MAREVA INJUNCTIONS

by

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The ten years that Mareva injunctions have been recognised by the law have seen a more rapid development than in any other doctrine of law or remedy. It is unnecessary to explain the basic nature of the remedy or its transition from relief directed against foreigners, threatening to remove assets from within the jurisdiction, in order to avoid apprehended judgement against them, to residents disbursing assets locally situated but with the same objective in mind. The evloution has been traced by many writers whose work is referred to by Mr K J Martin in his article "Mareva Injunctions" (1985) 59 ALJ 22.

The one constant through the ten years of change has been the raison d'etre for the grant of relief. As was said by the New South Wales Court of Appeal in Riley McKay Pty Limited v McKay 1982 1 NSWLR 264 at 276:

> "The basis of jurisdiction is founded on the risk that the defendant will so deal with his assets that he will stultify and render ineffective any judgement given by the Court in the plaintiff's action, and thus impair the jurisdiction of the Court and render it impotent properly and effectively to administer justice in New South Wales. As has appeared, the jurisdiction to grant the injunction is not to be exercised simply to preclude a debtor from dealing with his assets, and in particular to prevent him from using them to pay his debts in the ordinary course of business. It is directed to dispositions which do not fall within this category and which are intended to frustrate, or have the necessary effect of frustrating, the plaintiff in his attempt to seek, through the Court, a remedy for the obligation to which he claims the defendant is subject."

Somewhat in the same way as has been the case with tax avoidance, those wishing to avoid the impact of the application of this principle have devised new methods to further the aims sought to be proscribed by the remedy and it then fell to the courts to determine whether or not it was appropriate to extend the reach of the remedy in order to nullify the attempts to avoid. In the effort to ensure that the remedy is not avoided by subterfuge, courts both in this country and in England have had to explore the reach of the remedy and grapple with its applicability in new areas. It is to a trilogy of such decisions that I should like to direct attention this morning.

Probably the most commonplace problem in this context which arises at the present time is where, at the time of commencement of proceedings against the defendant, it is believed that assets have already been passed out of the defendant's name to members of his family or to companies or trusts controlled by him. A recent example of this problem was the factual situation confronting Clarke J in Vereker v Choi. Mr Choi was one of the directors of Dominican Finance Limited, a deposit taking company in Hong Kong. An action was brought against him in Sydney by the plaintiff alleging an oral guarantee in respect of $750,000.00 placed on deposit with Dominican Finance Limited in Hong Kong. The plaintiff sought a Mareva injunction to immobilise some half a million dollars standing to the credit of Mrs Choi. The plaintiff claimed that the moneys came to Mrs Choi from Mr

Choi. Mrs Choi alleged that the moneys were borrowed by her, or given to her by members of the family other than her husband. Justice Clarke granted a Mareva injunction and an appeal was taken to the Court of Appeal but the matter was compromised before the appeal could be heard.

At the time the matter was before Clarke J, neither the judge nor counsel was aware of the decision of the English Court of Appeal in S C F Finance Co Limited v Masri 1985 2 AER 747. The factual situation in that case parallelled, for relevant purposes, that which confronted Clarke J. However, not only did the primary judge in England grant a Mareva injunction but he also ordered a trial of a preliminary issue to determine the beneficial ownership of the moneys standing to the credit of the wife in that case. The wife took an appeal to the Court of Appeal on the basis that there was no jurisdiction to grant injunctive relief against her since she was not a party to the action and no cause of action was alleged against her. The judgement of the Court was delivered by Lord Justice Lloyd who, of course, until recently was a Judge of the Commercial Court and indeed had some role to play at an earlier stage of the proceedings in that Court. He said (p 749):

> "So counsel for the second defendant (the wife) suggested that the Court decide first a preliminary point of law; what happens when there is a dispute between the plaintiff and a third party as to the ownership of assets within the jurisdiction? What happens if the plaintiff says that the assets belong to the defendant and the defendant says that they do not or if a third party claims they belong to him? Counsel submits that it is sufficient if the third party claims the assets. Unless the

> claim is obviously unsustainable, the Court is then bound to give effect to that claim, without further enquiry. Hirst J rejected that submission. He held that it will be necessary to have a lengthy hearing to determine the beneficial ownership of the $400,000. ... Where the assets appear to belong to a third party, the Court will not have granted the order in the first place without good reason. I can see no reason whatever why the Court should be obliged to discharge the injunction on the mere say-so of the third party. If the Court were so obliged, then Mareva jurisdiction would be in danger of being nullified at the whim of the unscrupulous. If a Court were not permitted to enquire into a third party's claim, but were bound to accept it at its face value, how could the Court be satisfied that any transfer of assets to the third party had occurred before rather than after the injunction? Every consideration of policy and convenience points, in my view, against the principle which counsel for the second defendant asserts."

I completely agree with the course suggested by the English Court of Appeal, notwithstanding that it is somewhat difficult to reconcile with principle. In the ordinary course, assuming that judgement is recovered by the plaintiff against the husband, it would then be a matter for the Official Receiver of the husband's estate to institute proceedings against the wife to recover the property and make it available for distribution between the creditors of the husband. Until there is a sequestration order against the husband, it is difficult to see on what basis assets, which have been passed to a wife by way of gift, can be recoverable. In other words, in granting a Mareva injunction, there is an underlying assumption not only that the plaintiff will succeed against the husband, but that the husband's estate will be insufficient to satisfy the judgement, that a bankruptcy will follow and that

proceedings will then be taken to recover the property from the wife. It is certainly a far cry from the day when Mareva injunctions first came into vogue and it was a condition precedent to the grant of injunctive relief that there should be a subsisting cause of action against the party against whom the order is made. In situations of the kind now considered, the plaintiff has no cause of action against the wife of any kind. Nonetheless, for the reasons given by Lloyd LJ, it is necessary that, in appropriate cases, the court should have jurisdiction to make an order.

In order to meet more sophisticated attempts to put assets beyond the reach of the plaintiff, the scope of Mareva injunctions has been taken even further in two recent decisions that have not yet been reported. Once again, an injunction was granted by Clarke J in circumstances which bore some resemblance to the facts considered by the English Court of Appeal in April 1985. The decision of Clarke J has been the subject of an appeal and we are awaiting the decision of the New South Wales Court of Appeal. The decision of the English Court of Appeal was given on 3 April 1985 in the matter of SIB Limited v VWAG, the Court comprising Cumming-Bruce LJ and Hollings J. The primary judge granted injunctions restraining the defendant from disposing of shares in foreign companies and of his rights, interests and benefits under the terms of trusts entitled to English assets, or to shares in foreign or English companies entitled to any English assets, and most significantly from

directing or procuring disposal or charge of English assets by any such company or trust. Furthermore, the defendant was required to disclose information about the operation of foreign companies and trusts. The evidence disclosed, prima facie, a strong case of deceit and breach of fiduciary duty against the defendant as well as an elaborate and ingenious scheme devised by him whereby his personal assets were organised in such a way that they were held by foreign and English corporations and trusts in a manner that effectively concealed his true beneficial interest in English assets. The plaintiff claimed that the first defendant brought into existence an elaborate structure of corporations and trusts in order to make it impracticable for the liquidators of the plaintiff companies to reap the fruits of any legal proceedings they might take. By the mechanisms of shares held by nominees and of trusts in which the first defendant was nowhere named as beneficiary, in trust deeds which gave the trustees power to add to the beneficiaries, an appearance was given of a legal and beneficial holding of English assets independent of the first defendant. However, in the Court's view, a strong prima facie case was established that the whole structure was but a facade behind which the first defendant was able to control and manipulate the operations of the company directors and trustees who purported to exercise independent powers. The defendant submitted that the evidence went no further than showing that the first defendant held shares registered in foreign corporations. Further, there was a distinction between

discovery, the object of which was to police injunction, and the power to order discovery establish the nature and extent of the defendant's interest in assets within the jurisdiction. In the submission of the defendant, the most that was established was that the English assets in question were vested in foreign corporations, or trusts, in which the first defendant was not a named beneficiary and that the fact that he held shares in such corporations only showed entitlement to the foreign assets. The plaintiff contended that if the Court was satisfied that the legal structure, that is to say the corporations and the trusts, had some reality but nonetheless constituted vehicles over which the defendant exercised substantial or effective control Mareva injunction was appropriate in order to prevent disposal of English assets and that discovery by interrogatories was appropriate in order to ascertain the nature and extent of the defendant's interest. In essence, the Court upheld the plaintiff's submissions and, relying upon cases such as Wallersteiner v Moir 1974 3 AER 217, considered that the Court will use its powers to pierce the corporate veil if that was necessary to achieve justice irrespective of the legal efficacy of the corporate structure under consideration. The Court said in part:

> "We hold that the evidence sufficiently establishes that over a period of years the servants or agents of the first defendant have on the first defendant's instructions brought into existence the sophisticated and intricate network of inter-related English and foreign companies and foreign trusts as a mechanism through which the first defendant could at will dispose of his English assets."

In the result, the appeal was dismissed, although it was contemplated that there might be an appeal to the House of Lords. It requires no words from me to make clear how the reach of Mareva injunctions is expanded by an approach such as that with which the judgement is pregnant.

I will complete the trilogy of recent cases with a reference to the decision in Hospital Products Limited v Ballabil Holdings Pty Limited 1984 2 NSWLR 662 from which an appeal was dismissed by the Court of Appeal in a decision as yet unreported given on 4 March 1985. Essentially the question which arose was whether the remedy of a Mareva injunction was confined to assets within the jurisdiction or whether a defendant properly before the Court could be enjoined from disposing of foreign assets in aid of the illicit purpose. I perceived the problem to be this:

> "Why should the attempt of a defendant within the jurisdiction to make himself judgement proof in relation to foreign assets be any more permissible or any less inimical to the proper administration of justice than similar action with respect to locally owned assets? It will be appreciated that, in the circumstances assumed, courts of the country where the asset is located have no jurisdiction to make orders of any kind against the defendant. There is no cause of action capable of being litigated within the jurisdiction; there is no defendant within the jurisdiction. In a similar way, a question arises as to the justification for treating an asset located in a foreign jurisdiction differently from that within the jurisdiction in circumstances where a defendant has been wise enough to remove an asset shortly before the grant of a Mareva injunction. Is there premium to be placed on foresight in removal of assets before the grant of injunctive relief where the purpose is to render the defendant judgement proof?"

I recognised that there were powerful dicta to suggest that

the answer to the questions which I posed should be adverse to the grant of relief. However, for the reasons which I gave, I decided both that there was jurisdiction and that relief should be given. My decision was upheld but the members of the Court of Appeal indicated somewhat differing approaches. The Chief Justice took note of the fact that I expressed my conclusion in terms which do not necessarily attach significance to the fact that the injunction was directed to assets or their product that were present within the jurisdiction when the litigation commenced but which were thereafter, but before the grant of the injunction, removed from the State. He said:

> "It may be that this is not a critical fact in finding jurisdiction but it is not necessary to go so far in the present case."

Thus, he based his finding of jurisdiction on the fact mentioned. He accepted that at some time in the future it will be necessary to determine authoritatively whether initial presence of assets within the jurisdiction was a necessary prerequisite. Glass JA came to a conclusion similar to that of the Chief Justice. The third member of the Court, Priestley JA, said something which may be thought surprising. He said that:

> "Unless and until the decision in Riley McKay is overruled or varied it states the law in New South Wales."

It would tend to suggest that His Honour does not consider the decision to be correct. He then went on to say that once one accepts that the Court has power to grant a Mareva injunction, "there is no reason why that injunction should be limited to assets of the company within New South Wales".

In other words, he did not restrict the scope for the exercise of power in the way that the Chief Justice and Glass JA thought appropriate for the purposes of the case before them.

It cannot be doubted that, as time goes on, other and different steps will be taken by persons and companies to try and avoid the operation of a Mareva injunction and it will be interesting to see what the response of the courts will be. Indeed, if the House of Lords does grant leave to appeal in the SIB case a considerable amount of light may be shed on the court's jurisdiction to grant injunctions of this nature.

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