdiction dealing with absconding debtors are not inconsistent with the injunctive relief sought.... In my opinion such provisions do not deprive this Court of granting a Mareva type injunction in this jurisdiction."164

And in the Manitoba case, Matas J.A. added:

> "If a claimant...could bring his claim within the established procedures under either the Queen's Bench Rules or the Fraudulent Conveyances Act, it would not be necessary to invoke the Mareva injunction. In my view, the existence of these provisions does not preclude the issuance of a Mareva injunction in this jurisdiction."165

Huband J.A., in dissent, while admitting that the Manitoba courts have jurisdiction to grant Mareva orders, declined to do so in Feigelman, in part because of the existence of other possible remedies:

> "The existence of remedies through the Fraudulent Conveyances Act, pre-judgment garnishment proceedings, and orders of attachment draw one to two conclusions:
>
> (1) Where other specific remedies are available those remedies should be the first resort, and a Mareva injunction should not be issued where other remedies are available,
>
> (2) If the other remedies are not available the courts should be cautious to fill the void by a Mareva injunction."166[underlining mine]

The other Canadian jurisdictions have similarly welcomed this additional pre-trial step despite available attachment remedies.

Only New Brunswick has moved by the implementation of practice rules to regulate or entrench the practise.[167] Following the decision in Humphries, the New Brunswick Civil Procedure Rules were amended and a new Rule, now 40.03, was put in place incorporating the Mareva principle. Under the heading "Injunction For Preservation of Assets (Mareva Injunction)," the new rule codifies the procedure without altering the principle.[168]

In the Province of Nova Scotia, a specific procedure is available to permit an ex parte order for attachment in circumstances where a Mareva might otherwise be appropriate.[169] Rule 49 of the Nova Scotia Civil Procedure Rules provides that a plaintiff must post a bond as well as prove the required facts by affidavit; similarly, security may also be posted by a defendant to regain possession of the property attached.

(C) OTHER JURISDICTIONS

If one looks to other reaches of the Commonwealth, one can see that the courts have based their jurisdiction on even broader statutory powers. In the Aus-

tralian states, section 23 of the Supreme Court Act (N.S.W.) is an example: "The Court shall have all jurisdiction which may be necessary for the administration of justice." The New South Wales Court of Appeal approved the Mareva principle recently under that authority in Riley McKay Pty. Ltd. v. McKay and Another.[170]

In New Zealand, the statute[171] is equally general in its scope:

> "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."[172]

Despite a similarly broad entitlement to pre-judgment charging orders to attach assets of fleeing or absconded debtors under their Code of Civil Procedure,[173] the courts of New Zealand have granted the injunction since 1978.[174]

(D) CAUSE OF ACTION

One further matter related to the courts' jurisdiction must be raised. It arose in the only House of Lord's decision reviewing the Mareva practice, The SISKINA,[175] and has been quoted with approbation in the Canadian courts.

In that case, the owners of cargo laden on SISKINA claimed damages against the shipowner, a one-ship Panamanian company. That claim was governed by Italian law. The vessel was later lost in the Mediterranean and as a consequence insurance monies became payable in London. The cargo owners issued a writ in the English High Court claiming damages and an injunction restraining the owners from disposing of the insurance proceeds. Kerr J. set aside the writ and discharged the injunction on the ground that the English court had no jurisdiction to give leave to serve process outside the country. His ruling was reversed by a majority of the Court of Appeal (Lord Denning M.R. and Lawton L.J., Bridge L.J. dissenting) but was restored by the House of Lords.[176]

The claim itself, the Lords determined, was not such a cause of action as to entitle the plaintiffs to obtain leave for service out of the jurisdiction of the court. Lord Diplock, who delivered the leading speech, said:

> "A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependant on there being a pre-existing cause of action 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 answerable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancilliary and incidental to the pre-existing cause of action."[177]

The Mareva injunction is thus not appropriate to claims justiciable only in foreign courts and a plaintiff must clearly bring his principal cause of action within the jurisdiction of the court to which he makes application.

The Federal Court of Canada, in the only case thus reported of its Mareva experience,[178] dismissed a Mareva application when leave to serve the Statement of Claim ex juris was denied by the chambers judge. While counsel in that and other cases have then turned successfully for the same relief to provincial superior courts where leave to serve is not formally required in many instances, the issue, if and when contested, will remain an issue of forum conveniens. A plaintiff of necessity will still be required to satisfy the court with respect to Lord Diplock's concern that the court is also competent to adjudicate on the principal claim against the particular defendant.

FOOTNOTES

CHAPTER V

138. Supreme Court Act (U.K.), 1981 c. 54, into force on January 1, 1982.

139. R.S.B.C. 1979, c. 224.

140. Supreme Court Act, R.S.B.C. 1979, c. 397, s. 8.

141. Supreme Court Rules, 1979, Rules 44 and 45.

142. (1979) 10 B.C.L.R. P-21. (BCSC)

143. Supra, fn 9.

144. R.S.B.C. 1979, c. 72.

145. Supra, fn 140.

146. Judicature Act, R.S.O. 1980, c. 223, s. 19 (1).

147. (1982) 135 D.L.R. (3d) 535, 39 N.B.R. (2d) 674, 103 A.P.R. 674.

148. Ibid, per Stratton J.A. at p. 547 (D.L.R.).

149. [1983] 143 D.L.R. (3d) 715, 2 W.W.R. 97.

150. Ibid, at p. 721 (D.L.R.).

151. (1983) 39 O.R. (2d) 513, 141 D.L.R. (3d) 268.

152. Ibid, at p. 531.(O.R.)

153. Ibid, at p. 534.(O.R.)

154. Supra, fn 16.

155. Ibid, at p. 6.

156. Federal Court Act, S.C. 1970-1971, c. 1, s. 3.

157. Ibid, s. 17.

158. Ibid, ss. 22 and 2 (m).

159. See supra, fn 14 for listing of some unreported Federal Court of Canada decisions.

160. Federal Court Rules, 1971, SOR/71-68, as amended.

161. Rule 469 (2).

162. For example, see Stockwood, supra, fn 11, at p. 97.

163. Supra, fn 13.

164. Ibid, at p. 58 (D.L.R.).

165. Supra, fn 17, at p. 722 (D.L.R.).

166. Ibid, at p. 734.

167. Supra, fn 147.

168. See Appendix IV for full text of the N.B. Rule.

169. Rule 49. Its existence did not prevent the court in Parmar v. Parceria et al (1982) 141 D.L.R. (3d) 498 (at p. 505) from allowing the Mareva order in Nova Scotia.

170. Supra, fn 85. Other Australian courts have used a similar state statute. Cf. Praznovsky v. Sablyack [1977] V.R. 114, Barisic v. Topic and Another 37 A.C.T.R. 1 and Sanko S.S. Co. Ltd. v. D.C. Commodities (Australia) Property Ltd. [1980] W.A.R. 51, as examples.

171. The Judicature Act, R.S.N.Z.

172. Ibid, s. 16. See Hunt v. B.P. Exploration Company (Libya) Limited [1980] 1 N.Z.L.R. 104.

173. Under Rule 19 of the New Zealand Code of Civil Procedure, a creditor can obtain a charging order prior to judgment if he can identify the assets of the debtor and if he can show that the debtor is "absent from New Zealand or about to quit New Zealand with intent to defeat his creditors." Cf. article by Cato, C.B. "The Mareva Injunction and Its Application in New Zealand" (1980) New Zealand Law Journal 270.

174. From Systems and Programmes (N.Z.) Ltd. v. P.R.C. Public Management Services (Inc.) [1978] N.Z. Recent Law 264; also see the October 13, 1978 unreported decision of Mosen v. Donselaar and the Hunt decision, supra, fn 171.

175. Supra, fn 64.

176. The Court of Appeal decision is reported beginning at p. 806 (All E.R.) while the House of Lords' opinions begin at p. 821 (All E.R.).

177. Ibid, at p. 824.

178. Elseguro Inc. v. Ssangyong Shipping Co. Ltd., supra, fn 14.

CHAPTER VI - MAREVA GUIDELINES

A. AMERICAN CYANAMID TEST

As an exception to the general principle of no execution before judgment, the Mareva injunction should not be, and in practice is not, granted as a matter of course. While the heart of a plaintiff's case is demonstration of the risk that the defendant's assets will be removed from the jurisdiction or otherwise disposed so as to nullify the effect of final judgment, it is incumbent upon him in material filed before the court to establish his entitlement to this unique remedy. As earlier mentioned, these have been referred to as the Mareva Guidelines.

Most applications are quia timet: the plaintiff has not suffered any injury or loss and the defendant has not normally committed any wrong against the plaintiff, save usually the non-payment of a debt or wrong which forms the principal basis of the former's substantive cause of action. It is the fear only that the defendant will by future actions cause unfair disadvantage to the plaintiff in pursuit of his lawful cause of action and remedy.

As a form of interlocutory injunctive relief, the Mareva is subject to the ordinary approach of the courts to applications inter partes for prohibitory injunctions.[179] It is to be remembered that it is a remedy,

not a cause of action in its own right.[180] The rules laid down by Lord Diplock in the House of Lords in 1975 in American Cyanamid Co. v. Ethicon Ltd., generally accepted in this country and specifically in this Province,[181] have clarified the onus on an applicant. The Ontario Court of Appeal recently however,[182] in referring to the subsequent decision of the House of Lords in N.W.L. Ltd. v. Woods,[183] has expressed the lone view that the American Cyanamid tests may not be suitable in some restricted circumstances.

While in England he need not establish a prima facie case to entitlement, a plaintiff must at very least satisfy a court that his claim is "not frivolous or vexatious; in other words, that there is a serious question to be tried."[184] Early Canadian trial judgments used other language in denoting the currently viewed, less stringent requirements of the applicant to establish validity of his claim but despite variance in adjectival description, it appeared clear that the test being applied by Canadian courts was more lenient than the former prima facie case.[185]

The Manitoba Court of Appeal last year commented on the interchangeability of terms:

> "The phrase 'good arguable case' was used by Megarry V-C in Barclay-Johnson v. Yuill and by Denning M.R. in Rasu Maritime S.A. v. Perusahaan et al.... Lord Denning in (that case) said that the test was

> in conformity with that laid down in American Cyanamid....
>
> In a later case, Mothercare Ltd. v. Robson Books Ltd. [1979] F.S.R. 466... Megarry V-C discussed the terms 'frivolous and vexatious' 'serious question to be tried' and 'a real prospect of succeeding.' Megarry V-C suggested that 'frivolous and vexatious' should be read in a sense different from its sense used in relation to striking out actions and concluded that the three terms were to be considered as equivalents."186

Remarkably although perhaps understandably, the phrase "a good arguable case on the merits" is one which has appeared most often in "pure" Mareva cases following the Third Chandris decision in 1979. Whether that is a more onerous burden than "a serious question to be tried" is unclear but it is substantially less onerous than a prima facie case.

Alone among the decisions in Canada however, are two of the most authoritative and they may well fortell a sharp shift in weight of the burden on a plaintiff seeking the injunction. The Manitoba Court of Appeal last year also said:

> "In Manitoba, this court has held, (despite the American Cyanamid decision) that generally the test of a prima facie case should continue to be applied on applications for an interlocutory injunction. I would not apply any lesser test to applications for a Mareva injunction."187

And the Ontario Court of Appeal has also varied the American Cyanamid and English Mareva tests and will at least in that Province require the plaintiff to establish a prima facie case on the merits:

> "...the material...must be such...as persuades the court that the plaintiff has a strong prima facie case on its merits."188

While other trial and appeal courts in Canada have not gone that far, it is possible to understand these two decisions in several ways. First, in both Manitoba and Ontario, the highest courts have earlier gone on record as declining to fully adopt the new American Cyanamid tests as being applicable whereas that is not true in either British Columbia or New Brunswick or in most other provinces for that matter, and thus the tests will remain different for Mareva situations until the Supreme Court of Canada otherwise determines. Secondly, the Feigelman and Chitel cases may simply presage what is yet to come. The Canadian Mareva jurisprudence has developed very quickly to this point, based on the earlier English experience. These two decisions may simply be a warning expression of the sometime-heard judicial caution for overuse of the doctrine in inappropriate circumstances.

In either event, once being satisfied of that onus, a court need then weigh only whether irreparable

harm not compensable by damages to either party would result before assessing the balance of convenience.[189]

B. THE REQUIREMENTS

The guidelines (or further requirements) bear examination.[190] Originally expressed by Lord Denning, they have come after further explanation to be accepted as follows:

(1) The Plaintiff should make full and frank disclosure of all matters in his knowledge which are material for the judge to know;

(2) 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;

(3) The Plaintiff should give some grounds for believing that the defendant has assets within the jurisdiction;

(4) The Plaintiff should give some grounds for believing that there is a risk of the assets being removed before the judgment or award can be satisfied; and

(5) The Plaintiff must give an undertaking in damages, in case it fails in its claim or the injunction turns out to be unjustified; in a suitable case, this should be supported by a bond or other security.

In British Columbia, judges in both reported and unreported cases have followed these principles. Trainor J., in granting the first Mareva order in 1979 in Manousakis v. Manousakis, did so on the basis of the English authorities to that date although his judgment preceded the

Third Chandris decision by some three months. In the three trial judgments reported in this Province since that landmark case, the judges have each declined to grant the injunction.

Davies L.J.S.C. (as he then was) in Devlin and Multiply Development Corporation Limited v. Hean[191] was asked to grant an order restraining the defendants from paying or accepting payment of monies payable under an earlier judgment. He reviewed several of the historic cases but without the benefit of any binding authority and ultimately concluded that as the applicant failed in the fourth of the English guidelines to adduce any evidence to indicate that a judgment of money would be unenforceable, it was not a proper case for an interlocutory injunction. It would appear at least from the judgment and the brief transcript that the Mareva issue entered the argument only indirectly.

In the next reported British Columbia case, Dean v. Ford Credit Canada Ltd. et al,[192] while the Mareva principle was acknowledged by McEachern C.J.S.C. as being well established in Canada, the Chief Justice declined to apply the doctrine in that particular case commenting simply:

> "I do not think that this is a suitable case to permit execution or to furnish security before judgment."193

While that would appear to represent a misunderstanding of the Mareva doctrine, the experienced judge earlier rejected argument as well on the applicability of Rule 46 (1) (a) to the case before him and did not comment on the guidelines at all. It does not appear that any but the very first of the long line of Mareva cases were cited to him and thus, it is not a judgment which helpfully adds to the jurisprudence in the area.

In Parkes v. Clarke, Oxley and Archibald, Clarke & Defieux Ltd.,[194] Proudfoot J. earlier this year refused to grant a Mareva order in an action for specific performance on the strength of the material filed before her. Adopting the Third Chandris guidelines as criteria, the judge concluded that the plaintiff failed to satisfy two of the five elements listed by the Master of the Rolls. In a 1980 unreported case, Greenwood Forest Products (1969) Ltd. v. Westgulf Export Lumber Co. Inc.,[195] the same judge embraced the guidelines as have fifteen other judges of the trial bench in this province, including Meredith, Macfarlane, Wallace, Dohm and McLachlin JJ. and McClellan, Huddart, Darling, Arkell, Catliff, Macdonald and van der Hoop C.C.J.J. in the cases cited below.[196]

The four Canadian appeal courts which have considered the Mareva have also embraced and adopted the guidelines. The New Brunswick Court applied them in

sustaining an ex parte order in Humphreys v. Buraglia.[197] The Manitoba Court of Appeal in Feigelman et al v. Aetna Financial Services Limited et al[198] upheld granting an injunction and the Ontario Court of Appeal in Chitel et al v. Rothbart et al[199] refused to allow continuance of the injunction while upholding the principle and guidelines. The fourth, the B.C. Court in Sekisui House Kabushiki Kaisha v. Ikuo Nagashima et al,[200] was not faced with the issue at all directly but agreed with their applicability.

In the first of these cases, an ex parte injunction had been obtained to prevent a defaulting debtor from disposing of certain real property within New Brunswick. The defendant had in fact been in British Columbia. An order had also been granted allowing him to be served substitutionally. When he failed to have the writ, service thereof and the injunction set aside, the defendant appealed to the New Brunswick Court of Appeal without success. Speaking for the Court, Stratton J.A. after reviewing the English cases and an earlier trial decision in his own province declared:

> "...if there exists a substantive cause of action on which the plaintiff is suing or about to sue in this Province and it appears that there is danger that the defendant may abscond or remove or dispose of his assets so as to prevent satisfaction of any judgment the plaintiff may obtain, I am of the opinion, for the reasons expressed in the Third Chandris Shipping case and in the Prince Abdul Rahman case, that the Courts of this

> Province have jurisdiction in a proper case to grant an interlocutory judgment so as to prevent the defendant disposing of assets which otherwise might be available to satisfy a judgment obtained by the plaintiff. I would however repeat the admonition of Lord Denning that the Mareva injunction must not be stretched too far lest it be endangered and I would respectfully adopt as applicable to all applications for such injunctive relief the guidelines enumerated in the Third Chandris Shipping case."201

The Manitoba court similarly adopted the guidelines in Feigelman. In that instance the defendant, a federally incorporated company with head office in Quebec, was sued by Manitoba shareholders of a second company which had been placed in receivership by the defendant acting pursuant to its powers under a debenture. While the defendant had maintained an office in the province, it was in the course of closing down and removing its assets to the head office in Quebec. The plaintiff applied for and obtained an injunction restraining removal of the assets from Manitoba.

In sustaining the granting of the order, the appeal court was unequivocal on this point:

> "Subject to the general principles applicable to interlocutory injunctions, I would adopt as applicable to Manitoba, the statement of principle expressed by Denning M. R. in Mareva, subject to the guidelines set out in Third Chandris...."202

Then the Ontario Court of Appeal in its judgment delivered only six months ago reacted somewhat differently, although from an obviously more difficult background. At the trial level, decisions of the Ontario courts have varied in their acceptance of the Mareva doctrine and its guidelines. As Appendix II illustrates, Ontario has had by far more Mareva cases than any other legal jurisdiction, save the United Kingdom. Because of a heritage of case authority[203] deeply rooted in older common law principles, acceptance of the new remedy by that court was alarmingly slow. Early cases granting such orders often did without reference to the English decisions[204] or by extending the exceptions to the common law rule.[205] It was not until 1981 that a clear decision approving the Mareva was made in that Province in Liberty National Bank and Trust Co. v. Atkin et al.[206]

Montgomery J. in that case departed from the refusal in 1978[207] by Lerner J. (as he then was) to adopt the Mareva principle and their judicial brethren of the High Court determined to follow one course or the other until the recent Chitel case affirmed the legitimacy of the remedy. In Chitel, the plaintiff sued her doctor alleging the conversion by him of her shares in two private companies as he had advised her in securities matters. She obtained an ex parte Mareva injunction early in the proceedings restraining disposition of the physician's property or other assets as it was alleged he intended to leave Canada.

The injunction was continued on two further occasions and the application was finally heard after many more affidavits had been filed, cross-examination on them was completed and pleadings had been exchanged. Because of conflicting Ontario authority, the chambers judge referred the matter to the Province's highest court under an enabling statutory provision.

Speaking for himself, Arnup and Goodman JJ.A, MacKinnon A.C.J.O. refused to continue the injunction on the basis that the plaintiff had patently failed to make full and frank disclosure of all relevant facts on the initial application. Mrs. Chitel, it was found, knowingly withheld pertinent information which resulted in a completely misleading picture of the relationship between the parties thereby disentitling her to the exercise of the court's discretion in granting any ex parte application.

In the ratio of the case, the Associate Chief Justice said:

> "..the plaintiff must, in securing an ex parte interim injunction, make full and frank disclosure of the relevant facts, including facts which may explain the defendants' position if known to the plaintiff. If there is less than this full and accurate disclosure in a material way or if there is a misleading of the court on material facts in the original application, the court will not exercise its discretion in favour of the plaintiff...."208

Although not necessary strictly speaking for the conclusion he reached, the judge in what is probably obiter therafter in fourteen pages of his written reasons elucidated the current state of the law in Ontario respecting Marevas. Early Ontario cases refusing to apply English Mareva principles were declared "in error" and were overruled.[209]

After referring to English and previous Canadian authorities and in what is clearly stated to be an attempt to limit "the proliferation of the now commonly called Mareva injunction",[210] the Court declared that applicants, at least in Ontario, have an additional burden in such cases, even within the Mareva guidelines:

> "As I mentioned earlier, items (1), (2) and (5) of Lord Denning's guidelines are standard considerations for the courts of this province when considering the usual application for an interlocutory injunction. However, when an application for a Mareva injunction is before the court, the material under items (1) and (2) of the guidelines must be such...as persuades the court that the plaintiff has a strong prima facie case on the merits.
>
> ...(T)he material under item (3), which deals with the assets of the defendant within the jurisdiction, should establish those assets with as much precision as possible so that, if a Mareva injunction is warranted, it is directed towards specific assets or bank accounts....
>
> Turning finally to item (4) of Lord Denning's guidelines - the risk of removal of these assets before judgment - ...the applicant must persuade the court by his material that

> the defendant is removing or there is real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of the assets remote, if not impossible in fact or in law."[211] [underlining mine]

Within the same five guidelines then, the Ontario Court of Appeal as we earlier discovered has extended the obligation of the applicant to show in his filed material a strong prima facie case and not merely a good arguable case on the merits. It should also be noted that as to the fourth guideline, the Court has proposed an alternative limitation on a plaintiff, allowing a defendant to deal with or to "dissipate" his assets in the usual course of business or living. Recent English and Canadian cases have tended to acknowledge that limitation in particular circumstances.[212] The Ontario decision has already been applied by a District Court judge in that Province in Gassler v. Gassler et al.[213]

In the British Columbia case, Sekisui, a Japanese construction company sued its customers, now resident in Vancouver, for default under the terms of the contract. An ex parte Mareva order was obtained from Madam Justice McLachlan restraining the defendants from "removing or taking any steps to remove or otherwise dispose of any of his or their assets within the jurisdiction of the Court."

The plaintiff subsequently applied for summary judgment and for examination of the defendants under Rule 42A (5); the defendants applied to stay or dismiss the action as vexatious. Macdonald L.J.S.C. dismissed all applications and the parties appealed.

Thus the matter of the efficacy of the Mareva order was not at issue on the appeal. The chamber judge was upheld on his ruling against summary judgment and dismissal but the higher court required the defendants to file an affidavit in the nature of discovery concerning their assets, a helpful handmaiden to the Mareva which we shall later examine.[214] In a very brief but clear statement after commenting in one sentence of the Mareva heritage, specifically the Third Chandris guidelines, the Chief Justice of British Columbia added:

> "I am in respectful agreement with these requirements as pre-conditions for obtaining an injunction before judgment...."[215]

Quoting Ackner L.J. in his admonition in A.J.Bekhor & Co. Ltd. v. Bilton[216] in 1981 not to carry a Mareva plaintiff's privileged position too far lest the Mareva defendant be treated like a judgment debtor,[217] the British Columbia court then refused the plaintiff full discovery of the defendants, aligning itself with the recent English authority.[218]

The New Brunswick, Manitoba and Ontario decisions, at that time still all unreported, were not referred to by the Court and it is therefore uncertain whether the remarks of Nemetz C.J.B.C. will be varied when the issue is squarely faced.

C. CANADIAN POSITION SUMMARISED

From the recent appeal decisions, one might summarize the following basic conclusions:

(1) Mareva injunctions are available in the superior and country courts of the provinces and territories in Canada and in the Federal Court;

(2) A plaintiff seeking Mareva relief must abide the five guidelines outlined by Lord Denning in Third Chandris, as embraced by the Canadian courts;

(3) The courts granting Mareva relief will apply the American Cyanamid test appropriate to applications for interlocutory injunctions;

(4) It is no longer necessary to prove that there is a danger that the defendant's assets will be removed from the jurisdiction; it is sufficient to establish that there is a risk of their disposal before judgment is obtained;

(5) The applicant in most jurisdictions will be required to show a good arguable case on its merits or that there is a serious question to be tried;

(6) The courts at least in Ontario and Manitoba have altered the general rule and will require the Mareva applicant to show either a prima facie case or a strong prima facie case on the merits;

(7) The existence of pre-trial attachment procedures will not preclude the granting of a Mareva injunction;

(8) An applicant will also be required to satisfy the court that he has a substantive cause of action justiciable within the jurisdiction of the court.

FOOTNOTES

CHAPTER VI

179. See Bean, supra, fn 6, discussion beginning particularly at p. 79 for the current authorities.

180. See discussion, supra, at pp. 61-3 of this text.

181. As for example, see Manousakis, supra, fn 142, B.P. Exploration, fn 13, and Greater Vancouver Sewerage and Drainage District v. Ambassador Industries Ltd. (1983) 41 B.C.L.R. 292 (B.C.C.A.), Inter-City Express Ltd. v. Inter-City Truck Lines (Can.) Inc. (1980) 16 B.C.L.R. 43 (also B.C.C.A.)

182. Chitel, supra, fn 151.

183. [1979] 3 All E.R. 614.

184. American Cyanamid, supra, fn 5, at p. 510 (All E.R.).

185. See interesting discussion by Steele J. of the Ontario High Court in the recent case of Carlton Realty Co. v. Maple Leaf Mills Ltd. (1978) 22 O.R. (2d) 189, 93 D.L.R. (3d) 106.

186. Feigelman, supra, fn 17, per Stratton J.A. at p. 724 (D.L.R.)

187. Ibid.

188. Chitel, supra, fn 151, at p. 532 (O.R.)

189. Supra, fn 184. The other factors which may be taken into account by the court in weighing that balance if it is still unsatisfied: (i) the need to preserve the status quo, (ii) the course of action which creates the least uncompensable disadvantage to the parties, (iii) whether one party's case is disproportionately stronger than the other's and (iv) special factors in particular cases such as trade disputes, neighbour covenants, etc.

190. Third Chandris, supra, fn 62, at p. 984 (All E.R.)

191. (1982) 34 B.C.L.R. 158.

192. Supra, fn 16.

193. Ibid, at p. 148.

194. (1983) 42 B.C.L.R. 268.

195. Unreported, SCBC C812750, June 25, 1980, Vancouver Registry.

196. See the cases sampled in Appendix III.

197. Supra, fn 147.

198. Supra, fn 149.

199. Supra, fn 151.

200. Supra, fn 16.

201. Humphries, supra, at p. 691 (A.P.R.)

202. Feigelman, supra, at p. 723.

203. See Divisional Court reluctance in Bank of Montreal v. Page Properties Ltd. et al (1981) 32 O.R. (2d) 9 and discussion by Stockwood, supra, fn 11, at p. 86 and 94.

204. Robert Reiser & Co. v. Nadore Food Processing Equipment Ltd. et al, supra, fn 28.

205. Mills and Mills v. Petrovic et al, supra, fn 31, and similar cases mentioned there.

206. (1981) 121 D.L.R. (3d) 160, 31 O.R. (2d) 715.

207. O.S.F. Industries Ltd. v. Marc-Jay Investments Inc. [1978] 88 D.L.R. (3d) 446, 20 O.R.(2d) 566, 7 C.P.C. 57.

208. Supra, at p. 519.

209. Ibid, at p. 532. Particularly the decision of Lerner J., supra, fn 207.

210. Ibid, at p. 515.

211. Ibid, at pp. 532-3.

212. See Chapter VII, infra.

213. An unreported judgment of Vannini, D.C.J. of the Ontario District Court on February 22, 1983, cited at (1983) 18 A.C.W.S. 351.

214. See Chapter VIII, infra.

215. Supra, fn 16, at p. 7 Reasons for Judgment.

216. [1981] 1 Lloyds Rep. 491, 2 All E.R. 565.

217. Ibid, at p. 577 (All E.R.)

218. Sekisui, supra, fn 16, at p. 8 of Reasons.

CHAPTER VII - VARIATION, EXTENSION & DISSOLUTION

In some measure because Mareva orders are often granted solely on representations on behalf of an applicant and when few details are known of the nature, extent or whereabouts of the defendant's assets, it is not unusual for further applications to be made to the court to have the original order varied, extended or even vacated. In this chapter, we shall examine some of the purposes for and circumstances under which such alterations are normally allowed.

A. VACATING THE ORDER

Far from being simply a further exception to the traditional rule in Lister v. Stubbs as some judges adamantly continue to maintain,[219] the Mareva practice is widespread, particularly in the United Kingdom where jurisprudence develops at its fastest rate. As Lloyd J. observed several months ago in PCW (Underwriting Agencies) Ltd. v. Dixon and Another:[220]

> "From having been regarded at first as an exceptional remedy... they had by 1979 become commonplace.... In the Commecial Court alone applications for Mareva injunctions are now running at the rate of 40 a month; in the Queen's Bench list the number of ex parte applications has increased from 785 in 1979 to double that figure in 1983.... There is no division of the

High Court in which Mareva injunctions are not now regularly granted."[221]

He also remarked that only a very small portion of injunctions granted ex parte ever come back for re-hearing before the court. That is likely as the U.K. Court of Appeal earlier remarked[222] because the terms of the original order have been appropriate. Where they are not, it is open to have the matter referred, usually on very short notice, to the Chamber list for re-hearing. In the event the order was improperly obtained, the defendant can apply to have the order struck.

Most applications for re-hearing come at the defendant's initiative although in those jurisdictions where the order is of an interim nature only,[223] the circumstances can be reviewed anew by the court at the time the plaintiff makes application to have the order extended for a further period. In the latter case, the hearing is often before a different judge and while the second initially may be reluctant to interfere with an order granted by exercise of the first judge's discretion, a change in circumstances or revelation of other facts can have that result.

If a defendant can show by affidavit that material facts alleged by the plaintiff are incorrect or misleading and that on the true state of affairs the plaintiff had no entitlement to the original order, it will be

vacated.[224] This would appear to be true whether the facts were originally as the defendant is able to establish or have only subsequently developed.[225] The plaintiff is required to satisfy the court on all five guidelines formulated in the Third Chandris case,[226] subject to what is said hereafter, and a failure to do so will disentitle him to the special order. A failure to prove that there is real risk of the defendant's removal or disposition of his assets is as fatal to the applicant as an inability to establish the existence of assets in the jurisdiction belonging to the defendant. A defendant may well be able to prove sufficient facts to dislodge the onus on an applicant to show "a good arguable case" and, at least in Ontario and Manitoba, the burden of "a strong prima facie case" makes the plaintiff's position even more vulnerable when under attack.

By virtue of the court's wide discretion in equitable matters generally, a defendant who bona fide intends to remain with sufficient of his assets in the jurisdiction and seriously to contest the plaintiff's claim against him may well be able to tip the balance of convenience to ensure maintainance of the status quo without the necessity of the restrictive order. The Mareva principle was not established for such situations.[227]

Lastly, if a defendant is able to show bad faith or improper motive on the part of his adversary,

such facts are equally disastrous to the plaintiff. The result follows similarly from the first of the Mareva guidelines requiring full and frank disclosure.[228] As the Ontario court in Chitel warned:

> "There is no necessity for citation of any authority to state the obvious that the plaintiff must, in securing an ex parte Mareva injunction, make full and frank disclosure of the relevant facts, including facts which may explain the defendant's position if known to the plaintiff. If there is less than this full and accurate disclosure in a material way or if there is a misleading of the court on material facts in the original application, the court will not exercise its discretion in favour of the plaintiff...."[229]

It is equally bad faith to relate truthful facts but to withhold others with the result that the picture left with the court is incomplete or misleading.[230] The "unclean hands" doctrine will clearly work to a defendant's advantage in such situations.

B. PROVIDING SECURITY

If a principal purpose of the application for a Mareva order however, is in fact to require the defendant to post security for the plaintiff's claim, such motive is legitimate. While not specifically regarded as a function of the order (for it would even more clearly disturb Lister as an authority worth citing), most judges openly

acknowledge that a fast method of discharging a Mareva injunction is for the defendant to provide some form of suitable security satisfactory to the plaintiff and to have the order dissolved by consent.[231] In Pertamina, Lord Denning went so far as to say:

> "In a case where the defendant is able to put up security, it may often be just and convenient to grant an injunction to see that he does it."[232]

While others have suggested that a defendant's inability to obtain security may well prove the wisdom of granting an injunction in the first place,[233] the danger in extending the practice too far is obvious. A successful Mareva plaintiff is in some sense already secured by a defendant's general assets being retained within the jurisdiction, albeit they are available to satisfy the claims of all of his creditors; to allow him in each case formal security in priority to other creditors would indeed be pre-judgment attachment outside the bounds of current statute law and beyond the scope of Mareva's initial design.

A recent extension of note is that illustrated by CBS United Kingdom Ltd. v. Lambert and Another[234] in the U.K. Court of Appeal where the court required delivery of assets belonging to the defendants to the solicitor for the plaintiff pending trial of the action. While some

earlier Canadian cases[235] have required the defendant to pay specific sums of money (proceeds of sale, bank account balances, etc.) into court to act as security for the plaintiff, it would now appear to include all moveable property. The United Kingdom court did add:

> "... no order should be made for the delivery up of a defendant's wearing apparel, bedding, furnishings, tools of his trade, farm implements, live stock or any machines (including motor vehicles) or other goods such as materials or stock in trade, which it is likely he uses for the purposes of a lawful business.... If the evidence is clear that such... were bought for the purpose of frustrating judgment creditors they could be included in the order."[236]

Unless there is likelihood that the defendant or a third party would ignore the court order, it seems unnecessary however, to require possession of the assets actually be given to the plaintiff.

The question of security available to a plaintiff is related to his right to obtain an Anton Piller order of which we shall say more later in this chapter.

The fifth of the Third Chandris guidelines requires the successful applicant to provide an undertaking to pay damages if the claim or the injunction proves later to have been unjustified. It is both fair and

realistic that the risk should be borne in part by a plaintiff and it is in this way that some protection is afforded the person against whom the order is obtained. While Rule 45 (6) permits a British Columbia court discretion to waive such an undertaking, it is infrequently exercised and an undertaking or actual security is normally required.[237]

It should be noted however, that it has been waived in some Mareva cases where hardship might otherwise result.[238] It is not unknown in this Province for the requirements to be waived on other interlocutory applications[239] and some judges will refuse to require additional security so long as the standard written undertaking is given.[240] By virtue of instigating proceedings, the plaintiff will in any event have submitted to the jurisdiction of the court not only concerning his own claim but as defendant to any counterclaim.

The protection bestowed on a defendant by such an undertaking has been extended to third parties who might also be affected by a Mareva order. As the effect of some orders is rather sweeping when one considers service on all banks, brokerages and other depositories of a defendant, some third parties quite unconnected with the litigation were being required under penalty of contempt or committal to spend considerable time and effort to comply.

It is now usual for the court to provide that a successful plaintiff undertake to protect and indemnify third parties against liability and to reimburse them for reasonable expenses incurred when required to comply with a Mareva order.[241] This could include a bank's costs to locate a defendant's accounts[242] or a port authority's loss of income by requiring a defendant's vessel to remain at a commercial berth.[243] While the Canadian courts have not yet had issues before them requiring much discussion concerning protection of rights of third parties, as the incidence of orders begins in increase, it is likely requirements for third party security will be at least as stringent as they are in the United Kingdom.

C. VARYING TERMS OF THE ORDER

Any person affected by an interlocutory injunction may on proper notice apply to the originating court to have the terms of the order reviewed or varied. This applies equally to third parties who have been served with the order and to litigants who are parties in the cause or matter.[244] The Mareva order is frequently set in broad terms by virtue of its very nature[245] and third parties are often affected not as subjects of the injunction but because of the law of contempt of court if they act contrary to terms of the order.[246] As has been recently pointed out:

> "As soon as the judge makes his order, it takes effect on every asset of the defendant covered by the terms of the injunction, before the defendant himself can be served and even before the order is drawn up. Thus, every person who has knowledge of it must do what he reasonably can to preserve the asset. He must not assist in any way in the disposal of it or he will be in contempt."[247]

The U.K. Court of Appeal in Z Ltd. v. A-Z and AA-LL[248] has given some limited but forthright guidance to third parties who are served with notice of a Mareva injunction; it is of particular importance to banks and other depositories to follow the directions suggested in this case, at least until Canadian courts should determine other guidelines.[249]

If compliance with the order proves either impractical or impossible, a third party should obviously apply to have its terms varied so that it might fairly be made workable. So long as the third party is not a collaborator[250] of the defendant whose interest or motive is contrary to that of the plaintiff, the court normally will attempt to satisfy the objections raised by a third party on an application to vary. It is when interests of the third party and the plaintiff are competing that great care must be exercised by the judge in altering the terms at all. As Rose has pointed out:

> "A serious potential drawback of permitting a variation ... of the

> injunction at the instigation of a third party intervenor or of the defendant is that of preferring one creditor to another."[251]

To allow a third party to deal with some of the defendant's assets frozen by virtue of a Mareva order could well defeat a successful applicant from the fruits of the procedure, either by allowing its disposition to or by a third party or by reducing in total the defendant's assets within the jurisdiction which might otherwise be available to the plaintiff and other creditors after judgment.

Two recent cases illustrate the difficulties although there have been several in the last year.[252] Earlier this year in Oceania Castelana Armadora S.A. of Panama v. Mineralimportexport (The THEOTOKOS),[258] Lloyd J. in the U.K. Commercial Court was faced with a request by Barclays Bank to vary the terms of a Mareva order obtained ex parte by a shipowner against his defaulting charterer. The defendant, a Rumanian corporation, had a contract with the National Coal Board which involved the carriage of coke from England to Rumania. The defendant's cargoes of coke, frozen by a Mareva injunction, were in fact released when funds were deposited with Barclay's Bank in London to act as substitute security. The Bank which was served with the original order and a subsequent Mareva attaching the funds on account, sought leave to vary the

injunction to allow it to set off its own claims against the defendant.

Mr. Justice Lloyd varied the terms of the order by adding the clause,

> "Provided nothing in this injunction shall prevent (the bank) from exercising any rights of set-off it may have in respect of facilities afforded by (the bank) to the defendants prior to the date of this injunction."[254]

By this means, he (i) allowed the bank to release any of the defendant's funds on deposit in excess of the plaintiff's claim, inclusive of costs, and (ii) allowed the bank to set-off against the remaining funds any claims it had against the defendant, including future interest on such claims. In doing so, the court followed dicta in several recent decisions in the U.K.[255]

The second case, which followed the first by several days, further illustrates the court's dilemma on an application for variation but also clearly points a direction away from the comfort initially felt by plaintiffs who received unopposed Mareva injunctions. In PCW (Underwriting Agencies) Ltd. v. Dixon and Another,[256] the defendant himself applied to vary the injunction which had been sought earlier and granted, attaching all of his assets within the jurisdiction, save for "a reasonable living ex-

pense of 100 pounds per week." The defendant, described as "a member of Lloyd's and a wealthy man,"[257] wished to increase his living allowance to 1,000 pounds weekly, to pay certain of his other debts and to pay his solicitors on account for their defence of the action brought by the plaintiff.

The original order was very broad indeed and had the effect of "freezing" all of the defendant's considerable assets in his own country. After weighing carefully the risk of the defendant's removal of his assets, the security remaining for the plaintiff and the basis of the defendant's need, the court allowed the variations requested. For the first and third reasons, the result is not surprising and so long as it does not alarmingly dissipate the defendant's remaining assets, such orders are regularly made:[258]

> "The ... justification for the Mareva is to prevent the plaintiff from being cheated out of the proceeds of their action, should it be successful ... not to secure priority for the plaintiff ... still less, to punish the defendant for his alleged misdeeds.
>
> I am not going to attempt to define in this case what is meant by dissipating assets within the jurisdiction or where the line is to be drawn; but wherever the line is to be drawn this is well within it. It could not possibly be said that he is dissipating his assets by living as he has always lived....

> I say nothing about the cost of defending himself in these proceedings. The Mareva jurisdiction was never intended to prevent expenditures such as this ...."[259]

Given the nature of the injunction, it is not surprising that courts on occasion have been prepared to vary the terms of their orders to permit defendants to deal with their assets in the ordinary course of their business.[260] One similarly cannot argue against the proposition that a Mareva defendant should be allowed to live according to his usual standard or style while the litigation is in progress and should be enabled to retain and pay his solicitors to defend the action initiated by the plaintiff if there is a reasonable defence available. With the existence (certainly in British Columbia and in many other common law jurisdictions) of fraudulent preferences legislation, should courts in these jurisdictions ever vary a Mareva injunction to allow a defendant to pay the debt owed to a creditor other than the one who has obtained the injunction?

It is clear that some debts should be allowed priority to that of the plaintiff but the courts when permitting variations to original Mareva orders ought to tread very carefully in sanctioning preferences among creditors lest clear injustice should result.

FOOTNOTES

CHAPTER VII

219. For example, see views of MacKinnon A.C.J.O. in Chitel, supra, fn 151, at p. 531.(O.R.)

220. [1983] 2 All E.R. 158.

221. Ibid, at p. 160.

222. See Denning M.R. in Third Chandris, supra, fn 62.

223. As in the Federal Court, see Chapter VI, supra, and in some of the provincial superior courts. It is of course open to the court even in British Columbia to grant a Mareva order until a fixed time in order that the defendant may be served and be heard on the merits of the injunction.

224. As in Chitel, supra, fn 151.

225. It is not generally construed as "substituting one's own discretion" for that of the original judge if there is a subsequent change in circumstances or facts which should have been disclosed on the original application were earlier unknown or withheld.

226. See comments, supra, at pp. 90-1, concerning the undertaking required of the Mareva plaintiff.

227. The courts guard against putting such a defendant in the same position as a judgment debtor. See comments of Nemetz C.J.B.C. in Sekisui, supra, fn 16.

228. As set out at p. 71, supra.

229. Chitel, supra, fn 151, at p. 519.(O.R.)

230. Ibid, at p. 520.

231. Pertamina, supra, fn 66.

232. Ibid, at p. 662.

233. Rose, F.B. "The Mareva Injunction - Attachment in Personam" (1981) Lloyds Mar. & Comm. L. Quarterly 177, at p. 183.

234. [1982] 3 W.L.R. 746, 3 All E.R. 237.

235. See for example, Quinn v. Marsta Cession Services Ltd. et al (1981) 34 O.R. (2d) 659.

236. Supra, fn 234, at p. 752 (W.L.R.) The assets ordered in this case to be delivered to the solicitor were a Jaguar, a Lotus and a Scimitar sports car.

237. The Rule reads "Unless the court otherwise orders..." See decision of Wallace J. in Oilworld Supply Company et al v. Gary Audas et al (Unreported SCBC C830812, March 14, 1983, Vancouver Registry) for usual disposition. In this case as the plaintiff was a foreign corporation, it was obliged to post security in addition to providing the usual written form of undertaking.

238. Allan and Others v. Jambo Holdings Ltd. and Others [1980] 1 W.L.R. 1252, 2 All E.R. 502.

239. See the following B.C. decisions: Delta v. Nationwide Auctions Inc. [1979] 4 W.W.R. 49, a decision of Locke J.; Save-on-Meats v. Jim Pattison Ltd. (Unreported, SCBC C823387, Vancouver Registry), a decision of Esson J.; Watson et al v. City of Vancouver et al (Unreported, SCBC C827576, February 7, 1983, Vancouver Registry), a decision of Proudfoot, J.

240. See Parmar Fisheries Ltd. v. Parceria Maritime Esperanca L.DA. et al (1982) 141 D.L.R. (3d) 498, 53 N.S.R. (2d) 338, 109 A.P.R. 338, a decision of Nunn J. of the Trial Division of the Nova Scotia Supreme Court.

241. Z Ltd. v. A-Z and AA-LL, infra, fn 248. The Court of Appeal in this case extensively reviewed developments related to Mareva in the six years since 1975 and helpfully provided guidelines for third parties in dealing with Mareva orders served on them.

242. Searose Ltd. v. Seatrain (U.K.) Ltd. [1981] 1 W.L.R. 894, 1 Lloyds Rep. 556, 1 All E.R. 806.

243. Clipper Maritime Co. Ltd. of Monrovia v. Mineralimport-export (The MARIE LEONHARDT) [1981] 1 W.L.R. 1262, 2 Lloyds Rep. 458, 3 All E.R. 664. See also Galaxia Maritime S.A. v. Mineralimportexport (The ELETHERIOS and the GRECIAN LEGEND) and Oceanblue Compania Naviera S.A. as Intervenors [1982] 1 W.L.R. 539, 1 Lloyds Rep. 351, 1 All E.R. 796.

244. See B.P. Explorations Company (Libya) Limited v. Hunt [1981] 1 W.W.R. 209, [1980] 114 D.L.R. (3d) 35, at p. 213 (W.W.R.), Iraqui Ministry of Defence, supra, fn 73. and the cases cited hereafter.

245. Often the language will provide that "the defendants by themselves, their servants or agents or otherwise howsoever be restrained...."

246. Contempt proceedings are available as they would for other breaches of a court order. See McAllister, supra, fn 11, p. 88.

247. Arlidge, A. and Eady, D. The Law of Contempt. London: Sweet & Maxwell, 1982. At p. 2-51.

248. [1982] 2 W.L.R. 288, 1 Lloyds Rep. 240, 1 All E.R. 556, Q.B. 558.

249. The view of Eveleigh L.J is more sympathetic to the position of third parties than that of Denning M.R. or Kerr L.J. The former, relying heavily on the proof of mens rea in establishing wrongdoing on the part of a third party, would require the conduct to be "contumatious" before finding it contemptible. The majority did not express the same view.

250. The term was used by Goff J. in Iraqui Ministry of Defence v. Arcepay Shipping Co. S.A. (Gillespie Brothers and Co. Ltd. intervening) (The ANGEL BELL) [1980] 1 Lloyds Rep. 632, 1 All E.R. 480, 2 W.L.R. 488, Q.B. 65 at p. 488 (W.L.R.) See also Pertamina, supra, fn 66, at p. 656-7.

251. Rose, supra, fn 233, at p. 191.

252. Ibid.

253. [1983] 2 All E.R. 65.

254. Ibid, at p. 71.

255. Specifically, Project Development Co. Ltd. S.A. v. K.M.K. Securities Ltd. and Others [1982] 1 W.L.R. 1470 [1983] 1 All E.R. 465, Iraqui Ministry of Defence (The ANGEL BELL), supra, Galaxia Maritime S.A. (The GRECIAN LEGEND), supra, and Clipper Maritime Co. Ltd. of Monrovia (The MARIE LEONHARDT), supra.

256. Supra, fn 220.

257. Ibid, at p. 160.

258. See cases cited at fn 255, supra.

259. Supra, fn 256, at p. 162

260. Iraqui Ministry of Defence (The ANGEL BELL) supra, seems to have been one of the earliest cases to have permitted a variation for this purpose. It is now quite usual.

CHAPTER VIII - COROLLARY RELIEF

A. DISCOVERY

A Mareva injunction would be useless to a plaintiff who was suing a defendant who intended to deal with his assets in order to deprive his opponent of an executable judgment unless as well there was a method of requiring the defendant to disclose what his assets were and where they were located. In his initial application and in accord with the guidelines, the plaintiff need only affirm the existence of those assets of which he has knowledge. Often there are others.

In yet another extension of the graces of equity, the English court in 1980 in A v. C[261] determined that a Mareva plaintiff should be entitled in a proper case to discovery in aid of his Mareva order; it would be proper if it was necessary for the effective operation of the injunction:

> "... the Court should, where necessary, exercise its powers to order discovery or interrogatories in order to ensure that the Mareva jurisdiction is properly exercised...."[262]

The power to make such corollary orders was felt to derive from the ordinary procedural rules but the Court of Appeal the following year in A.J. Bekhor and Co.

Ltd. v. Bilton[263] described it as an inherent power to make "ancilliary orders as appear to the Court to be just and convenient to ensure that the exercise of the Mareva jurisdiction is effective to achieve its purpose."[264]

While that has meant interrogatories and the disclosure of documents in England, it equally will apply to examination viva voce where otherwise permitted, as in British Columbia, by the Rules of Court. Whether sought under the auspices of Rule 42A (5):

> "Where difficulty arises in or about the execution or enforcement of an order, the court may make such order for ther attendance of a party or person as it thinks just."[265]
> [underlining mine]

or under several other applicable rules, or the inherent jurisdiction, discovery of documents or persons will be permitted by the court. The Sekisui House order in the British Columbia Court of Appeal referred to earlier[266] is an example but the caution expressed by Nemetz C.J.B.C. in that case will remain applicable:[267]

> "The plaintiff has an injunction granted by McLachlin J. This has little value if one does not know either the amount or whereabouts of these assets. It is an untenable situation for a litigant to have a court order yet find it impossible to enforce. It is also an untenable situation to have prospective third parties, eg. financial institutions, put in the position of

> breaking the order because of lack of specificity, i.e. identification of the fund as part of the order. What, then, can be done in these particular circumstances? In my view, to order a general examination at this time would be premature. However, in order to breathe some life into the injunction, I would order that a list of assets and their location as of the date of the injunction be set out in affidavit form by the defendants and delivered to counsel for the plaintiff forthwith. In the event that the affidavit is unsatisfactory, the plaintiff may apply to a trial judge in chambers for an order for cross-examination on the affidavit. In the event that no affidavit is delivered within two weeks from the date of this judgment, then the appellant will have liberty to re-apply to this division of the Court."268

As can be seen, the court refused full discovery at such an early stage, aligning itself closely with the recent English authorities, but permitted an order sufficiently broad to assist the plaintiff in locating the defendant's assets.

B. ANTON PILLER ORDERS

Shortly after the first Mareva cases, the U.K. Court of Appeal, again led by Lord Denning, fashioned another potent remedy known as an Anton Piller order: an order, usually also granted ex parte, enjoining a defendant to permit a plaintiff to enter the defendant's premises that he might inspect, remove or make copies of documents or other evidence for purposes of pending

litigation. Described as "something of a hybrid between discovery and injunction,"[269] it is designed for instances where there is a serious risk that the defendant may destroy vital material so as to defeat the ends of justice before any application, with notice to the defendant, could be brought before the court.

Following an earlier decision in 1975, EMI Records Ltd. v. Pandit,[270] the Court in Anton Piller K.G. v. Manufacturing Processes Ltd. and Others[271] set out the following requirements:

(i) the applicant must have a very strong prima facie case,

(ii) the potential or actual damage to his interests must be very serious,

(iii) there must be clear evidence that the defendant has in his possession incriminating documents or things, and that there is a real possibility that he may dispose of or destroy such materials before any application inter pares[272] can be made.

The same Court several years later in Yusif v. Salama[273] adopted a somewhat less onerous test for the plaintiff on such applications, reducing (i) to simply a prima facie case. While Lawton L.J. was even later to refer to the practice as "piling Piller on Mareva,"[274] there is no doubt that it provides an additional aid to the Mareva applicant.[275]

The advent of Anton Piller is at least as great an intervention on a defendant's legal rights as Mareva. Mr. Justice Browne-Wilkinson of the U.K. High Court recently spoke of the extreme nature of the former:

> "I would emphasize that the effect of an order if made is far-reaching. First, a defendant has had no opportunity to present his case to the court or to bring matters to the court's attention which might alter the court's view of the matter. It is an extreme thing for a court to make a severe order without even giving the defendant an opportunity to be heard. Secondly, the execution of the order involves an invasion of the rights of privacy: to the extent that the jurisdiction is exercised it is incompatible with the view that an Englishman's home is his castle.
>
> Third, if not very carefully watched, it is capable of being abused. A plaintiff engaged in trade who obtains an (Anton Piller) order enabling him to enter the business premises of a competitor and search that competitor's documents may obtain a quite unfair and wrongful commercial advantage...."[276]

The development now seems entrenched and is granted when required by Canadian courts in any appropriate proceedings, not simply those related to infringement of rights pertaining to intellectual property.[277] Substantial questions concerning the privilege against self-incrimination in such instances, while answered statutorily in part in the United Kingdom,[278] have yet to be dealt with seriously by the courts in this country following the welcome

arrival of the Canadian Charter of Human Rights and Freedoms last year.[279]

C. DEFAULT JUDGMENT

Mareva relief is by its very nature a temporary remedy which, in keeping with all interlocutory orders, expires upon final disposition of the case by the court. In the ordinary case, a plaintiff proceeds to set the matter for hearing and at trial, a final order is made dealing with all issues between the parties. The interlocutory orders would normally fall and the successful plaintiff is entitled to proceed by way of execution against the defendant's assets retained within the jurisdiction by virtue of the Mareva order.

If the defendant fails to appear to the initial writ of summons, in the ordinary case the plaintiff would move the court for judgment in default pursuant to the Rules of court in the appropriate forum. In most jurisdictions however, as in British Columbia,[280] the procedure is not available where the writ is endorsed with a claim for an injunction and in order to successfully apply for default judgment, a plaintiff would have to abandon his injunction. In so doing he would run a risk that the defendant might dispose of his assets the moment the injunction was removed.

In Stewart Chartering Ltd. v. C & O Managements S.A.,[281] this "catch-22" situation was alleviated when Goff, J. (as he then was) determined that as courts must have control over their own processes, he would order judgment by default without requiring that the Mareva injunction first be ceded:

> "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 jurisdiction can only be given effect to if the Court has power to continue the Mareva injunction after judgment, in aid of execution."[282]

This would appear to be the only reported case not only permitting a plaintiff to obtain default judgment without relinquishing his Mareva order but also extending the effect of the order to permit successful execution after judgment. It is arguable however, that such instances may well present a further example of court-assisted preferences to creditors.[283]

In extending corollary relief to applicants for Mareva injunctions, the courts have so far attempted to remain faithful to original Mareva principles by permitting only those extentions which will legitimately enable the doctrine to remain effective. Determining the location and value of assets and preventing a defendant from

subverting the principle altogether are logical elaborations as is permitting a deserving plaintiff to enter default judgment without requiring abandonment of the Mareva itself. It is of interest to note that the new New Brunswick practice rule specifically provides that the injunction might continue in force beyond judgment in order that execution proceedings might be taken.[284]

As parties and their counsel make more frequent use of these supplementary rights, one can envisage situations where equal or similar legal rights will be placed in another competing setting. Aside from issues of preference among interested creditors in the same action, courts may soon be faced with two Mareva plaintiffs who have secured orders against the same defendant and his assets, or a Mareva plaintiff and a third party who has also secured a Mareva order against the same defendant, or in an Admiralty context, a Mareva plaintiff and a second claimant who causes the defendant's assets to be arrested. Guided by the even hand of equity, solutions will undoubtedly be found.

FOOTNOTES

CHAPTER VIII

261. A v. C [1980] 2 All E.R. 347, 2 Lloyds Rep. 200. The jurisdiction to make such orders was apparently first recognised in London & County Securities v. Caplan where an order for discovery was made not against the defendant but against a bank in which it was believed the defendant's assets were held. That case and a Court of Appeal (U.K.) decision, Mediterrania Raffinaia Sicilian Petroli S.p.a. v. Mabanaft G.m.b.H. are both unreported but referred to by the C.A. in the subsequent case of Bankers Trust Co. v. Shapira [1980] 1 W.L.R. 1273, 3 All E.R. 353., at p. 1280 (W.L.R.).

262. Ibid, at p. 351 (All E.R.)

263. [1981] 2 W.L.R. 601, 1 Lloyds Rep. 491, 2 All E.R. 565, 1 Q.B. 923.

264. Ibid, per Ackner L.J. at p. 576 (All E.R.).

265. Of the British Columbia Supreme Court Rules.

266. Supra, fn 16.

267. See p. 80 of this text, supra.

268. Ibid, at pp. 6-7.

269. Snell's Principles of Equity, supra, fn 3, at p. 649.

270. [1975] 1 W.L.R. 302.

271. [1976] Ch. 55.

272. Ibid, at p. 62.

273. Yousif v. Salama [1980] 1 W.L.R. 1540, 3 All E.R. 405.

274. In CBS United Kingdom Ltd. v. Lambert and Another supra, fn 234, at p. 749 (W.L.R.)

275. Ibid. See also Johnson v. L & A Philatelics Ltd. [1981] F.S.R. 286, where one of the first such orders including both Mareva and Anton Piller provisions was made by Goff J. in the Q.B. Division. The form of the order is actually set out in the Report.

276. Thermax Limited v. Schott Industrial Glass Limited [1981] F.S.R. 289, at p. 291-2.

277. There are many examples but see lengthy discussion of the practice recently by the Federal Court of Canada (Appeal Division) in Nintendo of America, Inc. v. Coinex Video Games Inc. et al (1983) (Unreported, December 30, 1982, A-1273-82, Ottawa). See also CBS United Kingdom Ltd. v. Lambert and Another, supra, fn 234, and discussion, supra, at p. 87 of this text.

278. See Rank Film Distributors Ltd. v. Video Information Centre (a firm) [1980] 3 W.L.R. 387 and [1981] 2 W.L.R. 668.

279. The right to be protected by the giving of incriminating evidence against oneself has constitutional bases and is afforded by the Canada Evidence Act. The effect of the Canadian Charter provisions have yet to be fully tested. See Chapter IX, supra, for discussion of some other aspects of the Canadian Charter in the context of the Mareva injunction.

280. British Columbia Supreme Court Rules, Rule 17.

281. [1980] 1 W.L.R. 460, 2 Lloyds Rep. 116, 1 All E.R. 718.

282. Ibid, at p. 117 (Lloyds Rep.).

283. See discussion, supra, at pp. 96-7.

284. See Appendix IV.

CHAPTER IX - THE CANADIAN CONTEXT

The remedy would appear to be established in Canada; the guidelines for its availability have been approved generally by senior courts of several of the provinces and chamber judges have been granting orders for four years. While in some parts of this country greater caution is still being exercised than is the case in others, our courts have had neither the heritage nor experience of the English court to yet develop a distinctly Canadian jurisprudence.

A. THE FEDERAL STATE

Some questions still remain to be examined with a deeper analysis than has been apparent in the cases reported to date. The birthplace of the Mareva was a sovereign state with unitary political and judicial structures. The doctrine arose in a legal system where there was a dearth of statutory or common law remedies available to creditors in situations where debtors sought to avoid their liabilities.

Those reaches of the British Commonwealth which have embraced the Mareva principle, Canada and Australia particularly, have current political and legal frameworks considerably different than their motherland and have developed, as we have seen, other ways of solving debtor-creditor problems. With constitutional distribution

of both legislative and juridical powers divided between the provincial and federal jurisdictions, it is possible that within the Canadian context different considerations ought to be addressed than is the case in the United Kingdom.

For example, while the Canadian courts have permitted Marevas to issue against defendants who wish to move their assets from one province to another, is such a drastic remedy necessary in a federated nation where judgments in one province are usually reciprocally enforceable in another? In two of the court of appeal decisions we have examined (and many more at the trial level), Mareva injunctions have been sustained where the defendant's absence from the province or the removal of his assets has simply been to another Canadian jurisdiction.

In Humphreys v. Buraglia,[285] the defendant spent some considerable time in British Columbia and could not be located or served readily in New Brunswick. In the Manitoba case, Feigelman v. Aetna,[286] the defendant as an economic measure wished to close its office in Winnipeg, as it had done earlier in Ontario, and to re-group its business in the Province of Quebec where, should the plaintiffs have initiated their action and succeeded in their claim, any judgment against the defendant might be executed upon and paid. In neither of these two cases does any detailed consideration appear to have been given to what might be

described as a practical contextual difference between the Canadian and English situations. That is not to say that a Mareva order should be refused in every circumstance where a defendant can be readily located in another Canadian province for even absence from the geographic jurisdiction of the court to which the application is made is not a necessary requirement for entitlement. The fact should weigh however, and weigh heavily, in measuring the risk to the plaintiff in permitting the defendant to continue to deal with his assets within Canada.

The British Columbia appeal decision in Sekisui[287] was set more in the mould of early English cases where the defendant had been normally resident outside of the country as opposed to another political division within the same nation.

Lord Denning in Pertamina[288] earlier suggested that a court might not enjoin the transfer of a defendant's assets to another jurisdiction in which judgment either could be registered or enforced when he said:

> "...(The goods) are going to be removed to Hamburg where they will be just as much liable to seizure as in England, and probably more so, as the process is more understood and acceptable there."289

Only in a very recent case, as yet unreported, has a court in

this country seized upon what could be a significant factor in declining to simply copy the English practice. Meredith J. of the British Columbia Supreme Court in Deane v. Lds Corporation (1970) Ltd.[290] set aside an ex parte order enjoining a defendant from removing its assets from British Columbia to Manitoba, recognizing the right of the company to close its B.C. operations for valid economic reasons in commenting that

> "The purpose of a Mareva injunction is to prevent a defendant from 'stultifying any judgment....' before such is given. The movement of assets from place to place, carried out in the normal course of the defendant's business, does not provide the factual situation for the granting of such relief."[291]

The learned judge determined that the purpose of the move was not to defeat the plaintiff's claim and noted that any judgment obtained in this Province would be reciprocally enforceable in Manitoba.

This is one of very few instances seen where this issue has been directly faced and while it may also result from the fact that the motion was fully argued by counsel representing both parties, an exception to the usual practice, such relevant considerations ought not to be left solely for such occasions. Clearly, in both the New Brunswick and Manitoba cases, orders were vigorously resisted.

B. THE CHARTER OF RIGHTS

Since the arrival of Mareva to the Canadian scene, the Canadian Charter of Rights and Freedoms has also made its debut.[292] Its effect on established jurisprudence is rapidly being tested in the criminal law field and challenges in areas of civil practice and procedure will undoubtedly come more slowly. By virtue of its intended wide application however, contests based upon infringements of entrenched rights are bound to follow in most fields of regulated conduct.

Mobility rights, established by section 6 of the Charter, could well provide an arena for challenge to the applicability of a Mareva order in certain situations of interprovincial movement. Section 6 provides:

> (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (a) to move to and take up residence in any province; and
> (b) to pursue the gaining of a livlihood in any province.
>
> (3) The rights specified in subsection (2) are subject to:
>
> (a) any laws or practices of general application in force in a province other than those which discriminate among persons primarily on the basis of province of present or previous residence, and

(b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
[underlining mine]

While ostensibly derived from Canadian reception in 1976 of the 1966 United Nations International Covenant on Civil and Political Rights,[293] it is probable that concern about economic balkanization of Canada principally prompted inclusion in the Charter of provisions related to interprovincial mobility.

In common with sections 3 and 23 of the Charter, the first sub-section extends rights only to citizens of Canada. But with respect to sub-section (2), it is likely that the courts will continue to interpret the opening phrases as excluding legal persons such as corporations,[294] conferring physical mobility rights on natural persons only and limiting them to those with formal status as citizens or permanent residents.

It is arguable that a Mareva order could operate to prohibit a defendant, intending to relocate in another part of the country, from effectively doing so if he must leave his house, bank accounts and other assets behind. While actual physical movement, taking up employment, starting or expanding a business, etc. would be unaffected by the injunction, its practical effect could have that result.

Another provision, section 7 of the Charter, bears brief examination as well. While the new Charter does not include the language of the previous Diefenbaker Bill of Rights[295] concerning the "right to the enjoyment of property and not to be deprived thereof,"[296] the statutory safeguard in the 1982 Charter chosen by Canadian legislators may successfully avoid problems encountered in the United States[297] inherent in the phrase "due process." It may be argued that protection of individual property rights is one of the fundamental freedoms afforded to every person in Canada but it is unlikely an argument exists that the Mareva process unlawfully deprives such enjoyment so long as the constitutional protection "not to be deprived thereof except in accordance with the principles of fundamental justice" remains.

Certainly, once committees responsible for procedural rule changes formulate statements of practice such as New Brunswick has done and it is appreciated that Mareva is not an attachment process at all, arguments such as is suggested will carry even less weight.

C. MULTIPLE REMEDIES

With approval of the Mareva principle in Canada, unpaid creditors had opened to them another formidable course of action to ensure recovery from their

recalcitrant debtors. Its need in the United Kingdom and in Canada was undoubted as instances regularly arose where relief was unavailable in any other form. It is hard to imagine, with extentions of the principle now firmly in place, how the rule in Lister v. Stubbs can be said to remain of any real substance this full century later.[298]

We have seen that the English and Canadian courts have been ad idem in their refusal to deny the Mareva restraint even when other remedies may have been available and in Canada, that issue has been dealt with in several cases.[299] While at first denied in New Brunswick,[300] the better view expressed since has been that in any typical suit, several forms of remedy may be potentially available and each should normally be granted on its own particular merits without regard to the convenience of others. Initial impetus for the view came from Brandon J. in THE RENA K[301] where it was unsuccessfully argued that as the remedy of arresting ships in Admiralty actions in rem was available, the Mareva injunction should not. There is now no doubt as to the clear distinction between these two procedures[302] but the case by its uniqueness helps to illustrate another distinction between the English and Canadian situations.

In contrast to his English counterpart, the Canadian creditor prior to Mareva in many cases had other alternative courses open to him. For the major part, those

courses are still open to him but our courts, it appears, preferred to accept the English view without fully considering whether in the more frequent circumstance when alternate remedies are available, the Canadian court might view more strictly the necessity for application of the Mareva doctrine. Obviously, when use of another remedy is precluded factually or even by severe restrictions on usage, Mareva discretion should be exercised if it is just and convenient. What must be guarded against however, within the Canadian context, is its utilisation for the purpose of enforcing another remedy which turns out to be unavailable. That would, it is submitted, be an improper extention of the principle and as one writer has put it with another design:

> "... it would seem to be reformulating the unavailable remedy by pressing the Mareva procedure into service merely for the sake of expanding it."303

D. UNIFORMITY

Two final comments can be made concerning the application in Canada of the Mareva doctrine. Firstly, the courts have been slower in this country than they have been in England to adopt not only the guidelines but the principle itself. This undoubtedly is due in part to the traditionally conservative tendency of the Canadian judiciary to avoid indigestion when sampling any foreign

concoction; its uncertain extentions and its unknown final dimensions would provide a second explanation for the caution being exercised.

Now that exploratory expressions found in trial judgments are receiving the sanction of higher courts, probing of limits of the extentions of the doctrine will certainly continue. Whether, having regard to the Canadian situation, that extention should include a defendant who may not show any signs of disposing of his assets but simply converts everything he has into the form of ready cash may prove the next test in Mareva evolution.

Secondly, it may be important having regard to some of the considerations outlined in this chapter and for the sake of some certainty for national business organizations that there be a measure of uniformity in definition of the outer dimensions of the principle to be applied in each of the provinces and territories. The first judgments of the four appeal courts we have examined are not helpful to this end.

FOOTNOTES

CHAPTER IX

285. Supra, fn 147.

286. Supra, fn 149.

287. Supra, fn 16.

288. Supra, fn 66.

289. Ibid at p. 335 (A.E.R.).

290. Unreported, SCBC C831082, March 17, 1983, Vancouver Registry.

291. Ibid, at p. 2 (Reasons for Judgment).

292. Hereafter referred to as "the Charter." It is Part I (ss. 1-34) of the Constitution Act 1982 which in turn is Schedule B of the Canada Act, 1982, c. 11 (U.K.). Approved by the Canadian House of Commons on December 2, 1981 and the Senate on December 8, 1981, it received royal assent and came into force as of April 17, 1982.

293. U.N. GAOR Supp. 16, U.N. Doc. A/6316, in force in Canada August 19, 1976. Article 12 (1) thereof provides that "Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

294. See an example of the approach taken by the Alberta Q.B. in Southam Inc. v. Director of Investigations and Research of the Combines Investigation Branch [1982] 4 W.W.R. 673. Cf. Laskin, J.B. "Mobility Rights Under the Charter" in (1982) 4 Supreme Court L. R. 89 at p. 90-1.

295. Of 1960; R.S.C. 1970, Appendix III.

296. Section 7 reads in full:
"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

297. See discussion supra, Chapter IV, at pp. 46-9, concerning constitutional attacks on the American pre-trial attachment procedures alleging breach of the 14th Amendment safeguard of "due process."

298. Lister, cited supra, at fn 20. Certainly fewer and fewer courts refer to the decision than was the case when early Mareva jurisdiction was being tested.

299. Supra, Chapter V, p. 58.

300. See Irving Oil Limited v. Biornstad, Biorn & Co. et al (1981) 35 N.B.R. (2d) 265, 88 A.P.R. 265 (N.B.Q.B.)

301. [1979] 1 All E.R. 397, Q.B. 377 (Q.B.)

302. Not only was there initial doubt, there was some confusion when Lord Denning from time to time would refer to the Mareva as "acting in rem like the arrest of a ship does." Subsequent decisions have satisfactorily and with finality clarified that the Mareva order acts in personam only and in no way attaches to assets as the Admiralty arrest procedures do.

303. Rose, supra, fn 233, at p. 182.

CHAPTER X - POST SCRIPTUM

One must concede there is wisdom in standing back and looking a second time at the effects wrought by any new invention, discovery or innovation. In some cases, it is possible to make revisions in a second edition or to incorporate necessary changes or adjustments in a newer model. Sometimes it is mandatory to turn it all up and start anew. Practical experience is one of the best guides in determining the nature of the course one should adopt for the future.

The invention and practical evolution of the Mareva doctrine is no exception to these general prescripts. Justification for its creation is as great in 1983 as it was prior to 1975 and it has proven an essential and effective measure in debtor-creditor law. Its antecendents are undoubtedly frail and may soon be gone themselves altogether. Reliance upon them as sources may even be described as shabby. Approval has nevertheless been given to a much needed implement.

Adjustments are required to be made in extentions which have been fashioned to the underlying doctrine. They are now taking shape and will have the effect ultimately of renovating and strengthening the principles involved. This will be tuning rather than reforming as the

latter is not required. As it is applied in the Canadian context, some analysis is essential in the courts to ensure all that is imported is actually necessary in our situation. Some, it has been suggested in this paper, is not. The formulation of practice rules or the amendment of existing statutes can easily be tools to fabricate the minor adjustments needed.

As an equitable intervention, its use cannot be rigidly defined or controlled and as with earlier contrivances formed for ancient courts of equity by resourceful Chancellors, the need for its continued presence and its longevity cannot be accurately forecast.[304] One writer has likened the emergence of what is an admitted judicial invention to the rise over 125 years ago of the Rule in Tulk v. Moxey concerning the binding effect of restrictive covenants on successors in title. Whether or not a fair analogy, in neither case was the final result predictable by its judicial author.

Another has suggested that the instrument in this case was invented primarily because of the English Court of Appeal refused to accept the House of Lord's test in American Cyanamid.[305] It would seem the suggestion might have some merit if one can conclude that the plaintiffs in Karageorgis[306] and Mareva[307] would not likely have succeeded in obtaining injunctions under Lord Diplock's tenets

for damages would adequately have compensated them in both cases, precluding the granting of equitable relief.

Whether there is veracity to the suggestion is of course only speculation not likely possible of corroboration. As the courts in this country continue to clarify the applicability of that same test here, the mind of Lord Denning in 1975 may become more relevant.

As for any interlocutory injunction, litigants affected by a Mareva order, as well as third parties, are able to apply on short notice to have the order varied, set aside or dissolved, or even to appeal the decision. Those steps in this jurisdiction are still very rare, perhaps confirming that the order is both useful and appropriate. As consequences of the relief become more wide-spread and informed judges and counsel fairly raise even more inevitable effects, it is to be hoped that further challenges will enable even greater refinements to be set in place.

FOOTNOTES

CHAPTER X

304. (1979) 95 Law Quarterly Review 474.

305. The suggestion is that of Lazarides, supra, fn 61, at p. 52.

306. Supra, fn 9.

307. Supra, fn 8.

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APPENDIX I - TABLE OF UNITED KINGDOM CASES

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APPENDIX IV

NEW BRUNSWICK RULES OF CIVIL PROCEDURE

PRESERVATION OF RIGHTS PENDING LITIGATION

RULE 40 Interlocutory Injunction or Mandatory Order

40.01 A request for an interlocutory injunction or mandatory order, or for an extension thereof, may be made

(a) before commencement of proceedings, by preliminary motion, and

(b) after commencement of proceedings, by motion, but, in the former case, the request may be granted only on terms providing for commencement of proceedings without delay.

40.02 (1) Subject to section 34 of the Judicature Act, where a motion under Rule 40.01 is made without notice, an injunction may be granted for a period not exceeding 10 days.

(2) Subject to paragraph (3), a motion to extend an injunction may be made only on notice to all parties affected by the order sought.

(3) Where

(a) a party evades service of a notice of motion to extend an injunction, or

(b) service of a notice of motion to extend an injunction has not been effected on all parties and, because of exceptional circumstances, the injunction ought to be extended,

the court may extend the injunction but each such extension shall be limited to a period not exceeding an additional 30 days.

40.03 (1) Where a person claims monetary relief, the court may grant an interlocutory injunction to restrain any person from disposing of, or removing from New Brunswick, assets within New Brunswick of the person against whom the claim is made.

(2) In considering whether to grant an injunction, the court shall take into account the nature and substance of the claim or defence, and consider whether there is a risk of the assets being disposed of or removed from New Brunswick.

(3) Notwithstanding Rule 40.02, an injunction may be granted under this subrule to remain in effect until judgment.

(4) Where an injunction has been granted under this subrule to remain in effect until judgment and the claimant succeeds on his claim for debt or damages, the injunction shall, without further order, continue in effect until the judgment is satisfied.

40.04 Unless ordered otherwise, on the granting of an interlocutory injunction or mandatory order, the plaintiff or applicant is deemed to have undertaken to abide by any order as to damages arising therefrom.

40.05 An injunction or mandatory order may be made under this rule either unconditionally or upon terms and conditions as may be just.