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The Law School

Lancaster University

The Evolution, Utility and Effectiveness of the *Mareva* Jurisdiction in English Law: A Critical Appraisal

Joshua S. A. Sendall LL.B. (Hons)

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Dedicated to the memory of my Grandparents,

Elizabeth and Ron Barr

Declaration

I confirm that the thesis is my own work; that it has not been submitted in substantially the same form for the award of a higher degree elsewhere; and that all quotations have been distinguished and the sources of identification specifically acknowledged.

Abstract

The *Mareva* injunction has been available in England for 40 years. Initially, the *Mareva* injunction was a contentious form of relief; today it is regarded as an exceptionally effective device in common law jurisdictions across the globe.

This body of work critically appraises the development, evolution and effectiveness of the *Mareva* injunction. It is primarily established that the *Mareva* injunction is an equitable remedy. A corollary crystallises; in order to gain a fuller understanding of the *Mareva* injunction it is necessary to contextualise it within the equitable jurisdiction. Traditional doctrinal research methods explicate the development of the equitable jurisdiction drawing attention to certain characteristics, common themes, techniques and principles. Equity becomes the contextual framework upon which the ensuing discourse is rendered. At its heart equity is found to be about remedies; a supplementary system which repairs defects in the law. The *Mareva* injunction was devised to ring fence amenable assets on a temporary basis; to protect the possibility of an effective remedy. The continuing effectiveness of the *Mareva* injunction is examined in relation to evolving externalities such as the rise of globalisation inclusive of developing financial infrastructures and improving technologies. The action taken by the courts to overcome the difficulties presented by the abovementioned evolving conditions are evaluated. The range of ancillary and connected orders of the court which have been created or refined in order to ensure that the *Mareva* injunction remains effective are critically appraised. It is argued that the *Mareva* injunction can no longer be viewed in isolation; it is part of an evolving matrix of interconnected devices which characterise the modern *Mareva* jurisdiction.

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Contents

Abbreviations

Banking L J	**Banking Law Journal**
CJQ	**Civil Justice Quarterly**
CJICL	**Cambridge Journal of International and Comparative Law**
CUP	**Cambridge University Press**
CPR	**Civil Procedure Rules**
EAPO	**European Account Preservation Order**
HLR	**Harvard Law Review**
JBL	**Journal of Business Law**
JIBFL	**Journal of International Banking and Finance Law**
LS Gaz	**Law Society Gazette**
LQR	**Law Quarterly Review**
MLR	**Modern Law Review**
NLJ	**New Law Journal**
OJLS	**Oxford Journal of Legal Studies**
OUP	**Oxford University Press**
PD	**Practice Direction**
Syd L Rev	**Sydney Law Review**

Introduction

0.1. The focus of this thesis is the *Mareva* injunction. An effective explanation of the *Mareva* injunction is derived from a description of the circumstances under which it is regularly granted. The *Mareva* injunction is commonly ordered to prevent a defendant from evading or escaping its obligations to a creditor by disposing of or transferring assets beyond the jurisdiction with the intention of preventing the applicant from executing an ensuing judgment against those assets. Today in England the jurisdiction to grant a *Mareva* injunction is derived from section 37 of the Senior Courts Act 1981. The relevant procedural rules are found in the Civil Procedure Rules (CPR): Part 25 'Interim Remedies and Security for Costs' and Practice Direction 25A 'Interim Injunctions'.[1] In order to obtain the order an applicant must be able to: establish a cause of action by evidencing an underlying right in law or equity; demonstrate the existence of assets within the jurisdiction;[2] demonstrate a real risk that the respondent's assets may be dissipated; and present a good arguable case, demonstrating that success at trial is likely, and that if the order is refused then there is a genuine risk that any favourable ensuing judgment award would remain unsatisfied. As such, the *Mareva* jurisdiction is about the business of protecting the administration of justice. One of the important features of the *Mareva* injunction is that an application thereof will ordinarily be made *ex parte* (i.e. without notice) in

[1] Specific court guides also contain particular provisions relating to *Mareva* orders, see: The Chancery Guide, sections 5.25 to 5.36; Queen's Bench Guide, section 7.13 and The Admiralty & Commercial Courts Guide (9th edn), section F15 and Appendix 5.

[2] Although note, Ch 3 para 3.12. on the Worldwide *Mareva* Jurisdiction 'Foreign Assets and Proceedings'.

order to maintain the element of surprise which is often necessary to prevent the defendant from abusing an opportunity to dissipate their assets prior to its award. It shall be seen that the characteristic elements of speed and secrecy are just two features which have gained the *Mareva* injunction the reputation of being one of the law's nuclear weapons.

0.2. The aims and objectives outlined herein are achieved by means of a doctrinal research approach. The *Mareva* jurisdiction is explicated by way of a systematic exposition of the equitable principles and rules which have governed the availability of the *Mareva* injunction throughout time. There is an analysis of the relationship between equitable principles, restrictive common law precedents and certain customary policy considerations which have impacted upon the *Mareva* jurisdiction. It is observed that to some extent these considerations have created difficulties for claimants and practitioners but on further analysis it becomes apparent that the judiciary have overcome those difficulties via the formulation of innovative remedies and procedures. The propensity of the English judiciary to overcome those difficulties leaves an optimistic impression at the close of the thesis.

0.3. The research herein is not reform-orientated. It is a body of theoretical research with a fundamental aspect; theoretical because it promotes a fuller understanding of the conceptual basis of the *Mareva* jurisdiction in reference to the combined effect of a range of variables which impact upon it; fundamental because it generates a more holistic or profound understanding of the *Mareva* jurisdiction as a social phenomenon inclusive of historical and economic derivations and implications. A range of conventional library based legal research sources are

utilised throughout this body of work. There is a continuous content analysis of case law and legislation. Furthermore, the works of numerous notable and acclaimed jurists, practitioners and academic lawyers are reviewed; all are considered to be influential. Of particular note are the works or SFC Spry,[3] Edmund Henry Turner Snell,[4] Steven Gee,[5] Felicity Toube,[6] William Blackstone,[7] JH Baker,[8] FW Maitland,[9] William S Holdsworth,[10] HSG Halsbury,[11] WR Cornish[12] and Joseph Story.[13] A critical perspective is generated throughout the discourse via the inclusion and consideration of scholarly and practitioner journal articles.

0.4. This thesis has four broad aims. The discourse is directed at: *firstly*, establishing how and why the *Mareva* injunction was developed; *secondly*, establishing why the *Mareva* injunction is regarded as an extraordinarily effective device; *thirdly*, establishing whether equity has the capacity to evolve in order to protect the integrity of the processes of the courts in order to fortify the administration of justice in an ever changing world; and *fourthly*, establishing how the courts ensure that the *Mareva* jurisdiction remains an effective one.

[3] ICF Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (9th edn, Sweet & Maxwell Ltd 2014).
[4] Edmund Henry Turner Snell and John A McGhee, *Snell's Principles of Equity* (JA McGhee ed, 32nd edn, Thomson Reuters (Legal) Limited 2010).
[5] Steven Gee, *Commercial Injunctions (Formerly Mareva Injunctions and Anton Pillar Relief)* (Sweet & Maxwell 2004).
[6] Felicity Toube, Jonathan Wheeler and Kevin Roberts, 'England and Wales' in Felicity Toube (ed), *International Asset Tracing in Insolvency* (OUP 2009).
[7] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* (University of Chicago Press 1979).
[8] JH Baker, *An Introduction to English Legal History* (4th edn, Butterworths 2003);
[9] FW Maitland, *Equity Also The Forms of Action at Common Law: Two Course of Lectures* (CUP 1929).
[10] William S Holdsworth, *History of English Law* (7th edn, Sweet & Maxwell 1969).
[11] HSG Halsbury, *Halsbury's Laws of England* (Butterworths 2007).
[12] WR Cornish, *The Oxford History of the Laws of England* (OUP 2010).
[13] Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America Vol Ii* (3rd edn, C C Little & J Brown 1843).

0.5. The second broad objective of this body of work is to establish why the *Mareva* injunction is considered to be an extraordinarily effective device. That objective goes hand in hand with the first broad objective; establishing how and why the *Mareva* injunction was developed. To understand what makes it such an extraordinarily effective device the heritage of the *Mareva* injunction is examined within the context of the equitable jurisdiction during Chapter One. It is argued that a valuable understanding of the modern exposition of equitable principles and remedies necessitates an appreciation of what they are as well as how and why they were established. In order to gain that insight the historical and contextual development of equity is outlined and discussed inclusive of certain common themes which characterise the jurisdiction; thematic concepts such as conscience and the pursuit of the spirit of justice. The birth and growth of equity are examined in relation to the development of the common law and the relationship between the two systems. It becomes apparent that much which governs the *Mareva* jurisdiction can be ascribed to its heritage within the equitable jurisdiction. As such equity is a topic which is interwoven into the fabric of this thesis.

0.6. Chapter Two builds upon the foundations laid in Chapter One. As noted, Chapter One establishes that the *Mareva* injunction is a creature of equity, about the business of preserving the spirit of justice and preventing unconscionable conduct. Chapter Two validates those submissions by way of the contextual delineation of the development of the *Mareva* injunction during the second half of the 1970s. The discussion addresses the application of equitable techniques in practice, demonstrating how the peculiar equitable jurisdiction facilitated a shift away from

the customary English position which barred *Mareva* relief towards the modern and formative codified position which enables an applicant to obtain an injunction to freeze a defendant's assets where there is a risk that they may attempt to deal with their assets in a manner or form which would nullify an eventual judgment reward. The chapter's objects are delivered through a discussion of relevant case law in addition to an evaluation of the judicial rationale which underscored this area of law. The emerging modern business world inclusive of developing modern technologies is found to be significant; amplifying the risk that debtors may evade their obligations to creditors. What becomes apparent during Chapter Two is that the development of *Mareva* jurisdiction is itself a paradigmatic validation of the third abovementioned broad objective; establishing whether equity has the capacity to evolve in order to protect the integrity of the processes of the courts in order to fortify the administration of justice in an ever changing world. That validation is further fortified in the subsequent chapter.

0.7. In Chapter Three the focus moves from the fledgling cases which brought about the birth of the *Mareva* jurisdiction towards the modern *Mareva* jurisdiction. The aim is to gain an understanding of the modern scenarios which cause a creditor to consider supplicating the *Mareva* jurisdiction. It becomes apparent that the typical scenarios which gave rise to a *Mareva* application in the 1970s are not the same today. It is observed that the developing pan-global economy enables increasingly intricate commercial transactions to be established. The extent to which the modern global economy presents creditors with distinct problems is addressed and it is established that modern technologies facilitate skilfully fashioned deals which create

more opportunities for debtors to renege on their creditor obligations. Having generated an impression of the adverse complex scenarios which a creditor can be faced with another aim crystallises, namely an assessment of some of the strategic options available to a practitioner to overcome the formidable challenges presented by the modern deceptive debtor. In the process of achieving that aim the third and fourth broad objectives receive additional consideration as the measures taken by the English courts to ensure that the *Mareva* jurisdiction remains an effective one are discussed in relation to the adverse scenarios which are exacerbated by the modernising and evolving world. It becomes apparent that there is an ostensible interplay between the third and fourth broad objectives. The propensity of the English judiciary to create innovative responses to new problems in order to render the *Mareva* jurisdiction effective becomes clear. It is seen that a range of ancillary and connected orders have been created which allow claimants to act covertly and decisively to protect their interests in assets which may otherwise be spirited away. Those remedies are found to consist of a range of pre-trial interlocutory orders which may be set up to freeze an amenable asset, tender discovery or preserve evidence where it appears likely that a defendant has acted or will act to organise their affairs with the intention of defeating an eventual judgment reward.

0.8. In chapter Four the distinct problems created by separate corporate personality are discussed in relation to the *Mareva* jurisdiction. The principle of separate corporate personality which stands as one of the foremost principles of English Company law is found to present distinct problems for practitioners who advise creditors. It is established law that in England a company is both an

association of its members and also an entity separate from its members. It is precisely because a company is considered to be an entity separate from its members that a legal persona is conferred upon it. Concisely, the company is a person in the eyes of the law. As a result of this concept it is accepted that a company can enter into contracts of its own volition and also own property. It becomes apparent that these truths create additional difficulties where the proprietary status of non-defendant company assets are concerned in the case of a respondent to a standard form freezing order who also owns and controls that company. The difficulty, which pivots upon whether or not a standard form injunction can legitimately touch those assets, is discussed in relation to two recent High Court cases which presented two incompatible judgments. Ultimately, a Court of Appeal decision is discussed which provided clarification on the issue of separate corporate personality and third party asset holdings. At the close of the final chapter a prevailing conclusion matures which aligns closely with the perspective of Professor Sir Roy Goode: The *Mareva* jurisdiction constitutes a remarkable example of the effectiveness of procedural law and the continuing creative role of the judiciary.[14]

[14] Professor Sir Roy Goode and Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin Books 2010) 1289.

Chapter One: What is Equity?

Introduction

1.1. The focus of this dissertation is the *Mareva* injunction, contemporarily referred to as the freezing order. According to Eden 'an Injunction is a writ, issuing by the order and under the seal of a court of equity'.[1] Whilst there are reported instances where a Court of Law exercised a prima facie analogous power, for example by way of a writ of prohibition and estrepement in the case of waste,[2] the application of such analogous legal doctrines were rare and according to Eden fell 'completely into disuse'.[3] Consequently Story's statement, that the jurisdiction to grant injunctions was a power 'peculiar to Courts of Equity' is widely accepted.[4] The submission that an injunction is an equitable remedy is of little value in the absence of an understanding of what equity is and what it actually means. It has been suggested that discussing modern case law in reference to the equitable principles and case law of the past may mask the rational integrity of the law.[5] On the contrary, a valuable understanding of the modern exposition of equitable principles and

[1] Robert Henley Eden, *A Treatise on the Law of Injunctions 1789-1841*(Joseph Butterworth & Son 1821) 1.
[2] *Jefferson v the Bishop of Durham* (1797) 1 Bos & Pul 121.
[3] *Eden* (n 1) 159.
[4] Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America Vol Ii* (3rd edn, C C Little & J Brown 1843) 184; for a deconstruction of Story's submission see, RP Meagher, JD Heydon and MJ Leeming, *Meagher, Bummow and Lehane's Equity: Doctrines and Remedies* (4th edn, Butterworths Lexis Nexis 2002) 11.
[5] Peter Birks, 'Reviews and Notes: Meagher, Gummow and Lehane's Equity Doctrines and Remedies. 4th Ed' (2004) 120 LQR 344.

remedies demands an understanding of what they actually are as well as how and why they were established.

1.2. Equity is a concept and a subject which is inextricably interwoven within the very fabric of this thesis. *Mareva* Injunctions are said to be an equitable remedy; they fall within the remit of equity's jurisdiction. This Chapter is concerned with establishing what it actually means to say that an injunction is equitable. In pursuit of that understanding, the historical development of equity will be outlined and discussed. Certain common themes which permeate equity's jurisdiction will be identified. In the process of identifying and discussing those themes it will become apparent that the growth of equity's jurisdiction has been fundamental to the holistic development of the English legal system. The inauguration and evolution of equity will be examined in relation to the development of the common law. The significance of the relationship between the law and equity will be surveyed and established as a major contributing factor to the fluctuating availability of specific remedies such as injunctive relief from the medieval period to the modern day.

Common Themes within Equity

1.3. Equity can be broadly understood to pertain to notions of justice, ideas which go beyond the practical, procedural or bureaucratic rules which constitute the positive law.[6] Conceived of as such, equity has contributed significantly to several legal systems, in some instances intentionally incorporated, and others conceived of

[6] Ronald Dworkin, *The Philosophy of Law* (OUP 1979) 17; Edmund Henry Turner Snell and John A McGhee, *Snell's Principles of Equity* (JA McGhee ed, 32nd edn, Thomson Reuters (Legal) Limited 2010) 3.

almost inadvertently.[7] Equity introduces an element to the positive law which is underpinned by concepts of ethics; the pursuit of the spirit of justice. Equity is a particularly stratified concept deriving its composition from innumerable and often diverse sources,[8] but there is a common theme – equity is a supplementary system. Within the submission that equity is supplementary lies the datum that for equity to intervene there is a requirement that the positive law or a set of primary rules already exists. In England this state of affairs is deep-routed; it is embedded within the legal system. The established *status quo* is confirmed by the often cited equitable maxim 'equity follows the law'.[9] As such, equity can be considered to be secondary or ancillary but as shall be argued that it is not by association subordinate. Equity can qualify or legitimise the administration and application of the positive law by compelling those who are party to proceedings to submit to a more conscionable, a more 'complete' form of justice than the primary rules of the unaided positive law are mandated to generate.[10]

The value of equity to our legal system

1.4. It is not suggested that acknowledging the influence of equity's jurisdiction entails questioning the legitimacy of the positive law. Neither is it suggested that that the law is bereft of any moral content or worth. It is however advocated that to recognise the impact of equity concurs with the submission of Aristotle that the

[7] R Newman, *Equity in the World's Legal Systems* (Establissments Emile Bruyland 1973). 14-18.
[8] H Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (Murray 1861) 44.
[9] *Stack v Dowden* [2007] UKHL 17 [33] (Lord Walker HL); *Jones v Kernott* [2011] UKSC 53 [22] (Lord Walker & Lady Hale SCJJ).
[10] *Wilson v Northampton and Banbury Junction Rly Co* (1874) LR 9 Ch App 279 [284].

joined labours of equity and the positive law are focussed upon achieving a complete justice although by alternative means.[11] However to some extent equity's development is attributable to the conflict which arose between its jurisdictional boundaries and those of the law. In an ideal world the perfect legal system would comprise objective principles applied universally. The reality is that that the application of the positive law can have the effect that an unjust result occurs; the generality of prescribed and inflexible rules fail to accommodate the diverse array of scenarios which arise in everyday life. In such situations equity may intervene in order to deliver supplementary assistance, ensuring that a more holistic justice is served which can account and adjust for the unique array of cases that arise in practice. Broadly speaking equity possesses more flexibility and as a result it can tender bespoke responses to atypical or original cases. Nonetheless as shall be discussed in due course equity is not a capricious jurisdiction. In the exercise of his or her equitable jurisdiction a judge works to adjudicate in accord with what he or she believes that the law maker would want if that exceptional or unique case was laid before them.[12] In a nutshell, when exercising equitable jurisdiction a court determines in accordance with the 'spirit of the rule and not according to the strictness of the letter'.[13]

[11] Aristotle, *Aristotle's Nicomanchean Ethics* (Robert C Bartlett and Susan D Collins, tr, eds, University of Chicago Press 2011) 90-115.
[12] M McNair, 'Equity and Conscience' (2007) 27 (4) OJLS 659, 660.
[13] William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765-1769* (University of Chicago Press 1979) iii 429.

Injunctions: a creature born out of conflict?

1.5. As discussed, to understand the nature and application of injunctive relief within the English legal system an explanation of equity's historical derivations is beneficial. While the logic of examining the origins and development of injunctions within the contextual framework of the equitable jurisdiction could be called into question, it is maintained that in order to generate a meaningful understanding of the modern use of injunctions it is necessary to consider the jurisdictional issues which have affected their availability, to establish how they came to be as well as the ways in which their use has evolved through time. Looking specifically at the English jurisdiction it can be said that equity pertains to those doctrines and remedies which were generated by the Court of the Chancery prior to its abolition under the Judicature Acts of 1873-1875.[14] According to Maitland, equity began its development in earnest throughout the medieval era through the interactions of the Lord Chancellors and their office, namely the Chancery.[15] It should not be inferred that equity ceased its development when these Acts became operative. As shall be observed latter in this discourse equity is a progressive jurisdiction, its principles may evolve to accommodate contemporary scenarios.[16]

1.6. It was established earlier that the supplementary nature of equity requires the existence of a more prescribed system of law. In England the system which provided those foundations and expedited the conception of equity was the

[14] *McGhee* (n 6) 4; A Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 LQR 238; FW Maitland, *Equity Also The Forms of Action at Common Law: Two Course of Lectures* (CUP 1929) 1-3.
[15] *Maitland* (n 14) 1-5.
[16] *Re Hallett's Estate* (1879-80) LR 13 Ch D 696 [710] (Sir George Jessel MR).

common law which commenced and developed quickly from the time of the Norman Conquest of 1066 and the rule of Henry III. Throughout this early developing period the common law possessed insufficient precedent to direct a judge when adjudicating a dispute. Courts worked broadly to provide a regimented system directed towards determining quarrels; certain practices employed in the process would surely now be considered archaic and draconian, for example trial by combat.[17] The Chancellor was central to the fledgling development of the common law as the office of the Chancellor was authorised to issue the necessary writs which enabled a litigant to begin an action in the common law courts. In time legislative restrictions, (particularly the Provisions of Oxford 1258 and the Statute of Westminster the Second (De Donis Conditonalibus) 1285 constrained the Chancellor's independent authority to issue any new forms of writ. As a result of such restrictions the common law came to be regarded by some as a system unable to justly address the distinct merits of an atypical case. The system was criticised because when presented with two *prima facie* similar cases the common law could not differentiate between the unique material facts of a case which litigants felt justified a modified or different application of the law. There were also concerns that influential and powerful parties to a trial may be able to coerce a jury, resist or frustrate a court order. By way of a contextually apt example a court order may be frustrated by way of a defendants' dissipating or otherwise relocating impugned assets; rendering an order to pay monies futile.[18] Therein lays a brief summary of some stimuli which prompted the development and intervention of equity.

[17] CK Allen, *Law in the Making* (7th edn, OUP 1964). 399-405.
[18] William S Holdsworth, *History of English Law* (7th edn, Sweet & Maxwell 1969) 1:398-403.

The heavenly origins of equity's jurisdiction

1.7. It became a common practice that where a litigant felt that justice was not being served in the common law courts an appeal would made directly to the King as the 'fount of justice;' the highest point of corporeal appeal. The sovereigns authority as the 'fount of justice' derived legitimacy from the idea that the King was God's representative on earth, imbued with the blood of Christ established by a traceable bloodline to King David which was itself traced to the great patriarchs of the old testament ending at Adam born of YHWH-Elohim the monotheistic Judaeo-Christian deity. During the first half of the 14th Century high volumes of applications requesting the King's adjudication prompted the King to delegate with increasing regularity his judicial responsibilities to the Chancellor who would thereby exercise the sovereign's residuary jurisdiction as the 'keeper of the King's conscience'.[19] In 1349 the volume of applications was such that Edward III issued an order which sanctioned the delegation of his royal judicial virtues. In 1474 Edward the IV made a declaration which effectually transferred his judicial authority to the Chancellor entirely. The upshot of Edward IV's decree was the creation of a Court of the Chancery - distinct and independent from the Crown.[20]

[19] MF Morris, *An Introduction to the History of the Development of Law* (University of California Libraries 1909) 278.
[20] *Holdsworth* (n 18) 1:400-404.

The essence of equity

1.8. Sources from the early days of the Chancery indicate that the Chancellor justified his intervention on vague and inconsistent concepts of conscience.[21] Indeed conscience came to be a chancery hallmark; emblematic of what the chancery stood for. Unfortunately, neither the Chancellor's specific incentives nor his justifications are known in full today because the Chancellors reasoning's were either not recorded or were poorly preserved.[22] Considering the function of the Chancellor in reference to the common law adds valuable insight toward the focus of this dissertation. The rigidity of the common law limited a judge's autonomy due to the exacting procedure for pleadings, allegations, tracing and receiving evidence. In contrast the Chancellor was comparatively less restricted, possessing the authority to elicit a wider array of evidence which was admissible within the jurisdiction of the Chancery.[23] Such exploratory techniques enabled a Chancellor to circumnavigate or avoid altogether certain formalities and technicalities which could defeat an applicant's claim at common law. Thus imparting to the Chancery relative freedom to pursue the spirit of justice free from the bureaucratic obstacles which hindered the common law. Equity's purposeful pursuit of the spirit of justice is a fundamental facet of this discourse. In chapter two it shall become apparent that the birth of the *Mareva* jurisdiction is a prime example of how an equitable jurisdiction was

[21] DR Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Ashgate Publishing 2010) 11-19; TS Haskett, 'The Medieval English Court of Chancery' (1996) 14 (2) Law and History Review 245, 268; JH Baker, *An Introduction to English Legal History* (4th edn, Butterworths 2003) 105-107.
[22] *Haskett* Ibid, 263.
[23] A Burrows, 'We Do This at Common Law but That in Equity' (2002) 22 (1) OJLS 1. J Getzler, 'Patterns of Fussion' in P Birks (ed), *The Classification of obligations* (Clarendon Press 1997).

established and utilised to fortify the integrity of the court's processes; to tender the effective administration of justice.[24]

Common Law conflict

1.9. Numerous jurists suggest that the activities of the medieval chancery were considered to be contentious by lawyers of the common law. The inference was that equitable intervention undermined the common law because the chancery administered an inconsistent discretionary form of justice.[25] The discord between equity and the common law is unmistakably personified by Shakespeare in Measure for Measure through the characters of Angelo and Escalus. Escalus favours notions of fairness and consideration of the comprehensive range of facts which make up a case, this flexible approach typified the equitable establishment. On the other hand Angelo advocated an undeviating black letter approach to the administration of justice; an exacting schema typical of the common law.[26]

1.10. The conflict between equity and law continued throughout the first part of the seventeenth century. A now infamous disagreement between Lord Ellesmere of the chancery and Coke CJ of the King's Bench Court forced the King to address the matter head on. Resolution was delivered by James I in the *Earl of Oxford's Case*.[27] The King ruled that regardless of the fact that equity was a supplementary system and one which actually required the existence of the primary common law, in a case

[24] Peter Devonshire, 'Pre-Emptive Orders against Evasive Dealings: An Assessment of Recent Trends' [2004] JBL 357–377, 374.
[25] JH Baker and SFC Milsom, Sources of English Legal History: Private Law to 1750 (Butterworths 1986) 104.
[26] William Shakespeare, *Measure for Measure* (Palgrave Macmillan 2010) II ii 79-82.
[27] *The Earl of Oxford's Case* (1615) 1 Ch Rep 1 [6].

where equity and the law were in conflict, equity would prevail.[28] This ruling established a significant tenet fundamental to the operation of the English legal system. The essence of the judgment which was codified in the Judicature Act 1873[29] still endures to this day. Equity's primacy is rational when you consider the origins of the two systems. The common law grew largely out of a body of customs and of the precedents laid down by early itinerant judges. Whereas equitable jurisdiction derived its mandate from the personhood of the sovereign, thus it is understandable that the sovereigns own system should reign above the former.

Parallel jurisdictions

1.11. The previous discussion could feasibly create the impression that the law and equity were in a state of constant conflict, a concept which would be misleading.[30] The two institutions did not always construct inconsistent substantive rules, nor were the two systems always at odds with one another when adjudging similar facts.[31] The two institutions generally operated with distinct capacities and in distinct areas; equity did not deliberately seek to contradict the common law. Equity's jurisdiction operated *in personam* and its authority was enforced by means of specific remedies. The courts of the common law did not have the jurisdiction to grant specific remedies such as injunctions. Contrastingly, the remedy dispensed at law was by way of monetary damages, a contrast which demonstrates the two evolving systems distinct *modus operandi*.

[28] Ibid.
[29] S. 25 (11).
[30] J Getzler, 'Patterns of fusion in P Birks (ed), *The Classification of obligations* (Clarendon Press 1997) 176-179.
[31] *McGhee* (n 6) 9.

The stabilisation of the equitable jurisdiction

1.12. Judicial differences were present within equity's jurisdiction throughout its development as well as externally between itself and the law. Throughout the seventeenth century concepts of conscience developed and changed as chancery lawyers continued to fine tune equity's technique, a process which invariably involved a certain level of judicial vacillation. On the one hand, prominent Chancellors such as Lord Eldon (1801-1827) and his predecessor Lord Hardwicke (1737-1756) preferred the rules of systemisation initiated by the earlier Lord Nottingham.[32] By the twilight of Lord Eldon's Chancellorship the significant growth of the equitable doctrines had settled,[33] equitable jurisprudence had advanced to the stage where the courts of the Chancery operated by way of reference to established rules, principles and precedents. In a manner and form equity had developed a level of technical stability and consistency which was more typical of the common law that equity stood to supplement. Lord Eldon rebutted assertions that Equity was an arbitrary power, free to disregard former precedents and rules. Equity was not to be regarded as a capricious force; the doctrines and technique of equity should be 'well settled, and made uniform'.[34]

1.13. On the other hand, and in contrast to Lord Eldon's schema, a second concept persisted. Kerr and Gee observed that equity was not a static or constant system of

[32] Ibid.
[33] Ibid.
[34] *Gee v Pritchard* (1818) 2 Swans 402 [414].

rules applicable to a quantifiable set of circumstances.[35] Their opinion was that the cases in which equitable jurisdiction were exercised should be considered as examples; the judgments thereof are not definitive precedents. The supposition is that a strict observance of the established rules, principles and precedents of equity is not always appropriate or even possible because as Kerr noted in the late 19th century, the evolution of society may necessitate the formulation of new remedies suitable for new scenarios,[36] a sentiment mirrored in Chapter Three[37], one which supports the notion that equity is not 'past the age of child bearing'. A potential conciliation of the two schemas therefore is that equity whilst stable should possess the innate capacity to be both accommodating and dynamic.

The gradual fusion of equity and the law

1.14. By the close of Lord Eldon's Chancellorship in the first quarter of the 19th century the legal landscape was trite for jurisdictional fusion. The main heads within equity's jurisdiction were well established: the regulation of mortgages and relief against forfeiture; guardianship of lunatic's property; the control of powers and trusts; guardianship of infants.[38] Rights and titles at law were not disputed, equity existed to supplement them, coming to be recognised as a 'gloss' on the on the law.[39] The accepted idea that equity is a supplementary system is underpinned by

[35] William Kerr, *A Treatise on the Law and Practice of Injunctions in Equity* (1st edn, William Maxwell & Son 1867) 4-5; Steven Gee, Commercial Injunctions (Formerly *Mareva* Injunctions and Anton Pillar Relief) (Sweet & Maxwell 2004) 3.
[36] *Kerr* (n 35) 4-5.
[37] See Ch 3 para 3.1.
[38] *Maitland* (n 14) 17-21.
[39] Ibid 19.

the aforementioned maxim 'equity follows the law'.[40] In the eighteenth and early nineteenth centuries the courts of the common law did not commonly entertain a title or right of equity, the supposition is that there was a presumption that applicants would appeal to the supplementary courts of the Chancery in pursuit of a more complete form of justice. In that respect equity and the law could be considered to operate on a quasi-symbiotic basis. Nonetheless the reality remained that in a case which traversed the two jurisdictions litigants were faced with the prospect of dual actions; subsequently the legislature sought to formalise and harmonise the quasi-symbiotic interaction between the common law and equity.

1.15. As noted there were clear distinctions between the common law and equity. Jurisdictional distinctions and oscillation was becoming a topic which the legislature was taking an interest in. What was becoming apparent was that in order to ameliorate the jurisdictional difficulties each court would need to be able to deliver a 'complete justice' in each case laid before it. Each court (irrespective of its common law or equitable heritage) would need to be able to award both damages and injunctive relief in any case which warranted it. The Chancery reform movement was mirrored by an equivalent process occurring in the common law domain under the umbrella of the Common Law Commissioners. The common law process culminated in section 79 of the Common Law Procedure Act 1854 which authorised the common law courts to award injunctive relief against the repetition or continuance of a wrong. Injunctive relief could be awarded in addition to any damages ordered in respect of a harm which had already occurred. The practicable corollary was that the

[40] *Jones v Kernott* [2011] UKSC 53 [22] (Lord Walker & Lady Hale SCJJ); *Stack v Dowden* [2007] UKHL 17 [33] (Lord Walker).

courts of equity should correspondingly be endowed with the authority to order damages in addition to equitable relief; a recommendation which the Chancery Commission made in its third report of 1856:

> 1.16. "We are of opinion that in all cases in which a Court of Equity interferes by injunction it should have jurisdiction to give compensation in damages for the injury done in addition to restraining the commission of the injury for the future, and that such damages should be given although the act complained of may have produced not profit for the wrongdoer".[41]

1.17. Looking broadly at the parallel reform movements occurring in the common law courts and the Chancery as discussed above it is apparent that although they marked progress, they did not offer perfect solutions. Under the Section 82 of the Common Law Procedure Act 1854 a common law court could grant an *ex parte* inunction at any point in time once an action had been brought but its availability was dependent on there being a subsisting power to grant damages at common law. Therefore the courts of the common law did not have the jurisdiction to order an injunction to enforce a right which was only recognised by equity, nor did they have the jurisdiction to restrain anticipated or threatened wrongs when no past wrong could be established. The simple reason for this prohibition was that where a common law court could not establish an existing cause in damages it could not

[41] Chancery Commission, Third Report of Her Majesty's Commissioners Appointed to Inquire into the Process, Practice, and System of Pleading in the Court of Chancery & c, 1st series [2064] HC 1856, vol 22, 3-4.

grant an injunction. Contrastingly the Chancery Court's intervention was permissible even where there was a mere threat of infringement upon some legal or equitable right; at equity an injunction could be granted *quia timet*.

1.18. The jurisdiction to grant an injunction *quia timet* was dependent upon there being some evidence to indicate that some wrongful act would be committed in the future. The perceived threat of a potential transgression unaccompanied by a wrong in the past was actually the most common cause of bills seeking injunctions in equity.[42] Significantly, the jurisdiction to grant injunctions *quia timet* did not demand of an applicant the burden of establishing that a future transgression was a certainty rather that it was very likely. Furthermore In a case where a past wrong could be established, in order for a *quia timet* injunction to be granted an applicant still had to show some genuine threat suggesting that a transgression would occur in the future.[43] By its nature the *Mareva* injunction is *quia timet* at work; operating on the basis of the perceived threat that amenable assets may be dissipated.

Simplifying persisting Jurisdictional complexities

1.19. The old Courts of the Chancery were invariably petitioned with requests to order an injunction to support a contractual right, but not the specific performance of that contract. Convolutedly the contractual right in question had to be tried in a court of the common law, while a Court of the Chancery could grant an injunction in the interim period between the action commencing in the common law court and the judgment thereof. Alternatively a perpetual injunction could be ordered

[42] *Fearson v Loe* (1878) 9 Ch.D 48 [65] (Sir George Jessel MR).
[43] *Proctor v Bailey* (1889) 42 Ch.D 390 [398].

following validation at the trial of a contractual right in the common law court. The *status quo* was simplified somewhat following a statutory provision which compelled judges in the High Court of Chancery and the Court of the Chancery of the County Palatine of Lancaster to adjudge the merits of the underlying action itself rather than refer the matter to the Common law Courts.[44]

The Judicature Acts: a fused jurisdiction

1.20. In 1869 a commission was established to simplify conclusively the bifurcated bureaucratic procedures that many believed hindered the judicial process. The Judicature Reform Commission of 1869 concluded that previously discussed attempts to clarify and simplify jurisdictional confusion had largely failed and proposed more fundamental reforms.[45] The principal proposition of the Commission was that the cumbersome systems of Equity and the Law should converge creating a new fused jurisdiction.[46] The crystallisation of the recommendations of the Judicature Reform Commission was effected by the Judicature Acts[47] which created a unified Supreme Court of Judicature.

1.21. The Judicature Acts by and large codified the *Earl of Oxford's case* judgment, legislating for the combined administration of equity and the law with clear protocol

[44] The Chancery Regulation Act 1862, better known as Sir John Rolt's Act (25 & 26 Vict. C42), the legislation compelled the application of the formerly ineffective Improvement of the Jurisdiction of Equity Act 1852; cited in, *J C Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282 [289]-[299] (Dixon J).
[45] SFC Milsom, *The Historical Foundations of the Common Law* (2nd edn, Butterworths 1981) 83.
[46] WR Cornish, *The Oxford History of the Laws of England* (OUP 2010) 1202-1212.
[47] Supreme Court of Judicature Acts 1873 and 1875 ('Judicature Acts').

for situations where a conflict arose between the two systems.[48] The formative legislation stipulated that where equity and the law were in conflict the former would prevail.[49] Ten specific instances were listed and significantly to the discourse herein, one such instance was the power of granting injunctions and appointing receivers.[50] The united administration of the Supreme Court directed to administer the fused jurisdiction comprised the Court of Appeal and the High Court sub-divided into five divisions, later three. As each Division was now statutorily bound to recognise defences in equity the common injunction became defunct and was abolished accordingly.[51] Although in theory the result of disputes set before the new Supreme Court would be the same as prior to the Judicature Acts; the modification was the elimination of the moribund meandering route to justice.

The effect of the Judicature Acts upon the availability of injunctions

1.22. The Judicature Acts altered the procedure for obtaining an injunction, henceforth a writ of injunction was no longer to be issued, and an injunction was obtainable by judgment or order only. The Act of 1873 vested the former jurisdiction of the Court of the Chancery into the High Court of Justice and a new additional jurisdiction to grant injunctive relief was created under s 25(8) of the 1875 Act. Under the new provision injunctions could be obtained by an interlocutory court order in every case where it was apparent to the court that it was 'just or convenient'

[48] *McGhee* (n 6) 10-13.
[49] Judicature Act 1873 S25 (11).
[50] Ibid s. 25 (1)-(10).
[51] Ibid s. 24 (5).

to do so.[52] This jurisdictional expansion marks a significant development towards the growth of the subject matter of this discourse; it is fundamental to the development of the modern day freezing injunction.

1.23. It shall become apparent in the following chapter that the statutory jurisdiction to grant injunctive relief is wide, however it does not tender an unfettered prerogative to be applied wherever a court sees fit. Injunctive relief can only be granted by the court where an applicant can demonstrate a right in law or equity.[53] Alternatively, in the case of anti-suit injunctions an applicant must demonstrate some actual conduct or threat of conduct by the other party to proceedings which either is or would be considered to be unconscionable.[54] The same is true of the *Mareva* jurisdiction[55], for example where there is a real risk that a defendant may remove an impugned asset from the UK in order to defeat an order in the future the courts may act to defeat such potential frustration. Gee claims that while the new legislative jurisdiction was, on the face of it a statutory innovation, in truth the old equitable principles and ratios which governed their jurisdiction were

[52] The superlative provision was re-enacted in s. 45 Supreme Court of Judicature (Consolidation) Act 1925, the current provision is s. 37 of the Supreme Court Act 1981.
[53] *Bremer Vulkan Schiffbau v South India Shipping Corporation Ltd* [1981] AC 909 [979]-[980]; *Mercedes Benz AG Leiduck* [1996] AC 284; *Pickering v Liverpool, Daily Post and Echo Newspapers Plc* [1991] 2 AC 370 [420]-[421]; *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 381 [395]-[396]; *Siskina* v *Distos Compania Naviera SA* (The Siskina) [1979] AC 210 [265]; *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30 curtailing the obiter dicta comments of Sir George Jessel MR in *Beddow v Beddow* (1878) 9 Ch D 89; *Malnesbury Railway Co* v *Budd* (1876) 2 Ch D 113.
[54] *South Carolina Insurance Co v Assurantite Maatchappij 'De Zeven Provincien' NV* [1987] AC 24 [39] G-40 H; *Pickering* v *Liverpool Daily Post* [1991] 2 AC 370 [420]-[421]; *Siskina* v *Distos Compania Naviera SA (The Siskina)* [1979] AC 210; *Cardile* v *LED Builders Pty Ltd* (1999) 198 CLR 380 [395]-[396].
[55] [1975] 2 Lloyd's Rep 509.

not rendered obsolete. But then again neither did they offer answers to new questions or create solutions to new problems.[56]

Conclusion

1.24. At this stage it is appropriate simply to comment that it has been demonstrated that the principles of equity stand as one of the principal foundations of the English legal system. Even in their modern form it is important to acknowledge that the heritage of equitable principles can be found in the function of the medieval Court of Chancery and the exploratory techniques of the Chancellors. It has been established that opinions have varied in relation to the principles of equity, and whilst equity is not a capricious jurisdiction it is generally accepted that equity is about the business of preventing unconscionable conduct. Equity can be considered to supplement the law and as such equitable remedies including injunctions, operate to ensure that the spirit of justice is upheld; to guarantee that the authority of the court is not rendered impotent. Since times immemorial equity has been valued precisely for the reason that it was not constrained by the same rigid obedience to custom or the doctrine of judicial precedent as the common law. Conceptually that comparative freedom facilitates the purposeful pursuit of the spirit of justice; a submission which forms a fundamental facet of the discourse which follows. In the following chapter it shall become apparent that the development of the *Mareva* jurisdiction is paradigmatic of the idea that equitable remedies can evolve in order to fortify the integrity of the court's process. Processes which could otherwise be

[56] *Gee* (n 35) 4.

thwarted by dishonest defendants or uncompromising bureaucratic obstacles. At its heart equity is about remedies; the *Mareva* injunction preserves the likelihood of an effective remedy by ring fencing amenable assets. It will become apparent that equitable principles and techniques can be extremely effective when used to protect the spirt of justice in practice.

Chapter Two: The emergence of the *Mareva* jurisdiction

Introduction

2.1. In the previous chapter the equitable jurisdiction was surveyed and it was established that the *Mareva* injunction was a creature of equity. The implications of that submission were discussed in terms of the objects of equity, namely the pursuit of the spirit of justice and the prevention of unconscionable conduct. The relative autonomy available to the courts when exercising an equitable jurisdiction when compared to the law was also established to be significant. In this chapter the focus narrows fixing its sights upon the development of the *Mareva* jurisdiction. This discussion addresses the application of equitable techniques in practice. The discourse builds upon the foundations laid in chapter one, seeking to demonstrate how the peculiar equitable jurisdiction facilitated a shift away from the restrictive traditional English positon which barred *Mareva* relief towards the modern formative position which allows a claimant to obtain a freezing order where there is a real risk that a defendant may abscond or remove assets from the jurisdiction which are required to satisfy a debt. This objective is achieved through a discussion of relevant case law as well as an evaluation of the judicial rationale which shaped this area of law. Certain other considerations are also discussed and held to be key, such as the nature of the emerging modern business world in the nineteen-seventies, inclusive

of technological advancements which amplified the potential for a debtor to evade his obligations to a creditor.

What is a *Mareva* Injunction?

2.2. *Mareva* Injunctions must be contrasted with an order for the detention, custody or preservation of an interest in property (whether real property, movable property, fungible property or monies) made with the intention of ensuring that a final order of the court is effective. Such an order can be issued pursuant to the rules of the court when appropriate or pursuant to the inherent jurisdiction of that court. A *Mareva* Injunction is a different creature, deriving its name from the case which for more than two decades tendered its namesake, *Mareva Compania Naviera SA v International Bulkcarriers SA*[1] In its current form a '*Mareva* Injunction' (later referred to as a 'freezing injunction' or 'freezing order' pursuant to the Civil Procedure Rules (CPR): Part 25 and Practice Direction 25A) is a term which is commonly used to denote a particular form of injunction which is granted as a means to prevent the removal of impugned assets from the jurisdiction or from dissipating, disposing of or dealing with the assets within the jurisdiction in any manner or form which would have the effect of frustrating the execution under proceedings brought by an applicant.[2]

[1] [1975] 2 Lloyd's Rep 509.
[2] *A J Bekhor & Co Ltd v Bilton* [1981] QB 923 [936]; *Z Ltd v A-Z* [1982] QB 558.

The traditional position

2.3. By the 19th Century it was the established practice that a court of equity would not grant an injunction to a creditor preventing a debtor from dealing with their property if that creditor was not able to establish a legal or equitable right or interest in that property.[3] Consequently, a person who wished to apply for relief on the basis of their claim to be a creditor could not file a bill with a Chancery Court to obtain an injunction based on the supposition that they were 'going' to be defrauded by way of the defendant 'making away with its assets'.[4] The implication was that there was no jurisdiction which could allow a court to order analogous injunctive relief. No suggestion of a defect in power arose; if such injunctions were ordered then a court would have exercised the same powers employed to enforce other equitable orders. It is apparent that equitable jurisprudence directed that in scenarios where relief of this kind was solicited it was on balance inappropriate, unconscionable or unjust to obstruct the defendant's right to deal with his or her property as he or she wished to. Although it follows that if an applicant could evidence a legal or an equitable right or interest attached to the impugned property then the general principles would be applicable and an applicant could act upon that proprietary right in and of itself.

[3] *Mills v Northern Railway of Buenos Aies Co* (1870) 5 Ch App 621 [627]-[628] (Lord Hatherley LC); W Joyce, *The Law and Practice of Injunctions in Equity and at Common Law*, vol 2 (Forgotten Books 1872) 923.

[4] *Mills* (n 3) [628] (Lord Hatherley LC); similarly see, *Grupo Mexicano De Desarrollo SA v Alliance Bond Fund Inc* 527 US 308 [318]-[321] (1999) – the USA Supreme Court held that a creditor could only receive such relief post judgment.

Innovative legal thinking

2.4. As inventive lawyers tested the waters in the aftermath of the Judicature Acts the judiciary issued repeated statements that prior to a judgment the High Court did not have the authority to restrain a person from dealing with or removing their assets from the domestic jurisdiction. Prior to the emergence of the *Mareva* jurisdiction in 1975 the lack of any practical or justiciable way to stop a non-resident of this country from frustrating an order of the court by removing impugned assets in order to frustrate a potential judgment was a *status quo* which was receiving legislative attention and jurisprudential criticism. The Supreme Court Practice and Procedure Committee Final Report[5] contained the proposition that the writ of *ne exeat regno* which restrained a defendant from fleeing the jurisdiction should be extended and made available post-judgment to stop a sentenced debtor from fleeing the jurisdiction and evading the obligations owed to his creditor.[6] It was in hindsight a forward thinking recommendation however it was not pursued at the time. Megarry J stated in *Felton v Callis*[7] that the writ *ne exeat regno* was categorically not available for application where the sole purpose was the preservation of assets within the jurisdiction. Although Megarry J did comment *obiter* that it would be advisable to consider legislative intervention in this area, echoing the comments of the Committee on the Supreme Court Practice and Procedure. Evidently legislative or judicial action to combat the problem of fleeing or evasive debtors was increasingly called for.

[5] Cmd 8878, 1953.
[6] See Ch 3 para 3.25.1.
[7] [1969] 1 QB 200.

2.5. Suffice to say that the aforementioned judicial preference has changed and it is now trite law that the *Mareva* injunction may be ordered in appropriate circumstances. The development of the *Mareva* jurisdiction is in many respects a product of that symbiotic relationship between the law and equity discussed in chapter one. That is to say that it is an area where equity intervened in order to supplement the common law; to achieve a 'more perfect justice'.[8] McGrath observes that the *Mareva* jurisdiction was inaugurated and developed primarily by judges to protect an applicant's interest's pre-trial.[9] That submission aligns closely with the essence of the maxim 'equity will not suffer a wrong to be without a remedy'.[10] A defect in the law was evident and equity intervened to realise the effective administration of justice.

Case law development: the conception of the *Mareva* injunction

2.6. It has been argued that a growing number of lawyers and litigants expressed a persisting desire for the creation of a *Mareva* jurisdiction. In the discussion which follows attentions concentrate on the body of case law which established that jurisdiction. The intention is to look at the material facts of the cases which follow, to identify similarities or differences, to look at common themes and to explore the judicial reasoning which facilitated the formation of this area of law. It will become apparent that whilst the *Mareva* jurisdiction is now beyond doubt, its institution was not without reservation or equivocation.

[8] See Ch 1 para 1.4.
[9] Paul McGrath, 'The Freezing Order: A Constantly Evolving Jurisdiction' (2012) 31 (1) CJQ 12–29.
[10] Gary Watt, *Trusts & Equity* (6th edn, OUP 2014) 527.

2.7. The case in which a freezing injunction was first granted was actually *Nippon Yusen Kaisha* v *Karageorgis*.[11] The applicants in the case, Nippon Yusen Kaisha were a large Japanese ship owning company. Nippon made charterparties with the defendants who were named George Karageorgis and John Karageorgis. The defendants chartered three vessels from the big Japanese ship-owners, the hire thereof was payable by the Karageorgis' who claimed to have transmitted funds to make good their bargain to New York. The transmission of those funds was disputed as the payment never materialised and Nippon was left without the monies owed to them. Attempts by Nippon to locate the defendants failed; it appeared that they had vacated their offices in Piraeus.[12]

2.8. Having received no payment, the Japanese ship-owners considered their options and enquiries were made to ascertain if any assets existed that they may be able to target in recompense. It was established that the Karageorgis' had funds located in a bank account in London; funds which Nippon hoped could be called upon to satisfy the debt owed to them. Nippon reasonably feared that the absente defendants could with all right remove the impugned assets from the jurisdiction. The removal thereof would leave Nippon with no recourse for justice.[13] For that reason they sought an interim injunction against the defendants to prohibit either of the two from disposing of or removing the money from the bank account which was

[11] [1975] 3 All ER 282; although the injunction received its namesake from a later case in the same year: *Mareva Compania Naviera SA v International Bulkcarries SA* Judgments delivered 23rd June 1975 in the Court of Appeal, Reported [1980] 1 All ER 213.
[12] *Karageorgis* (n 11) [283].
[13] Ibid.

within the English jurisdiction. Such preventive measures could notionally be effected by placing a bank that held the funds on notice, ordering them not to release the funds to the defendants until further instruction from the courts, or otherwise risk being held in contempt of court.

2.9. Lord Denning MR commented that it had never been the practice of the English courts to seize the assets of a defendant before a judgment had been given or to stop a person disposing of their assets as they saw fit; a *locus standi* at odds with conventional continental practices.[14] Lord Denning MR observed that there was a convincing *prima facie* case that the hire remained unpaid by either of the two defendants. The removal of the impugned assets would have made it almost impossible for the ship-owners to recover anything from absente charterers. It was the consideration of those points that convinced the Court of Appeal to grant what was (in domestic terms at least) an innovative order. The court established the jurisdiction under s 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which repeated the essence of s 25 (8) of the Judicature Act 1875:

> 'A mandamus or an injunction may be granted or a receiver appointer by an interlocutory Order of the Court in *all cases in which it shall appear to the Court to be just or convenient*'.[15]

The Court of Appeal agreed unanimously that the relief should be granted and the charterers restrained from frustrating a potential judgment by removing the funds

[14] TH Bingham, '"There Is a World Elsewhere": The Changing Perspective of English Law' (1992) 41 (3) *International & Comparative Law Quarterly* 513, 525; *Karageorgis* (n 11) [282]-[283] (Lord Denning MR).
[15] *Karageorgis* (n 11).

from the bank accounts held in London.[16] That order was practically effected in the manner and form notionally outlined above, by way of a mandamus of sorts operative upon the London bank requiring it not to allow the defendants access to their funds.

The *Mareva* case

2.10. *Mareva Compania Naviera SA v International Bulkcarries SA*[17] is widely regarded as a landmark judgment, not least because it is the case from which the *Mareva* injunction derived its namesake. Nonetheless, the immediate past discussion demonstrates that in reality it was the *Karageorgis*[18] case in which the injunction so labelled '*Mareva*' was first granted. That the injunction takes its name from a later case of the same year is perhaps misleading. The judgment is nonetheless important because it supported the *Karageorgis* judgment, further establishing the legitimacy and the utility of the *Mareva* injunction. In the *Mareva* case the Court of Appeal were asked to extend an injunction granted by Donaldson J which was due to expire on the same day that the Court of Appeal was sitting. It is noteworthy that Donaldson J was also the judge of the first instance in the *Karageorgis* case in which he had refused to grant the injunction sought, a decision which was reversed by the Court of Appeal. Contrastingly in the *Mareva* case Donaldson J granted the injunction (although not without reservation) until the end of the working day on the 23rd June 1975 - a strategically chosen time and date. The date was stipulated precisely because that was the day on which the Court of Appeal subsequently heard the case.

[16] Ibid [284].
[17] *Mareva* (n 11).
[18] *Karageorgis* (n 11).

Donaldson J was anticipating that by taking such action the Court of Appeal would be compelled to entertain certain questions which he felt ought to be addressed in relation to the new contentious form of injunction.[19]

2.11. Like the *Karageorgis* case, the applicants in the *Mareva* case were also ship-owners. They let a vessel named the *Mareva* to the defendants who were the charterers. The charter was for the purpose of return voyage to the Far East based on a daily rate beginning from the time of the vessels delivery to the charterers with payment being due half monthly in advance. The defendants proceeded to sub-charter the vessel to the President of India. The Indian party loaded the vessel with fertiliser which was consigned to India, payment being made by the Indian High Commission at the request of the defendants to a bank in London in the name of the defendants. The total sum paid by the High Commission was some £174,000. The defendants made good the first two instalments of half-monthly hire due by credit which was transferred to the applicant ship-owners. However the third instalment was not made as agreed and correspondences between the applicants and the defendants clearly indicated that the defendants were not able or willing to honour their obligations under the charter to make payment. The defendants also indicated that they were no longer able to meet any other obligations made under the charter nor were they able to secure any financial support which may enable them to pay their dues.

2.12. The applicants understandably regarded the conduct of the defendants as repudiation of the charter. A writ was issued claiming the unpaid hire of their vessel

[19] *Mareva* (n 11) [214] (Lord Denning MR).

and damages for the repudiation, which Lord Denning MR commented would in all likelihood amount to a substantial sum. The applicants served that writ upon the defendants agents present within the English jurisdiction and at the time of the appeal were in the process of applying for service out of the jurisdiction upon the defendants too. In such a scenario the trial thereof may provide recompense for the injured party, but significantly an award of money is of no value in the absence of any monies or assets owned by the defendants which may targeted for payment. By way of analogy - an order of the court for payment of monies is only beneficial so long as the defendant has money in his piggy bank.

The relevance of the Lister case to the Mareva jurisdiction

2.13. Lord Denning MR briefly commented upon the reservations that Donaldson J had expressed in relation to certain remarks made by Cotton LJ in the in the *Lister & Co* v *Stubbs* judgment.[20] Donaldson J was of the opinion that the Court of Appeal should have been directed to the *Lister* judgment in the *Karageorgis* case. In *Lister*, Cotton LJ asserted that in a scenario where a court could see that on the face of it an applicant would in all likelihood be able to establish that a debt was owed by bringing an action, no security thereon can be exacted until final judgment or decree.[21] The essence of Cotton LJ's declaratory statement was that a court cannot take action to protect a creditor until the final judgment is delivered. Lindley LJ noted in *Lister* that if a court took such interim action they would in essence be stretching the limits of the law to the extent that they would be doing the work of the

[20] (1890) 45 Ch D 1.
[21] *Lister* (n 20) [13], [799].

legislature.[22] In the light of the *Lister* line of argument Roskill LJ commented *obiter* that 'if necessary' the terms of the charter could be called upon as grounds for distinguishing the *Mareva* case from *Lister*. Whereas Lord Denning MR was somewhat more dismissive of *Lister*, citing statutory authority as the means to justify the jurisdiction to grant the novel form of interim relief.[23]

2.14. The *Lister* authority is now beyond doubt a dubious one. Indeed the Supreme Court of Justice recently stated in *FHR European Ventures LLP and others* v *Cedar Capital Partners LLC*[24] that the judgment in *Lister*, and the earlier judgment in *Metropolitan Bank* v *Heiron*[25] upon which *Lister* was partially based were both misguided, Lord Neuberger (SCP) acknowledged that in those two cases 'the law took a wrong turn'.[26] It is worth commenting that even if the judgment in *Lister* were sound it would be hard to reconcile its effect with a case such as *Mareva* because as Lord Neuberger (SCP) would have conceivably observed if he were presiding in *Mareva,* the case was not concerned with a bribe or secret commission.[27] Ultimately the Supreme Court stated that any decision which was made in reliance upon *Lister* or *Heiron* should be overruled.[28] Of course when exercising jurisdiction in *Mareva* Lord Denning MR did not possess powers of foresight which would allow him to consider the future erudite judgment of Lord Neuberger in the *FHR* case nor did he scrutinise the *Lister* judgment at length himself. He felt that it was sufficient for him

[22] Ibid [15], [800].
[23] S. 45 of the Supreme Court of Judicature (Consolidation) Act 1925.
[24] [2014] UKSC 45.
[25] (1880) 5 Ex D 319.
[26] *FHR* (n 24) [50].
[27] Ibid [47].
[28] Ibid [47]-[50].

to cite the relevant statutory authority which established his prerogative to make the order.[29]

Was it right to grant the relief?

2.15. In *Beddow* v *Beddow*[30] Sir George Jessel MR construed s. 45 of the Judicature Act 1925 (repeating s. 25(8) Supreme Court Judicature Act 1875), to the extreme ends that it bestowed an 'unlimited power to grant an injunction in any case where it would be right or just to do so'.[31] Meaning that the statutory provision did not give a judge an unfettered discretion to grant an injunction but in accord with the law. Ultimately as Lord Denning MR noted, although the statutory provision tenders wide power upon the court, an applicant must be able to establish a right in equity or the law in order for a court to consider granting an injunction.[32] Significantly, a court could only grant a *Mareva* order to protect an applicant's right once that right is proven to exist.[33] Denning did not dispute the correctness of that *status quo*; stretching it conceptually he claimed that the principle can be extended to apply to a creditor who asserts a right to be paid where a debt is outstanding, even before that right has been established absolutely by way of a judgment.[34] Furthermore, such a case is strengthened where there is a palpable risk that the party owing the debt may defeat a potential judgment by disposing of the assets.

[29] s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925.
[30] (1878) 9 Ch D 89.
[31] Ibid [93]; Supported by Common Law Procedure Act 1854 ss' 79, 81, 82.
[32] Judgments delivered 23rd June 1975 in the Court of Appeal, Reported [1980] 1 All ER 213; *North London Railway Co v Great Northern Railway Co* (1883) 11 QBD 30; summarised in 21 HSG Halsbury, *Halsbury's Laws of England* (Butterworths 2007) 348, para 729.
[33] HSG Halsbury, *Halsbury's Laws of England* (Butterworths 2007) 348.
[34] *Mareva* (n 11) [215] (Lord Denning MR).

2.16. Lord Denning MR's reasoning was pragmatic and based upon the reality that the defendant charterers possessed monies held in their name with a London bank and that in the absence of an order to the contrary the charterers may with all right remove those funds from the English jurisdiction. In which case the owners of the *Mareva* would be left without recompense having discharged their end of the bargain, which Roskill LJ agreed would constitute a 'grave injustice'. An injustice which the court could avoid by extending the injunction until the trial of matter or another order.[35] While Roskill LJ did stress the importance of judicial restraint when considering this emerging area of commercial law, on the whole he agreed with the leading judgment of Lord Denning MR, as did Ormrod LJ.

The first *inter parties* challenge

2.17. *Rasu Maritima SA v Perusahaan Pertambangan* is important for a number of reasons, not least because it was the first *Mareva* case in which the defendant party was represented, allowing for a more fruitful discourse to ensue than was the case in either *Karageorgis* or *Mareva.* Mr Mustill Q.C acting for the defendants questioned the correctness of the judgments in both *Karageorgis* and *Mareva.* He put it to the court that it had no jurisdiction to grant *Mareva* relief in the first place.[36] If the jurisdiction to grant the relief was, as counsel for the defendants suggested an erroneous jurisdiction then the order of such relief in this case would be incorrect also. Lord Denning MR addressed the doubts in relation to the jurisdiction to grant *Mareva* relief primarily by dispelling notions that it was an entirely new jurisdiction to England. He outlined an old process which was referred to as 'foreign

[35] Ibid [216].
[36] *Rasu Maritima SA v Perusahaan Pertambangan* [1978] QB 644 [648]-[649].

attachment';[37] a process which was described by William Bohun in 1723,[38] and later amended by Alexander Pulling in 1842.[39] Although the process of foreign attachment was evidently older than that, according to Pulling's account the process 'prevailed at a very early period in London, as in other Roman provinces' what's more it still persisted 'in other ancient cities and towns in England, such as Bristol, Exeter, Lancaster as well as in Scotland'.[40]

Foreign Attachment

2.18. Gee cites the custom of 'foreign attachment' as a possible basis for the development and expansion of the *Mareva* jurisdiction. Foreign attachment was a device which was utilised within the City of London by merchants and mercantile courts from the late fourteen hundreds onwards. The discussion which follows about the old but elapsed process of foreign attachment demonstrates that far from being a continental import or modern judicial fabrication, the jurisdiction to grant *Mareva* relief arguably constituted a customary judicial resurgence of sorts.

2.19. By way of the custom, a citizen of the City of London could make an application to the Court of the Mayor and Aldermen of London in relation to an unsatisfied debt. If it was not possible to locate the defendant or if the defendant was beyond the jurisdiction of the court then the applicant could attach any of the defendant's assets that were within the jurisdiction of the court. Such assets

[37] Ibid [657]-[658].
[38] William Bohun, *Privilegia Londini, Or, The Rights, Liberties, Privileges, Laws and Customs of the City of London* (3rd edn, of the original 1723 work, The Law Book Exchange 2009) 253-289.
[39] Alexander Pulling, *A Practical Treatise on the Laws, Customs and Regulations of City and Port of London: As Settled by Charter, Usage, by-Law, or Statute* (2nd edn, of the original 1842 work, with considerable additions, H Butterworth 1844) 185-195.
[40] Ibid.

included, but were not limited to monies, goods or even third party debts owed to the defendant. Pursuant to the proper procedure's being followed and after such time as the court believed that the defendant would not make good the debt because he had failed to stand before the court, the court would order the appraisal of his goods so that sufficient monies could be located or other goods located and delivered to the applicant to be held and or liquidated to satisfy the amount owing.[41] In order to receive the defendant's goods, the applicant was obliged to offer security to the end that should the defendant stand before the court within a period of a year and a day following the court's order and prove that he in fact owed no such debt to the applicant at the time the application was made, or that he owed only a part of the debt, the applicant would make restitution thereof. The debt had to be due within the City of London and the defendant had to be considered to be a foreigner, that is to say 'not civic' and therefore falling outside of the jurisdiction of the London Court. Foreign attachment did not require as modern presumption may suggest that the defendant should be a non-domestic resident of England simply a non-domestic resident of that court's jurisdiction.

2.20. By the mid eighteen-hundreds foreign attachment had come to be regarded as a biased and questionable process. Some commentators had come to believe that the procedure, which enabled a court to exercise its jurisdiction in the absence of a defendant was contrary to the prevailing notion of natural justice. Furthermore the process was fraught with difficulties in relation to the jurisdiction of the London

[41] Steven Gee, *Commercial Injunctions (Formerly Mareva Injunctions and Anton Pillar Relief)* (Sweet & Maxwell 2004) 13.

court.[42] Consequently the procedure became gradually less popular and eventually fell into disuse. It is however a device which remained popular in other common law jurisdictions, particularly in the United States of America[43] where the Supreme Court still utilises the doctrine today, albeit in a limited capacity.[44] Nonetheless in *Rasu* Lord Denning MR observed that on the continent of Europe and in particular in maritime towns and ports the process labelled '*saisie conservatoire*' (a French term) is commonplace, where it facilitates the seizure of assets to preserve them for the benefit of a creditor.[45] The fact that analogous processes (whether by one name or another) were common throughout Europe and other common law jurisdictions constituted further cause in the mind of Lord Denning MR that it should be incorporated into the law of England both pragmatically and as part of the harmonisation of the laws of the member states of the common market pursuant to the requirements of the Treaty of Rome.[46]

Did the emerging Mareva jurisdiction constitute a mischief?

2.21. As noted, it stood as established practice for a long while that a court would not before an order or judgment permit a creditor to seize money or goods belonging to a debtor. Conventionally, a creditor's proper remedy was to secure a judgment by way of an RSC Order 14 and thereby trigger the issue of bankruptcy proceedings against a debtor. Now within those proceedings lay a remedy; a conveyance or preference based upon a fraud, intended to defeat a creditor could be

[42] Ibid 14.
[43] Joseph Henry Beale, 'The Exercise of Jurisdiction "In Rem" to Compel Payment of a Debt' (1913) 27 (2) HLR 107.
[44] *Gee* (n 41) 14.
[45] *Rasu* (n 36) [658].
[46] Ibid [659].

set aside. Thus the judgment thereof could facilitate the retrospective re-crystallisation of funds upon which recompense could be levied – a *status quo* reinforced by considerable precedence. Until the judgment in *Rasu* the threshold test for *Mareva* relief was seemingly that an applicant would be able to obtain a summary judgment under RSC Order 14.[47]

2.22. Overcoming the obstacles of the apparent restrictive *status quo* Lord Denning MR pointed out that none of the prohibitive statements prior to *Karageorgis* relating to a prohibition upon restraining a person from dealing with his property before a judgment or order was made in point of fact related to a scenario where a defendant was absent from the jurisdiction but had assets in the jurisdiction. It is in relation to that distinct scenario that Lord Denning MR considered it to be right that the old custom of foreign attachment should make a resurgence; by way of the modern interlocutory injunction permitted by the jurisdiction purposefully legislated for under the Supreme Court of Judicature Act 1875 section 25 (8).[48]

2.23. Section 25 (8) is a provision which Lord Denning MR considered to bestow discretion upon a judge; however certain judgments had the effect of impressing restrictions upon judicial autonomy. The judicial restrictions upon the interpretation of this provision may have been tendered in *North London Railway Co.* v *Great Northern Railway Co* by the Court of Appeal in 1883 in which limiting statements

[47] Note: the modern CPR equivalent to the old RSC Order 14 can be found under CPR Part 24 Rule 24.2 however it does not hold the same sway in relation to the *Mareva* jurisdiction. Today a claimant is not required to fulfil old the summary judgment requirement; indeed CPR Practice Direction 25A paras 1.1-1.3 bestows wide powers upon a court to order a *Mareva* injunction by consent, in connection with charging orders and appointment of receivers, in aid of execution of judgments and/ or in any case where the judge(s) hold the requisite jurisdiction to conduct the trial of the action.

[48] Re-enacted in s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925.

upon the autonomy to dispense injunctive relief were made.[49] On the other hand as discussed earlier, the sentiments of Sir George Jessel MR[50] some five years previously in *Beddow* heralded autonomy and discretion, holding them to be key to a Court's utility.[51] The relative freedom which was fundamental to Lord Denning MR's development of the *Mareva* jurisdiction is a feature of the English legal landscape which receives mixed reviews domestically. Although it should be noted that in common law jurisdictions where similar judicial interpretive freedom is constitutionally constrained that freedom is sometimes envied or sought after because where the development of a remedy to address a new problem would be advantageous, the judiciary's hands are tied until legislative intervention, which may take considerable time.[52]

2.24. As discussed in Chapter One it was once the case that the jurisdiction of the courts of equity to grant injunctive relief was constrained and limited, not by statute, but by the practice of different Chancellors.[53] Sir George Jessel MR made declaratory statements that an essential function of a Court of Justice is the ability to restrain wrongful acts.[54] That utility was in his opinion unconstrained quite intentionally by the legislature by way of certain statutory provisions.

2.25. The Common Law Procedure Act 1854 s 79 states that:

'In all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought

[49] (1883) 11 QBD 30.
[50] *Beddow* (n 30).
[51] Ibid.
[52] Ruth Bader Ginsburg, '"A Decent Respect to the Opinions of [Human] Kind": The Value of a Comparative Perspective in Constitutional Adjudication' (2005) 64 CLJ 572-592, 586.
[53] See Ch 1 para 1.8.
[54] *Beddow* (n 30) [92].

> an action, he may… claim a writ of injunction against the repetition or continuance of such breach of contract, or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right'.

2.26. Section 81 of the same Act provided that 'in such action judgment may be given by the writ of injunction' as a Judge considers to be right in accordance with the law. The eighty-first provision was bolstered by the eighty-second which permitted the applicant to petition the court for *ex parte* injunctive relief which could be granted where a Judge considered it to be reasonable and just, that being the only limit upon the jurisdiction. According to Sir George Jessel MR the discretionary jurisdiction to grant injunctions was fortified by s. 25(8) of the Judicature Act 1875 and far from being a mischief the judicial discretion therein was intended to be a manifest feature of the legal landscape henceforth.[55] Sir George Jessel MR stated:[56]

> 2.27. 'It appears to me that the only limit to my power of granting an injunction is whether I can properly do so. For that is what it amounts to. In my opinion, having regard to these two Acts of Parliament, I have unlimited power to grant an injunction in any case where it would be right or just to do so: and what is right or just must be decided, not by the caprice of

[55] Ibid.
[56] Ibid.

the Judge, but according to sufficient legal reason or on settled legal principles.'

2.28. Thus in *Rasu* Lord Denning MR was maintaining the jurisdiction to grant injunctive relief and declaring that it should not be impeded by rigid rules of the court or limiting statements;[57] rather the courts should retain and employ the wide discretion to grant an interlocutory injunction in the manner envisioned by Sir George Jessel MR.[58] Such submissions support the aforementioned concept that equity should work not in accordance with the strictness of the letter of the law, but the spirit of the law.[59] It is submitted that the jurisdiction to grant *Mareva* relief does justice to both the letter of the law as embodied by s. 25(8) JA 1875 and the concepts of fairness and justice which underpin the spirit of the law and the essence of equity.

Mareva relief – part of an evolutionary process

2.29. The emerging *Mareva* jurisdiction is emblematic of the comments made in chapter one that equity must possess the latent ability to evolve,[60] it is submitted that *Karageorgis* and *Mareva* were part of that equitable 'evolutionary process'.[61] Equity possesses the capacity to fill the gaps in the law and the *Mareva* jurisdiction is an example of judges working to exercise jurisdiction in the way they consider that the law maker would have intended if he were presiding in the same case.[62] Huntley and Halliday recognise that modern financial structures continually develop, becoming increasingly more complex and sophisticated therefore they agree that the

[57] *North London Railway* (n 32).
[58] *Rasu* (n 36) [660].
[59] See Ch 1 para 1.4.
[60] See Ch 1 para 1.5.
[61] *Ward v James* [1966] 1 QB 273 [295].
[62] See Ch 1 para 1.4.

law should evolve and adapt to address those new challenges as they arise.[63] The import is that it is both just and convenient that *Mareva* relief was granted in *Karageorgis* and *Mareva* even on an *ex parte* application basis because a feature of the modern business landscape in the 1970s was the emerging reality that a debtor could 'by a single telex or telegraphic message, deprive' a creditor of those monies to which he was entitled.[64] Therefore it is manifestly important that a defendant is not aware that they are under suspicion until an order has been served.

2.30. Nevertheless in *ex parte* proceedings there is no opportunity for an adversarial discourse; only the applicant has the opportunity to present their case and that fact is contentious.[65] In consideration of the respondent's disadvantage the threshold for *ex parte* relief is higher than is the case of *inter parties* relief and the courts commonly require of the applicant a cross-undertaking in damages.[66] The courts may also insist that a cross-undertaking is 'fortified' by way of security before an order is granted.[67] Furthermore, it is noted that once an order has been granted, a respondent may apply to the courts to have that order discharged where there are justifiable grounds to do so. Being mindful of the abovementioned considerations the legitimacy of *ex parte Mareva* relief appears to be both justified and pragmatic; the courts are careful to balance and protect the interests of both parties.

[63] Graham Huntley and Caroline Halliday, 'Cold Comfort, Profession Trends' (2011) 161 NLJ 328.
[64] *Rasu* (n 36) [660].
[65] Gee notes that an *ex parte* application may be regarded as being contrary to the principles of natural justice because of the lack of a balanced adversarial discourse see, *Gee* (n 41) 14.
[66] Where an applicant inappropriately seeks, obtains and/ or enforces a *Mareva* injunction the courts are willing to hold that party to account for any loss incurred by the respondent as a result see, *Hone and Ors v Abbey Forwarding Ltd and Another* [2014] EWCA Civ 711.
[67] *Energy Ventures Partners Ltd v Malabu Oil & Gas Ltd* [2014] EWCA Civ 1295.

Widening the scope of relief

2.31. As mentioned earlier the *Rasu* judgment is significant because it affirmed the judgments in *Karageorgis* and *Mareva* but it also provided a wider threshold for relief. It is repeated that both *Karageorgis* and *Mareva* were cases in which a summary judgment could have been obtained under RSC Order 14. However Lord Denning MR asserted that the jurisdiction to grant *Mareva* relief should not be limited to instances falling under an Order 14 scenario but rather where the applicant can demonstrate that he has a 'good arguable case'[68] - in line with the test applied to serve outside of the jurisdiction.[69] In addition to delimiting the threshold to establish a claim, *Rasu* widened the range of assets upon which *Mareva* relief could be served from funds held in bank accounts (as in *Karageorgis* and *Mareva*) to encompass other goods. That extension can be considered to be both practical and necessary when one considers the supposition that capital held as money can be transferred into other goods: movables such as gold or diamonds; fungible goods such as shares in a public company; *a chose in action* such as shares in a private company; or conceivably real property in the form of land. Hence Lord Denning MR remarked that it would be permissible to allow an injunction of this nature to stand against property other than money such as machinery, materials and plant held at port as was the case in *Rasu*. Lord Denning MR's extension was cautiously supported by Orr LJ.[70]

[68] *Rasu* (n 36) [661].
[69] *Vitkovice Horni a Hutni Tezirstvo v Korner* [1951] AC 869.
[70] *Rasu* (n 36).

2.32. Incidentally the appeal was dismissed in *Rasu* and injunctive relief bared, but the dismissal was largely due to proprietary questions as to who held title over the impugned assets as well as their availability for retrieval if relocated out of the jurisdiction.[71] Relief was not barred because of any deficiency in the jurisdiction. The *Rasu* case is significant because it was the first time that a *Mareva* injunction was challenged on an *inter party* basis which facilitated a more balanced adversarial and productive discourse. The case identified an analogous device utilised centuries prior in the city of London, amongst the maritime ports of England and across the coastal regions of continental Europe, dispelling submissions that *Mareva* relief was an entirely foreign concept to this jurisdiction. Perhaps most importantly, the judgment in *Rasu* further fortified the validity of the *Mareva* jurisdiction establishing solid foundations upon which an order could be made. Furthermore it widened the availability and scope of relief which was increasingly pertinent and beneficial in the emerging technologically developing business community.

Mareva Jurisdiction for English Residents?

2.33. During the first half of this Chapter it was established that the *Mareva* jurisdiction was appropriate for cases where the defendant was a non-resident of the domestic jurisdiction. The *Mareva* injunction was primarily restrained to situations where there was a perceived threat that such a party may remove their assets from the domestic jurisdiction and thereby nullify an order of the court. The rationale for this position was that if a defendant or his assets were beyond the reach of an English court then any judicial recourse would entail an extraterritorial dimension;

[71] Ibid [663].

enforcement would usually require that the foreign jurisdiction's authorities cooperate in order to exact justice. It was comparatively more straight-forward to freeze that non-residents assets held within the jurisdiction than to pursue them extraterritorially. On the contrary, if a defendant is an English resident, that party falls within the reach of the English courts thus enabling an *in personam* action. Consequently, it remained disputed as to whether the *Mareva* jurisdiction could extend to encompass English nationals who were also resident within the jurisdiction. It had previously been postulated that if a party could be served in the jurisdiction then *Mareva* relief could not apply.

The van Weelde case

2.34. In *Van Weelde Scheepvaart Kantoor BV* v *Homeric Marine Services Ltd*[72] the court were petitioned by a company who chartered their vessel out to a resident English company who were engaged in the transportation of sugar to the Nigerian capital. The charterers took longer than was considered to be acceptable by the owners of the vessel to discharge the cargo at the port in Lagos; a considerable delay for which the applicants sought damages. The owners of the vessel sought after a *Mareva* injunction to operate upon the English resident defendants' assets until the final judgment was delivered to ensure that reparations would be available if that judgment were favourable. Ultimately the granting of *Mareva* relief in such a scenario was held to be contrary to what the court considered to be settled English practice. The court interpreted comments which appeared to be to the contrary in

[72] *Gebr Van Weelde Scheepavaart Kantoor BV v Homeric Marine Services Ltd*, *The Agrabele* [1979] 2 Lloyd's Rep 117.

Rasu as an indication of what the Court of Appeal thought the law ought to be and not a declaratory statement of what the law was.

The Daklouche case

2.35. The question regarding defendants who were resident within the jurisdiction sparked a brief period of judicial development. In *Chartered Bank v Daklouche*[73] there was a primary appraisal of the problem of jurisdictional residency. The defendants were a Lebanese husband and wife partnership, the Daklouches. The husband was the principal trader and his businesses had prospered on the back of the oil boom in Abu Dhabi and the Persian Gulf. For the main part he was engaged in supply of food and drinks wholesale to airports and other caterers and retail goods to the public but his wife assisted in the day to day running of the retail business. The wife relocated to England where a large house was bought and conveyed into her name.[74] The husband opened a business account with the Abu Dhabi Chartered Bank in the name of his company (both he and his wife had full power to operate that account). The husband's company fell into financial difficulty and the Abu Dhabi bank account became extremely overdrawn. The husband promised his bank manager that he was awaiting payment from several trade debtors and that, once he had been remunerated, he would pay off the overdraft. The husband was simultaneously being pressed for payment by his own creditors and so appeared to be in no position to make good the situation.

[73] [1980] 1 WLR 107.
[74] Ibid [111].

2.36. Enter the questionable transaction. In due course the husband receives three cheques which could have bettered his financial situation. The cheques were not made out to his business but to the 'account payee'. The husband paid these cheques into his own personal account held with the First National Bank of Chicago, not into his business account held with the applicant bank in this case, had he done so it would have cleared the overdraft. Following the disposition he withdrew the funds and closed his personal account. On balance it seems that he proceed to hand the money in cash to his wife who deposited it with two banks in Abu Dhabi and instructed them to transfer the funds by telegraph to a personal account held by her in London with the First National Bank of Chicago. This being done left the wife with some £70,000 in her London Bank. The applicants (the Abu Dhabi Chartered bank) on the other hand were left with an outstanding overdraft. To exacerbate matters the husband went missing.

2.37. The applicant bank made enquires and traced transactions to London and established that a large sum was deposited to the credit of the wife there. The applicants sought an injunction to restrain the wife from disposing of or otherwise dealing with those funds until the matter could be resolved. Such an injunction was granted by Mocatta J but discharged upon the wife's application by Donaldson J. Donaldson J held that the matter should properly be dealt with by the courts of Abu Dhabi and noted that orders of the English courts do not have an extraterritorial effect.[75] Nonetheless as had been the repeated practice of Donaldson J in cases

[75] Ibid.

involving *Mareva* relief, the injunction was extended temporarily until the Court of Appeal could hear the case.

2.38. If the discharge of the injunction had been immediately effective then that would have left the applicant bank in a precarious position. The wife had stated in her affidavit that she had several family members in countries ranging from Jordan to Beirut, in the absence of an injunction restraining her ability to do so she could with all right withdraw the funds in question and relocate them to another jurisdiction. The applicant bank would have had no other recourse than to attempt to serve the husband and sue in Abu Dhabi, obtain a judgment and place the husband in bankruptcy there, but as previously discussed such action as well as being fraught with technical difficulties is entirely pointless if (a) the husband cannot be found and/ or (b) the husband has no access to monies for recompense.[76] On the face of it the husband had acted to wilfully evade the obligations he owed to his creditors.

Resident or non-resident – when a defendant evades the court the same consequences affect innocent creditors

2.39. In the Words of Joseph Beale:

> 'It is so palpably unjust that a debtor should be able, by putting his property outside of the jurisdiction of the courts of his own domicil, to escape the compulsion of courts forcing him to discharge his obligation, that the court within whose

[76] See para 2.12.

> jurisdiction his property has been thus placed by him should use its power over the property to give justice to the creditor'.[77]

2.40. Such was Lord Denning MR's rationale as on examination it was evident that the husband had tenaciously acted to avoid his duty to pay his creditors by removing his assets from his jurisdiction and on the evidence the wife acted as the agent or nominee of the husband and those moneys were in the view of Lord Denning MR 'his moneys still or the firms moneys.'[78]

2.41. Lord Denning MR dealt with the husband and wife separately. Counsel for the wife submitted that Lord Denning MR's own comments in *Rasu* precluded extension of *Mareva* relief to touch upon an English resident:

> 'So far as concerns defendants who are within the jurisdiction of the court and have assets here, it is well-established that the court should not, in advance of any order or judgment, allow the creditor to seize any of the money or goods of the debtor or to use any legal process'.[79]

2.42. However in making that statement Lord Denning MR was referring to judicial inclinations in relation to those permanently resident in the jurisdiction whose assets were also here. He distinguished that scenario from the present case in which Mrs Daklouche who had formerly declared to be a temporary resident only but later claimed to have the intention to reside here permanently. Regardless of domicile

[77] Joseph H Beale, *A Treatise on the Conflict of Laws* (The Lawbook Exchange Ltd 1935) 449.
[78] *Daklouche* (n 74) [112].
[79] Ibid.

where it is considered to be likely that a defendant will flee the jurisdiction Lord Denning held that *Mareva* relief was both admissible and just.[80]

2.43. *Daklouche* is an important case for one silent reason; it marked further development in the field of *Mareva* relief, significantly affirming that even where a defendant is present or even a temporary resident in the jurisdiction and is served there *Mareva* relief may be granted.[81] That is important because it had previously been postulated that if a party could be served in the jurisdiction then *Mareva* relief could not apply. However as Everleigh LJ pointed out, such a principle would create an absurd situation whereby a party expecting to be served would simply travel to the jurisdiction accept the proper service of the writ and extinguish the *Mareva* relief. It is therefore submitted that the extension of *Mareva* relief to encompass this scenario was a commendable and pragmatic move.[82]

The consistency of the court's approach to foreign-based defendants and English-defendants

2.44. The extension of the *Mareva* jurisdiction to capture temporary residents was notionally approved *obiter dicta* in the *Unimarine SA* case.[83] Although the capture of parties resident within the jurisdiction, temporary or otherwise was contested by Ormrod LJ and Brandon LJ in the *Bank of Leumi* case, who considered it to be settled law that where a person is resident you may not restrain them from dealing with

[80] Ibid.
[81] Approved *obiter* in, *Third Chandris Shipping Corporation v Unimarine SA* [1979] QB 645.
[82] *Daklouche* (n 74) [114].
[83] *Third Chandris Shipping Corporation v Unimarine SA* [1980] 1 WLR 107.

their assets.[84] The *Siskina*[85] is a significant case because it was the first time that the House of Lords considered the controversial *Mareva* jurisdiction. The House reviewed two main points:

a) Did the RSC Ord 11 provide jurisdictional grounds upon which to legitimately service a non-resident defendant with the necessary writ?

b) Did the courts actually have the authority to order a *Mareva* Injunction in the first place?

2.45. The discussions in the House focused largely on the first point, that is whether or not the applicants could bring their claim under the then operative RSC ORD 11 r.1(1)(i). The Houses conclusion was that the applicants could not. Consequently the jurisdiction to adjudge the application on its merits or to confirm an interlocutory injunction therewith was nullified. The House of Lords did not deliberate upon the validity of the second point that is of the *Mareva* injunctive jurisdiction. However Lord Hailsham made noteworthy observations, the import being that the judicial distinction between resident and foreign defendants was untenable. Accordingly his Lordship indicated that in order for procedural propriety to prosper the position vis-à-vis applicants claiming against defendants who were resident within the English jurisdiction would have to be modified or the concept of the *Mareva* jurisdiction would have to be amended. Thus in a later case Sir Robert Megarry VC allowed a *Mareva* injunction over assets owned by an English defendant who was abroad temporarily but usually resided within the jurisdiction.[86]

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[84] *Bank Leumi (UK) Ltd v Rick George Sportain (UK) Ltd* CA (Civ Div) Transcript No 753 of 1979 (November 1 1979).
[85] *Siskina v Distos Compania Naviera SA* [1979] AC 210.
[86] *Barclay-Johnson v Yuill* [1980] 1 WLR 1259.

2.46. In *Rahman (Prince Abdul) bin Turki al Sudairy* v *Abu-Taha*[87] the extension of the *Mareva* jurisdiction received further fortification. The Court of Appeal allowed a *Mareva* injunction against two Kuwaiti defendants who by their own admission were permanent residents in England,[88] the injunction operated in a manner and form which forbade the removal of the defendant's assets from the jurisdiction and the dissipation of those assets within the jurisdiction. It is true that the original focus of the *Mareva* jurisdiction was foreign-based defendants because the courts considered the case for restraining assets as particularly persuasive where a defendant had limited ties to the jurisdiction.[89] Nonetheless Devonshire identifies a patent reality; debtor intentions' to thwart an eventual judgment reward is not a tendency that is peculiar to any one class of defendants.[90] In practice a party who was resident within the jurisdictional reach of the court was just as capable and likely to evade their obligations to a creditor by placing their assets beyond the reach of the court as a purely foreign-defendant. Lord Denning MR referring to the comments of Lord Hailsham in the *Siskina* asserted that where *Mareva* relief is concerned all defendants should be regarded in the same way 'no matter whether they be foreign-based or English-based'.[91] It is in that wider format that Vitale considers the *Mareva* injunction to be a most valuable weapon in the arsenal of the modern applicant.[92]

[87] [1980] 1 WLR 1268.
[88] Ibid [1270] (Lord Denning MR).
[89] Peter Devonshire, 'Pre-Emptive Orders against Evasive Dealings: An Assessment of Recent Trends' [2004] JBL 357, 359.
[90] Ibid 359.
[91] *Rahman* (n 88) [1272] (Lord Denning MR).
[92] Toni Vitale, 'Pre-Emptive Remedies in the United Kingdom' (1993) 12 (7) IBFL 5, 6.

Legislative intervention: The Statutory mandate to grant relief

2.47. Today in England the statutory authority to dispense *Mareva* injunctive relief is established by section 37 of the Senior Courts Act 1981.[93] There are three provisions of particular interest to this chapter's discourse which are stated below and of them the third is most significant:

Section 37 Powers of High Court with respect to injunctions and receivers.

1. The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.
2. Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.
3. The power of the High Court under subsection (1) 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 that jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within that jurisdiction.

2.48. The thirty-seventh section of the Senior Court Act 1981 superseded section 45 of the Supreme Court of Judicature (Consolidation) Act 1925.[94] Section 45 of the SCJA 1925 as previously discussed,[95] stated that:

[93] Formerly s. 37 of the Supreme Court Act 1981.
[94] Which itself superseded s. 25(8) Supreme Court Judicature Act 1875.
[95] See para 2.22.

> 'The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so'.

2.49. Discussions within this chapter have contained an extended analysis of the case law which laid the foundations of *Mareva* relief. That discussion demonstrated that *Mareva* relief was from the outset a contentious topic. It was identified that certain proponents of the practices of the Old Court of the Chancery believed that the emergent *Mareva* jurisdiction (which was reliant upon section 45 SCJA 1925) was contrary to the established and restrictive body of case-law which developed following the Judicature Acts 1873-1875. The restrictive proponent's opinions aligned closely with the previously discussed sentiments of Mr Mustill Q.C in the *Rasu* case who put it to the Court that in truth there was no authentic jurisdiction which allowed a court to legitimately grant a *Mareva* injunction at all.[96] Section 37 of the Senior Court Act 1981 is therefore of great significance because it is declaratory that the courts may dispense *Mareva* relief under a legitimate statutory authority. Today a set of Civil Practice Rules guide the practitioner, stipulating many procedural aspects of the modern *Mareva* jurisdiction. In the next chapter discussions will focus on how this area of the law is practicably effected. For now it is sufficient to comment that the legitimacy of the jurisdiction to grant *Mareva* relief is beyond any doubt.

[96] *Rasu* (n 36) [648]-[649]; see para 2.26.

What caused the legislative delay?

2.50. Dishonesty is not a new concept; its existence is a pervasive reality which has been known to manifest itself in the actions of some human beings throughout history.[97] It is also true that the intention of some debtors to avoid or evade making payment to their creditors by distributing or otherwise dealing with their assets in such a way as to thwart enforcement is not a new concept; it could be said that such conduct is an incident or manifestation of that same dishonesty which has persisted throughout time. The Fraudulent Conveyances Act 1571[98] drafted during the reign of Queen Elizabeth I was focussed upon defeating fraudulent transactions and schemes which were intended to spirit away assets in order to deprive creditors of the recompense to which they were honestly entitled. The purposive statue allowed a fraudulent transaction to be unwound following insolvency or bankruptcy, the Act encompassed a broad class of transactions or conduct which in the view of the court, 'have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder, or defraud creditors'.[99]

2.51. The extract above is but a small section of the statute, the torrential style[100] in which the full statute was drafted was indicative of the various ways in which debtors attempted to avoid their obligations in the sixteenth century and at the

[97] Julia Annas, 'Ancient Ethics and Modern Morality' (1992) 6 Philosophical Perspectives 119, 121-123.
[98] 13 Eliz 1 c 5, known also as the Statute 13 of Elizabeth; repealed by the Law Property Act 1925 s 207; note the similarities between the old Elizabethan law on fraudulent conveyance and section 172 of the Law of Property Act 1925 repealed by Insolvency Act 1985 (c. 65, SIF 66) s. 235(3), expanded in s. 423 the Insolvency Act 1986 see also, *Parry* (n 2) in Ch 3.
[99] An extract of the Fraudulent Conveyances Act 1571 as recited in *Re Eichholz, Decd. Eichholz's Trustee* v *Eichholz* [1959] Ch 708 [721]-[722].
[100] The draftsman's technique of crafting a statute in a style which encompasses every conceivable scenario, see *Norwich Union v BRB* [1987] 2 EGLR 137 [138].

centre of that conduct was a failure on the part of the debtor to do justice to the obligation owed to his creditor and a declaration by the legislature that such behaviour is reprehensible and should be combated accordingly.[101] Although it is noted that outside of England attempts to combat fraudulent conveyances are older still than even the Elizabethan statute.[102] The old Elizabethan law on fraudulent conveyance required a high threshold of proof and enforcement was only attainable post judgment and only once insolvency or bankruptcy was established. So, while the spirit of the Elizabethan statute was admirable, in practice it was not always practical and it certainly would not capture the *Mareva* scenarios discussed in the first part of this Chapter. Citing the Elizabethan statute is valuable because it demonstrates the longstanding insidious nature of a dishonest debtor in the eyes of the law in England and raises a legitimate question; why did the old courts of the Chancery, founded upon principles of justice and fairness[103] not conceive of *Mareva* relief long before 1975? Their unwillingness to do so appears (at least with hindsight) to stand contrary to the equitable maxim 'equity will suffer no wrong to be without a remedy'. Gee suggests that the answer lies within policy considerations and the established English customary principle of a man's assets being his own.[104]

2.52. To repeat certain notions touched upon throughout this chapter: a subsisting debt does not bestow any ability upon a creditor to exact any legal or equitable right

[101] *Freeman v Pope* (1870) LR 5 Ch App 538 [540] (Lord Hatherley LC).
[102] in Roman Law the *Paulian Action* (as per the Institutes of Justinian which is based largely upon the Institutes of Gaius of the second century AD) allowed a creditor to claim against a third party, rescinding the transfer of property made to that third party by the debtor with the intent of frustrating enforcement of the debt see, Max Radin, 'Fraudulent Conveyances at Roman Law' (1931) 18 (2) Virginia Law Review 109.
[103] See Ch 1 para 1.3.
[104] *Gee* (n 41) 16.

upon a man's assets.[105] Lord Hatherley LC believed that for the courts to conceive of such a right would be a 'fearful authority',[106] which could be open to abuse. The policy consideration was accordingly fuelled by a desire to avoid the risk that a party to a proceeding commenced by a creditor could be placed under abject financial pressure. Prohibiting a defendant from dealing with his own assets day to day could be an unfair imposition, blocking his income or perhaps destroying his trade entirely. Blameless third parties, for example customers of the defendant could find that their subsisting agreements were breached as a result. Finally, the imposition of the equitable *Mareva* jurisdiction upon the assets of a debtor is notionally contrary to the rubric that a creditor should do everything within his power to extract security before extending credit or accept the potential consequences of knowingly and willing making himself an unsecured creditor.[107]

Conclusion

2.53. The body of case law that saw the initiation and development of the *Mareva* jurisdiction inferred that the view outlined immediately above was too simplistic. It failed to capture and address the numerous ways in which the court's authority could be rendered impotent. Earlier in this chapter it was established that the range of options available to deceptive debtors to deal with their assets in such a way as to defeat an order of the court had become much more expansive, sophisticated and

[105] See para 2.22.
[106] *Mills* (n 3) [628].
[107] R Goode, cited in LS Sealy and RJA Hooley, *Commercial Law* (OUP 2005) 999; for an alternative perspective see A Keay, *Company Directors' Responsibilities to Creditors* (Routledge-Cavendish 2007) 235-240 and A Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach' (2007) 29 Syd L Rev 570.

difficult to unwind than when the Elizabethan draftsman put his legislative pen to paper.[108] Logic dictates that if a post judgment convoluted forensic analysis of the trail of assets can be avoided then that is surely favourable. The early *Mareva* cases cautioned of the cogent reality that debtors could spirit away large amounts of funds by means of a telex or an electronic transfer to a jurisdiction beyond the remit of the English courts. Assets may be switched between offshore companies; they may be hidden in offshore trusts. The consequence was that injured creditors could be left with no other option than to secure a judgment from the court and then proceed to undertake a detective's work; to reverse engineer what may have happened to the assets which were trite for recompense in-between a defendant's being notified of a trial or action and the judgment thereof. More often than not as the early *Mareva* cases demonstrated assets may have been siphoned off or transferred through a series of foreign jurisdictions and entities ranging from personal bank accounts, to real property, trusts or companies; funds may even have been converted at the drop of a hat into precious metals or stones and conveyed about a smuggler's person to lands foreign and inaccessible.

2.54. The forensic process required to follow a deceptive trail once a final judgment has been given can be unduly burdensome upon the creditor who has already been failed by that party to which they extended credit in good faith and if that party avoided making payment to begin with then it stands to reason that they may also be willing to go out of their way to render a judgment futile. The corollary is thus to eliminate the possibility that a deceptive party can defeat the processes of the courts

[108] See para 2.50.

by freezing their asset until a judgment award is made; today that remedy is available irrespective of where the defendant is domiciled so long as certain criteria are fulfilled. Having weighed up all of these considerations it was evident that some action should be taken in order to preserve the virtue of the justice system. On continental Europe such mechanisms were already in existence, while in the USA that policy determination was left squarely in the hands of the legislature.[109] Here in England the judiciary initiated the process, steered by the hand of Lord Denning MR and the decisions taken by the courts presided over by him were later codified by the legislature. Henceforward the aforementioned restrictive sentiments of Mr Mustill Q.C in the *Rasu* case were consigned to the history books. Essentially, if there is a risk that a defendant may abscond or remove assets from the jurisdiction or otherwise dispose of them within the jurisdiction then *Mareva* relief is admissible irrespective of domicile, residence or nationality. In the following chapter the modern *Mareva* jurisdiction is discussed in relation to other analogous devices, relief and ancillary orders. It will become apparent that when employed in conjunction with other techniques or orders the *Mareva* injunction can be extraordinarily effective.

[109] *Grupo* (n 4).

Chapter Three: The Modern *Mareva* Jurisdiction and the Mechanisms which Facilitate the Administration of Justice

Introduction

3.1. In Chapter Two the classical issues which precipitated the development of the *Mareva* injunction were discussed and it was observed that even in the 1970s deceptive tactics made it difficult for a claimant to achieve restitution. However, the typical scenarios giving rise to a *Mareva* application have changed since those fledgling cases. The emerging pan-global economy enables increasingly intricate commercial transactions to be established. The modern global economy offers organisations and individuals the opportunity to profit on the back of skilfully fashioned international deals. However these opportunities also present more occasions for contracts to be broken and for creditors to be misled by debtors.[1] Furthermore, claimants are faced with increasingly sophisticated technology which allows for the transfer of financial assets at the drop of a hat by parties operating with anonymity. This chapter surveys certain measures taken by the English courts to combat the adverse scenarios generated by processes of globalisation and developing technologies. It will become apparent that the English courts have crafted erudite judicial remedies which allow claimants to act both covertly and decisively in

[1] Mark SW Hoyle, *The Mareva Injunction and Related Orders* (3rd Revised, LLP Professional Publishing 1997).

order to protect interests in assets which may otherwise be spirited away.[2] It shall be seen that such remedies consist of a matrix of pre-trial interlocutory orders which may be instituted in order to freeze an impugned asset, facilitate discovery or preserve evidence where it is likely that a defendant will defraud a creditor or otherwise organise their affairs in such a manner as to inequitably obstruct the resolution of disputed legal or factual issues.

Understanding the modern *Mareva* context

3.2. One relatively simple technique employed by debtors or fraudsters is where funds are converted into cash which is then used to open one or more bank accounts under names which are not easily linked to the individual or company from which the funds originated. Another common and relatively simple method used by those seeking to cover their tracks is the withdrawal of funds from a bank account which are then transferred from one jurisdiction to another via a range of informal measures, for example via the 'hawala' system employed in Africa, Asia and the Middle East.[3] Alternatively, payments may be made by companies in jurisdictions where it is difficult to gain any information relating to movements between accounts or even about the companies who made the payments. One method popularised by

[2] Note Parry's description of the close relation between *Mareva* injunctions and section 423 Insolvency Act 1986; the two measures may be utilised at different stages in insolvency. While a *Mareva* injunction will *prevent* an asset from being spirited away a s.423 IS action can enable the avoidance of a transaction once an asset *has been* put beyond a creditor's reach see, Rebecca Parry, *Transaction Avoidance in Insolvencies* (OUP 2001) 237.

[3] The 'hawala' system essentially enables "money transfers without money movement." The system is an alternative or parallel remittance system. It exists and operates outside of, or parallel to 'traditional' western banking or financial channels (which it predates). It has both legitimate and illicit applications. It facilitates the transfer of money between different jurisdictions on the basis of communication and trust via members of an informal network of hawala dealers (hawaladars), see, Mohammed El-Qorchi, 'The Hawala System' (2002) 39 (4) Finance and Development <http://www.gdrc.org/icm/hawala.html> accessed 3 September 2015; George Sim, 'Asset Tracing - a Practical Guide - Expert Witness Supplement' (2004) 154 NLJ 1774.

the media is where an elusive party utilises *offshore* bank accounts which bear no name; only an anonymous account number. These offshore accounts are often located in regions which are characterised by a disinclination on the part of the banks to cooperate with a party who seeks information about the account holder. However, it ought to be appreciated that such accounts and jurisdictions are not absolutely impenetrable; cooperation may be solicited but the degree of cooperation does vary from region to region and case to case.[4]

3.3. There are a great number of other methods utilised in order to shroud the trail left by practices intended to conceal assets. It is not uncommon for a person who wishes to evade detection to create a complex labyrinth of transfers, withdrawals and proprietary conversions. Funds may be routed through several domestic and/ or international banks; a transfer may be made to a company, a family member or another person under the control or influence of the person who is making the transfer; a transfer may be made to a discretionary trust where the beneficiaries are members of the transferor's family or where the trustees are controlled or influenced by the person making the transfer. A person may: borrow against their assets and then transfer or convert the borrowed funds by those means above; make payments into insurance policies; make repayments on mortgages held by another family member; use more traditional methods such as purchasing travellers' cheques to encash in a different location; convert their funds via the

[4] On the subject of civil measures see, CPR R 34.13.7; Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970; on the subject of criminal measures see, The Criminal Justice (International Co-operation) Act 1990 (ratifying the 1959 European Convention on Mutual Assistance in Criminal Matters); generally see, Jonathan Tickner, 'Swiss Banking Secrecy - Not so Secret' (2001) 32 LS Gaz 40; Terry Corbitt, 'Money Laundering, Tax Havens and Offshore Banking' (2001) 165 Criminal Law and Justice Weekly 542.

purchase of precious stones or jewellery which are then transported elsewhere; or use concealed safe-deposit boxes.[5] This list is certainly not exhaustive but it serves to demonstrate that where a claimant seeks recompense extrication alone may be a formidable task. It also highlights that deceptive schemes often involve one or more foreign jurisdictions which may necessitate the supplication of the World Wide *Mareva* jurisdiction which will receive attention shortly. Clearly pursuing the trail of assets apposite for remuneration can be an extremely challenging task. The process directed at unravelling such complicated trails is broadly referred to as asset tracing (civil).

Asset Tracing

3.4. Accounting for the introductory discussion above it is clear that where a claimant contacts a practitioner seeking advice in relation to an outstanding debt and indicates that there is a risk that a debtor may attempt to dispose of or dissipate assets which may be targeted in the future to satisfy that debt, preserving those assets is not necessarily a straightforward case of petitioning the court for a freezing injunction pending a final judgment order. Practitioners must take into consideration a number of varying factors: whether the debtor is worth suing in financial terms, or perhaps whether criminal proceedings are more appropriate; the current locale of the debtor; the debtor's known connections both outside of the domestic jurisdiction and within it; the extent to which the debtor's lifestyle may indicate where assets may have been hidden or dispersed; the extent and location of the debtor's assets;

[5] *Sim* (n 3).

and who currently holds and or controls the impugned assets.[6] It is submitted that an 'asset tracing' exercise may be of great benefit to any practitioner attempting to untangle a debtor's web.

3.5. For the purposes of this discussion 'asset tracing' is to be broadly regarded as the process of tracing a monetary value in the manner and form established by Lord Millett in *Foskett* v *Mckeown.*[7] Tracing is thus the exercise by which the claimant demonstrates what has happened to their property, identifying the proceeds and the parties who have handled, or received it. The exercise justifies the applicant's claim, establishing that the proceeds may be properly regarded as representing their property. Tracing is different from claiming. It ascertains the 'traceable' proceeds of a claimant's property enabling that claimant to substitute the traceable proceeds for the asset which originally formed the subject matter of their claim. The principles of law which govern the exercise of tracing are themselves complex and must be carefully regarded by the practitioner.[8] Nevertheless, there are a range of ancillary orders and procedures which assist in effecting the *Mareva* jurisdiction. It shall be seen that some are suitable for use prior to the claimant's application for an *ex parte* freezing injunction on a preparatory basis and some others are only granted by the court as an ancillary or interlocutory order. Regardless, each order which follows (including the freezing injunction itself)[9] may be considered an order of the court generally available for civil asset tracing.

[6] Lionel D Smith, 'Tracing into the Payment of a Debt' (1995) 54 (2) CLJ 290, 292-294.
[7] [2001] 1 AC 102 [128].
[8] Eric S Rein, 'International Fraud: Freeze, Seize, And Retrieve' (1999) 116 Banking L J 144.
[9] See para 3.9.

3.6. Legal practitioners are duty bound to ensure that their clients are informed from the outset that where any litigation undertaking is concerned there may be a substantial cost involved.[10] Where the *Mareva* jurisdiction is concerned it is submitted that in the long run it may be wise for a claimant to commit resources prior to a *Mareva* application on a preparatory basis and/ or for a practitioner to advise them in this respect. Of the orders which follow the *Norwich Pharmacal* and *Bankers Trust* jurisdictions are commended as suitable preparatory mechanisms and as it shall be observed where a covert operation is required either order may be joined with a Gagging and/ or Sealing Order.[11] Such pre-trial preparatory exercises bring two distinct advantages. Firstly, the exercise could reduce the possibility that unforeseen costs will arise and perhaps give an indication as to whether or not a lengthy litigation process is worth pursuing at all; where it is unlikely that suitable assets will ever be located the process may well become a futile and costly exercise. The potential scale of a *Mareva* case must not be underestimated. By way of example the *JSC BTA Bank* cases[12] have been an ongoing dispute with actions in numerous courts. Since the claimant first sought advice the costs have spiralled and there have been in the region of fifty interim applications including but not limited to applications for disclosure, cross-examination, appointment of a receiver, *Norwich*

[10] CPR SI 1998/3132; Jonathan Herring, *Legal Ethics* (OUP 2014) 267-271.
[11] See Ch 2 para 2.23.1.
[12] *Ablyazov & ors* v *JSC BTA Bank* [2011] EWCA Civ 1588; *JSC BTA Bank* v A *& ors* [2009] EWCA Civ 1125; *JSC BTA Bank v Ablyazov* [2010] EWHC 1779 (Comm); *JSC BTA Bank v Ablyazov & ors* [2011] EWHC 1136 (Comm); *JSC BTA Bank v Ablyazov & ors* [2011] EWHC 2500 (Comm); *JSC BTA v Ablyazov & ors* [2011] EWHC 2664 (Comm); *JSC BTA Bank v Ablyazov & ors* [2012] EWHC 455 (Comm); *JSC BTA Bank v Ablyazov & ors* [2012] EWHC 783 (Comm); *JSC BTA Bank v Ablyazov & ors* [2012] All ER (D) 85; *JSC BTA v Ablyazov* [2012] EWHC 648; *JSC BTA Bank v Kythreotis & ors* [2010] EWCA Civ 1436; *JSC BTA Bank v Mukhtar A & ors* [2010] EWHC 90 (Comm); *JSC BTA Bank v Mukhtar Ablyazov & ors* [2011] EWHC 202 (Comm); *JSC BTA Bank v Mukhtar Ablyazov* [2012] EWCA Civ 639; *JSC BTA Bank v Solodchenko Fourie v Le Roux* [2007] 1 WLR 320 *Fourie v Le Roux* [2007] 1 WLR 320 *Fourie v Le Roux* [2007] 1 WLR 320 *& ors* [2010] EWHC 2843 (Ch); *JSC BTA Bank v Solodchenko & ors* [2011] EWHC 2163 (Ch); *JSC BTA Bank v Shalabayev & anor* [2011] EWHC 2915 (Ch).

Pharmacal orders and proceedings for contempt. Clearly claimants and practitioners must be mindful of the potential magnitude of a *Mareva* case; it is submitted that a preparatory exercise which utilises the techniques, procedures and court orders discussed within this chapter can assist in this respect.

3.7. Secondly, it is cogently inadvisable that a claimant should depend upon a party who has already reneged upon their obligation to repay a debt to conduct themselves transparently during proceedings. A claimant to a freezing injunction can only rely on that order to be truly effective where the respondent to it complies fully with its terms and any ancillary components (such as standard disclosure).[13] For that reason the use of well-timed pre-trial or interlocutory asset tracing exercises which utilises one or more of the mechanisms below may be valuable because it seeks to identify at the earliest stage possible, the range of assets which may become amenable in order to satisfy a judgment order in the future. It is repeated that Identifying the assets before a freezing injunction is granted can bring great benefits, not least having that order composed so that it captures specific assets from the outset rather than risking a dispute arising at a later stage as to whether or not a standard form order will capture a certain class of asset or touch a certain asset holder, such as a third party.[14]

[13] See para 3.19.2.
[14] See Ch 4 para 4.17.

The modern Freezing injunction

3.8 Before the turn of the millennium in April of 1999 the introduction of the Civil Procedure Rules (CPR), brought with them a change in terminology for the *Mareva* jurisdiction. The *Mareva* injunction is now termed as a 'freezing order' pursuant to CPR r25 1(1) (f). There is a plain logic for this being so, as it is an 'injunction' which effectively freezes assets. In accordance with the provision a 'freezing injunction is regarded as an order:

(i) Restraining a party from removing from the jurisdiction assets located there: or

(ii) Restraining a party from dealing with any assets whether located within the jurisdiction or not.

The new terminology was intended to be representative of the nature of *Mareva* relief. It had the effect of simplifying the language which related to the jurisdiction; employing analogous conceptual terminology to that already in use in various jurisdictions across the globe. The introduction of the plain language approach with its usage of terminology like 'freezing order' or freezing injunction' could have the effect of shrouding the nature and development of the *Mareva* jurisdiction. In 2004 Lord Millett vocalised a similar observation in relation to CPR Pt 72. His Lordship feared that the introduction of new terminology could mask the proprietary nature of performance by third party debt orders which is peculiar to the historical development of what was formerly termed a Garnishee Order. His Lordship criticised the discontinuation of the term 'Garnishee Order' because its previous usage

brought with it a more comprehensive understanding of that jurisdiction.[15] It pointed to a more comprehensive or fuller appreciation of the Garnishee Order in terms of its heritage and development; explicating not only what the law was but importantly why it was so. It is submitted that the same is true here; the true nature of *Mareva* relief inclusive of its unique development in the courts of equity must not be obscured or overlooked through the desire to simplify the language of the law. Therein lies the utility of the two previous chapters, they stand to illuminate the heritage of the *Mareva* jurisdiction, to explain its peculiar development in order to provide a more complete picture which fortifies the rational integrity of the law in relation to the modern freezing injunction.

Mareva injunctions: the fundamental grounds

Statutory authority

3.9. It was argued at the close of the previous chapter that it is now beyond doubt that the courts in England will award a freezing injunction over the assets of a defendant pursuant to section 37(1) of the Senior Courts Act 1981 where it is "just and convenient".[16] That submission was recently reaffirmed within the *Eco Quest plc v GFI Consultants* decision.[17] It is reemphasised here because it is considered to be an expression which captures the essence of the *Mareva* jurisdiction. The court's jurisdiction to grant a freezing injunction is unrestricted save by the court's own assessment of what the appropriate course is based on a full assessment of the

[15] *Compare Societe Eram Shipping Co Ltd v Compagnie Internationale de Navigation* [2004] 1 AC 260 [112].
[16] See Ch 2 para 2.29.
[17] [2014] EWHC 4329 (QB) [83] (Salter J).

distinct scenario set before it;[18] an assessment which may be influenced by equitable defences such as hardship or unclean hands.[19] What shall become apparent as this thesis progresses is that the courts will do what is just and convenient but also *necessary* to make the *Mareva* jurisdiction an effective one.

3.10. A freezing order composed in the standard form[20] is intended to capture all of the defendant's assets whether those assets are held in the defendant's name personally or whether they are solely or jointly owned. The order is intended to operate upon any asset irrespective of whether a defendant can directly or indirectly dispose of or deal with that asset as if it were his personally. Furthermore the defendant is considered to possess such a power even if a third party controls or holds that asset in accord with the defendant's direct or indirect instructions. Although in Chapter Four it will become apparent that in practice the issue of freezing injunctions and third parties is not necessarily straightforward.[21]

The requirements

3.11. There are four main criteria which must be satisfied in order for an application to be successful. In practice it is established that the courts will grant an order to support proceedings in England where:

[18] E.g. while the court would commonly discharge a freezing injunction following the making of an administration order, a winding up order or a bankruptcy order (thereby allowing the defendants assets to be applied in accordance with the statutory scheme), in the exercise of its discretion the court may alternatively consider there to be scenarios where it is "just and convenient" to allow it to continue e.g. see, *Eco Quest plc v GFI Consultants* [2014] EWHC 4329 (QB) [82]-[86] (Salter J).

[19] ICF Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages* (9th edn, Sweet & Maxwell Ltd 2014) 540; *CBS United Kingdom Ltd v Lambert* [1983] Ch 37; see also, *JSC BTA Bank v Solodchenko (No 8)* [2013] 1 WLR 1331.

[20] Note, the 'standard form freezing order' is annexed to CPR PD 25A.

[21] See Ch 4 para 4.5.

1. There is a clear course of justifiable action in England.
2. The applicant can establish that on the merits there is a good arguable case.[22]
3. The applicant is able to evidence the *prima facie* existence of assets that are within the jurisdiction[23] or outside of it in the case of a Worldwide Freezing Order.[24]
4. The applicant can demonstrate that there is a genuine risk that the defendant may attempt to dissipate or dispose of the impugned assets without good cause before such time as a judgment could be given or enforced, thereby rendering any eventual judgment impotent.[25]

Important considerations for applicants

3.12. There are a number of important issues which an applicant should consider when supplicating the *Mareva* jurisdiction:

1. A *Mareva* injunction does not give the applicant with any form of security over the relevant assets. Neither does a *Mareva* injunction provide the applicant with priority above the respondent's other creditors in the case that the respondent becomes insolvent.[26]
2. All applicants have a duty to provide the court with evidence of all material facts which may be relevant to the case upon which the applicant relies.[27]

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[22] Robert Pearce, John Stevens and Warren Barr, *The Law of Trusts and Equitable Obligations* (5th edn, OUP 2010) 150; *Re BCCISA (No 9)* [1994] 3 All ER 764 [785].
[23] *Commissioners for HM Revenue & Customs v Cozens* [2011] EWHC 2782 (Ch) [72].
[24] See para 3.15.
[25] *Irish Response Ltd v Direct Beauty Products Ltd* [2011] EWHC 37 (QB) [25]-[41] (Seymour J).
[26] *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 3 All ER 164; *Flightline Ltd v Edwards and anor* [2002] EWHC 1648 (Ch), [2003] EWCA Civ 63.
[27] CPR 25A r3.3; *Third Chandris Shipping Corpn v Unimarine SA* [1979] QB 645; see also, *Negocios Del Mar SA v Doric Shipping Corpn SA, The Assios* [1979] 1 Lloyd's Rep 331; *Brinks-MAT Ltd v Elcombe* [1988] 3 All ER 188; *Tate Access Floors Inc v Boswell* [1990] 3 All ER 303.

3. Applicants will be generally required to provide undertakings to the court; this will typically include a cross-undertaking in damages.[28]
4. *Mareva* injunctions are not enforceable in foreign jurisdictions without the permission of the English courts. The injunction will not have a binding extraterritorial effect upon third parties until and unless it has been recognised, registered and enforced in the relevant court of foreign jurisdiction.[29]
5. Delay may defeat a claim in accordance with the usual rules in relation to equitable remedies. In addition to the fact that delay may undermine an application it may also increase the risk that the respondent may dissipate their assets prior to an order.[30]

Important considerations for respondents

3.13. There are a number of important points which a respondent to a freezing order should consider:

1. A respondent will normally be required by the court within a specific timeframe to provide disclosure of all of their assets.[31]
2. A respondent should carefully and promptly consider whether or not there may be any legitimate grounds to apply to the courts to have the order varied or discharged.[32]

[28] CPR 25A r5.1(1); *Third Chandris* ibid.
[29] See para 3.21.
[30] *Spry* (n 19) 546; *Fisher v Brooker* [2009] 1 WLR 1764.
[31] *Derby & Co Ltd v Weldon* [1990] Ch 48.
[32] The standard form order, annexed to CPR 25A, para 2 and 13.

3. A respondent to an order should take all necessary steps to make sure that they comply with the terms of a freezing order. A respondent who breaches an order will be committed for contempt which may result in the seizure of assets, a fine and/ or imprisonment.[33]

The procedure

3.14. Freezing orders are ordinarily supplicated *ex parte* (without notice to the respondent). Providing the defendant with notice may defeat the objects of the order. The general application procedure is outlined in CPR Part 23 and CPR PD 23A. The application will generally be made to a judge from the High Court or a circuit judge in the County Court. There are other notable procedural aspects:

1. The application notice is completed by way of 'Form N244' or 'N244 (CC)' in the Commercial Court.
2. A draft order will normally be based upon the standard form order which is annexed to CPR PD 25A or Appendix 5 of the Guide to the Commercial Court.
3. Supporting evidence for the application is made by way of affidavit as per CPR PD 25A r3.1.
4. Generally the respondent is required either immediately or within a specified timeframe (upon receipt of the order) to inform the applicant's solicitors of the value and location all of their assets.[34]
5. Where a *Mareva* injunction is or ordered *ex parte* it normally be granted for a specified period of time. Furthermore a return date will be stipulated for a full

[33] Ibid, para 16; Contempt of Court Act 1981.
[34] See, CPR 25A r9(1).

hearing during which the court will decide whether the order should be continued, varied or discharged.[35]

Foreign Assets and Proceedings

3.15. When an English court is presented with a case that falls purely within the borders of its own jurisdiction that court may act with a level of confidence that its judgments will be complied with and its orders enforced. Originally in England the *Mareva* injunction was confined to operate domestically; although that same rule was not conventional in other Commonwealth jurisdictions.[36] The restrictive position of the English courts altered following a number of decisions in the last two years of the nineteen-eighties. Now Worldwide Freezing Orders (WFO) and other associated orders can be granted by the courts in relation to assets located abroad as well as domestically.[37] Although where an asset or a defendant is located outside of the English jurisdiction the court is faced with additional jurisdictional issues which must be taken into account.[38] It is noted that the jurisdiction to grant extraterritorial *Mareva* orders is ardently opposed by some who claim that the English courts should not presume to grant a WFO unless that court has personal jurisdiction over the party against whom the order is made.[39] Nonetheless, in practice the WFO has been

[35] CPR 25A r5.1(3).
[36] See, *Ballabil Holdings Pty Ltd v Hospital Products Ltd* (1985) 1 NSWLR 155; *Coombs & Barei Construction Pty Ltd v Dynasty Pty Ltd* (1986) 42 SASR 413; *Yandil Holdings Pty Ltd v Insurance Co of North America* (1987) 7 NSWLR 571; *National Australia Bank v Dessau* [1988] VR 521.
[37] *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65; *National Australia Bank Ltd v Dessau* [1988] VR 521; *Fourie v Le Roux* [2007] 1 WLR 320; on the subject of guidelines as to the form of an order form see, Practice Direction [1996] 1 WLR 1552.
[38] For the most recent comprehensive domestic discussion see, *Masri v Consolidated Contractors International Ltd (No 2)* [2009] 2 WLR 621 [30]-[35] (Collins LJ).
[39] For a deconstruction of the legitimacy of the extraterritorial jurisdiction to grant World Wide *Mareva* relief see, Trevor C Hartley, 'Jurisdiction in Conflict of Laws - Disclosure, Third-Party Debt and Freezing Orders' [2010] LQR 194, 194-221.

granted irrespective of whether a defendant had any assets inside of the jurisdiction,[40] and/ or regardless of whether the applicant had yet to receive a judgment.[41] There are a number of principles which play a significant role in the court's assessment of whether a *Mareva* injunction should be extended to capture foreign assets;[42] while an extensive analysis of them here would detract from the current discussion there are a number of comments which are worth making.

3.16. There is a general inclination to limit the use of the *Mareva* jurisdiction to domestic applications or at least in relation to assets that fall within the remit of the English jurisdiction and there are sound reasons why that should be so. The most convincing argument thereof centres on comity considerations;[43] the idea that the English courts should act with courtesy towards and consideration of another jurisdiction's territorial sovereignty. Thus it has been asserted that the English courts should only consider the extension of a freezing injunction to capture foreign assets where there is considered to be a substantial risk that confining an order to our own jurisdiction would preclude the applicant's effective protection.[44] In *Derby & Co Ltd* v *Weldon (No 1)*[45] Parker LJ declared that in the scenario that a court can determine that there are sufficient domestic assets which would cover the appropriate sum or where a court is not satisfied that foreign assets could be located or effectively

[40] *Derby & Co Ltd v Weldon (Nos 3 & 4)* [1990] Ch 65; *Fourie v Le Roux* [2007] 1 WLR 320; *National Australia Bank Ltd v Dessau* [1988] VR 521; See Practice Direction [1996] 1 WLR 1552 Re the form of an order.
[41] *Derby & Co Ltd v Weldon (no 1)* [1990] Ch 48; *Fourie v Le Roux* [2007] 1 WLR 320.
[42] Spry identifies seven core principles which govern the World Wide Freezing Orders availability, for a description see, *Spry* (n 19) 552.
[43] *Masri v Consolidated Contractors International Ltd (No 2)* [2009] 2 WLR 621 [35] (Collins LJ).
[44] *Spry* (n 19) 552.
[45] [1990] Ch 48.

frozen or where the extension of an order abroad would in all circumstances be oppressive, then to grant that order would be unjustified.[46]

3.17. The comity consideration can also operate so as to assist a party located in another jurisdiction. So while the English courts are careful not to offend the sovereignty of another jurisdiction there are statutory provisions to assist foreign jurisdictions too. Section 25 of the Civil Jurisdiction and Judgments Act 1982 enables the English courts to agree to a freezing injunction to assist foreign proceedings even where no proceedings have been commenced here. *Refco* v *Eastern Trading Co*[47] provides a two stage test which is to be adopted where section 25 is invoked. The first step is relatively simple, the court will consider how it would respond if the same case were laid before it domestically; would the court grant the relief in aid of domestic proceedings here? Secondly, the court will consider whether or not the lack of substantive jurisdiction would mean that the granting of relief were injudicious.[48]

3.18. Much of the rationale driving the court's willingness to allow orders which touch foreign assets or orders which assist foreign proceedings appear to be influenced by notions of jurisdictional cooperation and mutuality;[49] parallel considerations expedited Article 81(1) on the Treaty on the Functioning of the European Union:

[46] Ibid [56].
[47] [1999] 1 Lloyd's Rep 159.
[48] This second limb can be an extremely complicated issue, generally see, *Credit Suisse Fides Trust Sa v Cuoghi* [1998] QB 818; Felicity Toube, Jonathan Wheeler and Kevin Roberts, 'England and Wales' in Felicity Toube (ed), *International Asset Tracing in Insolvency* (OUP 2009) 46.
[49] E Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncoverred* (OUP 2008); Nicolas Kyriakides, 'A European-Wide Preservation Order: How the Common Law Practices Can Contribute' (2014) 33(1) CJQ 93; 93-106.

> "The Union Shall develop judicial cooperation in civil matters having cross-border implication, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases."

3.19. A very brief comment should be made in relation to the UK Parliament's decision to opt out of the European Account Preservation Order Regulation (EU 655/2014) (EAPO Regulation). The EAPO is a progressive procedural device which seeks to incorporate desirable aspects of associated orders from around the EU: the *in rem* attachment order and the *in personam* freezing order. The EAPO can be considered to be a product of the spirt of the abovementioned 81(1) TFEU which seeks to instil jurisdictional cooperation and mutuality across the Union. It could be construed that England's decision to opt out of the EAPO appears to be contrary to the principles of jurisdictional cooperation. However it is submitted that its domestic adoption was largely unnecessary as Part 74 of the current Civil Procedure Rules 1998/3132 are sufficiently fit for purpose. Kyriakides suggests that the EAPO will have the effect that other continental jurisdictions will better conform in practice to the concept of inter jurisdictional cooperation which is already active within both the English institution and other member states.[50]

3.20. Throughout the last chapter it was noted that the *Mareva* cases often included inter-jurisdictional transactions. In order for the courts to be able to judiciously and consistently dispenses justice which touches assets beyond domestic

[50] Nicolas Kyriakides, 'A European-Wide Preservation Order: How the Common Law Practices Can Contribute' (2014) 33(1) CJQ 93; 93, 106.

borders the courts continue to be careful not to offend the judicial sovereignty of another jurisdiction and they must also be willing to assist another jurisdiction in order to propagate the transnational cultures of inter-jurisdictional cooperation and collaboration necessary to combat the modern elusive debtor.[51] As discussed in the previous chapter, the English *Mareva* jurisdiction is a generally progressive one, a fact that persists in relation to WFO's too. The considerations which govern the availability of the WFO are modified and amended as the courts encounter new scenarios. As a result new guidelines (such as those discussed below) occasionally develop in order to preserve and further the spirit of justice which drives the equitable *Mareva* jurisdiction.

3.21. Two significant provisos are now included in a WFO and both to one degree or another where created because of comity considerations and notions of judicial pragmatism. Following the *Babanaft International* case[52] a freezing injunction which extends to touch foreign assets must contain a *Babanaft* proviso, which offers protection to foreign third parties by declaring that the injunction will not bite upon them until and unless that injunction has been acknowledged, registered or applied by the relevant court within that jurisdiction. Following *Baltic Shipping* v *Translink Shipping Ltd*[53] a freezing order extending to capture foreign assets will also contain a *Baltic* proviso. It ensures that where a bank has a branch within the domestic jurisdiction, they are required to comply only with what they realistically consider their legal obligations to be in relation to assets which belong to a defendant which

[51] Lord Woolf, 'The Tides of Change' in RS Markesinis (ed), *The British Contribution to the Europe of the Twenty-First Century* (Hart 2002) 1, 10.
[52] *Babanaft International Co SA v Bassatne* [1990] Ch 13.
[53] [1995] 1 Lloyd's Rep 673.

the bank holds at another branch abroad. This is an important proviso because where a bank assists in the breach of a freezing injunction or directly breaches that injunction it may be held in contempt of court.[54]

Disclosure Orders

3.19.1. There are two principal techniques utilised by the courts in order to ensure that the *Mareva* jurisdiction is effective. One principal method which commonly renders a freezing injunction effective is where a third party, normally a bank which the defendant holds an account with is committed for contempt if it knowingly assists in the breach of an order. Once the bank is placed on notice, contempt can be established irrespective of whether or not the defendant has been served with the order as the third party would be regarded as guilty of behaviour which knowingly interferes with the administration of justice by facilitating contravention of the order.[55] The other principal technique involves disclosure. Disclosure is predominantly directed toward facilitating the delivery up of information and documents from a defendant in relation to their assets.[56]

[54] Note, that in certain circumstances a bank may become the subject of a dishonest assistance action.
[55] *Z Ltd v A-Z* [1982] QB 558 (CA) [578] (Eveleigh LJ), approved in *Att-Gen v Times Newspapers Ltd* [1992] 1 AC 191; Lawrence Collins, *Essays in International Litigation and the Conflict of Laws* (OUP 1994) 87.
[56] See E.g. *A v C* [1981] QB 956; *Bekhor & Co Ltd v Bilton* [1981] QB 923 (CA); *House of Spring Gardens Ltd v Waite* [1958] FSR 173 (CA); *Bank of Crete SA v Koskotas* [1991] 2 Lloyd's Rep 587 (CA).

Standard Disclosure

3.19.2. Within the English jurisdiction those party to a freezing order are required to provide disclosure of documents. Unless the contrary is stipulated by the courts then this means 'standard disclosure'. The courts may limit disclosure or dispense with it entirely; those who are party to an order may agree to do the same. Standard disclosure will vary from case to case on the basis of: the documents that a party relies on, documents which are considered to adversely affect a party's case personally, adversely affect the case of another party or support the case of another party and finally those documents that the court requires a party to disclose in accordance with a relevant practice direction. A party required to provide disclosure must make reasonable searches for documentation. A party is authorised to inspect documentation revealed by way of a statement of claim, a witness summary or statement or a signed affidavit. The jurisdiction exists to order disclosure even where doing so would constitute a criminal offence in foreign law.[57] The disclosure duty will continue until proceedings conclude. On application the courts are authorised to request a disclosure of specific documentation. The justification for the exercise of this discretion is the prevailing obligation of a party to provide access to documentation which will assist the other party's case. The use of documentation disclosed to a party is not unlimited, disclosed documentation may only be used for a purpose which assists the proceedings for which the document was originally disclosed.[58] Exceptions being where the court gives permission or where a document is read at a hearing which is held in public (although as shall be discussed shortly the

[57] *Morris v Banque Arabe et Internationale d'Investissement* [2000] CP Rep 65 Ch D; however the courts retain the discretion refuse to make it on comity grounds [73] (Neuberger J).
[58] *Toube* (n 48) 49.

courts may by way of order restrict such disclosure)[59] or where both parties agree to the document's use for some other purpose.

Pre-action Disclosure

3.19.3. A party may seek disclosure prior to proceedings by way of a pre-action disclosure application. Domestically pre-action disclosure is obtained under CPR r31. 16, it will be granted where the court can ascertain a likelihood that the claimant and respondent will become party to proceedings in the future. The court will also establish that the disclosure would be likely to fall within the range of standard disclosure (discussed above). The courts will consider the pre-action disclosure to be a desirable process to assist in the fair disposal of proceedings and/ or to assist in the resolution of those proceedings or to reduce costs. It should be noted that where pre-action disclosure is sought a potential claimant may alternatively consider utilising the *Norwich Pharmacal* or *Bankers Trust* jurisdiction, the two prospective jurisdictions to be discussed in due course, the former in particular is considered to be particularly useful where a claimant wishes to build a solid case covertly before an action.

Witness summons

3.19.4. Where oral evidence and or the production and presentation of documents is requisite for the efficacy of a trial the court may summons a named individual under CPR r34.2. The production of documentation will ordinarily occur at a convenient

[59] See para 3.23.1.

date prior to the trial taking into account the time that parties may require to consider and review the material before the trial commences. Gross J declared in *South Tyneside MBC* v *Wicks Building Supplies Ltd*[60] that witness summons are not appropriate devices for a speculative investigation, a summons must stipulate those documents which are sought. Delivery up of the documentation must be necessary either to resolve the matter or to save costs. The courts will pay close attention to and scrutinise any application which requests the production of confidential documents. The person summoned has the right to know what his or her obligations are under that summons and so it is particularly important that required documents are identified as part of a class of documents or are specifically identified.

Other Ancillary Orders

The Norwich Pharmacal Order

3.20.1. The *Norwich Pharmacal* Order (NPO) can be extremely effective when used in conjunction with a freezing injunction.[61] The device was borne out of Lord Reid's judgment in *Norwich Pharmacal Co* v *Customs and Excise Commissioners.*[62] The NPO requires a third party who has unknowingly or innocently facilitated the wrongful act of another to assist the party that has been wronged. That assistance comes in the form of full and frank disclosure to the injured party about any and/ or all information ranging from a trail of transactions to the identity and or location of the

[60] [2004] EWHC 2428 (Comm).
[61] Wayne Anthony, 'Trace the Assets - Expert Witness Supplement' (2003) 153 NLJ 868.
[62] [1974] AC 133 (HL).

wrongdoer or those who have also been involved in the facilitation thereof.[63] When being employed on a preparatory basis an NPO ought to be sought at an early stage before court proceedings have commenced; as identified it is manifestly advantageous that discovery of relevant information is obtained from banks, financial advisors and accountants promptly.

3.20.2. A substantial volume of case law established that the following considerations may give rise to a court's willingness to grant such relief.[64] Generally, a respondent to a NPO will have been caught up in some manner or form of transgression and that involvement will have been more than merely bearing witness to the wrongdoing. An applicant will require of the respondent, documentation and/ or information intended to vindicate a right and/ or allow the claimant to protect him or herself following a conceived transgression or actual transgression. Although it is not a mandatory aspect of the jurisdiction that the required documents/ information are a definite precursor to court proceedings, this is commonly the case.

3.20.3. A transgression or a feared transgression which gives rise to an NPO is not confined to claims of an equitable proprietary nature, but may include claims in tort; in equity, a breach of contract, a breach of confidence and also crime. The documentation/ information which is sought after is not confined to the identity of the transgressor; it may also encompass an enquiry to establish whether or not the perceived transgression actually occurred at all. As such, obtaining an NPO is a

[63] Ibid [175] (Lord Reid).
[64] *Norwich Pharmacal* (no 62); *Bankers Trust v Shapira* [1980] 1 WLR 1274; *Ashworth Hospital Authority v MGN Ltd* [2002] 1 WLR 2033; *British Steel Corporation v Granada Television Ltd* [1981] AC 1096; *Carlton Film Distributors Ltd v VCI Plc* [2003] EWHC 616 (Ch).

pragmatic step because it could drastically reduce the exposure to the claimant in terms of monetary risks in the event that a claim has weak foundations and of spiralling legal costs or associated costs in forensic accountancy once a freezing injunction is served. An NPO is not a suitable device for the procurement of information or discovery in relation to a respondent who is placed beyond the domestic jurisdiction. In the scenario that a claimant requires information from a non-domestic party he or she should consider the preparation of letters rogatory. However a provision of the Civil Jurisdiction and Judgments Act 1982[65] joined with principles established following *Credit Suisse* v *Cuoghi*[66] allows a claimant to petition the English courts for an NPO to operate over a respondent who is subject to the jurisdiction of the English courts relation to proceedings which are taking place abroad.

3.20.4. The NPO has received plentiful attention in recent time in relation to defamation suits, especially where the internet is involved; in eliminating the shelter conferred by the cyber anonymity of a person who is 'trolling'[67] its effectiveness is undisputed.[68] However, its utility must not be overlooked where a claimant is considering issuing proceedings in the commercial court. It could be advanced that an NPO is only a necessary device where the procedures available under the CPR have been ruled out as appropriate. There is no doubt that caution should be

[65] s. 25(1) (5) Civil Jurisdiction and Judgments Act 1982 (as amended).
[66] [1998] QB 818.
[67] Trolling is the act of making a deliberately offensive or provocative online post with the aim of upsetting someone or eliciting an angry response, see, The Committee Office and House of Lords, 'House of Lords - Communications Committee - First Report' (22 July 2014) <http://www.publications.parliament.uk/pa/ld201415/ldselect/ldcomuni/37/3704.htm> accessed 3 September 2015.
[68] Anna Vamialis, 'Online Defamation: Confronting Anonymity' (2013) 21 (3) International Journal of Law and IT 31, 45.

exercised when considering the use of the *Norwich Pharmacal* jurisdiction. Nonetheless, it is submitted that attaching such a condition precedent to its invocation is entirely unwarranted; the NPO is not considered to be an exceptional remedy subject to stringent restrictions.[69] The NPO remains a valuable preliminary device in the arsenal of the practitioner.[70]

Nostro Accounts

3.21.1. Where an asset transfer includes any US currency amount there is likely to have been a transfer between what are referred to as 'Nostro' accounts held in New York. A 'Nostro' account is an account which is held by a bank within a foreign jurisdiction which is usually that where the foreign currency originates. Taking as an example a person who has converted funds formerly GB sterling to US dollars thereof held in a New York Nostro account - the practitioner conducting the case for the claimant would be wise to consider obtaining an appropriate order in a New York Court.

The Bankers Trust jurisdiction

3.22.1. Where a claimant is merely concerned with gaining information which relates to the location of assets held by a banking organisation forming the subject matter of a proprietary claim, that claimant should consider invoking the *Bankers Trust*

[69] *President of the State of Equatorial Guinea v Royal Bank of Scotland International* [2006] UKPC 7; *R (on the application of Mohamed) v Secretary of State for Foreign and Commonwealth Affairs* [2008] EWHC 2048 (Admin) [94]; *Campaign Against Arms Trade v BAE Systems* [2007] EWHC 330 (QB) [15]-[20] (King J).
[70] Charles Hollander, 'Norwich Pharmacal Takes Wings' (2009) 28 (4) CJQ 458.

jurisdiction. The *Bankers Trust* jurisdiction arose out of *Bankers Trust Co* v *Shapira*[71] it is a device which bears a similarity to the NPO. However its ambit is significantly limited in scope. Bankers Trust applications are ordinarily sought against the third party bank who has become involved in laundering monies following a fraud. The third parties involvement in that laundering process places them in a position to disclose documentation/ information which may assist in the tracing process. The condition precedent for its supplication is that a claimant can demonstrate the genuine prospect that the provision of the information could help to preserve assets which form the basis of their proprietary claim. Where more information is required other than confirmation of location, a claimant may alternatively tender an application under statutory jurisdiction via the Bankers' Books Evidence Act 1879, though its remit is also limited. It does not include correspondence between a bank and a suspected fraudster, or information relating to paying in slips or cheques.[72] The *Norwich Pharmacal* jurisdiction is certainly the more suitable option where a more comprehensive picture is sought.

'Gagging Orders'

3.23.1. The courts have the ability to issue an injunction which restrains the party it is served to from informing or otherwise indicating to third parties that proceedings have commenced or that any order has been made. A gagging order may be ordered in conjunction with a 'sealing order' which is effectively a judicially enforced secrecy order, it is binding upon the party to whom it is served and it also excludes the

[71] [1980] 1 WLR 1274; *Arab Monetary Fund v Hashim (No 5)* [1992] 2 All ER 911.
[72] *Toube* (n 48) 49.

general public from the normal access allowed to the record of the court's proceedings.[73] Secrecy orders are a good means of providing the claimant which sufficient time to consider and utilise the information gained by means of another order such as an NPO. Where an NPO and gagging order are combined they can provide the claimant party with the opportunity to gain information by means of a court order without a danger being posed to a cooperating third party of violation of their confidentiality duties owed to the primary party suspected of transgression. Gagging and sealing orders may also be issued ancillary to the operation of a freezing order.[74] Working a covert asset tracing exercise from the outset can be particularly useful because the debtor or asset holder remains unaware that he or she is the subject of an investigation until such time as the trail has been extricated and the *ex parte* freezing injunction ordered on the basis of the fuller picture.[75]

Search orders

3.24.1. Search orders (originally *Anton Piller* orders)[76] established at roughly the same time as the *Mareva* injunction and refer to an *ex parte* device which authorises a claimant, in conjunction with a supervising solicitor to gain entry to the respondent's premises with the objective of inspecting them and removing documentation or other articles or soliciting information, for example by way of the examination of computer systems. A search order may incorporate other provisions or directions such as a clause which requires a defendant to respond honestly to one

[73] Martin S Kenney, 'The Use of Sealing and Gagging Relief in Complex Insolvency Proceedings Involving the Investigation of Fraud and Discovery of Hidden Assets' (2008) 2(1) Insolvency and Restructuring International 9.
[74] Eric S Rein, 'International Fraud: Freeze, Seize, And Retrieve' (1999) 116 Banking L J 144.
[75] *Sim* (n 3).
[76] *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55.

or more specified interrogatories or to tender full discovery in other specified respects.[77] In practise the form of a search order may vary from one jurisdiction to the next and so the following discussion refers generally to the English jurisdiction. It is noted that when a domestic court has jurisdiction over a respondent its remit is extended to grant the order in respect of premises abroad. However such extension of the search order is less preferable than seeking an order in the courts of the applicable foreign country.[78]

3.24.2. *Anton Piller* relief takes its namesake from *Anton Piller KG* v *Manufacturing Processes Ltd*.[79] An application for a search order is made *ex parte* and accordingly the claimant must be able to demonstrate "an extremely strong prima facie case" the damage declared whether feared or incurred will be "very serious" and there will be "clear evidence" that the respondent has in his or her possession documentation or other things which incriminate them and there will be a "real possibility" that the defendants may seek to destroy or remove such incriminating evidence prior to any *inter partes* application being made.[80] It is often asserted that search orders constitute a near punitive imposition upon a respondent, particularly because they're made without notice.[81]

[77] *Spry* (n 19) 582.
[78] Securing the authority of the courts where an asset or defendant is located is preferable to the extension of the domestic authority to theirs; see also *Compare Altertext Inc v Advanced Data Communications Ltd* [1985] 1 WLR 457.
[79] [1976] Ch 55.
[80] *Anton Piller* (n 76) [62A]-[62B] (Ormrod LJ) and [62] (Lord Denning MR); see also, *Lock International Plc v Beswick* [1989] 1 WLR 1268 and *Universal Thermosensors Ltd v Hibben* [1992] 1 WLR 840.
[81] See Ch 2 para 2.30.

3.24.3. When a search order is granted it is usually proper that service is made by a solicitor.[82] Persons who are granted access to the respondent's premise are generally limited to the named solicitor and none other than a specified number of persons who are authorised to do so by him or her, the particulars will vary from case to case.[83] Access to the respondent's premise is usually permitted to enable the authorised party to search for, inspect and take a copy of pre-specified documents, articles or some other property and/ or to remove pre-specified documents, articles or some other property; a respondent may also be required to deliver up keys, open lock-boxes or print-out information from computers.[84] The respondent may also be ordered to give up the name and address of any person or persons or party who have been involved in specified dealings with the respondent and also to disclose details of those dealings,[85] furthermore the respondent may be required to notify third parties that proceedings against him or her have commenced and/ or to warn them of the possibility that proceedings may be brought against them in the even that incriminating evidence comes to light.[86]

3.24.4. Similarly to the NPO, search orders may be granted as an ancillary device, operative alongside a freezing order.[87] However unlike the NPO a search order will not be be permitted as a means to establish what if any causes of action are

[82] CPR 25A r7.2; *Universal Thermosensors* (n 80); although note the suggestion in *Columbia Picture Industries Inc v Robinson* [1987] Ch 38 that an independent officer of the court be appointed to effect service of the order.
[83] *Columbia Picture Industries Inc v Robinson* [1987] Ch 38.
[84] *Universal City Studios Inc v Mukhtar & Sons Ltd* [1976] 1 WLR 568, Spry (n 19) 582.
[85] *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721; *Golf Lynx v Golf Scene Pty Ltd* (1984) 75 FLR 303.
[86] *EMI Ltd v Pandit* [1975] 1 WLR 302; *Anton Piller* (no 76); *EMI Ltd v Sarwar* [1977] FSR 146; *Universal Thermosensors* (n 80).
[87] *CBS United Kingdom Ltd v Lambert* [1983] Ch 37.

justified.[88] It should be understood that there is no universally accepted search order. Rather, when an order is granted that order will be tailored to accommodate for the specific exigencies of that case in reference to such considerations as the likelihood that under normal processes documentation or materials or some other property could be concealed or disposed of by the respondent. These considerations are taken into account by a court prior to the order being granted in conjunction with a consideration of the level of hardship that an order may cause to the respondent as well as other considerations which are commonplace when exercising an equitable jurisdiction.[89] The considerations touched upon in this section on the *Anton Piller* jurisdiction are not exhaustive but they serve to demonstrate that both practitioners and claimants should be cautious when considering whether or not to petition the courts for an order of this kind not least because the claimant must give an undertaking in damages[90] and where the court deems it necessary he or she may have to support that undertaking by means of the provision of an adequate security such as a bond.[91]

3.24.5. *Anton Piller* relief remains a contentious issue, largely because of its intrusive nature. Concerns raised have included anxieties in relation to the violation of a defendant's right to privacy[92] as protected by the European Convention of Human Rights 1950,[93] as well as the damage which may be caused to their reputation as a

[88] *Hytrac Conveyors Ltd v Conveyors International Ltd* [1983] 1 WLR 44.
[89] *Spry* (n 19) 396-436; 581-583.
[90] *Bhimji v Chatwani* [1991] 1 WLR 989.
[91] *Rank Film Distributors Ltd v Video Information Centre* [1982] AC 380; *Anton Piller* (n 76).
[92] Michael Wabwile, 'Anton Piller Orders Revisited' [2000] JBL 387, 396.
[93] Article 8(1) however note the article does not purport to protect freedoms in absolute terms.

result of an order.[94] Davies comments that the destruction of a defendant's commercial reputation may disturbingly be an underlying motivating factor where a claimant seeks a search order.[95] It has been asserted that when the freezing injunction and the search order are combined they are regarded as two of the law's 'nuclear weapons'.[96] Their potency is not disputed, it is true that although both operate ancillary to a primary action they are extraordinary remedies which will often have a decisive effect upon a case. It has even been asserted that their use is often instrumental in persuading an opposing party in civil proceedings to settle a claim for damages.[97] It is accepted that the search order is a powerful weapon in the arsenal of the litigator however likening it to a nuclear weapon aligns by way of analogy to the submission herein that its use should be regarded as a last resort. Accordingly other less invasive options should be considered before a search order is considered[98] such as a CPR 25.1 applications on notice to gain access and inspect the defendant's premises.[99] It is all too easy when reviewing case law or examining a practitioners' text to identify the most powerful device as the perfect option for your purposes; this is not necessarily a fair appraisal where the same ultimate result can be achieved by less invasive means. Search orders are now invariably considered to be a device which should only be utilised when there is a clear and justifiable basis

[94] Hugh Laddie and Martin Dockray, 'Piller Problems' [1990] 106 LQR 601, 603; Toni Vitale, 'Pre-Emptive Remedies in the United Kingdom' (1993) 12 (7) IBFL 5.
[95] Michael Davies, 'Anton Pillers after the Practice Direction' [1996] CJQ 13, 17.
[96] *Bank Mellat v Nikpour* [1985] FSR 87 [92] (Donaldson J).
[97] Mark SW Hoyle, *The Mareva Injunction and Related Orders* (3rd Revised, LLP Professional Publishing 1997).
[98] Professor Sir Roy Goode and Ewan McKendrick, *Goode on Commercial Law* (4th edn, Penguin Books 2010) 1291.
[99] CPR 25.1 c (ii) & d.

for that serious course of action and even then only after the most thorough judicial scrutiny.[100]

Writ *ne exeat regno* and *Bayer* Orders

3.25.1. The ancient writ *ne exeat regno* order operates to prevent a defendant from going abroad. It is a device which has a longstanding equitable heritage. It was originally used exclusively for the political purposes of the Crown but by the 19th century its most frequent application was towards the objective of restraining debtors from evading obligations to creditors by fleeing the domestic jurisdiction.[101] The writ *ne exeat regno* is a device which is utilised with decreasing regularity. More common in the Commercial Courts is the use of a *Bayer* order[102] which was established in *Bayer AG* v *Winter and Ors*.[103] The *Bayer* order which may be granted to safeguard the effective execution of a search order operates to restrain a defendant from departing from the jurisdiction without the permission of the court. It requires a party to deliver up their passport and/ or other travel documents to the applicant's solicitors. The order will ordinarily continue until injunctive or ancillary orders have been served and/ or until the necessary information has been obtained as stipulated in those orders.[104]

[100] *Lock International Plc v Beswick* [1989] 1 WLR 1268; *Universal Thermosensors* (n 80); Spry (n 19) 588; Hugh Laddie and Martin Dockray, 'Piller Problems' [1990] 106 LQR 601, 620.
[101] John Beames, *A Brief View of the Writ Ne Exeat Regno: With Practical Remarks Upon It as an Equitable Process* (Henry Whiting Warner ed, S Gould 1821) 2.
[102] Lesley J Anderson, 'Antiquity in Action - Ne Exeat Regno Revived' (1988) 104 LQR 246, 260.
[103] [1986] 1 WLR 497, applied in *Re a Company (No. 003318 of 1987) (Oriental Credit)* [1998] Ch 204.
[104] *Toube* (n 48) 47.

Conclusion

3.26. There is no doubt that the process of recovering assets is a formidable challenge. The convoluted schemes that debtors or fraudsters create in order to avoid making good an obligation can present a claimant with an intricate web of deception. This chapter has sought to demonstrate how such impediments can be overcome. In the quest to break through the barriers a claimant may be tempted to turn as hastily as possible towards a judgment order. An alternative approach has been established; to direct enquiry broadly to all persons or parties which may have become embroiled in a scheme to deprive or defraud; not as the immediate inclination may be, to focus intransigently upon a questionable transaction or to turn immediately towards a *Mareva* injunction. It is submitted that there are scenarios where a claimant should have serious regard for moving with all haste firstly to discover and to secondly freeze amenable assets before moving to seize them.

3.27. Several ancillary orders can aid a claimant, a number were touched upon herein. It has been argued that the *Mareva* injunction can be particularly effective when it is used strategically in conjunction with a range of pre-trial interlocutory orders; it is part of a matrix of remedies which notionally form the 'modern *Mareva* jurisdiction'. One such device, the *Norwich Pharmacal* order, enables a claimant to locate amenable assets via a third party who has innocently or unknowingly facilitated a wrongful act. That party is required to provide disclosure to the injured party which can help to shed light upon the trail of assets. The NPO is an extremely useful preparatory device and its value should not be overlooked by a practitioner

who is advising a potential *Mareva* claimant. The value of conducting a covert investigation should not be underestimated. There is a risk that a debtor or fraudster will attempt to spirit away amenable assets if they perceive that they are under suspicion. In order to reduce that risk the courts may grant a Gagging order to restrain a party who is the subject of an order from discussing or disclosing any aspect of that order to another party and/ or a Sealing order which prohibits the normal publicly available record of court proceedings. The use of secrecy orders enables the practitioner to conduct a covert investigation and the claimant to consider their options while reducing the potential for a shrewd debtor to frustrate a freezing order. Either one of the two secrecy orders may also be granted in conjunction with a freezing order.

3.28. The *Bankers Trust* jurisdiction was also identified as an option where a claimant requires information which relates to the location of assets held by banks. Whilst its operation is similar to that of the NPO it is not as comprehensive in terms of the range of disclosure that it can elicit. Additional but limited information may be procured under the Bankers' Books Evidence Act 1879. Certainly where a comprehensive investigation is sought the NPO was established as the more suitable option.

3.29. Where there is an extremely strong prima facie case that a very serious injury will be incurred and the courts can be convinced that there is clear evidence that a respondent possesses something which may incriminate that party, the courts may grant a search order under the *Anton Piller* jurisdiction. That search order authorises

a solicitor and other persons specified by the solicitor to enter the premise of the respondent to secure information which may otherwise be concealed or destroyed. The search order is an invaluable ancillary device where information in the respondent's possession is likely to be influential at trial or where that information may lead to the discovery of an amenable asset trail. However, it must be noted that a search order is not a suitable means of establishing a cause of action. Orders which prevent a defendant from fleeing the jurisdiction until the resolution of a dispute were outlined. It was recognised that the *Bayer* order in particular may benefit a claimant when used to safeguard the effective execution of a search order. *Anton Piller* relief was found to be a contentious jurisdiction largely due to its invasive nature and the hardship that it can place upon the respondent; while it should not be sought after lightly it remains a proven and valuable option, especially when it is operating in conjunction with a freezing injunction in relation to a justifiable cause.

3.30. At the outset of this chapter the difficulties faced by claimants who suspect that another party will ultimately renege on their obligations was reaffirmed in the context of the modern pan-global economic climate. It was established that technological innovations can facilitate swift transnational transactions, a reality which creates a greater opportunity for profit but also for risk. It is asserted that as the liberalisation and deregulation movements prosper globally the number of judgment debtors will increase. It was noted that on a global scale a party who seeks protection in a claim against a deceptive debtor is afforded scant protection. It is submitted that the challenges although daunting can be aided via the utilisation of those pre-trial interlocutory devices discussed herein; establishing who the

transgressors are, the nature and location of amenable assets or property and freezing those assets under the *Mareva* jurisdiction. So it is asserted that the English judiciary have answered the call for proportionate responses to the increased risks posed by improved technology and globalisation by fashioning erudite judicial remedies which allow a party to covertly and hastily protect their interests in assets which would otherwise be spirited away. Moore claims that the availability of the matrix of remedies discussed throughout this chapter have contributed significantly towards the appeal of England as the preferred jurisdiction for numerous international traders who desire the reassurance and satisfaction afforded by a system which works to protect their rights.[105] Milman explains that the *Mareva* jurisdiction also significantly contributes towards the utility of English common law in the context of transnational business failure, corporate collapse and insolvency;[106] it strengthens the practically effective body of law which has developed to manage transnational corporate collapses, crises and failures.[107]

[105] George CJ Moore, 'Choice of Law and Forum: Swift Justice in England Including Pre-Judgment Tactics & Relief and Enforcement Throughout Europe' (1998) 15 (5) International Law Quarterly 4; also see, SG Rammeloo, 'Jurisdiction Clauses in Transnational Company Relationships' (1994) 1 Modern Journal of European and Company Law 426.
[106] David Milman, *National Corporate Law in a Globalised Market: The UK Experience in Perspective* (Edward Elgar Publishing Inc 2009) 135.
[107] Ibid 130-137.

Chapter Four: The *Mareva* Jurisdiction and Third Parties

Introduction

4.1. In *Federal Bank of the Middle East Ltd* v *Hadkinson and Others* Mummery LJ declared that the *Mareva* jurisdiction is:

> "designed to prevent injustice to a successful Claimant by preserving assets and funds and guarding so far as possible against the risk that they will be disposed of or dissipated before a judgment is satisfied so as to render ineffective the Claimant's attempts to recover what is due to him".[1]

4.2. Mummery LJ's statement certainly captures the spirit of the *Mareva* jurisdiction as discussed in the previous two chapters. Nonetheless, the courts are faced with the reality that no two defendants are the same and that individual cases bring with them distinct scenarios and varying levels of complexity. Furthermore, the assets which an applicant may wish to target in recovery for a subsisting debt also vary from case to case. The typical freezing order is formulated with the intention that it is operative upon all of a defendant's assets irrespective of whether those assets are held in the defendant's name and whether or not they are jointly or solely owned. The standard freezing order was drafted to encompass any asset which a

[1] [2000] 1 WLR 1695 [1709G]-[H].

defendant has the authority to dispose of either directly or indirectly or that he has the power to deal with as though they were his own. The defendant is notionally considered to have such power in the case of a third party holding or controlling an asset in accordance with the defendant's indirect or direct instructions. Though in practice as shall be discovered within this chapter, the *Mareva* jurisdiction can be potholed with difficulties which centre on whether or not an asset can be legitimately captured by the standard form freezing injunction, specifically in the case of third party holdings.

4.3. This chapter surveys such difficulties, focusing upon the complications which are created by virtue of a corporate bodies' separate persona at law. The extent to which corporate personality creates obstacles for *Mareva* claimants is viewed through the lens of a claimant seeking to freeze the assets of third party companies which are owned and controlled by the respondent to a freezing injunction. As shall be witnessed such scenarios have propagated ambiguity which has left claimants, practitioners and third parties in an unclear position; unsure as to whether or not a standard freezing injunction can capture third party assets. As shall be seen such ambiguity was exacerbated greatly when two contradictory judgments were delivered by High Court judges. The technical problems which the irreconcilable judgments created for banks in particular is deliberated as well as the extent to which a recent Court of Appeal judgment ameliorates those problems.

The difficulties presented by separate corporate personality

4.4. A freezing injunction drafted in the standard form has the effect of restricting what the respondent may do with *his* assets:

> "the respondent's assets include any asset which he has the power directly or indirectly to dispose of or deal with as if it were his own. The respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions"

4.5. It could be inferred that such a provision encompasses company assets in the scenario that a respondent deals with or disposes of assets held by a company which he controls and owns. While the standard freezing injunction is formulated to capture a wide variety of assets, the courts have invariably faced difficulties which relate to the assets of a company and whether or not they are captured by the standard form freezing injunction because of the longstanding *Salomon* principle.[2] This problem has become a contentious issue even in the case of a defendant who is in control of a company and is also the sole shareholder. A layperson could be forgiven for coming to the conclusion that where a company has a single shareholder and that shareholder is also the chief controlling influence over that company, the assets of the company are to all intents and purposes that person's, albeit by a convoluted route. However in *Gas Lighting Improvement Co Ltd* v *Commissioners of*

[2] The significance of well-established rubric (discussed in due course) was recently restated succinctly by Lightman J who explained that a company is entitled to organise and conduct its affairs in the expectation that the court will apply the ordinary principles of *Salomon v Salomon & Co Ltd* [1897] AC 22 see, *Acatos and Hutchenson plc v Watson* [1995] 1 BCLC 218 [223] (Lightman J).

Inland Revenue[3] Lord Summer declared that the notion that a company is merely an apparatus employed for the purposes of the shareholder is a "layman's fallacy".[4]

4.6. The layperson's assumption although perfectly understandable could not be considered to be trite law because of the peculiar nature of one of the foremost principles of English company law. It is established law that in England a company is both an association of its members and also an entity separate from its members. It is precisely because a company is considered to be an entity separate from its members that a legal persona is conferred upon it. Concisely, the company is a person in the eyes of the law. This phenomenon is referred to as separate corporate personality.[5] Separate corporate personality is a concept which enables a company to make contracts and to be party to legal proceedings. The members of a company are separate from that company and as such they are not liable for its debts and they do not carry on its business. The most significant aspect of all to this body of work, is that company property is considered to belong not to the members, but to the company itself as a separate and distinct person. This feature of company law was considered by the House of Lords in *Macaura* v *Northern Assurance Co Ltd*[6]*.* Lord Wrenbury stated that, "the corporator even if he holds all the shares is not the corporation… neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation".[7]

[3] [1923] AC 723.
[4] Ibid [741].
[5] *Salomon v A Salomon and Co Ltd* [1897] AC 22.
[6] [1925] AC 619.
[7] Ibid [633].

4.7. The question of the proprietary status of company assets has persisted nonetheless. The question arose following the founding of the *Mareva* jurisdiction, can the terms of a freezing injunction be considered to capture the assets of a body corporate? Where a respondent to a freezing order in standard terms organises a disposal of company assets which he or she owns and controls that defendant may be considered to be in breach of that freezing order; such a rubric may on the face of it run contrary to the doctrine of separate corporate personality. Conflicting views thereof crystallised when two irreconcilable judgments where delivered on the 6th June 2013. Both *Group Seven Limited* v *Allied Investment Corporation Limited and Others*[8] and *Lakatamia Shipping Company* v *Nobu Su and Others*[9] concerned the scope of a standard freezing order in respect of company assets.

4.8. In *Group Seven*[10] Hildyard J adopted a similar stance to Lord Wrenbury's in *Macaura*[11] and ruled that a respondent who organises the disposal of assets held by a company that he owns and controls would not be regarded as being in breach of a freezing injunction composed in the standard form. In stark contrast Burton J's judgment in *Lakatamia*[12] directed that such a respondent would be regarded as being in breach of the freezing injunction. The incompatible judgments created uncertainty for third parties. As shall be discussed in due course the ambiguity these two cases created, presented particular problems for banking organisations who are required to act when placed on notice of the terms of a freezing order.

[8] [2013] EWHC 1509 (Ch).
[9] [2013] EWHC 1814 (Comm).
[10] *Group Seven* (n 8).
[11] *Macaura* (n 6).
[12] *Lakatamia* (n 9).

The Group Seven case

4.9. In *Group Seven* the respondent was a Mr Sultana who was the sole owner and director of Wealthstorm Limited. The claimant secured a freezing injunction against the respondents company. Following the order the respondent acted to procure that his company entered into an agreement to settle claims which the company had relating to a loan which was outstanding. The respondent's actions effectively diminished the value of those assets to the company. As a result the claimant petitioned the court to commit the respondent for contempt of court, on the grounds that he had wilfully and intentionally breached the freezing order operating against him.

4.10. Hildyard J's judgment was twofold. Firstly he held that it was a clear and discernible fact the assets of the company were categorically not in accordance with the law the assets of the respondents. The corollary was therefore that he could not have possibly disposed of *his* assets. The second pivotal issue considered by Hildyard J was whether it was possible in the eyes of the law that the terms of the standard freezing injunction outlined in chapter two could vary that position.[13] The judge measured whether a company with a single director, who owned every share in the company could hold or control that company's assets according to the sole director and shareholder's *direct or indirect instructions* subject to the meaning of that provision.[14] According to Hildyard J such a reading was not permissible, he believed his position to be definitive and beyond reproach owing to "settled principles of

[13] *Group Seven* (n 8).
[14] Ibid [*65*].

company law",[15] a rationale discoverable in those principles established in the seminal *Salomon* case touched upon earlier. His position was supported by the judgments of Rimer and Patten LJJ in the Court of Appeal judgment of *Prest* v *Prest*[16] which reaffirmed a company's separate corporate personality, emphasising its status as near sanctified. This perspective on the primacy of separate corporate personality was further fortified by way of a clear declaration by Lord Neuberger to the same effect in the Supreme Court in *Prest* v *Petrodel Resources Ltd*.[17]

4.11. In line with the well-established doctrine the respondent company is to be regarded as having diminished its own assets, irrespective of the reality that the respondent had procured the company to enter into the disputed agreement; as a matter of law he was not instructing the company directly or indirectly to make the questionable disposition. In *Prest* v *Prest* Rimer LJ stated in reference to a company, "Those who control its affairs – even if the control is in a single individual – act merely as the company's agents" and that company's property "remains the property of the company and belongs beneficially to no one else…"[18] Hence Hildyard J ruled that the respondent could not be held in contempt by virtue of breaching the freezing order as the property in question could only be considered to have once been the property of the company, thereof becoming that of the disponee, the disposition being made by the company and not the respondent. Hildyard J's judgment could be considered to be dubious considering that Hildyard J came to the conclusion he did irrespective of that fact that as part of the list of assets provided

[15] Ibid.
[16] [2012] EWCA Civ 1395.
[17] [2013] UKSC 34.
[18] *Prest* (n 16) [105].

during the disclosure process the defendant had noted his interest in the loan made by the company.[19] Hildyard J noted that his decision may ominously have the effect of diluting the "efficacy of the standard CPR form of freezing order and surprise and unsettle".[20]

The *Lakatamia* Case

4.12. Burton J, presiding in the *Lakatamia*[21] case adjudged a similar issue but arrived at an entirely different conclusion than that of his fellow High Court Judge in the *Group Seven* case. In *Lakatamia* the claimant had also been granted a freezing injunction in the standard form. Similarly to the *Group Seven* case it came to light that the respondent controlled the procurement of company assets held by companies that he owned, the issue therefore, as in *Group Seven* was whether the standard freezing injunction captured those assets. The longstanding *Salomon* principle was unsurprisingly presented as an embargo on the concept that a freezing injunction could be extended so as to capture assets held by a company which was owned or controlled by the respondent for the same reasons outlined in the *Group Seven* discussion above. It was further asserted that the *Salomon* line of argumentation was supported by the Court of Appeal judgment in *Prest* and the Supreme Court decision in *VTB Capital Plc v Nutriek Int Corp.*[22]

[19] David Sandy, 'Going Head to Head' (2014) 164 NLJ 13.
[20] *Group Seven* (n 8) [65].
[21] *Lakatamia* (n 9).
[22] [2013] UKSC 5.

4.13. Burton J did not dispute the legitimacy of *VTB*, *Prest* and *Salomon*. That aspect was not addressed *per se,* however he had no difficulty in finding that the assets held by those companies which were owned and controlled by the respondent *were* captured by the scope of the freezing order operating against the respondent. He stated:

> "I have no doubt… that the First Defendant effectively controls, and indirectly owns, the companies… which own the assets, the vessel and the shares which I have described, brings the position plainly, and intendedly, into the definition of paragraph 3 of the Order".[23]

4.14. Burton J delivered a tripartite judgment explaining why he considered the standard form freezing injunction to capture the company assets. Firstly, it was asserted that the *Salomon* principle was not offended by his judgment because it was dependent upon a traditional analysis of company law wherein the companies' owner could by a resolution at a general meeting dictate the future of the company's assets held by a company which he owned or controlled. Secondly, where a respondent effected the disposition of assets held by that company he would be effectively diminishing the value of his own assets, specifically the shareholding in that company.

4.15. Thirdly, he presented a concept which was discussed in *Parbulk II AS* v *PT Humpuss Intermoda Transportasi TBK and other companies*,[24] which directed that

[23] *Lakatamia* (n 9) [16]
[24] [2011] EWHC 3143 (Comm).

where a claimant has the benefit of a freezing injunction, he or she can extend that order so as to capture the assets of a company which is owned or controlled by the defendant on the grounds that the claimant may, in due course be in a position to execute its judgment against the shares in the defendants company itself. In that respect such a judgment merely preserves the *status quo* until such time as a final order is made. Pursuant to this tripartite line of reasoning Burton J ruled that the assets held by the companies owned and controlled by the respondent were properly captured by the standard terms of the freezing injunction operating for the claimant.

The difficulties created by these conflicting judgments

4.16. Clearly the two judgments of the High Court are incompatible. Such irreconcilable case law muddies the waters casting ambiguity upon the legal landscape, leaving claimants, respondents and practitioners in a difficult position. Hildyard J's conclusion was influenced heavily by *Prest* and *VTB*; significant cases which champion the sanctity of separate corporate identity. Burton J's decision is one underscored by judicial pragmatism;[25] declaring that the respondent was barred from making a disposition of assets held by a company which he owned and controlled. It should perhaps be appreciated that Hildyard J did not have the benefit of the second submission heard by Burton J, being the concept that the disposition of assets by a company which was held by the respondent to a freezing injunction would effectively constitute a diminution in the value of that asset, namely his

[25] Emily Gillett, 'Freezing Orders and Third Parties -- Casting the Net Just Wide Enough' (2014) 8 JIBFL 518, 519.

shareholding in that company. In that respect Burton J had the benefit of being able to consider an erudite submission from counsel for the claimants whereas Hildyard J did not.

4.17. In his decision Burton J considered the idea that a judgment creditor may in executing a judgment choose to appoint a receiver over the interests of the respondent, in the company over which he had control, meaning that the freezing injunction would extend to obstruct any dealings by the respondent in that company. It is worth noting that Burton J cited certain authorities in support of this line of reasoning which were perhaps properly directed towards a different question namely whether a freezing injunction could be issued to operate against a 'non-cause of action defendant'; not as was suggested, whether a freezing injunction's terms prohibited the respondents dealings in the assets of the company in concern, if such a company was not itself a party to proceedings. On the other hand Hildyard J made a very sensible suggestion in his judgment being that a claimant could consider the drafting of a variation to the standard form to prevent a company which was owned by a respondent from dealing and or disposing of its assets on the grounds that the assets held by that company may in the future become the target of an order for the purposes of enforcement. In so doing Hildyard J was describing the *Chabra* jurisdiction.[26] *Chabra* orders take their name from *TSB Private Bank International SA* v *Chabra.*[27] The *Chabra* order will receive further attention in due course. For now it is sufficient to comment that such an instrument can be extraordinarily effective,

[26] *TSB Private Bank International SA v Chabra* [1992] 2 All ER 245; for a recent explanation see, *Parbulk II AS v PT Humpuss Intermoda Transporasi TBK & Ors* [2011] EWHC 3143 (Comm).
[27] [1992] 2 All ER 245.

enabling a claimant to join a party to whom there is no direct cause of action as a 'non-cause of action defendant' to the freezing injunction on the grounds that the third party is holding an asset or assets which may become amenable for the purposes of execution in favour of a judgment creditor in due course.

The implications of the conflicting judgments for Banks as third parties, a closer look

4.18. Banks are invariably placed in a challenging position when effecting the terms of a freezing injunction. Banks must respond quickly, making prompt and critical decisions soon after receiving notice of a freezing injunction. Laville explains that their task is especially difficult where a customer's undertakings are conducted via numerous entities and bank accounts.[28] On the one hand a bank must act in compliance with the terms of the injunction. On the other hand that bank must consider the obligations it owes to its customer in terms of data protection; such obligations remain operative unless they are specifically contradicted by the injunction. Whether or not a claimant can rely on a bank to preserve defendant's assets is of the utmost importance because as Capper states that preservation is what "really makes the injunction 'stick'".[29]

4.19. A bank or another third party may become bound by a freezing order in one of two primary ways. Most commonly, a claimant will issue proceedings and obtain a freezing order against a defendant, substantive relief being sought thereof. That

[28] Roger Laville, 'Freezing Orders and the Corporate Veil' (2013) 9 JIBFL 565.
[29] David Capper, 'Tort Liability for Breaching Asset Freezing Injunctions' (2005) 64 CLJ 26.

defendant is known as a cause of action defendant or 'CAD'.[30] Once the order is made the claimant will usually serve the CAD's bank with notice of that order, ensuring provision of a copy of the order to the bank. Upon receipt of said notice the bank becomes bound by the court's order. A freezing injunction captures assets held by a bank or third party where there is a legal or beneficial interest enjoyed over those assets by the CAD. A bank is bound not as a party to the order; rather it is bound because if it or any third party takes steps with knowledge of that order which has the effect of frustration, then that party will find itself in contempt of court.[31] It is important to note however that the decision in *HM Commissioners of Customs and Excise* v *Barclays Bank plc*,[32] directs that where a bank unintentionally or negligently allows a CAD to breach an order, that bank will be neither liable in damages nor held in contempt of court.

4.20. As an alternative to the first scenario a claimant may choose to invoke the *Chabra* jurisdiction and add a bank or another third party to the proceedings as a named defendant. This can be done irrespective of the fact that no substantive relief is pursued from that party. The bank or third party would hence become a non-cause of action defendant (NCAD).[33] Pursuant to the *Chabra* jurisdiction a claimant may freeze an asset which is held by an NCAD even in the case of a CAD who does not enjoy any legal or beneficial interest in the assets. Invocation of the *Chabra* jurisdiction against an NCAD bank is of great benefit to a claimant where it is likely that they will be able to obtain a judgment which permits targeting the assets held

[30] *Chabra* (n 26).
[31] *Capper* (n 29).
[32] [2006] UKHL 28.
[33] *Chabra* (n 26).

by the NCAD in order to satisfy the judgment. Such a process would be most common in the case of an NCAD who is the creditor of the CAD or in possession of assets which the CAD transferred in fraud of creditors. It should be noted that it is not normally necessary to utilise the *Chabra* jurisdiction where a bank is concerned because a bank is usually under no illusion as to the identity of their customers and are ordinarily very astute when it comes to complying with a freezing injunction. Nonetheless, the *Chabra* jurisdiction can be invoked to great effect against an entity which is owned or controlled by the primary defendant but holds assets beneficially, such as a company.[34]

4.21. In the interim period between the delivery of the irreconcilable judgments in the *Group Seven* and *Lakatamia* cases and resolution being tendered by a higher appellate court, banks and other third party groups who were placed on notice of the terms of a freezing injunction would be put in a precarious position. Pragmatically the threat to a bank of being found liable following the conflicting decisions may be regarded as slight where a bank chooses to follow the *Group Seven* approach over *Lakatamia*, refusing to freeze company assets which a CAD controls and owns. Laville observes that it is more likely that an aggrieved customer will sue a bank for breach of mandate if the bank follows Lakatamia and freezes the CAD's company assets than it is for the bank to be found liable in tort or contempt for not doing so.[35] Sandy stresses the difficult position faced by banks because of the conflicting judgments

[34] *HM Revenue & Customs v Egleton* [2006] EWHC 2313 (Ch); 1 All ER 606 [12] (Briggs J).
[35] *Laville* (n 28) 567.

which left banks in the dark as to whether to freeze company assets in the case of a respondent who wholly owned and controlled a company.[36]

The Court of Appeal Provides Third Party Resolution

4.22. Two unrelated cases considering novel but comparable scenarios being handed down on the same day by two judges of equal standing apparently unaware that such a similar case was being heard at the same time, was as Tomlinson LJ stated, a "coincidence".[37] That those two judges of equal standing happened to reach such incompatible conclusions must therefore be considered an unfortunate coincidence. Resolution on the question at hand came when the first defendant in the *Lakatamia* case appealed the decision of Burton J.

4.23. The Court of Appeal subsequently dismissed the first defendant Mr Su's appeal and continued the injunction granted by Burton J but their Lord Justices did not entirely agree with Burton J's conclusions. During his delivery of the leading judgment Tomlinson LJ commented that he could not support the reasoning in paragraph 16 of Burton J's J judgment. He regarded it as improper to assert that the assets held by the non-defendant companies were "plainly and intendedly" within the scope of the term 'assets' covered by paragraph 3 of the freezing order.[38] Nonetheless, the Court of Appeal held that Burton J was correct to declare that the injunction did capture the impugned assets but not because of the rationale of paragraph 16. Rather the orders capture of these assets was properly accepted for

[36] *Sandy* (n 19).
[37] *Lakatamia Shipping Co Ltd v Su and others* [2014] EWCA Civ 636 [9].
[38] *Lakatamia* (n 37) [26].

the reasons advanced by Burton J in paragraph 17 of his judgment. The assets were frozen for the salient reason that dealing with them prospered the genuine reality that they would be diminished, which would in turn cause a diminution in the value of the shareholdings in the non-defendant companies. Interestingly that same reasoning had had previously been advanced by the Court of Appeal in *JSC BTA Bank* v *Solodchenko*.[39]

4.24. The most important aspect of Tomlinson LJ's judgment herein was the clarification it delivered on the contentious issues which arise out of paragraph 6 of the standard form freezing injunction which will now be discussed. Paragraph 5 of the standard form order prohibits the respondent from disposing of, dealing with or diminishing the value of any of his assets. Paragraph 6 states that:

> "Paragraph 5 applies to all the Respondent's assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the Respondent's assets include any asset which he has the power, directly or indirectly to dispose of or deal with as if it where his own. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions."

4.25. Tomlinson LJ confirmed that there are no grounds on which it can be affirmed that the wording of these two provisions have the effect or were intended to have the effect of catching within the definition of a defendant's assets, the assets of a

[39] [2011] 1 ELR 888.

company which he controlled and owned; such assets were categorically not "directly affected" by such an order as Burton J had inadvertently inferred. So the *Lakatamia* freezing injunction was upheld only on the basis that dealing with those assets had the latent potential to diminish Mr Su's shareholdings in them. Therefore the judgment does not alter the well-established proprietary *status quo* of a company's assets in line with the Salomon principle; although such a finding is largely unsurprising.

4.26. In this respect the legal landscape is clearer for individuals and businesses who use investment vehicles, holding companies and various other corporate structures. The Court of Appeal has un-muddied the waters and defined the extent to which company assets may be captured by the standard form freezing injunction terminology. In essence the assets of a wholly owned and controlled subsidiary which is the subject of a freezing injunction are not directly touched or frozen by a standard form injunction, nor is the subsidiary directly caught by its ambit. Rimer LJ stated that an understanding of "control" on the contrary conflicts with the fundamental principles of the law of companies and separate corporate personality. So ends the ambiguity tendered by the opposing judgments of Hildyard and Burton J in that respect. That being said a person whom a freezing order is operating against must be evermore mindful not to act so as to intendedly or otherwise diminish the value of an asset even if that asset is held not by them but by a company that they own and control because to do so, more clearly now than before, contradicts the terms of the standard form freezing injunction in line with the guidance given by the Court of Appeal.

4.27. What should also be noted about the Court of Appeal decision in *Lakatamia* are certain obiter comments of Sir Bernard Rix which endorse an earlier submission:

> "Where a Defendant's alleged liability is not merely that in the ordinary way of a party liable in debt or damages but is said to arise out of the misappropriation of funds or some such dishonesty, as in the Ablyazov litigation, it will often be possible to request the court to make orders in wider terms and/ or to make the Defendant's corporate creatures Defendants themselves. But in the more ordinary case, even where a freezing order is justified under its standard rationale, that does not extend to freezing the assets of other parties or corporate non- Defendants."[40]

4.28. Sir Bernard Rix's comments tender two very important points which crystallise in the event that a claimant wishes to freeze the assets of a non-defendant company, he or she must be ready to:

- either make a sufficient case indicating that the company concerned is nothing more that the "money-box" of the defendant and thus holds assets to which the defendant is in point of fact beneficially entitled,
- and/ or consider joining that company to proceedings itself under the aforementioned *Chabra* jurisdiction.[41]

40 *Lakatamia* (n 37) [42].
41 Ibid.

Conclusion

4.29. During the course of this chapter it has become plainly obvious that separate corporate personality, one of the cornerstones of English Company law can pose problems for a variety of interested parties where freezing injunctions are concerned. The principal problem herein was that of the proprietary status of company assets in the case of a respondent to a standard form freezing injunction who also owns and controls that company. It was unclear whether or not the standard form injunction could capture such assets within its ambit. The disparity in this area was worsened when two incompatible judgments were delivered on the same day by judges of equal standing in the High Court. On the one hand, Hildyard J adopted a conservative position in *Group Seven*, holding that a respondent who arranges for the disposition of assets held by a company that he owns and controls would not be captured by a standard form freezing injunction. Conversely Burton J's pragmatic reasoning underscored his declaration that such a scenario would permit for those assets to be captured. It became apparent that ambiguity in this area presented problems for litigants and also third parties, banks in particular, who must make informed decisions promptly when placed on notice of the terms of a freezing injunction. On the one hand Hildyard J's judgment suggested that a bank should not freeze non-defendant company's assets because to do so would be contrary to the well-established *Salomon* principle. On the other hand, Burton J's judgment suggested that for a bank to freeze such assets, fell plainly and intentionally within the remit of a standard freezing injunction.

4.30. Resolution was delivered when the Court Appeal continued the injunction which was upheld by Burton J in the *Lakatamia* case. Their Lord Justices made two significant points. Firstly they held that Burton J was incorrect in his suggestion that the assets held by a non-defendant company were clearly and intentionally captured by the wording of a standard form freezing injunction. However they ultimately held that Burton J's second limb was agreeable. He was right to hold that the injunction did capture the impugned assets by virtue of the fact that dealing with them prospered the genuine possibility that they would be diminished which would thereby cause a diminution in the value of his shareholdings in the non-defendant companies. The invocation of the *Chabra* jurisdiction was a notion of particular value to claimants which was considered by Hildyard J in *Group Seven* and Sir Bernard Rix during the *Lakatamia* appeal. Accordingly, claimants and practitioners advising claimants should seriously consider joining third parties as NCAD's to any proceedings. In so doing a claimant would be able to target third parties who hold assets which may become amenable for payment during the enforcement process. Invoking the *Chabra* jurisdiction in this way would avoid the need to go down the *Lakatamia* route entirely, simplifying the process for all parties involved.

4.31. It could be suggested that the mere fact that the ambiguity discussed herein ever came to light in the first place was an occurrence indicative of a flawed legal system. However it is submitted that rather than being regarded negatively or characterised as a blatant case of judicial vacillation, the alternate judgments of Hildyard and Burton J were simply telling signs of a commercial legal system which works to respond to the dynamic nature of commercial transactions. In that respect

the Chancery Court was operating with the elastic principles of equity which offer the capacity to evolve with the constantly changing nature of modern commerce. At the core of the two judgments was a desire by one means or another to combat the sophisticated, dishonest dealings of debtors and fraudsters, to protect the spirit of justice; while Hildyard J signposted the *Chabra* jurisdiction, Burton J attempted to combat the matter in a more direct manner. What should be appreciated is that whilst the two judgments were *prima facie* incompatible, both judgments advocated features later supported by the Court of Appeal. Namely, Hildyard J's suggestion of invoking the *Chabra* jurisdiction and Burton J's second limb vis-à-vis the diminution of an asset by the third party route. In that respect the contrary nature of *Group Seven* and *Lakatamia* need not be reduced to a figurative battle between the seminal *Salomon* principle on one side of the battlefield and judicial pragmatism on the other. Rather as a dynamic and progressive judicial process. After all, if the legal system were an impeccable machinery then there would be no need for the various appellate levels of jurisdiction to exist. All matters would be resolved without issue at the trial of the first instance. However ours is a legal system that has prospered and one which persists in jurisdictions across the globe, the discourse herein demonstrates and legitimises the English commercial legal system which progressively seeks to interpret the law and scrutinise its own decisions in order to evolve and realise a more complete form of justice.

Chapter Five: Conclusion

5.1. The first broad objective of this thesis was to establish how and why the *Mareva* injunction was established. It was acknowledged that the *Mareva* injunction was categorised as an **equitable** remedy. The corollary of that recognition was the crystallisation of an idea; in order to develop a deeper understanding of the *Mareva* injunction it would be necessary to generate a perception of the equitable jurisdiction itself. That perception was cultivated by researching what equity is, how equity came to be and why it was required; the research thereof produced a broad overview of the equitable jurisdiction. It is clear now that acquiring that overview was crucial. As noted, the *Mareva* jurisdiction was constructed upon equitable foundations, it necessarily followed that within the equitable jurisdiction lay a fuller understanding of the nature of *Mareva* relief. The insight gained by means of the research conducted during Chapter One is considered to be a fundamental feature of this body of work. The abovementioned model proved to be fruitful. Equity became a thematic conceptual framework and a valuable discourse was rendered upon it; a discussion which explicated how and to some extent why the *Mareva* injunction was created.

5.2. Equity was found to be a supplementary system with the capacity to repair defects in the law. It was noted in Chapter One that equity can legitimate or qualify the administration and application of the law by compelling those who are party to proceedings to submit to a more conscionable and complete form of justice than the

law alone can elicit. To elaborate, the generality of prescribed and inflexible rules occasionally fall short of offering appropriate solutions to the diverse array of scenarios which arise in everyday life. Pausing to relate that submission with the facts in *Karageorgis*[1] provides a comparable scenario. The Japanese applicants in the case were owed money by debtors who had failed to meet their payment obligations, in spite of the fact that the creditor applicants had discovered that the debtors had sufficient funds held in a London bank to meet their obligations. The money held in that bank account constituted an amenable source of recompense in the event of the likely judgement award. The problem was that in the interim period between the commencement of *inter parties* proceedings and the ensuing judgement award the debtor defendants would be free to deal with those funds as they wished. The defendants could with all right remove their assets from the jurisdiction and in so doing they would render the ensuing judgement award ineffective.

5.3. On the one hand there was a prescribed and restrictive rule which directed that a party to proceedings could not be barred from dealing with, dissipating or disposing of their assets as they saw fit,[2] even if adhering to that restrictive position had the inadvertent effect of thwarting the possibility of justified recompense. On the other hand if the court could grant an interlocutory order which prohibited the

[1] [1975] 3 All ER 282; although the injunction received its namesake from a later case in the same year: *Mareva Compania Naviera SA v International Bulkcarries SA* Judgments delivered 23rd June 1975 in the Court of Appeal reported [1980] 1 All ER 213.

[2] Although note that while protective proprietary principles are certainly highly regarded in England they are not peculiar to English law. The 'right to peaceful enjoyment of property' is a principle protected by international law under the European Convention on Human Rights 1950 Art 1 First Protocol. However, pursuant to that provision the state may act in a manner which impairs the proprietary right of disposal on a temporary basis in order to further the public interest or subject to the conditions provided for by law.

defendant from dealing with, dissipating or disposing of an asset on a temporary basis, until a judgment award then the amenable asset(s) could be preserved and the administration of justice could be safeguarded. Patently, the generality of the prescribed restrictive rubric which barred the relief had the collateral effect of impeding the administration of justice. It was argued that the court's longstanding unwillingness to grant such an order when the scenario clearly called for injunctive relief exposed a defect in the law and that defect stood contrary to the maxim 'equity will not suffer a wrong to be done without a remedy'. When the Court of Appeal granted the injunction which restrained the removal of the impugned asset from the jurisdiction it was exercising a residuary equitable power which aligned with principles fashioned in the old courts of the Chancery. The essence of the statutory provision relied upon by Lord Denning which authorised his court to grant an injunction where it was "just or convenient" was of unmistakably equitable stock. Its supplication in *Karageorgis* had the effect of repairing a defect in the law, thereby upholding the administration of justice, compelling the defendants to yield to a more conscionable and complete form of justice.

5.4. The first broad objective was really composed of two parts. If the two components of the objective are dealt with in turn then it becomes apparent that the objective questioned *why* the *Mareva* injunction was developed; concisely, it was found that the injunction was first ordered to counterbalance an apparent defect in the law which adversely prejudiced creditors. The next component of the first broad objective asked *how* the *Mareva* injunction was developed; it was developed

primarily by the judiciary (chiefly Lord Denning's Court of Appeal)[3] and was subsequently codified in section 37 of the Senior Courts Act 1981. Today the availability of the Modern freezing injunction in practice is governed largely by the Civil Practice Rules (CPR) which were introduced in 1999, specifically Part 25 and Practice Direction 25A.

5.5. The second objective was to establish why the *Mareva* injunction is regarded as an extraordinarily effective device. It is argued that there is an interaction between the first and second broad objectives. Part of the reason that the *Mareva* jurisdiction is considered to be so effective is precisely because of its ancestry as an equitable remedy; it possesses an elasticity which characterises the equitable jurisdiction allowing for the formation of practically effective remedies. By way of analogy, for an exercise in product design to be considered a success it should result in the design of a product which is fit for purpose. Arguably an exercise in the design of equitable remedies should similarly result in the formation of relief which is commensurate to the problems it seeks to resolve. It was discovered that the *Mareva* injunction was essentially developed to combat attempts by deceptive debtors to defeat likely judgement awards. The *Mareva* injunction was designed to be effective, taking in to consideration the stimuli which expedited its development.

5.6. The primary purpose of the *Mareva* injunction appeared to be simple; to stop deceptive debtors from removing amenable assets from beyond the jurisdiction on a temporary basis prior to a likely judgement award. While the purpose is clear and

[3] Under s. 45 of the Supreme Court of Judicature (Consolidation) Act 1925 which repeated the essence of s. 25(8) of the Judicature Act 1875.

seems relatively straightforward, further analysis found that the solution was more complicated. It is commonly the case that an impugned asset is held on behalf of the debtor by a bank. This highlighted a problem because while the primary defendant can be ordered not to deal with an asset the risk still remains that they may disobey the court's order, withdraw their funds and spirit the asset(s) away if there is the potential to do so. Accordingly, for the *Mareva* injunction to be effective it would have to touch both the bank and the defendant. This performance criterion was effected by way of a mandamus which operates upon a bank, requiring that they do not allow the defendant to deal with that asset beyond the terms of the order until the matter is resolved. The bank is not a primary defendant and so binding them also presented an issue; that issue was solved simply by the implication that if a bank knowingly or negligently assists in the breach of the court's order then it would be found in contempt of court and may also risk proceedings for dishonest assistance.

5.7. It was discovered that where a creditor has become convinced that a debtor is going to renege upon their duty to make payment, circumstances have often already deteriorated to the point whereby a creditor considers the debtor to be dishonest and deceptive. If the debtor becomes apprehensive that they are under suspicion then they may act with all haste to circumvent the effectiveness of a freezing injunction by removing or dealing with their asset before a court can make an order which would have the effect of rendering both the interlocutory order and a likely judgement award futile.[4] Accordingly, for a *Mareva* injunction to be effective it must be swift and covert. That performance criterion is met by the propensity of the

[4] See, *Paul David Wood & Anor v Timothy Darren Baker & Ors* [2015] EWHC 2536 (Ch) [10] (Hodge J).

courts to grant a *Mareva* injunction *ex parte.* The fact that a *Mareva* injunction is ordinarily ordered without the knowledge of the primary defendant makes it extremely effective because by the time they become aware of the order their bank has already been placed on notice. However, the lack of a balanced adversarial discourse in *ex parte* proceedings of this nature has been the subject of criticism.[5] In response it is noted that the courts accede to those abovementioned points and consequentially the *ex parte* application entails a higher threshold than an *inter parties* application; an applicant is also commonly subject to a cross-undertaking in damages and the courts may impose an additional requirement that the cross-undertaking is 'fortified' for example by way of a bank guarantee.[6] Alternatively, the courts may decide that a limited cross-undertaking in damages is appropriate; the decision is based on the court's assessment of what is fair.[7] Ultimately, a defendant can apply to have a *Mareva* injunction discharged where the basis of a successful *ex parte* application was in fact flawed; in that scenario the applicant may also incur loss as a result of their cross-undertakings in damages. Prospective *Mareva* applicants must bear in mind the court's readiness to hold to account those who inappropriately seek, obtain and enforce *Mareva* injunctions. So while contention surrounds the without-notice aspect of *Mareva* applications, the courts are careful to balance and protect the interests of both parties.

[5]Gee notes that an *ex parte* application may be regarded as being contrary to the principles of natural justice because of the lack of a balanced adversarial discourse see, Steven Gee, *Commercial Injunctions (Formerly Mareva Injunctions and Anton Piller Relief)* (Sweet & Maxwell 2004) 14.

[6] A recent Court of Appeal case provides confirmation of the appropriate three stage test to be applied where a court is to decide whether to order fortification see, *Energy Ventures Partners Ltd v Malabu Oil & Gas Ltd* [2014] EWCA Civ 1295, also see *Hone and Ors v Abbey Forwarding Ltd and Another* [2014] EWCA Civ 711 which confirms the usual contractual approach (including as to remoteness of damage) in a courts assessment of compensation under a cross-undertaking in damages in the case of a *Mareva* order.

[7] *JSC Mezhdunarodniy Promyshlenniy Bank v Sergi Viktorovicch Pugachev* [2015] EWCA Civ 139 [77] (Lewison LJ); *Paul David Wood* (n 4) [36]-[40] (Hodge J).

5.8. The response to the second broad objective is thus; the *Mareva* injunction is regarded as an extraordinarily effective device because it is a bespoke remedy. It was tailor made to combat the difficulties which expedited its development and as a result it was very effective at dealing with the problems which were evident in the time of its initiation. Therein lies the utility of the third broad objective. If the courts address the modern *Mareva* case in the very same way as they did *Karageorgis*[8] or *Mareva*[9] 40 years ago then it is unlikely that the *Mareva* injunction would be regarded as so potently effective because the nature of the typical *Mareva* case is fundamentally different today than it was in 1975. It is argued that continuing high regard for the *Mareva* jurisdiction has been largely dependent upon the court's ability to respond to the changing nature of the developing world.

5.9. In Chapter Three the significance of the third broad objective became apparent. Nothing which follows should detract from the overriding impression generated by way of the combined impact of the fledgling *Mareva* cases discussed throughout Chapter two. The early *Mareva* cases tendered a radical innovation within the very fabric of the civil litigation process in England and in that respect they are considered to be pivotal; turning the tables in favour of the injured creditor. Nonetheless, Chapter Three established that in order to remain effective the *Mareva* jurisdiction had to alter in order to respond to the diverse array of scenarios which fell before the courts as time progressed.

[8] *Mareva* (n 1).
[9] Ibid.

5.10. The original *Mareva* cases concerned foreign based debtors who had assets located at banks within the English jurisdiction. The argument thereof was perhaps notionally more convincing than where a person was both resident within the jurisdiction and held assets within the jurisdiction owing to their undeniably limited ties to the jurisdiction. Over the course of time the scope of the *Mareva* injunction expanded in order to touch a wider array of domiciled defendants. Devonshire's observation that all debtors, irrespective of their country of residence may attempt to evade the effect of a judgement of the court is apt.[10] Irrespective of residency, the fact remains that dishonest debtors may attempt to defeat an eventual judgement award. A number of cases discussed in Chapter Two were found to have been significant in the further development of the jurisdiction.[11] These cases gradually extended the *Mareva* jurisdiction, establishing that whether a defendant was a resident within the jurisdiction or outside of the jurisdiction, so long as they had assets within the jurisdiction then the court could act to restrain their disposal pending a judgment. A milestone judicial innovation occurred in 1990 when the English Court of Appeal upheld a decision which extended the remit of the *Mareva* injunction on an international or worldwide basis to capture a defendant's assets which were located in foreign jurisdictions. The institution of the World Wide *Mareva* jurisdiction helped to balance the scales in favour of creditors regardless of the locale of a debtor or an amenable asset; far from fledgling, the *Mareva* injunction had taken flight.

[10] Peter Devonshire, 'Pre-Emptive Orders against Evasive Dealings: An Assessment of Recent Trends' [2004] JBL 357–377, 359.
[11] See, *Gebr Van Weelde Scheepavaart Kantoor BV v Homeric Marine Services Ltd*, *The Agrabele* [1979] 2 Lloyd's Rep 117; *Chartered Bank v Daklouche* [1980] 1 WLR 107; *Rahman (Prince Abdul) bin Turki al Sudairy* v *Abu-Taha* [1980] 1 WLR 1268, *Siskina v Distos Compania Naviera SA* [1979] AC 210; *Barclay-Johnson v Yuill* [1980] 1 WLR 1259.

5.11. In Chapter One it was asserted that one of the most valuable aspects of the equitable jurisdiction was its innate capacity to respond to an atypical scenario or original case with a commensurate response. Sir George Jessel MR supported that submission when he commented that equity is a progressive jurisdiction because equitable principles may accommodate contemporary scenarios.[12] In Chapter Three the manifestation of that concept was discussed: the contemporary world was surveyed in relation to the modern *Mareva* jurisdiction and the range of pre-trial interlocutory and ancillary orders which can make it effective. It was restated that the typical scenarios which give rise to a *Mareva* application are different now than 40 years ago. The emerging pan-global economy was found to enable increasingly intricate commercial transactions to be established. It was explained that a modern debtor can construct increasingly convoluted schemes to avoid the obligations which they rightly owe to their creditors. As a result, organisations and individuals can profit through skilfully constructed international deals which utilise sophisticated technologies allowing a dishonest debtor to spirit away financial assets anonymously and instantaneously. Creditors are faced with intricate webs of deception characterised by electronic transfers and proprietary conversions often with inter-jurisdictional dimensions. It was discovered that asset tracing is the process by which the claimant demonstrates what has happened to their property, identifying the proceeds and the parties who have handled, or received it. An asset tracing exercise justifies the applicant's claim, establishing that the proceeds may be properly regarded as representing their property, allowing them to target those proceeds in recompense. It was witnessed that the courts have developed a range of orders

[12] *Re Hallett's Estate* (1879-80) LR 13 Ch D 696 [710] (Sir George Jessel MR).

which are generally available to assist in the exercise of civil asset tracing which include the modern freezing order both domestic and worldwide.

5.12. The *Norwich Pharmacal* order assists the claimant to locate amenable assets through a third party who has innocently or unknowingly facilitated a wrongful act. That party is obligated to provide disclosure to the injured party which can help to illuminate the trail of assets. The NPO was established to be an extremely useful preparatory device; its value must not be overlooked by a practitioner who is advising a potential *Mareva* claimant. The value of conducting a covert investigation should not be underestimated. As mentioned earlier there is a risk that a debtor or fraudster will attempt to remove amenable assets from the jurisdiction if they perceive that they are under suspicion. In order to further reduce that risk it was recognised that the courts may grant a Gagging order to restrain a party who is the subject of an order from discussing or disclosing any aspect of that order to another party and/ or a Sealing order which prohibits the customary publicly of court proceedings. The use of secrecy orders safeguards a covert operation providing the claimant with time to consider their options while reducing the potential for a debtor to frustrate a freezing order. The *Bankers Trust* jurisdiction was also identified as an option where a claimant requires information which relates to the location of assets held by banks. Its operation is similar to that of the NPO but it is not as wide-ranging in terms of the disclosure that it can elicit. Additional but limited information may be procured under the Bankers' Books Evidence Act 1879. Where a comprehensive investigation is sought the NPO was established as the most effective option.

5.13. Where there is an extremely strong *prima facie* case that a very serious injury will be incurred and the courts can be convinced that there is clear evidence that a respondent possesses information or materials which may incriminate that party, the courts my grant a search order via the *Anton Piller* jurisdiction. A search order authorises a solicitor and other persons specified by the solicitor to enter the premise of the respondent to secure information which could otherwise be concealed or destroyed. The search order was found to be an invaluable ancillary device where information in the respondent's possession is likely to be influential at trial or where that information could lead to the discovery of an amenable asset trail. However, it must be noted that a search order is not a suitable means of establishing a cause of action. Orders which prevent a defendant from fleeing the jurisdiction until the resolution of a dispute were outlined. It was recognised that the *Bayer* order in particular may be beneficial to the claimant who seeks to safeguard the effective execution of a search order.

5.14. *Anton Piller* relief is a contentious jurisdiction largely due to its invasive nature and the hardship that it can place upon the respondent; while it should not be sought after lightly it is a proven effective option, especially when it operating in conjunction with a freezing injunction in relation to a justifiable cause. The strategic value of each device discussed in Chapter Three must not be underestimated or overlooked but the *Anton Piller* order in particular was found to have a potent strategic value and its use may have a decisive effect upon the outcome of a dispute; often eliciting an out of court settlement. The range of ancillary and connected orders discussed in Chapter Three should be strongly considered by the practitioner

because whether they are employed strategically on a preparatory basis prior to proceedings or on an interlocutory basis they can render the *Mareva* injunction even more effective.

5.15. The insight gained by way of the combined impact of this thesis' first three broad objectives is the realisation that the *Mareva* jurisdiction is truly progressive. That recognition exposes how the courts ensure that the *Mareva* jurisdiction remains an effective one and in so doing provides the response to the fourth broad objective. The *Mareva* injunction, unaided by other ancillary or connected orders of the court can be an extremely effective device where the claimant seeks to freeze a readily identifiable asset of sufficient value to discharge the debt owing to them. However in evaluating the third broad objective what became apparent is that in order to render the *Mareva* jurisdiction effective in each case, the courts may have to order supplementary assistance. That supplementary assistance comes in the form of innovative and creative judicial responses or solutions to combat the diverse array of techniques employed by deceptive debtors intended to obstruct the creditor's route to recompense. It was noted earlier that the *Mareva* injunction has been likened to a nuclear weapon; however that statement was accurately made in reference to the combined effect of the *Anton Piller* order and the *Mareva* Injunction.[13] In a modern context the *Mareva* injunction cannot be viewed accurately in isolation. Thus the term '*Mareva* jurisdiction' notionally comes to encompass a matrix of remedies; the *Mareva* injunction and the array of ancillary and connected orders of the court. The arsenal of judicial remedies may be required and employed to safeguard the administration of justice. However the courts are frequently faced with new issues

[13] *Bank Mellat v Nikpour* [1985] FSR 87 [92] (Donaldson J).

and as a result their acumen alters too. In that respect the *Mareva* jurisdiction is always changing; it is only ever the sum of the judiciaries' combined experience to date. As noted the matrix of ancillary and connected orders of the court is frequently growing and evolving and while that reality is indicative of the court's willingness to respond to new problems it also means that the practitioner's task becomes more complex as they consider the best way forwards in each case in reference to the gradually changing legal landscape.[14] In time it will almost certainly be necessary for the Civil Procedure Rules to be fully revised and redrafted to properly represent the current legal landscape.

5.16. Chapter Four sought to critically appraise a specific instance where the judicial system has worked to solve a complicated and unclear scenario through the lens of the *Group Seven*[15] and *Lakatamia*[16] sagas. The distinct problems created by separate corporate personality were discussed in relation to the *Mareva* jurisdiction. The concept of corporate personality was found to create an issue where the proprietary status of non-defendant company assets are concerned in the case of a respondent to a standard form freezing order who also owns and controls that company. That difficulty pivoted upon whether or not a standard form order could legitimately touch those assets. It was seen that the ambiguity was exacerbated when two irreconcilable judgments were coincidentally delivered on the same day by

[14] Note e.g. Hodge J's recent decision to effectively pierce the corporate veil of entities owned by bankrupt respondents. The court allowed what are essentially *Mareva* injunctions in favour of joint trustees in bankruptcy to operate over the assets and businesses of a number of corporate respondents. Injunctions were also granted which restrained specific respondents from dealing with shares in any of the corporate respondents see, *Paul David Wood* (n 4).
[15] *Group Seven Limited* v *Allied Investment Corporation Limited and Others* [2013] EWHC 1509 (Ch).
[16] *Lakatamia Shipping Company* v *Nobu Su and Others* [2013] EWHC 1814 (Comm), [2014] EWCA Civ 636.

the High Court. On the one hand In *Group Seven* Hildyard J assumed a conservative stance and held that a respondent who arranges for the disposal of company assets held by a company that he owns and controls could not be caught by a standard form freezing order. On the other hand in *Lakatamia* Burton J delivered a contrary judgment which directed that in such a scenario, the company assets would be captured by a standard form order. The disparity presented by the two incompatible judgments created an untenable ambiguity for third party banks. A bank must act swiftly once placed on notice of the terms of a freezing order and the two conflicting decisions signposted very different approaches; Burton J's decision indicted that a bank should freeze the company assets and Hildyard J's decision directed that to do so would be contrary to the well-established principle of separate corporate personality.

5.17. On appeal Burton J's decision was upheld. Although their Lord Justices were careful not to impinge upon the sacred *Salomon* principle by way of an acceptance of the first limb of Burton J's decision. The Court of Appeal found Burton J's second limb to be agreeable, according to which the company assets were caught by the injunction by virtue of the fact that the assets could be diminished by the defendants dealing with them and that truth prospered the genuine prospect of a diminution in the value of his shareholdings in the non-defendant companies. In the *Lakatamia* Sir Bernard Rix also venerated an aspect of Hildyard J's judgment namely the suggestion of the invocation of the *Chabra* jurisdiction. The *Chabra* jurisdiction enables a claimant to join a third party as a non-cause of action defendant (NCAD) party to proceedings. The invocation of the *Chabra* jurisdiction would thus remove the need

to go down the *Lakatamia* route and allow a claimant to target a third party who holds amenable assets during enforcement.

5.18. Throughout Chapters Two and Three the manner in which the courts in England interpret the law in relation to equitable principles was discussed. It was also noted that the court's interpretation is invariably the subject of scrutiny in a court of higher appellate jurisdiction. That judicial process of interpretation and scrutiny propagated the *Mareva* jurisdiction in England. When joined with the range of ancillary and connected orders discussed throughout Chapter Three and Four it was demonstrated that the English legal system has proven its ability to evolve in order to accommodate contemporary scenarios such as those created by improving technologies and globalisation. What has been established is that the courts are both able and willing to fashion creative judicial remedies which allow a creditor to act with haste to protect their interests in assets which may otherwise be spirited away, thus overcoming attempts by debtors to evade their obligations by one means or another. That process is symbolic of two things firstly, the idea that equitable remedies can evolve in order to fortify the integrity of the court's processes and secondly, the response to the fourth broad objective namely, how the courts ensure that the *Mareva* jurisdiction remains an effective one.

5.19. Looking again at the procedural nature of the *Mareva* jurisdiction in isolation through the lens of the *Group Seven* and *Lakatamia* sagas allows the fourth broad objective to be explained in the context of a real-world example. At the close of Chapter Four it was noted that the mere fact that two apparently incompatible judgments were ever given could be regarded as a sign that the English legal system

is defective. It could be suggested that the two irreconcilable judgments where indicative of judicial vacillation. On the contrary, it is submitted that the two judgments were indicative of a system which functions dynamically to respond pragmatically to the wide array of scenarios which fall before it as time progresses. A sentiment formulated at the close of Chapter Four is repeated; if the legal system were an impeccable machinery then there would be no need for the various appellate levels of jurisdiction to exist at all. All matters would be resolved perfectly at the trial of the first instance. However the English legal system has prospered and the doctrines and remedies it has produced persist in jurisdictions across the globe, the discourse herein demonstrates and legitimises the English commercial legal system which progressively seeks to interpret the law and scrutinise its own decisions in order to evolve and realise a more complete form of justice.

5.20. The *Mareva* jurisdiction remains an exceptional example of the best traditions of the English legal system.[17] *Mareva Compania Naviera SA v International Bulkcarries SA*[18] is a recognised precedent in several common law jurisdictions; a fact that reveals both its integrity and standing.[19] As stated the *Mareva* jurisdiction is progressive and ever since its initiation it has been growing and developing in order to meet the demands of modern fraud and the modern creditor/ debtor relationship; repeatedly reassessing how best to protect the interests of both parties. The result is an order where the interests of each party are skilfully balanced and protected by way of specific provisions which are constantly reviewed and (re)assessed by the

[17] Paul McGrath, 'The Freezing Order: A Constantly Evolving Jurisdiction' (2012) 31 (1) CJQ 12.
[18] Judgments delivered 23rd June 1975 in the Court of Appeal, Reported [1980] 1 All ER 213.
[19] Ronan Keane SC's Forward to, Thomas B Courtney, *Mareva Injunctions and Related Interlocutory Orders* (Butterworths 1998).

judiciary, practitioners and academic lawyers. Recent case law demonstrates that the jurisdiction is still swiftly evolving; a prolific body of jurisdictional developments have resulted from the *JSC* sagas.[20] A few brief examples are provided: in one *JSC BTA Bank* case[21] the Court of Appeal declared that the risk of self-incrimination does not negate the disclosure requirement of a *Mareva* order; in another *JSC BTA Bank* case[22] the applicant Bank successfully obtained a receivership order under s. 37 of the Senior Courts Act, a decision which was subsequently up-help on appeal[23] and in another *JSC BTA Bank* case[24] the bank successfully applied for a variation of the receivership order which provided the receivers with greater control over the impugned assets. The three cases constitute just a handful of actions in the *JSC* saga which now numbers in the region of 50 interim applications and the creation of a considerable volume of case law. The *JSC* sagas demonstrate how dynamic this area of law can be. As a result practitioners must be constantly vigilant; todays *Mareva* jurisdiction is markedly different than it was a decade ago, let alone 40 years ago when it was founded.

[20] *Ablyazov & ors* v *JSC BTA Bank* [2011] EWCA Civ 1588; *JSC BTA Bank* v A *& ors* [2009] EWCA Civ 1125; *JSC BTA Bank v Ablyazov* [2010] EWHC 1779 (Comm); *JSC BTA Bank v Ablyazov & ors* [2011] EWHC 1136 (Comm); *JSC BTA Bank v Ablyazov & ors* [2011] EWHC 2500 (Comm); *JSC BTA v Ablyazov & ors* [2011] EWHC 2664 (Comm); *JSC BTA Bank v Ablyazov & ors* [2012] EWHC 455 (Comm); *JSC BTA Bank v Ablyazov & ors* [2012] EWHC 783 (Comm); *JSC BTA Bank v Ablyazov & ors* [2012] All ER (D) 85; *JSC BTA v Ablyazov* [2012] EWHC 648; *JSC BTA Bank v Kythreotis & ors* [2010] EWCA Civ 1436; *JSC BTA Bank v Mukhtar A & ors* [2010] EWHC 90 (Comm); *JSC BTA Bank v Mukhtar Ablyazov & ors* [2011] EWHC 202 (Comm); *JSC BTA Bank v Mukhtar Ablyazov* [2012] EWCA Civ 639; *JSC BTA Bank v Solodchenko & ors* [2010] EWHC 2843 (Ch); *JSC BTA Bank v Solodchenko & ors* [2011] EWHC 2163 (Ch); *JSC BTA Bank v Shalabayev & anor* [2011] EWHC 2915 (Ch).

[21] *JSC BTA Bank v Ablyazov* [2009] EWCA Civ 1125.

[22] [2010] EWCH 1779 (Comm).

[23] *JSC BTA Bank v Ablyazov* [2010] EWCA Civ 1141.

[24] [2012] EWHC 648 (Ch).

5.21. A number of difficulties raised by way of the *JSC* sagas are yet to be resolved. One such issue was entertained by the Supreme Court on 28th July 2015,[25] namely whether or not a right to draw down pursuant to a facility agreement constitutes an 'asset' within the meaning of the standard form freezing order. If the Supreme Court rules that it does, then loan facilities may become subject to restraint on dealing or exercise prior to trial. The Supreme Court is currently in recess but when the judgment is delivered it could alter the current position vis-à-vis the *Mareva* jurisdiction and *choses in action.* The issue is problematical not least because of the proprietary issues involved in facility agreements. The case raises a number of interesting questions which centre on who is regarded as the beneficial owner of monies loaned, until such time as a loan agreement is discharged; the creditor or the party loaning the monies. That point is significant because the standard form freezing order is designed to capture the respondent's assets or those assets that the respondent can deal with '*as if*' they were their own. Furthermore, if the court decides that it can freeze funds loaned by a bank, can those funds legitimately form the subject matter of a judgement award before the facility agreement has been fully discharged? If the court decides that they can, then would the situation alter if the funds had been extended under a *Quistclose* trust?[26] It is recommended that further research in this area would certainly be valuable. The ambiguity in relation to *choses in action* and the *Mareva* jurisdiction may be clarified when the judgment is eventually handed down; until then the contention will undoubtedly persist.

[25] *JSC BTA Bank (Appellant) v Ablyazov (Respondent)* UKSC 2013/0203, on appeal from [2013] EWCA Civ 928.
[26] See, *Barclays Bank Ltd v Quistclose Investments Ltd* [1968] UKHL 4.

5.22. In the process responding to this thesis' four broad objectives a critique crystallised. In the introduction Goode's suggestion that the *Mareva* injunction is a striking example of the effectiveness of procedural law and the creativity of the judiciary was noted. That submission is not disputed *per se,* in fact this body of work has largely substantiated it. Alternatively, a nuance is advanced. Critically appraising the statement's legitimacy highlights an apparent issue with reliance upon procedural law and judicial creativity; it can be a long time in the making. The *Mareva* jurisdiction was originally opposed above all else because it appeared to be contrary to a well-established restrictive rubric. This body of work demonstrated that the *Mareva* injunction derives its heritage from the equitable jurisdiction. It is tempting to raise the equitable jurisdiction to lofty heights; to claim that it transcends the inelastic realms of the positive law. Equity is often heralded as the law's conscience, about the business of upholding the spirit of justice and to some extent this body of work has corroborated that concept. However the fact remains that it took the tenacity and pragmatism Lord Denning MR to innovate, to turn the tables in favour of the injured creditor. Had it not been for the tenacity and juridical pragmatism of Lord Denning MR and his Court of Appeal then it is likely that the restrictive *status quo* would have persisted for some time more.

5.23. Case law is littered with comments amounting to an unwillingness amongst the judiciary to create strong precedent without the guidance, approval or intervention of the legislature. Lindley LJ demonstrated that predilection in *Lister*[27] in reference to

[27] 45 Ch D 1 at 15, [1886-90] ALL ER Rep 797 [800].

the restrictive rubric which was restated by Cotton LJ.[28] Those limiting and restrictive statements persuaded Donaldson J that the very initiation of the *Mareva* jurisdiction was contrary to a well-established precedent; a precedent which is now beyond doubt defunct.[29] Today, with the power of hindsight it appears obvious that the restrictive *status quo* was misinterpreted, misapplied or given too much credence by cautious members of the judiciary. Lord Devlin once commented that members of the judiciary 'tend to be old-fashioned in their ideas'.[30] It is argued that members of the judiciary should be willing to challenge precedent which obstructs their pragmatic judgement. Judges of higher jurisdiction should be willing to innovate, to test the judicial waters in order to foster a truly forward thinking and pragmatic legal system.[31] If their decisions are mistaken then as it has been seen throughout this discourse the appellate system will rectify their judgment; but if they work with the conceptual elasticity which equity can enable then as has been witnessed herein, uniquely effective remedies can be created which can render the processes of the court more effective.[32]

5.24. The modern *Mareva* case is typically sophisticated but may also be complicated by jurisdictional issues; amenable assets are often located in one or more

[28] Ibid [799].
[29] *FHR European Ventures LLP and Ors v Cedar Capital Partners LLC* [2014] UKSC 45 [47]-[50].
[30] Lord Devlin, 'Judges and Lawmakers' (1976) 39 MLR 1.
[31] Although it is acknowledged that caution must be exercised e.g. see Lord Walker's suggested adoptive guidelines, Lord Walker, 'How Far Should Judges Develop the Common Law' (2014) 3 (1) CJICL 124, 127: i) if a judicial solution is doubtful the judiciary should be weary of imposing their own remedy ii) caution must prevail where the legislature has chosen not to clear up a known issue or has purposefully legislated and left the difficulty untouched iii) judicial intervention should be resigned to purely legal matters; issues relating to social policy are less suitable for judicial intervention iv) the judiciary must not set aside fundamental legal doctrines lightly v) changes should not be introduced unless they can bring about certainty and finality.
[32] An additional example of the value of judicial innovation is provided by way of the modern law of negligence as per *Donoghue v Stevenson* [1932] UKHL 100*, see Lord Goff's comments in Woolwich Equitable Building Society v IRC* [1993] AC 70 [173].

jurisdictions and the primary defendant may not be domiciled in anyone of them. The *Mareva* injunction is part of the practically effective matrix of remedies which has been developed to combat and manage aspects of fraud, matrimonial disputes, creditor and debtor relationships and cases of insolvency. It has been argued that in the corporate context the modern *Mareva* jurisdiction has contributed significantly towards the appeal of England as the preferred jurisdiction.[33] Part of the allure of English company law is that it entertains concepts such as universality which direct that an insolvent company's assets and liabilities are to be regarded as one irrespective of location.[34] Furthermore, English company law embraces the notion that all creditors, regardless of location ought to be treated equally in line with the common priorities determined by the law of companies in England.[35]

5.25. In order for the courts to be able to judiciously and consistently dispense justice which touches assets placed beyond domestic borders the courts continue to be careful not to offend the judicial sovereignty of another jurisdiction and they remain willing to assist another jurisdiction in order to propagate the transnational cultures of inter-jurisdictional cooperation and collaboration necessary to combat the modern elusive debtor.[36] The Worldwide *Mareva* jurisdiction was discussed and it was seen that much of the rationale which drives the court's willingness to allow an

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[33] David Milman, *National Corporate Law in a Globalised Market: The UK Experience in Perspective* (Edward Elgar Publishing Inc 2009); George CJ Moore, 'Choice of Law and Forum: Swift Justice in England Including Pre-Judgment Tactics & Relief and Enforcement Throughout Europe' (1998) 15 (5) International Law Quarterly 4; SG Rammeloo, 'Jurisdiction Clauses in Transnational Company Relationships' (1994) 1 Modern Journal of European and Company Law 426.

[34] *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] UKPC 26; see also, *Re Paramount Airways Ltd (No 2)* [1992] 3 WLR 690 [699]-[700] (Sir Donald Nicholls VC).

[35] See *Mitchell v Carter* [1997] BCC 907 [912] (Millett LJ); *Re Shruth Ltd* [2005] EWHC 1293 (Ch); see generally, *Milman* (n 33) 130-132.

[36] Lord Woolf, 'The Tides of Change' in RS Markesinis (ed), *The British Contribution to the Europe of the Twenty-First Century* (Hart 2002) 1, 10.

order which touches a foreign asset or an order which assists foreign proceedings are influenced by notions of comity, jurisdictional cooperation and mutuality. It was found that jurisdictional cooperation and mutuality is increasingly important in the *Mareva* context because of the abovementioned transnational aspects. Since 1972 English company law has been influenced heavily by EC Company Law harmonisation objectives;[37] it was also seen that the Union generally seeks to develop a spirit of judicial cooperation in civil matters with a cross border element.[38] The arrival of the European Account Preservation Order (EAPO) which can be considered to be a product of the emergent European spirit of cooperation is a sign that trends are generally moving towards a unified *Mareva* style approach.[39] The growth of harmonised Pan-European responses to *Mareva* scenarios is undoubtedly progressive. However it is noted that modern corporations and conglomerates are increasingly transnationally diverse entities; in order to manage the *Mareva* scenarios of the future effectively and efficiently the growth of a Universalist or harmonised pan-global *Mareva* style approach, codified in international law may become a pragmatically attractive concept.

[37] A goal facilitated largely by directives pursuant to Art 44(3)(g) of the EEC Treaty.
[38] Article 81(1) on the Treaty on the Functioning of the European Union.
[39] It is restated that although England has chosen to opt out of the EAPO, England already has a policy of jurisdictional cooperation in the *Mareva* context pursuant to Part 74 of the current Civil Procedure Rules 1998/3132.

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