Chapter 7

Preservation of assets: other types of relief

The use of the Mareva injunction has become so widespread that it is now regarded as probably the foremost type of interlocutory relief for the preservation of assets. The courts do, however, have other procedures available, and the power to grant other forms of interlocutory relief in circumstances in which Mareva relief is inappropriate, or liable to be ineffective. 7.001

(1) Buyer's claim on contracts for the sale of a ship

A recurring problem in practice has been that of a purchaser who believes that a vessel which is about to be delivered under a concluded sale agreement (usually on the Norwegian Sale Form) suffers from defects. If the vessel is indeed defective when delivered, the buyer may have a claim for damages under the sale agreement. This depends on the terms of the agreement; although terms as to fitness for purpose and merchantable quality implied by ss13 and 14 of the Sale of Goods Act 1979 can be implied in a ship sale contract, such sales are nowadays more often concluded on an "as is" basis. Accordingly, if the buyer has a claim at all, it is more likely to arise in respect of a breach of an express term of the sale agreement. For example, in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)*,[1] the claim was in respect of, *inter alia*, the alleged breach of the term providing for the vessel to be delivered "free of average damage affecting class". 7.002

A buyer who has reason to believe that he would have a good claim for damages if he took delivery of the vessel will often have in mind the following considerations.

(1) The buyer, for commercial reasons, wishes to take delivery of the vessel.

[1] [1983] 1 W.L.R. 1412.

(2) The buyer does not wish to be left with an unsecured claim for damages against the seller. The seller is often a company which is selling its only known asset.

(3) The proceeds of sale may be payable to a bank which holds a mortgage over the vessel, and has first claim over the sale proceeds.

(4) The provisions of the sale agreement usually entitle the seller:

(a) to serve a notice making time of delivery of the essence, and
(b) to forfeit the buyer's deposit and cancel the contract if the buyer fails to comply with such a notice.

(5) The buyer may not be entitled to reject the vessel, even if he wishes to do so.

(6) The buyer may not even have reliable detailed information about the suspected defects, upon which to consider the position and decide what prospects he has of legitimately rejecting the vessel, or to assess the quantum of his prospective liability in damages if he makes the wrong decision.

7.003 Buyers have attempted to deal with these considerations by proceeding to take delivery of the vessel and applying for a Mareva injunction over the sale proceeds within the jurisdiction either before or after delivery. In *Ateni Maritime Corporation v Great Marine Ltd (The Great Marine No.1)*[2] the sellers argued that because of the Mareva relief the price had not been paid under the contract, and they were entitled to cancel. This argument was rejected on the ground that payment of the price is effectively made under the contract even though the proceeds are then immediately frozen in the hands of the seller.

The courts have shown a marked reluctance to assist buyers with Mareva relief. In relation to an application before delivery of the vessel is accepted by the buyer, two major objections have arisen. First, it is often the case that the buyer will not acquire a right of action in damages until he has accepted delivery. Secondly, it is said that the buyer should not be allowed to use the Mareva injunction procedure to set a "trap" for the unwary seller, who gives up the vessel, only to find the sale proceeds immediately frozen in his hands.[3]

The first objection is based on the rule that Mareva relief is not available unless and until the claimant has an accrued cause of action. The courts have consistently refused to grant Mareva injunctions to assist a claimant who has strong grounds for believing that the potential defendant

[2] [1990] 2 Lloyd's Rep. 245.
[3] *Z Ltd v A-Z and AA-LL* [1982] Q.B. 558 at 585, *per* Kerr L.J. *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)* [1983] 1 W.L.R. 1412 at 1419, *per* Kerr L.J. citing with approval a passage from Mustill J. whose judgment is reported at [1983] 2 Lloyd's Rep. 600.

will break his contract or commit a tort. In *Siporex Trade SA v Comdel Commodities Ltd*,[4] Bingham J. refused to grant a Mareva injunction to a plaintiff who had not yet acquired a cause of action. However, upon the plaintiff acquiring a cause of action by making a payment to the defendant, Bingham J. subsequently granted an injunction restraining the defendant from dealing with (*inter alia*) the fund resulting from the payment.

7.004 If the claimant does not yet have a cause of action against the defendant, then he is not claiming any final relief to which a Mareva injunction can be ancillary, and there is no jurisdiction to grant the Mareva relief.[5] In cases outside of the *quia timet* jurisdiction, the refusal to grant relief in respect of a cause of action which a claimant expects to acquire in the near future is both inconvenient and liable to cause injustice. The claimant will have to make an immediate, urgent application to the judge upon acquiring the cause of action. In the meantime, the intended defendant may remove assets from the jurisdiction or deal with those assets. If the assets have yet to be acquired by the intended defendant, he may nevertheless enter into a valid equitable assignment, which will bind the assets when they are acquired and defeat the Mareva when it is eventually granted: *Pharaoh's Plywood Co. Ltd v Allied Wood Products*.[6]

In Australia the courts have declined to impose a rigid requirement that the plaintiff must have an existing maintainable cause of action (see para.1.020–1 above). Furthermore, such a requirement is in contrast to the result sought to be achieved by the court on the exercise of the *quia timet* jurisdiction, where injunctive relief is granted to prevent the commission of future wrongs. That jurisdiction enables the court to grant final relief in the form of a negative or a mandatory injunction,[7] and s.37 of the Supreme Court Act 1981 gives jurisdiction to the court to grant (*inter alia*) an interlocutory injunction *quia timet*. Mareva relief is necessarily only by way of interlocutory injunction whether granted before or after judgment and so is to be distinguished from the *quia timet* jurisdiction. Under the *quia timet* jurisdiction the claimant has an existing right which the defendant is threatening to infringe. Despite the distinctions to be drawn between the granting of relief *quia timet* and an application for Mareva relief in anticipation of acquiring a cause of action, there is a similarity. In each case the objective of the claimant is to prevent or forestall injustice through future conduct of the defendant.

In *A v B*,[8] the plaintiffs sought an injunction to freeze sums in a joint account prior to taking delivery of a vessel. An injunction was granted, to take effect if and when delivery of the vessel took place, and to be served

[4] [1986] 1 Lloyd's Rep. 428.
[5] *Veracruz Transportation Inc. v VC Shipping Co. Inc. (The Veracruz 1)* [1992] 1 Lloyd's Rep. 353; *Zucker v Tyndall Holdings Plc* [1992] 1 W.L.R. 1127; *Re Q's Estate* [1999] 1 Lloyd's Rep. 931 at 938; *Steamship Mutual Underwriting Assn (Bermuda) v Thakur Shipping* [1986] 2 Lloyd's Rep. 439.
[6] Court of Appeal (Civ Div) Transcript No.217 of 1980 (January 18, 1980).
[7] *Hooper v Rogers* [1975] Ch. 43; *Morris v Redland Bricks* [1970] A.C. 652.
[8] [1989] 2 Lloyd's Rep. 423.

on the defendants before delivery of the vessel. In granting this order Saville J. sought to avoid the inconvenience to the plaintiff of being required to make the application *ex parte* to the judge only after delivery. However, this practice has now been overruled by the Court of Appeal.[9] The best that can now be done is for matters to be explained to the judge in advance, the judge to give an indication that he is willing to grant relief once the cause of action arises, and then for this indication to be followed by the making of a court order immediately after the cause of action vests.[10]

7.005 The second objection raises the question whether the court should be willing to grant a Mareva injunction unless the buyer is prepared to disclose its existence to the seller before delivery of the vessel. If the court insists on such disclosure, the buyer will run the risk that the seller may refuse to complete the transaction unless the injunction is discharged. If, however, the buyer waits until after taking delivery of the vessel before seeking Mareva relief, the sale proceeds may be paid away before the injunction can be made effective. Furthermore, there is the consideration that it would not in principle be proper for the injunction to be kept secret in circumstances where the buyer is encouraging the seller to complete, in the expectation that he will obtain free use of the purchase money. In effect, the buyer would himself not be acting consistently with good faith in his dealings with the seller. In *Negocios Del Mar SA v Doric Shipping SA*,[11] the buyers obtained a Mareva injunction *ex parte* from Mocatta J. without disclosing their plan to keep the injunction secret pending completion. The injunction was discharged by the judge *inter partes* in view of the non-disclosure, and because he felt that the buyers had acted unfairly to the sellers in not disclosing to them the existence of the injunction before completion. Mocatta J. refused to give "the blessing of this court to what happened at the Eastcheap Branch of Lloyds Bank whilst a copy of [the] order was being . . . shown to the National Bank of Greece at Bevis Marks". The Court of Appeal upheld the judge's discretion on the same grounds, Shaw L.J. observing that:

> ". . . discretionary relief which is designed to prevent injustice is not to be sought by or accorded to a party whose conduct appears to have been governed by the principle of catch as catch can."

[9] *Veracruz Transportation Inc. v VC Shipping Co. Inc. (The Veracruz)* [1992] 1 Lloyd's Rep. 353; see para.12.002, below.

[10] *Re Q's Estate* [1999] 1 Lloyd's Rep. 931. The plaintiffs did not argue that they were entitled to a solicitor's lien under their retainer. This was governed by English law and contained a London arbitration clause. Arguably it entitled them to an equitable lien on the proceeds of the case on which they had acted for their client, which could have been protected *quia timet* by injunction in anticipation of those proceeds going into the bank account of their client in Jersey.

[11] [1979] 1 Lloyd's Rep. 331.

In *Z Ltd v A-Z and AA-LL* Kerr L.J. observed[12] that even disclosure of 7.006 the intention to use the injunction "as a means of setting a trap for the payee" should not suffice to justify the grant of the injunction in such cases. If the payer, "appreciating the implications", is willing to make the payment, then "the courts should not assist him to safeguard the payment in advance by means of a Mareva injunction. However, this is a special type of situation, and, like all others in this field, [is] ultimately a matter for the discretion of the judge". Nevertheless, the court may still grant Mareva relief *ex parte*[13] on the basis that it will be disclosed to the seller only after delivery of the vessel. Thus, in *Ateni Maritime Corporation v Great Marine Ltd*,[14] Phillips J. in chambers made an order *ex parte* which contained an undertaking by the plaintiffs to give notice of the order "immediately after (but not before) the completion of the Ship Sale Agreement and delivery of the vessel".

Even leaving aside these difficulties there are further considerations which may render Mareva relief unsatisfactory to the buyer:

(1) If the vessel is mortgaged (and most trading vessels are) the mortgagees would be entitled to receive the sale proceeds towards discharge of their mortgage. The mortgagees' prior claim over the sale proceeds cannot be defeated by a Mareva injunction.

(2) Even if the vessel is not mortgaged, the proceeds of the sale may be whittled away by *Angel Bell* orders enabling the seller to meet legal fees or other debts and expenses.

(3) The seller may assign his right to receive the sale proceeds to a third party before the Mareva injunction is granted. A bona fide assignee would be entitled to have the injunction discharged.

(2) Possible alternative remedies available to buyers

If the vessel does suffer from defects on delivery in breach of the sale 7.007 agreement, then at common law the buyer has a right to abate the price under the principles established by *Mondel v Steel*[15] (see further, *Modern*

[12] [1982] Q.B. 552 at 585. See also the observations of Mustill J. in *Ninemia Maritime Corporation v Trave Schiffahrtsgesellschaft GmbH (The Niedersachsen)* [1983] 2 Lloyd's Rep. 600 at 612, cited with approval by the Court of Appeal, reported in [1983] 1 W.L.R. 1412 at 1419 (where it was said "there is something unattractive about the idea" of the buyer ostensibly paying the full price to obtain the vessel while "preparing . . . behind the seller's back to deprive him of part of the price").

[13] In *The P* [1992] 1 Lloyd's Rep. 470 at 474, Evans J. held that the application in that case should not have been made *ex parte* because the parties were already locked in dispute and were communicating through solicitors.

[14] Unreported, May 25, 1989. The order is referred to in *Ateni Maritime Corporation v Great Marine Ltd (The Great Marine No.1)* [1990] 2 Lloyd's Rep. 245 at 247.

[15] (1841) 8 M.&W. 858.

and fidelity owed by the solicitor to the building society; it was a negligent mistake. In the course of his judgment Millett L.J. reviewed the class of case in which a fiduciary is placed in breach of his fiduciary duty to one principal because of "the double employment rule", which applies where his duty of loyalty and fidelity may conflict with what he has undertaken for another client. With the exception of cases in which informed consent can properly be obtained and has been obtained from both principals,[62] once the fiduciary places himself in the position of potential conflict in fulfilling the fiduciary duties owed to each client, this is a breach of the duty of loyalty and fidelity owed to each. The fiduciary must also not act when there is an actual conflict in that fulfilling his fiduciary duty owed to one principal would result in actual breach of the fiduciary duty owed to another. This is not confined to same matter conflicts but extends to cases in which there are matters which are related and which may generate conflicting fiduciary duties.[63]

Where a solicitor is threatening to place himself in a position where he cannot, or potentially may not be able, to fulfil his fiduciary duties owed to one client because of what he is proposing to undertake for another this may be restrained by injunction.[64]

[62] *Clark Boyce v Mouat [1994] 1 A.C. 428 at 435–436; Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 Q.B. 606 at 636.

[63] *Marks and Spencer plc v Freshfields Bruckhaus Deringer* [2004] EWHC 1337 at para.16 (permission to appeal was refused by the Court of Appeal).

[64] *Marks and Spencer plc v Freshfields Bruckhaus Deringer* [2004] EWHC 1337 at paras 23–25 (permission to appeal was refused by the Court of Appeal), where the solicitors were already acting for the claimant on the Davies contract which was also a very important part of the take-over bid which was being launched by Mr. Green.

Chapter 19

Contempt of court: the position of the defendant and non-parties

(1) Introduction: the effects of an injunction

19.001 The law of contempt of court is of ancient origin and fundamental contemporary importance.[1] It has been described as "the Proteus of the legal world, assuming an almost infinite diversity of forms".[2] Breach of a court order by the party restrained is only one of these forms. This form of disobedience is a civil contempt or "contempt in procedure"[3] and not a criminal contempt.

The general principle is that an injunction is addressed to the party enjoined, who must be a party to the proceedings.[4] There is also a power in the court to grant an injunction *contra mundum*;[5] but this only arises in very particular circumstances, such as in connection with publication of information by the media which if published could damage a ward of court, or lead to a clear and present risk of physical or psychological harm to an individual.

[1] N. Lowe and B. Sufrin, *Borrie and Lowe: The Law of Contempt* (3rd ed., 1996), p.2. The present chapter considers the law of contempt in relation to commercial injunctions. For works devoted to the law of contempt, see *Borrie and Lowe* (above); A. Arlidge, Sir David Eady and A.T.H. Smith, *The Law of Contempt* (2nd ed., 1999) and C.J. Miller, *The Law of Contempt* (2000).

[2] J. Moskovitz, "Contempt of Injunctions, Civil and Criminal" (1943) 43 Col. L.R. 780. This statement is referred to in a passage from *Borrie and Lowe: The Law of Contempt* (2nd ed., 1983), cited by Sir John Donaldson M.R., in *Attorney-General v Newspaper Publishing plc* [1988] Ch. 333 at 361–362.

[3] *Hadkinson v Hadkinson* [1952] P. 285 at 295, *per* Denning L.J.

[4] *Marengo v Daily Sketch* [1948] 1 All E.R. 406 at 407; *Iveson v Harris* (1802) 7 Ves. Jun. 251; *Brydges v Brydges* [1909] P. 187; *Attorney-General v Newspaper Publishing plc*; [1988] Ch. 333 *Royal Bank of Canada v Canstar Sports Group Inc.* [1989] 1 W.W.R. 662, Manitoba Court of Appeal. See Chapter 13, para.13.001, above.

[5] *Venables v News Group* [2001] Fam. 430 at [98–100] granting an injunction *contra mundum* in order to protect the claimants against the risk of serious physical injury if their new identities were to be disclosed ; *X, a Woman formerly known as Mary Bell v S and News Group Newspapers* [2003] F.S.R. 850 at [63] and [64] (protecting the identity of Mary Bell); *Attorney-General v H* [2001] 2 F.L.R. 895 (protecting a child from a clear risk of harm from an estranged father); *Re X (A Minor) (Wardship: Injunction)* [1984] 1 W.L.R. 1422; *Attorney-General v Newspaper Publishing plc* [1988] Ch. 333.

Non-parties are not themselves enjoined by an injunction.[6] If a defendant acts in breach of an injunction restraining him, then he will be in contempt of court. But the effect of an injunction is much wider.

19.002 When considering whether a defendant restrained by an injunction is in breach of that order questions can arise about whose conduct is to be treated as that of the defendant. It may be that the conduct of a person is to be treated as conduct of the defendant, so that the conduct will place the defendant in breach of the order. Questions can also arise as to the extent of the responsibility of the defendant to prevent others from carrying out the prohibited acts.

A further question is whether someone other than the defendant is liable for contempt of court. For example an employee can by his conduct put his employer in breach of an injunction and at the same time become personally liable for contempt. This question can arise whether or not the non-party's conduct is to be imputed to the defendant for the purpose of deciding whether the defendant is in contempt. The liability of the non-party for contempt can be based on:

(1) the non-party knowingly aiding and abetting a breach of an injunction.[7] In this situation there has to have been a breach of the injunction by the defendant; or

(2) a non-party with knowledge of the order doing "something which disables the court from conducting the case in the intended manner" and thereby interfering with the due administration of justice.[8] This can arise entirely independently of whether there has been any breach of the injunction. For example, where an injunction has been granted against publication by a defendant so as to keep the information confidential pending trial, a non-party who publishes that information knowing of the injunction will be in contempt of court.

(2) The position of the defendant against whom an injunction has been granted

(i) When the injunction commences

19.003 An injunction takes effect at the moment it is pronounced,[9] unless the court orders that it is to take effect from a later date.[10]

[6] *Lord Wellesley v Earl of Mornington* (1848) 11 Beav. 180.

[7] *Lard Wellesley v Earl of Mornington* (1848) 11 Beav. 180; *Lord Wellesley v Earl of Mornington (No.2)* 11 Beav. 181; *Seaward v Paterson* [1897] 1 Ch. 545; *Acrow Automation Ltd v Rex Chainbelt Inc.* [1971] 1 W.L.R. 1676; *Z Ltd v A–Z and AA–LL* [1982] Q.B. 558.

[8] *Attorney-General v Punch* [2003] 1 A.C. 1046; *Attorney-General v Times Newspapers* [1992] 1 A.C. 191 at 206D–H, 214C–215B, 224–225, 231B; *Attorney-General v Newspaper Publishing plc* [1988] Ch. 333; *Harrow London Borough Council v Johnstone* [1997] 1 W.L.R. 459 at 468.

[9] *Z Ltd v A–Z and AA–LL* [1982] Q.B. 558 at 572; CPR r.40.7(1).

[10] Under CPR r.40.7(1) there is power to make the order effective from a later date, but not a power to make an order effective from an earlier date *nunc pro tunc*.

(ii) Mens rea of the defendant, capacity to understand and minors

If the defendant has broken the terms of an injunction then he is in contempt of court.[11] There is no need to establish any intent to act contumaciously or any *mens rea*.[12] He must have the limited mental capacity which is required so as to understand what he could not do and the nature of the possible consequences.[13] The fact that a defendant obtained and acted on professional advice provides him with no defence, even if he believed that what he was doing did not infringe the requirements of the injunction.[14] It may or may not, depending on the circumstances,[15] go to mitigation of the penalty. Nor is it a defence for a defendant to contend that a variation to the injunction would have been granted, had one been sought, which would have permitted the act in question (*e.g.* to enable him to pay legal costs).[16] However, the "technicality" of the contempt and the absence of any serious fault will mitigate the position and may lead to no penalty being imposed by the court. 19.004

An injunction will not be granted against a minor who has no assets because the court will not commit him to prison for contempt and there is no effective means of enforcement.[17]

(iii) Effect of an undertaking given to the court

An undertaking by a defendant to the court has the same effect as an injunction.[18] A person who has given an undertaking may be held liable 19.005

[11] *Miller v Scorey* [1996] 1 W.L.R. 1122 at 1132C–F; *Re the Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd* [1966] 1 W.L.R. 1137 at 1162; *Spectravest Inc. v Aperknit Ltd* (1988) 14 F.S.R. 161 at 173–174.

[12] *Adam Phones v Goldschmidt* [1999] 4 All E.R. 486 at 492–494 in which *Irtelli v Squatriti* [1993] Q.B. 83 was not followed because it is inconsistent with other case law; *Bird v Hadkinson, The Times*, April 7, 1999 also declining to follow *Irtelli v Squatriti*, which was inconsistent with a series of earlier cases which laid down a requirement of strict liability .

[13] *P v P (Contempt of Court: Mental Capacity)* [1999] 2 F.L.R. 897; *Wookey v Wookey* [1991] Fam. 121.

[14] *Re the Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd* [1966] 1 W.L.R. 1137; *Z Bank v DI* [1994] 1 Lloyd's Rep. 656 at 660; *Spectravest Inc. v Aperknit Ltd* (1988) 14 F.S.R. 161; C. H. Giles & Co. v Morris [1972] 1 W.L.R. 307 at 319E–F (where the motion to commit/sequestrate was adjourned to give the contemnors the opportunity of complying with the order); *Summit Holdings Ltd v Business Software Alliance* [1999] 3 S.L.R. 197.

[15] *Parker v Rasalingham, The Times*, July 25, 2000; *Re the Agreement of the Mileage Conference Group of the Tyre Manufacturers' Conference Ltd* [1966] 1 W.L.R. 1137 at 1162; *Summit Holdings Ltd v Business Software Alliance* [1999] 3 S.L.R. 197; *Deputy Commissioner of Taxation v Hickey* [1999] F.C.A. 259 (March 18, 1999) at para.36 (where the solicitors had not applied for a variation, which "any reasonably competent solicitor" ought to have been able to have granted, and which would have authorised the dealings which were in contempt of court, and this was "a very significant mitigating factor").

[16] *TDK Tape Distributor (UK) Ltd v Videochoice Ltd* [1986] 1 W.L.R. 141; *Z Bank v DI* [1994] 1 Lloyd's Rep. 656 at 668. The order remains in force unless and until it is varied, and the fact that an application could have been made successfully to vary the order is no answer to the charge of contempt. See para.19.055, below.

[17] *London Borough of Harrow v G* [2004] EWHC 17, QBD.

[18] *Biba Ltd v Stratford Investments* [1973] Ch. 281 at 287; *Cobra Golf Inc. v Rata* [1998] Ch. 109. If a solicitor acts in breach of an undertaking given by him to the court (*e.g.* as the

in contempt of the undertaking even though it has not been served on him.[19]

(iv) What an injunction prohibits or orders

19.006 Injunctions can be purely negative, prohibiting prescribed conduct, or can be mandatory, requiring the defendant to take certain steps. Whatever the nature of the injunction it must be drafted so as to specify clearly what it requires. The general principle is that the person enjoined and any non-party simply through inspection of the order should be able to understand exactly what is ordered. If the order[20] or undertaking[21] is ambiguous, then the court will not punish for contempt.[22] Every order will refer to persons things and matters outside of the document. But the objective is to produce so far as is possible a free-standing document, which does not refer to other documents,[23] and which is clear and precise. In interpreting the document the court treats it as a free-standing document. So, *e.g.* if an injunction is granted giving effect to and adopting the words of a contractual promise, what matters is what the words mean in the injunction and this may not be the same as what they mean in the contract.[24] The court places itself in the position of the reasonable recipient of the order together with all the background knowledge which is reasonably available to the class consisting of the defendant and non-parties who may be affected by the order.[25]

price of obtaining an injunction or search order for his client) then he is in contempt of court; *Long v Specifier Publications Pty Ltd* (1998) 44 N.S.W.L.R. 545. See further on enforcement of an undertaking given to the court, para.24.043 below.

[19] *Hussain v Hussain* [1986] Fam. 134; *D v A & Co.* [1900] 1 Ch. 484.

[20] *Federal Bank of the Middle East v Hadkinson* [2000] 1 W.L.R. 1695 at 1705C–D; *Iberian Trust Ltd v Founders Trust and Investment Co. Ltd* [1932] 2 K.B. 87 at 95; *R. v City of London Magistrates' Court, Ex p. Green* [1997] 3 All E.R. 551 at 558; *R.C.I Bank of Western Australia Ltd v Anchorage Investments* (1992) 10 W.A.R. 59.

[21] *Redwing Ltd v Redwing Forest Products Ltd* [1947] R.P.C. 67 at 71.

[22] *cf Australian Consolidated Press Ltd v Morgan* (1965) 112 C.L.R. 483 at p.492 *per* Barwick C.J.; *Long v Specifier Publications Pty Ltd* (1998) 44 N.S.W.L.R. 545 at pp. 567–568, which support a narrower view of the scope of this defence, *i.e.* that unless the wording is so unclear it cannot be interpreted, the court must first interpret it finding the correct meaning, and then decide what to do as a matter of discretion in the light of that interpretation, including refusing to make an order holding a party in contempt because the party proceeded against reasonably misinterpreted the words, and was thus prejudiced by the defective state of the undertaking or order (*e.g.* in *Togher v Customs and Excise Commissioners* [2001] EWCA Civ 474 at [53–56], Lightman J. held that there was a good defence because of the ambiguity in the wording of the order, and Mr Togher's state of mind about what he thought the order meant).

[23] *Rudkin-Jones v Trustee of the Property of the Bankrupt* (1965) 109 S.J. 334; *Telesystem International Wireless Incorporated v CVC/Opportunity Equity Partners L.P.* [2002] C.I.L.R. at [46].

[24] *World Wide Fund for Nature v THQ/Jakks Pacific LLC (World Wrestling Federation intervening)* [2004] F.S.R. 10, p.161 at [16] ("Although the injunction was . . . framed with the . . . Agreement in mind, it must stand on its own terms . . .").

[25] *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 A.C. 715 at [73]; *Dairy Containers Ltd v Tasman Orient Line CV (The Tasman Discoverer)* [2004] UKPC 22 at [12].

The order may require the defendant to prevent others from acting in a particular way. What steps the defendant is required to take to bring this about is a matter of interpretation of the order. It may be that the defendant is required to use all reasonable efforts to bring about the desired result.[26] This is a separate point from whose conduct is to be imputed to the defendant as being his conduct for the purpose of contempt proceedings.

19.007 A mandatory order necessarily includes a prohibition forbidding the defendant from doing anything or permitting anything to occur which would disable him from complying with the mandatory terms of the order. So if an order requires disclosure of documents the defendant is by implication forbidden to destroy them or to give them away, and he must take proper care of them. If after the date of the order the documents are destroyed or lost he will be in breach of the order and liable to be proceeded against for contempt unless the defendant's inability to comply arose despite the exercise of proper care by himself, his servants and agents.[27] In *Re Bramblevale*[28] the former managing director was acquitted of contempt because contempt was not proved beyond reasonable doubt; there were the possibilities that he had destroyed the documents before the order had been made,[29] or that the documents had been lost before that date, or had been lost afterwards without any fault on his part, and therefore were not in his control at the date on which he was ordered to produce them.

Depending on the terms of an interim injunction the court may find itself trying out on a motion for contempt issues which overlap with the issues to be resolved in the underlying action.[30]

19.008 For the effect of para.7 of the example order, which is the clause which identifies assets which are described as coming "in particular" within the restraint in para.5, see paras 19.038–19–040, below.

(v) The defendant being placed in breach of the order by his servants or agents—imputing conduct of others to the defendant for the purpose of finding contempt

19.009 The defendant is personally enjoined by the injunction. He also must not do prohibited acts through others including his servants or agents. The principle is also that he who acts through another, carries out the acts himself.

[26] *World Wide Fund for Nature v THQ/Jakks Pacific LLC (World Wrestling Federation intervening)* [2004] F.S.R. 10, p.161.

[27] *Re Supply of Ready Mixed Concrete (No.2)* [1992] Q.B. 213, approving *Stancomb v Trowbridge Urban and District Council* [1910] 2 Ch. 190—see para.19.017, below.

[28] [1970] Ch. 128.

[29] *ibid.*, at 138D.

[30] *Spectravest Inc v Aperknit Ltd* [1988] F.S.R. 161; *Chanel Ltd FGM Cosmetics* [1981] F.S.R. 471.

Appendix 1

Obtaining Mareva-type provisional relief in New York state and federal courts

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This Appendix will discuss the availability of Mareva-type relief in the federal courts throughout the United States and the state courts in New York.[1] In general, such relief is largely unavailable—strictly speaking—in either court system. However, there are some conditions under which this type of relief can be obtained and there are also various alternative measures that can provide similar degrees of protection, provided the right circumstances exist. Below, after a discussion of federal and New York law rejecting Mareva injunctions, we review the approaches that practitioners may use in their efforts to secure assets for the satisfaction of prospective money judgments. A1.001

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[1] This Appendix does not touch on the availability of Anton Piller relief in New York state or federal courts because there is no counterpart to such relief in the United States. Plaintiffs under no circumstances are entitled to have a defendant's premises searched in order to find and seize items or documents that might become evidence in a later civil action filed by the plaintiff. See, *e.g.*, *Luciano v Marshall*, 593 P.2d 751, 752 (Nev. 1979) ("Even could a statutory basis for the procedure have been found, the search of petitioner's residence, and wholesale seizure of his personal property therein, in aid of civil process, would have been precluded by the constitutional prohibitions against unreasonable searches and seizures found in the United States and Nevada constitutions."). Such searches and seizures can only occur within the context of a criminal action, and then are executable only by officers of the relevant governmental authority, not by private parties. See US Const., Amendments IV, V, XIV; Kern Alexander, "The Mareva Injunction and Anton Piller Order: The Nuclear Weapons of English Commercial Litigation", 11 Fla. J. Int'l L. 487, 512 (1997) ("[T]here is no counterpart in U.S. civil procedure to the Anton Piller order. The nearest equivalent of an Anton Piller order under U.S. law is the use of a criminal warrant issued by a judge on an *ex parte* basis so that law enforcement authorities may seize important evidence before it is destroyed.").

(1) Provisional relief in an American context: understanding the federal system

A1.002 The United States is organized as a federal system, with the several states each having their own governments and judicial systems that are separate and independent from the Government and judiciary of the United States itself. In general, disputes arising under a state's law are taken up in the courts of that state, and disputes arising under federal law (federal question), or disputes between litigants from different states (diversity) may be taken up in federal court, although these disputes can be heard in state court as well.[2] Disputes between a litigant from a state and a non-US litigant (referred to as subjects of foreign states or "aliens") may also be heard in federal courts; however, there is no provision for federal diversity jurisdiction in disputes between aliens.[3] Thus, when faced with a dispute within the State of New York, a prospective litigant potentially may bring suit in either the courts of New York or the federal courts located within that state, depending upon whether the jurisdictional requisites for having the case heard in federal court are satisfied.

When diversity cases are heard in the federal courts, the applicable substantive law will typically be the law of the state in which the federal court sits (or the otherwise applicable state law), while the governing procedural law generally will be that of the federal system.[4] The authority of the federal trial courts in New York to grant provisional relief is largely governed by the Federal Rules of Civil Procedure (FRCP), the precedent established by the US Supreme Court, and then the precedents of the US Court of Appeals for the Second Circuit, to the extent not contradicted or overruled by the Supreme Court; however, the authority to order state provisional remedies, which is granted to federal courts through FRCP Rule 64, is governed by the forum state's law. In the state courts of New York the authority to extend provisional relief is governed mostly by the New York Civil Practice Law and Rules (CPLR) (although provisional relief is also available through other New York statutes), the decisions of New York's highest court, the New York Court of Appeals, and the decisions of the Appellate Divisions of New York, again to the extent not contradicted or overruled by the Court of Appeals.

The practical import of the state/federal distinction is diminished in the context of the availability of Mareva-type relief in New York because, as will be seen below, neither the federal nor the New York state courts recognize their ability to grant such relief, under federal or state law. However, the courts or the legislatures of the two separate jurisdictions could conceivably strike divergent paths going forward, with the authorities in one determining that such relief is available while the other holds fast to its denial of such relief. For now, however, the outcome in the federal and New York state courts will be the same: Mareva-type relief is unavailable, but the full panoply of provisional and injunctive remedies under New York state law is available in both court systems.

[2] Although disputes under state law between litigants from different states or between an alien and a US litigant can be heard in state court, as can disputes involving federal questions, the defendants in such cases have the right to remove the case to federal court. See 28 U.S.C. § 1441.

[3] See 28 U.S.C. § 1332.

[4] See *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938).

(2) Federal equity jurisdiction: Mareva relief unavailable under federal law

A1.003 The perspective of the American federal courts on Mareva-type relief is governed by the case of *Grupo Mexicano de Desarrollo, SA v Alliance Bond Fund, Inc.*[5] In that case, the Supreme Court faced the question of "whether, in an action for money damages, a United States District Court has the power to issue a preliminary injunction preventing the defendant from transferring assets in which no lien or equitable interest is claimed".[6]

This question arose out of a dispute between a Mexican holding company (GMD) issuing unsecured, guaranteed[7] notes to finance its operations and several investment funds (the "respondents") that had purchased $75 million in notes from GMD.[8] GMD fell into serious financial trouble as the Mexican economy worsened and as difficulties on a toll road construction programme GMD had invested in mounted.[9] These financial difficulties cast doubt on whether GMD could continue as a going concern and resulted in GMD being unable to make an interest payment on the notes issued to the respondent investment funds.[10] Efforts to restructure the debt with the respondents failed, and they brought suit on the notes in the US District Court for the Southern District of New York.[11] The respondents sought a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure[12] restraining GMD from transferring its only substantial asset—rights to millions of dollars in toll road notes from the Mexican Government—to others for the satisfaction of other debts and obligations.[13]

The district court granted the injunction and the US Court of Appeals for the Second Circuit affirmed. The district court reasoned that GMD's risk of insolvency and its use of the toll road notes to satisfy its Mexican creditors to the exclusion of the respondents meant that any judgment the respondents obtained in the action would be frustrated; thus, the injunction was warranted.[14]

[5] 527 U.S. 308 (1999).

[6] *ibid.* at 310.

[7] The Notes were guaranteed by four subsidiaries of GMD. See *ibid.*

[8] *ibid.*

[9] *ibid.*, at 311.

[10] *ibid.*

[11] *ibid.*, at 312.

[12] Rule 65 provides federal courts with the authority to issue preliminary injunctions and temporary restraining orders.

[13] 527 U.S. 308 at 312 (1999).

[14] *ibid.*, at 312–313. Although the respondents had also alleged in their complaint that the assignments of the rights to receive the Toll Road Notes violated the negative pledge clause of the note instrument, the district court's order was not entered on those grounds. Rather, the district court's order was entered "to protect its judgment before the judgment was rendered". *ibid.*, at 315 n.2. Thus on appeal the Supreme Court was not faced with the issue of whether an injunction prohibiting a violation of the negative pledge would have been proper.

Had the propriety of an injunction based on the negative pledge been before the court, it probably would have held that a court cannot enjoin specific performance of a negative pledge where monetary damages would adequately compensate any breach. See, *e.g. Lewis v Rahman*, 147 F. Supp. 2d 225, 238 (S.D.N.Y. 2001) (denying injunctive relief to single-fight boxing promoter where the boxer's breach of his negative covenant obligations was "compensable in money").

A1.004 In an opinion by Justice Scalia, the Supreme Court reversed. Referring to the grant of equity jurisdiction made in the Judiciary Act of 1789,[15] the court emphasised that under this grant, federal courts only have authority to administer in equity suits the principles of the system of judicial remedies that had been devised and were being administered by the English Court of Chancery at the time of the separation of the United States from Great Britain.[16] The court further noted, "[T]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by Rule 65 and depend on traditional principles of equity jurisdiction."[17] The question then became, as the court styled it, "whether the relief respondents requested here was traditionally accorded by courts of equity".[18]

After reviewing the relief obtained in the English equitable action known as a "creditor's bill" during the Revolutionary period, the court determined that such relief was not analogous to the relief granted by the lower courts in this case. As the court noted, "a creditor's bill could be brought only by a creditor who had already obtained a judgment establishing the debt".[19] This rule was the product of two equally important principles that remain fundamental ideals in American equity jurisprudence: (1) "the procedural requirement that remedies at law had to be exhausted before equitable remedies could be pursued" and (2) "the substantive rule that a general creditor had no cognizable interest, either at law or in equity, in the property of his debtor, and therefore could not interfere with the debtor's use of that property".[20]

A1.005 The court found that no such relief as fashioned by the district court then existed in England and held that the rule that a judgment establishing the debt was necessary before a court could interfere with the debtor's use of his property governed.[21] Rejecting Justice Ginsburg's suggestion in her dissent that "the grand aims of equity" could accommodate such relief as the respondents sought in this case, the court looked to the words of the English jurist, Justice Blackstone, who wrote:

[15] Commentators have suggested that the court should have undertaken an inquiry into whether the All Writs Act, 28 U.S.C. § 1651(a), which provides, "the Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law," could serve as the basis for authorising the type of injunctive relief granted by the district court in *Grupo Mexicano*. See, *e.g.* Elizabeth K. Cheung, Note, "Congressmen, the Ball Is in Your Court: *Grupo Mexicano de Desarrollo v Alliance Bond Fund*", 26 J. Legis. 147, 155–156 (2000). The court claims to have engaged in such an analysis by indicating that the determination of the powers granted under the All Writs Act and its predecessor, the Judiciary Act of 1789, are one and the same, that is, the determination of the injunctive authority conferred under both is limited by "what is the usage, and what are the principles of equity applicable in such a case". *Grupo Mexicano*, 527 U.S. at 326 n.8 (quoting *DeBeers Consol. Mines, Ltd v United States*, 325 U.S. 212, 219 (1945)).

[16] *Grupo Mexicano*, 527 U.S. at 318.

[17] *ibid.* at 318–319.

[18] *ibid.* at 319.

[19] *ibid.*

[20] *ibid.*, at 319–20.

[21] *ibid.*, at 321. The court considered, but rejected, two potential exceptions to this principle. The first was the suggested exception in cases of the debtor's insolvency. The court concluded, "that particular exception does not exist". *Ibid.*, at 320 n.4, citing *Pusey & Jones Co. v Hanssen*, 261 U.S. 491, 495–97 (1926). The second potential exception—where the debt was admitted or confessed—was not endorsed by the court, and the court disposed of it by determining that even if such an exception existed, it was inapplicable to the case before it. *Ibid.*, at 320 n.5. The United States as *amicus curiae* argued that there were additional exceptions to this general rule, but the court declined "to speculate upon the existence or applicability to this case of any exceptions". *Ibid.*, at 321.

> "It is said, that it is the business of a Court of Equity, in England, to abate the rigor of the common law. But no such power is contended for. Hard was the case of bond creditors, whose debtor devised away his real estate. . . . But a Court of Equity can give no relief . . ."[22]

Thus, while the court agreed that equity is flexible, it determined that such flexibility "is confined within the broad boundaries of traditional equitable relief", which, as its review of extant English approaches revealed, would not permit the restraint of a debtor's assets to secure a money judgment where no lien or equitable interest in the assets were claimed.[23] If the federal courts are to provide such relief, the court wrote, it is up to the US Congress to expand the courts' authority to embrace such power.[24]

The court was bolstered in its view that English courts did not provide the type of relief sought in this case at the time of the First Congress by the fact that the English Court of Chancery itself did not provide such injunctive relief until 1975 in *Nippon Yusen Kaisha v Karageorgis*,[25] "in which Lord Denning recognized the prior practice of not granting such injunctions, but stated that 'the time has come when we should revise our practice.' "[26] The court went on to note that this practice was solidified by the Court of Appeal in *Mareva Compania Naviera SA v International Bulkcarriers SA*,[27] and later by statute.[28] The acknowledgment by Lord Denning and commentators that "the adoption of *Mareva* injunctions was a dramatic departure from prior practice" buttressed the court's argument that American federal courts lacked such authority, which was still bound by the traditional limits of equity from which the English courts had departed.[29]

A1.006 In the end, it was the court's determination that English Courts of Chancery did not exercise authority to grant Mareva injunctions at the time America was formed that undergirded the court's decision, and thus the courts were not in any position to expand their authority to the abrogation of the core principle that "equity will not, as a general matter, interfere with the debtor's disposition of his property at the instance of a nonjudgment creditor".[30] The court was unwilling itself to

[22] 527 U.S. at 321, quoting Joseph Story, 1 Commentaries on Equity Jurisprudence § 12, pp.14–15 (1836).

[23] 527 U.S. at 322. The court made reference to its earlier case of *De Beers Consol. Mines, Ltd v United States*, 325 U.S. 212, 65 S.Ct. 1130 (1945), for statements it made rejecting this type of relief:

> "To sustain the challenged order would create a precedent of sweeping effect. This suit, as we have said, is not to be distinguished from any other suit in equity. What applies to it applies to all such. Every suitor who resorts to chancery for any sort of relief by injunction may, on a mere statement of belief that the defendant can easily make away with or transport his money or goods, impose an injunction on him, indefinite in duration, disabling him to use so much of his funds or property as the court deems necessary for security or compliance with its possible decree. And, if so, it is difficult to see why a plaintiff in any action for a personal judgment in tort or contract may not, also, apply to the chancellor for a so-called injunction sequestrating his opponent's assets pending recovery and satisfaction of a judgment in such a law action. No relief of this character has been thought justified in the long history of equity jurisprudence."

Grupo Mexicano, 527 U.S. at 327 (quoting *De Beers*, 325 U.S. at 222–223).

[24] 527 U.S. at 322.

[25] [1975] 2 Lloyd's Rep. 137, CA.

[26] *Grupo Mexicano*, 527 U.S. at 328, n.9 (quoting *Nippon Yusen*, n.25 above, at 138).

[27] [1975] 2 Lloyd's Rep. 509.

[28] See *Grupo Mexicano*, 527 U.S. at 328 (citing Supreme Court Act of 1981, § 37, 11 Halsbury's Statutes 966, 1001 (1991 reissue)).

[29] *Grupo Mexicano*, 527 U.S. at 328.

[30] *ibid.*, at 329.