CHAPTER ONE

INTRODUCTION

A. Definition

Injunctions have been classified in various ways by textbook writers.

A distinction is usually drawn between interlocutory and final injunctions. Final injunctions are granted only after a full determination of the rights of the parties, while interlocutory injunctions usually apply until the substantive determination by the court of the rights of the parties. It is therefore not surprising that the fundamental principle for interim injunctive relief is for the court to take whichever course that appears to carry the lower risk of injustice until trial (see *Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* [1992] 2 SLR(R) 1). Indeed, some cases in Singapore simply proceed with this consideration in mind in determining the issue of whether interim injunctive relief should be granted. See, for example, *Beckkett Pte Ltd v Deutsche Bank AG and Another* [2005] SGHC 105 where Choo Han Teck J was 'persuaded that many questions will have to be asked at trial and that a *strong* prima facie case for an injunction had been made out on the issues' (ibid at [2]) but nevertheless declined granting interim relief after considering 'whether an order granting the injunction prayed for would create more prejudice or unfairness than an order not granting it' (ibid at [7]).

The typical injunction is the negative or prohibitory injunction. It restrains or forbids the respondent from engaging in a wrongful act such as breaching a trust, passing off goods or breaching a contract. Less common, though extremely useful, is the mandatory or positive injunction. It directs the respondent to perform a positive act, such as to reduce the height of a boundary wall built in breach of contract.

As clarified by the Singapore Court of Appeal in *Tay Long Kee Impex v Tan Beng Huwah* [2000] 1 SLR(R) 786 at [46], there is no material difference between the terms 'interim injunction' and 'interlocutory injunction'.

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The interlocutory injunction is a useful weapon to have in a litigant's armoury. Its possible applications are virtually limitless as a court can order an interlocutory injunction whether or not a claim for a permanent injunction is included in the originating process (O 29, r 1(1), Rules of Court).

B. Jurisdiction

1. High Court

The Singapore High Court is specifically conferred with the power to provide for the interim preservation of property the subject-matter of any cause or matter by injunction by paragraph 5 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

A more general power is given by s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) to the High Court to grant an injunction by an interlocutory order of the court, either unconditionally, or upon such terms and conditions as the court thinks just where it appears to the court to be just or convenient that such order should be made. Moreover, the High Court, being a superior court, has the inherent jurisdiction, which is expressly preserved by O 92 r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), to make any order necessary to prevent injustice or to prevent an abuse of the process of the court.

The procedure for the application for an interlocutory injunction is provided by O 29 r 1 of the Rules of Court. The rest of O 29 provides for other forms of order that may be made in specific instances such as the preservation of subject matter and taking of samples.

A practice direction now enables a Registrar to hear an urgent application for an interim injunction on an ex parte basis although all applications for Mareva injunctions and Anton Piller orders will be heard by a Judge (Supreme Court Practice Directions, paragraph 42). See also O 32 r 9 of the Rules of Court which provides that a Registrar may transact all such business and exercise all such authority and jurisdiction as may be transacted and exercised by a judge in chambers.

2. Subordinate Courts

Section 31(1)(a) of the Subordinate Courts Act (Cap 321, 2007 Rev Ed) gives a District Court in Singapore the jurisdiction to grant such relief, redress or remedy or combination of remedies, either absolute or

conditional, as ought to be granted or given by the High Court and in as full and ample a manner. In addition, s 32 of the Act provides that a district judge has the jurisdiction in civil proceedings to make any order that might be made by a Judge of the High Court in chambers. By s 52 of the Subordinate Courts Act, a magistrate's court is given the same jurisdiction and powers conferred on the District Court by, inter alia, ss 31 and 32 of the Act. Section 4(10) of the Civil Law Act may also be relied upon for the courts.

Therefore, a District Court or a Magistrate's Court in Singapore, in relation to an action within its jurisdiction, will be able to exercise the like powers of the High Court.

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CHAPTER TWO

PROHIBITORY INJUNCTION

A delay between the time an action is commenced and the time judgment is delivered is almost inevitable. During this period, an interlocutory injunction may be granted in an appropriate case 'to prevent a litigant, who must necessarily suffer the law's delay, from losing by that delay the fruit of his litigation' (per Lord Wilberforce in *Hoffman-La Roche (F) & Co AG v Secretary of State for Trade and Industry* [1974] 2 All ER 1128 at 1146).

In most cases, the court is asked to grant relief to the applicant, at the expense and inconvenience of the respondent, at a stage when only affidavit evidence (or only an undertaking to file such evidence in cases of extreme urgency) or even without hearing the respondent if the application was made ex parte (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90).

As in other forms of equitable remedy, the interlocutory injunction is at the discretion of the court. Such discretion 'is not one to be exercised according to the fancy of whoever is to exercise the jurisdiction of equity, but is a discretion to be exercised according to the rules which have been established by a long series of decisions...' (per Lord Blackburn in *Doherty v Allman* (1878) 3 App Cas 709). In brief, the most basic requirements are that the applicant for the interlocutory injunction must have a cause of action recognised in law and that it must be shown that it will be just and convenient to grant such interlocutory relief (see *The Siskina* [1977] 3 All ER 803).

Since *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, the practice is for the courts to subject an application for interlocutory injunction which is prohibitory in nature to a series of tests to determine whether an injunction should be granted. The principles enunciated by Lord Diplock in *American Cyanamid* have been subject to various interpretations. For example, in *Fellowes & Son v Fisher* [1975] 2 All ER 829, Brown LJ classified Lord Diplock's principles into seven distinct

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tests. While the compartmentalisation of these principles is convenient, it is by no means rigid and the principles are merely guidelines. There are occasions when the court should deal with the matter more broadly and not go through the various steps suggested by Lord Diplock one by one (see, for example, Brown LJ's approach in *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 at 370). This is consistent with the *American Cyanamid* case where Lord Diplock said (ibid at 510) that the court's discretion ought not to be fettered by rigid rules.

A similar view that the *American Cyanamid* principles should not be applied as a rigid formula to interlocutory injunction applications has been taken in various cases across the Commonwealth (*Consolidated Traders Ltd v Downes* [1981] 2 NZLR 247; *Congoleum Corp v Poly-Flor Products (NZ) Ltd* [1979] 2 NZLR 560; *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 at 142).

Nevertheless, the *American Cyanamid* principles should generally be applied whenever appropriate (see *Federal Computers Services Sdn Bhd v Ang Jee Hai Eric* [1991] 2 SLR(R) 427; *Reed Exhibitions Pte Ltd v Khoo Yak Chuan Thomas* [1995] 3 SLR(R) 383 and *Re Fineplas Holdings Pte Ltd (formerly known as Tasinder Pte Ltd)* [2001] 1 SLR(R) 192).

A. The American Cyanamid Test

Broadly, the *American Cyanamid* principles require the applicant to show that:

(1) there is a serious question to be tried;

(2) if the applicant were to succeed at the trial, damages would not be adequate compensation for his loss;

(3) the balance of convenience lies in his favour;

(4) there are special circumstances in his favour or no special circumstances in favour of the respondent.

Although there is room for overlapping of the last three tests, the classifications are nevertheless convenient for the analysis of the requirements for granting an interlocutory order. In addition, the granting of an interlocutory injunction is subject to the usual equitable considerations.

1. The Fundamental Principle – Risk of Doing Injustice

However, in deciding whether to grant interim injunctive relief (be it prohibitory or mandatory in nature), the fundamental principle remains that the court should take whichever course that appears to carry the lower risk of injustice (*Chuan Hong Petrol Station Pte Ltd v Shell Singapore (Pte) Ltd* [1992] 2 SLR(R) 1).

Specifically, in the context of an application for an interim prohibitory injunction, the court's objective is to hold the balance as justly as possible until the substantial issues can be resolved (*Cambridge Nutrition Ltd v BBC* [1990] 3 All ER 523 at 535).

2. Serious Question to be Tried

An injunction is merely a form of remedy, like damages or an account of profits. A right to an injunction is not a cause of action, like a breach of duty of care or a breach of contract. An applicant for an interlocutory injunction accordingly must have a cause of action before the court will grant him any remedy. This is especially so when the court is asked to grant an interlocutory remedy without having the benefit of a full trial. If the applicant cannot show that he has a valid cause of action his application must fail (*RCA Sdn Bhd v Pekerja-Pekerja RCA Sdn Bhd* [1991] 1 MLJ 309; *Associated Newspapers Group plc v Insert Media Ltd* [1988] 2 All ER 420).

However, if the applicant can show that prima facie he has a valid cause of action, he need not go on to show in order to obtain interim injunctive relief that he will definitely succeed in that cause of action. He needs only to show that there is a serious question to be tried.

Prior to the decision of the House of Lords in the *American Cyanamid* case there was some uncertainty as to the degree to which the court had to be satisfied of the likelihood of ultimate success of the applicant's action. Expressed in a number of different ways, the previous cases broadly required the applicant to show at least a prima facie case (see *Stratford & Son Ltd v Lindley* [1964] 3 All ER 102), a *strong* prima facie case (see *Peru Republic v Dreyfus Bros & Co* (1888) 38 Ch D 348 at 362; *Challender v Royle* (1887) 36 Ch D 425; *Smith v Grigg Ltd* [1924] 1 KB 659) or, in some instances, a *probability of success* (see *Preston v Luck* (1884) 27 Ch D 497 at 506). Less stringent requirements were occasionally expressed, such as the need to show that there is 'certainly a

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case to be tried' (see *Jones v Pacaya Rubber and Produce Co Ltd* [1911] 1 KB 445 at 457).

The House of Lords in the *American Cyanamid* case [1975] 1 All ER 504 criticised the use of these expressions in no uncertain terms. Lord Diplock, ibid at 510, stated:

> Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as 'a probability', a 'prima facie case', or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief.

Instead, Lord Diplock, at 510, suggested that a *lesser* test must be satisfied and the 'Court no doubt must be satisfied that the claim is *not frivolous or vexatious*; in other words, that there is a serious question to be tried' (applied in *Reed Exhibitions Pte Ltd v Khoo Yak Chuan Thomas* [1995] 3 SLR(R) 383). Elsewhere in his Lordship's judgment, at 510, Lord Diplock also said that the application for interlocutory injunction must fail if the material available to the court 'fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial'.

As a general rule, once there is a serious question to be tried, it is irrelevant whether the court thinks that the plaintiff's chances of success in establishing liability are 90% or 20% (see *Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 at 373).

As shown by *Buckman Laboratories (Asia) Pte Ltd v Lee Wei Hoong* [1999] 1 SLR(R) 205, the prospects of the plaintiff's successs are generally investigated only to a limited extent during the injunction application. Odds against success do not defeat him unless there is no expectation of success.

The expression 'a serious question to be tried' was also considered in *Hong Kong Vegetable Oil Co Ltd v Wicker and others* [1977–1978] SLR(R) 65 where AP Rajah J held at [15]:

> 15 Principle 1 'provided that the court is satisfied that there is a serious question to be tried, there is no rule that the party seeking an interlocutory injunction must show a prima facie case'. I interpreted this principle to mean that once the court is satisfied that there is a serious question to be tried then the court is not to follow the previous practice of requiring

> a plaintiff to show a prima facie case before granting him an interim injunction. Therefore, in the instant case I was of the view that I had first to decide whether there is in fact and in law a serious question to be tried and again in my view implicit in 'a serious question to be tried' is the question *whether the action is properly conceived and whether all the proper, necessary and/or interested parties are before the court so that any order made by the court can properly and effectively be implemented. In my judgment, if these elements or any of them are not present then, because of non-compliance with this principle alone, the motion should stand dismissed.* [emphasis added]

3. Inadequacy of Damages

If there is a serious question to be tried, the next step in the analysis is to consider the adequacy of damages as remedies for the respective parties. In the *American Cyanamid* case [1975] 1 All ER 504 at 510, it is said that:

> the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial.
>
> If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff … the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial … he would be adequately compensated under the plaintiff's undertaking as to damages … If damages in the measure recoverable under such an undertaking would be adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason on this ground to refuse an interlocutory injunction.

Not only must the court consider whether damages will be an adequate remedy for the plaintiff, the court also has to consider the adequacy of damages from the defendant's point of view and determine whether the loss that may be suffered by the defendant during the same period will be adequately compensated by an award of damages made pursuant to the plaintiff's undertaking as to damages.

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It has generally been the case that the availability of equitable remedies depends upon whether there are adequate common law remedies. Therefore if the plaintiff's potential loss can be adequately recompensed by an award of damages, the basis for exercising the court's equitable jurisdiction does not arise (*WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088 at [106]; *Hong Kong Vegetable Oil Co Ltd v Wicker and others* [1977–1978] SLR(R) 65; *London and Blackwakk Railway v Cross* (1886) 31 Ch D 354 at 369). In addition, the adequacy of damages is relevant as it affects the extent to which the court can mitigate the loss suffered by a party in the event that the court is wrong in granting or failing to grant an interlocutory injunction. The adequacy of damages is also a factor in determining whether the potential loss is irreparable. As pointed out in *Re Fineplas Holdings Pte Ltd (formerly known as Tasinder Pte Ltd)* [2001] 1 SLR(R) 192 at [8], the burden is on the plaintiff to show that the defendant does not have means to pay appreciable damages (*Societe Generale and other v City Holdings (Pte) Ltd and another* [1990] 2 SLR(R) 528).

It is however respectfully submitted that inadequacy of damages as a threshold requirement before interim injunctive relief may be granted should be reconsidered by the Singapore courts in the light of the different approach that appears to have developed in New Zealand. The approach in New Zealand is to disregard 'hopelessly outdated jurisdictional concerns' and to consider the question of adequacy of damages as part of the wider question of what is the appropriate remedy (*Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623 at 631–632). The 'justice' approach to the grant of interim relief was emphasized by the New Zealand Court of Appeal in *TV3 Network Ltd v Eveready NZ Ltd* [1993] 3 NZLR 435 at 438: '… since the mingling of law and equity, … the remedy of injunction should be available whenever required by justice. To impose jurisdictional limits, as distinct from identifying factors which on practical grounds will tell against the discretionary grant of the remedy, would be a backward step'. See also *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 WLR 349 at 379 applied in *State Transport Authority v Apex Quarries Ltd* [1988] VR 187 at 193. Inadequacy of damages is, with respect, better viewed as a matter to be taken into account when the court exercising its discretion as to whether injunctive relief ought to be granted.

There are however several categories of loss which the courts have considered to be inadequately compensated by damages. Loss of goodwill is a type of loss which is hard to compensate and quantify

and would usually be an example of a case where damages are not an adequate remedy (*Reed Exhibitions Pte Ltd v Khoo Yak Chuan Thomas* [1995] 3 SLR(R) 383). Damages may also not be sufficient where there is a disruption in business (*Merchant Adventures Ltd v Grew & Co* [1971] 2 All ER 657). The loss of credibility, creditworthiness and standing in business circles which a managing partner, if excluded from management of the partnership business, suffers will not be adequately compensated by damages (*Arif v Yeo and another* [1989] 2 SLR(R) 236). Damages may also be inadequate if the defendant's financial means of paying substantial damages is suspect (*Evans Marshall & Co Ltd v Bertola SA* [1973] 1 All ER 992; *Morning Star Co-operative Society Ltd v Express Newspapers Ltd* [1979] FSR 113).

4. Balance of Convenience

After a court comes to the conclusion that there is a serious question to be tried and either: (i) considers that damages will not be an adequate remedy, or (ii) is unable to arrive at a clear decision on the adequacy of damages to the eventual successful party, it will go on to consider the balance of convenience. For it is 'where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises' (per Lord Diplock in the *American Cyanamid* case [1975] 1 All ER 504 at 511).

The description 'balance of convenience' has been described as an unfortunate expression by Sir John Donaldson MR in *Francome v Mirror Group Newspapers Ltd* [1984] 2 All ER 408 at 413. He said:

> Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are usually asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing, we are seeking a balance of justice, not of convenience.

Notwithstanding the correct distinction made by Sir John Donaldson MR between justice and convenience, the expression continues to be used as a convenient description of the process. In certain cases, the process is described as the 'balance of the risk of doing an injustice' (see *Cayne & Anor v Global Natural Resources plc* [1984] 1 All ER 225 at 237 applied in *Wu v Sky City Auckland Ltd* [2002] NZAR 441 at 450).

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Ltd v Transmarco Ltd [1989] 2 MLJ 408; *Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert* [1986] 2 MLJ 391). Conversely, when the court is discharging an injunction previously granted, it may order that the restraint on the defendant be continued pending appeal against the order to discharge (*Bryanston Finance Ltd v de Vries (No 2)* [1976] 1 All ER 25). Such injunctions pending appeal have been called Erinford injunctions after the *Erinford* case.

An Erinford injunction will be granted only where there is a likelihood of a successful appeal being rendered nugatory or if the plaintiff would not be adequately compensated in damages for the temporary damage between the date of hearing and the date when its appeal is heard (*Cocoa Processors Sdn Bhd v United Malayan Banking Corporation Bhd & Ors (No 2)* [1988] 3 MLJ 497).

CHAPTER FIVE

MAREVA INJUNCTION

A Mareva injunction or freezing order is an interlocutory order designed to prevent a defendant from negating the effect of a judgment which may be entered against him by disposing of his assets before execution on the judgment can be levied. The Mareva injunction essentially restrains a defendant from disposing of, removing or otherwise dissipating his assets. However, it acts *in personam* and not *in rem*; it does not confer on the plaintiff any security or priority over the defendant's assets (see *Cretanor Maritime Co Ltd v Irish Marine Management* [1978] 3 All ER 164).

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Together with the Anton Piller order (search order), the Mareva injunction (freezing order) are 'the law's two nuclear weapons' (*Bank Mellat v Nikpour* (1985) FSR 87 at 92). The law concerning these remedies is still evolving. The Mareva injunction is a major departure from the traditional common law principle that a person 'cannot get an injunction to restrain a man who is alleged to be a debtor from parting with his property' (per James LJ in *Robinson v Pickering* (1881) 16 Ch D 660; see also *Lister & Co v Stubbs* (1890) 45 Ch D 1).

In 1975, the English Court of Appeal in two cases, *Nippon Yusen Kaisha v Karageorgis* [1975] 3 All ER 282 and *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213 effected a radical change in the law when it granted interlocutory injunctions to restrain removal of the defendants' assets from the court's jurisdiction. The English courts derived jurisdiction to grant the injunctions by relying on the statutory provision contained in s 45(1) of the then UK Supreme Court of Judicature (Consolidation) Act 1925, which provided that:

> The High Court may grant a mandamus or an injunction or appoint a receiver, by an interlocutory order in all cases in which it appears to the Court to be just and convenient so to do.

The form of injunction granted in the two cases has now become known as the Mareva injunction.

A. Jurisdiction

In *Multi-Code Electronics Industries (M) Bhd and another v Toh Chun Toh Gordon and others* [2009] 1 SLR(R) 1000, Chan Seng Onn J held that the Singapore court's jurisdiction to grant or continue a Mareva injunction was founded under s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) (ibid at [116]). Section 4(10) of the Civil Law Act states:

> A mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the court, either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient that such order should be made.

The subordinate courts in Singapore can grant a Mareva injunction in the same way as the High Court in relation to claims within the subordinate courts' jurisdiction (see ss 32, 33 and 52 of the Subordinate Courts Act (Cap 321, 2007 Rev Ed)).

For the usual terms of and undertakings required of an applicant in connection with a local Mareva injunction order, see Form 10 of the Supreme Court Practice Directions. The sample worldwide Mareva injunction (together with the required undertakings to be given to the court) is contained in Form 9 of the same.

B. Scope of the Relief

Most Mareva injunctions are granted before judgment but Mareva injunctions can also be granted to a judgment creditor in aid of execution (see *Hitachi Leasing (Singapore) Pte Ltd v Vincent Ambrose and another* [2001] 1 SLR(R) 762 where Judith Prakash J approved the English decisions of *Stewart Chartering v C & O Managements SA, The Venus Destiny* [1980] 1 All ER 718 and *Orwell Steel Ltd v Asphalt and Tarmac (UK) Ltd* [1985] 3 All ER 747). See also *Faith Panton Property Plan Ltd v Hodgetts* [1981] 1 WLR 927 and *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 29. The Mareva injunction may even be granted in aid of execution of an order for costs only (see *Faith Panton Property Plan v Hodgetts* [1981] 2 All ER 877).

In *Camdex International Ltd v Bank of Zambia (No. 2)* [1997] 1 All ER 728 at 735, Phillips LJ however noted that a Mareva injunction granted after judgment was a relatively rare form of relief. This is because there is little need for this jurisdiction after judgment because of the ordinary

execution remedies that would be available (*Masri v Consolidated Contractors International Co SAL* [2007] EWHC 3010 (Comm)).

Initially, there was some doubt as to whether the Mareva injunction can be granted against a defendant resident within the court's jurisdiction. However, it is now well settled that the Mareva injunction can be granted against a defendant ordinarily resident within the court's jurisdiction (see *Barclay-Johnson v Yuill* [1980] 3 All ER 190).

The Mareva injunction is an ancillary relief and its availability is dependent on there being a pre-existing cause of action. The Mareva jurisdiction extends to cases where there is a danger that the assets will be dissipated within the court's jurisdiction as well as cases where there is a danger of removal of assets out of the jurisdiction (see *Prince Abdul Rahman v Abu Taha* [1980] 3 All ER 409).

The subject matter of a Mareva injunction can be tangible or intangible assets. Bank accounts, even joint accounts, chattels and choses in action can all be the subject matter of a Mareva injunction (see *Z Ltd v A-Z* [1982] 1 All ER 556; *CBS UK Ltd v Lambert* [1982] 3 All ER 237). Ships and aircrafts can be the subject matters of Mareva injunctions (see *The Rena K* [1979] 1 All ER 397 and *Allen v Jambo Holdings Ltd* [1980] 2 All ER 502). If the Mareva injunction is intended to cover a joint account, the order should expressly provide for it (see *Z Ltd v A-Z* [1982] 1 All ER 556 at 576). The Mareva injunction will also affect assets acquired by the defendant after the granting of the injunction (see *TDK Tape Distributors (UK) Ltd v Videochoice Ltd* [1985] 3 All ER 345).

1. Maximum Sum in the Mareva Injunction

The court will not usually grant a Mareva injunction to freeze all the assets of the defendant. The injunction order should specify a *maximum* sum equivalent to the plaintiff's claim. Only assets up to that sum specified in the injunction order will be frozen. This maximum sum is usually the sum claimed by the plaintiff from the defendant but the latter is free to deal with the balance of his assets (see *Z Ltd v A-Z* [1982] 1 All ER 556 at 565 and 575).

2. Living/Business Expenses as well as Legal Costs

If the defendant's assets are less than the plaintiff's claim, the injunction order should specify that the defendant is at liberty to use a certain sum per week or per month to meet his ordinary living expenses.

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The lifestyle and station of life of the defendant should be taken into consideration to determine the amount of expenses to be allowed (see *PCW (Underwriting Agencies) Ltd v Dixon* [1983] 2 All ER 697; *TDK Tape Distributors (UK) Ltd v Videochoice Ltd* [1985] 2 All ER 345). It should also be noted that a Mareva injunction does not prevent the defendant from borrowing money thereby increasing his total indebtedness (*Anglo Eastern Trust Ltd v Kermanshahchi* [2002] EWHC 1702 (Ch); *Deputy Commissioner of Taxation v Hickey* [1999] FCA 259 at [32]).

The Mareva injunction should also not restrain the defendant from using his assets to meet ordinary business expenses. Payments made in good faith in the ordinary course of business should be allowed (see *The Angel Bell* [1980] 1 All ER 480; *Canadian Pacific (Bermuda) Ltd v Nederkoorn Pte Ltd and another* [1991] 2 SLR(R) 738).

As confirmed by Lee Seiu Kin JC in *Tribune Investment Trust Inc v Dalzavod Joint Stock Co* [1997] 3 SLR(R) 813, if the defendant enjoined can show that the purpose he wished to use the frozen assets was a purpose which was bona fide and in accordance with an established course of trade, it would be a misuse of the Mareva jurisdiction to require the defendant to change his method of trading or require him to use assets presumably designated for another purpose: ibid at [19] and [20]. The application to use the asset enjoined in Singapore to pay the defendant's creditors was however dismissed on the facts of that case as the defendants did not provide evidence of their current financial position. Lee JC also exercised more caution as the debtors were outside the jurisdiction of the Singapore courts. See also *Goumas v McIntosh* [2002] NSWSC 713 at [22]–[23].

The court will also allow the defendant to use a reasonable amount of his assets to meet the costs of defending legal proceedings against him (see *Bank Bumiputra Malaysia Bhd v Lorrain Esme Osman* [1990] 3 MLJ 481).

C. Worldwide Mareva Injunctions

For centuries, equity has exercised jurisdiction over persons amenable to its jurisdiction to order them to do, or to refrain from doing, an act abroad (*Penn v Lord Baltimore* (1750) 1 Ves Sen 444). For example, it is this jurisdiction that empowers the courts to issue anti-suit injunctions.

Based on this same *in personam* jurisdiction, the Singapore courts may grant worldwide Mareva injunctions restraining defendants from

dealing with their assets all over the world. In *SSAB Oxelosund AB v Xendral Trading Pte Ltd* [1991] 2 SLR(R) 81 at [15], Lai Siu Chiu JC, endorsing English authorities cited to her Honour, held that a worldwide Mareva injunction could be ordered only in *very exceptional circumstances*. This statement was *expressly* endorsed by the Singapore Court of Appeal in *Wallace Kevin James v Merrill Lynch International Bank Ltd* [1998] 1 SLR(R) 61 at [18].

The existence of sufficient assets within the jurisdiction to afford protection to the applicant may be a good reason for refusing a worldwide Mareva injunction. Conversely, insufficient assets within the jurisdiction to meet the plaintiff's claim may be a good reason for extending the Mareva injunction to assets outside the jurisdiction (*Derby & Co Ltd v Weldon (Nos 3 and 4)* [1990] Ch 65.

In *Republic of Haiti v Duvalier* [1989] 1 All ER 456; *Roseel NV v Oriental Commercial and Shipping (UK) Ltd* [1990] 3 All ER 545 and *Derby & Co Ltd v Weldon (No 1)* [1989] 1 All ER 469, worldwide Mareva injunctions were granted in pre-trial situations.

Subsequently, in *Credit Suisse Fides Trust v Cuoghi* [1997] 3 All ER 724, the English Court of Appeal moved away from earlier authorities and held that the worldwide freezing injunction can be granted in circumstances in which 'it would be expedient' rather than being limited to a situation in which exceptional circumstances justified the order, which appears to be a relaxing of the applicable standard. See also *Refco Inc v East Trading Co* [1999] 1 Lloyd's Rep 159; *Motorola Credit Corporation v Uzan (No 2)* [2004] 1 WLR 113 which appear to support the same trend.

It is respectfully submitted that the 'exceptional circumstances' test endorsed by the Singapore Court of Appeal in *Wallace Kevin James* may have to be re-considered in the light of modern times. The notion of the exercise of the jurisdiction in relation to foreign assets being exceptional derives from the understandable caution when the jurisdiction was first exercised. There is no reason in principle why a worldwide Mareva injunction should not be ordered where it would be expedient to issue such relief to achieve the ends of justice.

Even prior to the English cases discussed above, the Australian courts took the lead and have frequently granted Mareva reliefs in respect of foreign assets (see *Ballabil Holding Pty Ltd v Hospital Products Ltd*

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[1985] 1 NSWLR 155; *Coombs & Barei Construction Pty Ltd v Dynasty Pty Ltd* (1986) 42 SASR 413).

D. Scope of Relief

Strictly speaking, the Mareva injunction is intended to affect the assets in the ownership of the defendant (see *Oceanica Castelana Armadora SA v Mineralimportexport, The Theotokos* [1983] 2 All ER 65). Where the Mareva injunction may affect assets which may belong to third parties, the court will not extend the injunction to such assets unless there are good and exceptional reasons (see *SCF Finance Co Ltd v Masri* [1985] 2 All ER 747).

In *OCM Opportunities Fund II, LP and others v Burhan Uray (alias Wong Ming Kiong) and others* [2004] 4 SLR(R) 74, Belinda Ang J helpfully clarified at [57]:

> … The Mareva jurisdiction extends to all assets, whether tangible assets or mere choses in action, *provided that the defendant is the legal or beneficial owner of them*: see The Practice and Procedure of the Commercial Court (5th Ed, 2000) at 138. Salary, like fees and commission, is a chose in action and is capable of being caught by an injunction. A monthly salary that is paid into a bank account is caught by an injunction as and when it is paid into the account. Paragraphs (1) and (2) of the Mareva order under the heading 'Exceptions to this Order' were aimed at D10's trade income as well as investment income. [emphasis added]

Simply put, the assets of a third party generally cannot be subject to a Mareva injunction. In *Westpac Banking Corp v Gill* (No 1) (1987) 2 PRNZ 52 (approved in *Federal Bank v Hadkinson* [2000] 2 All ER 395), Heron J discharged an injunction where the plaintiff was unable to satisfy the court that the defendant had a beneficial interest in assets owned by the trustees of a family trust.

It has been held in *Lee Sai Poh and others v Vejayakumar and another* [1997] 1 SLR(R) 1017 that where a plaintiff has a *proprietory* claim to assets in the hands of a defendant, a Mareva injunction ordered against the defendant could also operate as an injunction for the preservation of property pending trial if it was appropriate to do so. See also *CHS CPO GmbH and Another v Vikas Goel and Others* [2006] SGHC 49 at [19]–[21].

E. Procedure

The Mareva injunction is basically a special variant of the interlocutory injunction. As such, the basic rules of practice and procedure discussed earlier apply to an application for a Mareva injunction. Nevertheless, there are a few important matters in a Mareva application which ought to be noted.

A Mareva injunction is sought because of the fear of the defendant dissipating his assets. Thus the application is usually made ex parte and in chambers.

In paragraph 42 of the Supreme Court Practice Directions, it is stated:

> 42. Mareva injunctions and search orders
>
> (1) Pursuant to Order 32, Rule 9 of the Rules of Court, the Honourable the Chief Justice has directed that applications for Mareva injunctions and for search orders, whether made on an ex parte or inter partes basis, should be heard by a Judge in person. For the avoidance of doubt, all other ex parte applications for interim injunctions may be heard by a Registrar.
>
> (2) Applicants for Mareva injunctions and search orders are required to prepare their orders in accordance with the following forms in Appendix A of these Practice Directions:
>
> (a) Form 8: Search order;
>
> (b) Form 9: worldwide Mareva injunction; and
>
> (c) Form 10: Mareva injunction limited to assets within the jurisdiction.
>
> (3) The language and layout of the forms are intended to make it easier for persons served with these orders to understand what they mean. These forms of orders should be used save to the extent that the Judge hearing a particular application considers there is a good reason for adopting a different form. *Any departure from the terms of the prescribed forms should be justified by the applicant in his supporting affidavit(s).*
>
> (4) The applicant should undertake not to inform any third party of the proceedings until after the return date.

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(5) Wherever practicable, applications should be made sufficiently early so as to ensure that the Judge has sufficient time to read and consider the application in advance.

(6) On an ex parte application for either a Mareva injunction or a search order, an applicant may be required, in an appropriate case, to support his cross-undertaking in damages by a payment into Court, the provision of a bond by an insurance company, a banker's guarantee or a payment to the applicant's solicitor to be held by the solicitor as an officer of the Court pending further order.

Applications for search orders

(7) It was suggested in *Universal Thermosensors Ltd v Hibben* [1992] 3 All ER 257 at 276 that the order be served by a supervising solicitor and carried out in his presence and under his supervision.

(a) The supervising solicitor should be an experienced solicitor who is not a member or employee of the firm acting for the applicant and who has some familiarity with the operation of search orders. The evidence in support of the application should include the identity and experience of the proposed supervising solicitor. These guidelines are equally applicable in the local context and the Judge in his discretion may, in appropriate cases, require a supervising solicitor.

(b) Where the premises are likely to be occupied by an unaccompanied woman, at least one of the persons attending on the service of the order should be a woman.

(c) Where the nature of the items removed under the order makes this appropriate, the applicant will be required to insure them. [emphasis added]

These guidelines should be adhered to regardless of whether the substantive proceedings are commenced in the Supreme Court or the Subordinate courts in Singapore.

The affidavit in support of the ex parte application must state why there is a real risk that the defendant will dissipate his assets (see *The Ninemia* case [1984] 1 All ER 398). As in all ex parte applications, full and frank disclosure of all material matters must be made in the affidavit. In fact, it has been said that the rule requiring full disclosure is especially important in the context of the draconian remedy of the Mareva injunction (see *Bank Mellat v Nikpour* [1985] FSR 87 at 92). When the affidavit is sworn by the plaintiff or his authorised representative, it is also advisable

to state in the affidavit that the plaintiff undertakes to abide by any order the court may make as to damages suffered by the defendant as a consequence of the order applied for (see generally *Third Chandris Shipping Corpn v Unimarine* [1979] 2 All ER 972 at 984 and 985).

The draft injunction order must set out precisely the terms of the injunction applied for as well as the usual undertakings (see *Lock International plc v Beswick* [1989] 3 All ER 373). For the usual terms and undertakings in connection with a local Mareva injunction order, see Form 10 of the Supreme Court Practice Directions. The sample worldwide Mareva injunction is contained in Form 9 of the same.

The usual undertakings will include the following:

(1) an undertaking to abide by any order the court may make as to the payment of damages should the defendant sustain any by reason of the order; and

(2) an undertaking to indemnify any person other than the defendant, its servants or agents to whom notice of the order is given, against any reasonable costs incurred as a result of complying with the order.

See *Searose Ltd v Seatrain (UK) Ltd* [1981] 1 All ER 806 and *Z Ltd v A-Z* [1982] 1 All ER 556 at 565.

The injunction order should also:

(1) state a specific maximum monetary amount which will be affected by the order;

(2) identify as precisely as possible the assets to be affected by the order;

(3) provide that it does not prevent a bank affected by the order from exercising any right of set-off he may have against the defendant; and

(4) provide that the defendant and any other person affected by the order may apply to set aside or vary the order upon giving notice to the plaintiff's solicitors.

See *Z Ltd v A-Z* [1982] 1 All ER 556 at 564 and 565.

To enable committal proceedings to be raised for a breach of the injunction, the injunction order should contain a penal notice in the prescribed form (Form 81, Rules of Court (Cap 322, R 5, 2006 Rev Ed))

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