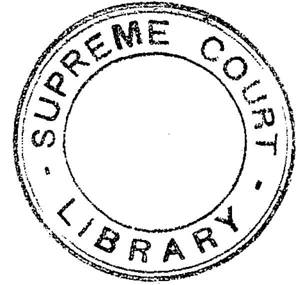

THE EXTRA-TERRITORIAL REACH OF THE MAREVA INJUNCTION*

by

JUSTICE ANDREW ROGERS**

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Can Mareva injunctions be granted against defendants who are out of the jurisdiction of the Court and in respect of foreign assets? As a matter of discretion should such orders be made? If so, what form should orders take? [1]

JURISDICTION

Mareva injunctions are a remedy evolved by the ingenuity of judges, particularly Lord Denning, in responding to the changing needs of the commercial community. The fact that the remedy, initially in England, and still in Australia, had no statutory basis, had important consequences in the evolution of the boundaries of relief. Because it was the creature of judge-made law, the courts were free to change and extend the boundaries as more experience was gained in the working of the order.

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[1]Analogous problems have been the subject of a helpful examination by Professor Gottwald "Limits to Extraterritorial Effects of Judicial Acts (1990) 9 C.J.Q. 61.

The other feature of the remedy that had an important effect on the reach of the injunction, was the basis on which it rests. In Australia, in Turner v Sylvester [2], there was a review of the largely English authorities as they then stood, and whilst expressing difficulty with the jurisdictional basis identified by Lord Denning, the judgment followed the path charted by Lord Goff, then a trial judge, in a number of cases in 1980-1981. As that learned judge said in A v C [3]:-

> "The principle underlying the jurisdiction is the prevention of an abuse, the abuse by a foreign resident causing assets to be removed from the jurisdiction, in order to avoid the risk of having to satisfy any judgment which may be entered against him in pending proceedings in this country."

Subsequent authority has made clear that the statement was too narrowly based. However the central concept in Lord Goff's statement remains unchallenged. That a court has inherent power to prevent abuse, is clear beyond argument. It is an abuse to dissipate one's assets for the purpose of ensuring that there remain no assets sufficient to satisfy a judgment.

Placing the jurisdiction on this basis emphasises a number of factors. First, the order of the court does not operate to provide security against any future judgment. In other words,

[2] 1981 2 NSWLR 295

[3] 1980 2 All ER 347, 351

although the defendant is precluded from disposing of assets, the order does not prevent payment of other debts in the ordinary course of business, or utilising the assets of the defendant for normal purposes of living expenses, costs of litigation, and other expenditures which the defendant has to make, and which are not calculated simply to dissipate assets.

Secondly, the order does not operate in rem. It is an order in personam. It is true that there are statements in the authorities to the contrary effect. Thus Lord Denning said in Z Ltd v A-Z & AA-LL (Ltd) [4] that the order operates in rem. In Babanaft International Co S.A. v Bassatne [5] Kerr LJ put the position more accurately when he said :-

> "...although Mareva injunctions are orders made in personam against defendants, they also have in rem effect on third parties....Although the passage in the judgment of Lord Denning M.R. in Z Ltd v A-Z and AA-LL (1982) QB 558, 573, headed "Operation in rem" may well go too far in a number of respects, there cannot be any doubt that Mareva injunctions have a direct effect on third parties who are notified of them and who hold assets comprised in the order."

Even this concession as to the effect of a Mareva injunction was rejected by Lord Donaldson in Derby (Nos 3 & 4) (infra

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[4] 1982 1 QB 558, 573

[5] 1990 Ch 13, 25

p9). Because the judgment is in personam, if the defendant is within the reach of the court, it should matter not if the assets in question are outside the jurisdiction.

Third, because the issue is whether or not there is a threatened abuse of the effectiveness of the court's order, so long as the threat is adequately proved, there should be less reluctance on the part of the court, than there might be in other circumstances, to reaching out by the order to prevent such a situation being brought about.

Initially, a Mareva injunction operated to prevent a foreign resident from removing assets from within the jurisdiction to make itself judgment-proof. It was early on recognised that the qualification that the defendant be a foreign resident had little logical justification. As long as the defendant was properly amenable to the jurisdiction of the court called upon to grant relief, residence was an immaterial matter. Again, it was illogical that restraining a defendant from committing an abuse of the court's function by disposal of assets should be restricted to removing assets from the jurisdiction of the court. Assets could, as easily, be dissipated within the jurisdiction. Thus, that qualification was also removed.

JURISDICTION

The question then, arose whether courts may grant relief in respect of foreign assets. In Intraco Ltd v Notis Shipping Corporation [6], Staughton J granted a Mareva injunction in respect of a Greek asset without turning his mind to any question of possible jurisdictional difficulty. His order was reversed by the Court of Appeal. No reasons were given.

In Hospital Products Ltd v Ballabil Holdings Pty Ltd [7], the judgment pointed out the seeming lack of logic in holding that a court was powerless to deal with a defendant resident within the jurisdiction, who, prior to the grant of relief, manages to transfer the whole of his assets, to Switzerland. Swiss courts would have no jurisdiction in relation to the assets, there would be no cause of action within that jurisdiction, and the defendant would not be resident within that jurisdiction. In order to satisfy the rationale for bringing the remedy into existence, it was essential that the court should hold that it had jurisdiction to make an order, in personam, in respect of the assets in Switzerland. On appeal the judgment was affirmed in Ballabil Holdings Pty.Ltd v Hospital Products Ltd [8]. Priestley JA agreed that there was no reason why a Mareva injunction should be limited to local assets. The two other

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[6] 1981 2 Lloyd's Rep.256

[7] 1984 2 NSWLR 662

[8] 1985 1 NSWLR 155

members of the court found it unnecessary to express a concluded opinion on this point.

In Bayer AG v Winter (No 3) [9], Hoffman J was willing to go part of the way. With all due respect, if the extract in the Times is an accurate re-statement of His Lordship's words, they may not be entirely appropriate. He seemed to take as the criterion for jurisdiction that the foreign court be willing to make orders similar in effect to a Mareva injunction, upon assets within its own jurisdiction. He seemed to contemplate that the judgment of the English court would be enforced by an order of the foreign court. Now that, it seems to me, overlooks the fact that the order operates in personam. The intervention of the local court should not be necessary.

Then the Court of Appeal in England in Ashtiani v Kashi [10], took the wrong turn. In the leading judgment, Dillon LJ gave four reasons why Mareva injunctions should not be granted in respect of foreign assets. First, it could well be oppressive to the defendant, that as a result of an order of an English court his assets everywhere should be frozen, or he should be subjected to applications for seizure orders in many other jurisdictions. With due respect, that is a proposition that I

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[9] Times 24 March 1986

[10] 1987 1 QB 888

find very difficult to accept. The injunction is granted on the basis that there is sufficient evidence of an attempt at abuse by the defendant. Why should a court treat such a defendant with tenderness? Secondly, His Lordship pointed out that it was difficult for the English court to control or police enforcement proceedings in other jurisdictions. As he said [11] "it is not very desirable that the English court should attempt to control such foreign proceedings, and the difficulties are underlined where, as here, the plaintiffs are not resident within the jurisdiction of the English court." Quite what the residence of the plaintiffs has to do with the matter, is not clear to me. The defendant was an Iranian national with British residency. Thirdly, the order involved an invasion of privacy. Fourth, an order for disclosure of assets could lead to the plaintiff obtaining security in some foreign jurisdiction. Neither of those two reasons seem to me to respond to the facts which gave rise to the need for an order. Oddly enough, towards the conclusion of his judgment, the Lord Justice seemed to be prepared to contemplate that special circumstances may justify an order in respect of foreign assets.

Lord Justice Neill rightly pointed out [12] , that the

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[11] ib p901

[12] ib p904

jurisdiction being in personam, there was no reason why an order should not be made in respect of foreign assets. He rested simply on the basis that as a matter of practice, such orders had not been made. Lord Justice Nicholls agreed with both judgments.

In 1988 the tide turned. Following earlier Commonwealth authority, the English Court of Appeal accepted that there is jurisdiction to make orders in respect of foreign assets. (cf Babanaft International Co SA v Bassatne [13], Republic of Haiti v Duvalier [14]; Derby & Co Ltd v Weldon (No1) [15] Derby & Co Ltd v Weldon (Nos 3 & 4) [16]; Derby & Co Ltd v Weldon [17]. Some of the Australian States (see Coombs and Barei Constructions Pty Ltd v Dynasty Pty Ltd [18] (Millhouse J) and National Australia Bank v Dessau [19]; (but cf Brereton v Milstein)[20] and Yandil Holdings Pty Ltd v Insurance Co of

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[13] 1990 Ch 13

[14] 1990 QB 202

[15] 1990 Ch 48

[16] 1990 Ch 65

[17] Unreported Court of Appeal 10 May 1990

[18] (1986) 42 SASR 413

[19] 1988 VR 521

[20] 1988 VR 508

North America[21] as well as the Federal Court of Australia (cf In Re Clunies Ross ex p Tottesdell [22] have so held.

I should mention that not only have there been orders restraining defendants from dealing with foreign assets but also wide ranging orders in aid of such Mareva injunctions have been made. Orders for disclosure of assets held world wide followed fairly naturally. It is the latest episode in the long running Derby v Weldon saga that represents the most striking advance.

As a result of the decision in Derby v Weldon (Nos 3 & 4) Receivers were in place in respect of the assets of the third defendant, a Panamanian company and the fourth defendant a Luxembourg company. Prior to the appointment of the Receivers and unknown to the plaintiffs, two Trusts were established in Lichtenstein. The trustees of one of the Trusts were individual Lichtenstein citizens, of the other Panamanian companies. It was conceded by the defendants that the two Trusts were formed to safeguard the assets against any possible future judgment. On these facts coming to light the Receivers' appointment was extended to the assets of the Trusts and the two Panamanian companies. By the time of the hearing some of

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[21](1986) 7 NSWLR 571

[22](1987) 72 ALR 241

the assets were located in Switzerland, and others ("the external assets") some £56 million were deposited by Swiss banks, on behalf of the trustees, elsewhere in Europe to take advantage of higher interest rates.

The dispute before the Vice-Chancellor, and eventually the Court of Appeal, was concerned with several different matters. First, the plaintiffs sought orders for the assets in Switzerland to be transferred to another country. Switzerland was not likely to recognise and enforce any judgment the plaintiffs may gain against the non-resident defendants who were served outside the jurisdiction. Additionally, Article 271 of the Swiss Penal Code made it an offence for the English-appointed Receivers to act in that capacity in Switzerland. On the other hand, a transfer of assets outside Switzerland would not have infringed Article 271. The Vice Chancellor refused the order, saying:-

> "I think this Court should hesitate long before taking steps, even though it may have power to do so under its right to act in personam, which require people to do things in foreign jurisdiction which may offend the sensibilities of the foreign jurisdiction in question, let alone requiring the doing of acts which may be unlawful by the law of the place where the act is to be done. In my judgment, the correct approach is to seek, if possible, to obtain the cooperation of the foreign court rather than seek to force people to do things in foreign countries under threat of penalty."(emphasis added)

On appeal, Dillon LJ recognised that this statement conformed with his own earlier stand in Ashtiani v Kashi, but accepted, in the light of more recent developments in extra-territorial Mareva law, that the approach was flawed. After rehearsing the object of Mareva injunctions , his Lordship continued:-

> "I see no reason why that should not extend, in principle and in an appropriate case, to ordering the transfer of assets to a jurisdiction in which the order of the English court after the trial of the action will be recognised from a jurisdiction in which that order will not be recognised and the issues would have to be relitigated if - which may not be entirely the present case - the only connection of the latter jurisdiction with the matters in issue in the proceedings is that moneys have been placed in that jurisdiction in order to make them proof against the enforcement without a full retrial in a foreign court, of any judgment which may be granted to the plaintiffs by the English court in this action or indeed if the only connection with the latter jurisdiction is financial, as a matter of controlling investments."

The order could be made. However, in the Court's discretion, the order was not made. Why not? Dillon LJ believed the voluntary concurrence of the trustees with the order would not be forthcoming. As there was little or no chance of the Swiss courts making an order in aid of the English order, Dillon LJ reasoned that the only sanction for disobedience would be to bar the Trustees from defending the action. But that would serve no practical purpose, as the other defendants would defend the proceedings, and these other defendants were the plaintiffs' major target. Though it seemed that the trustees would deal

with the Swiss assets in any way directed by the first and second defendants, it was unlikely that such a degree of control by the first and second defendants over the trustees could be established before the main trial so as to justify barring the first and second defendants from defending the action.

Staughton LJ also refused to grant this order. The thrust of his judgment was slightly different. He was obviously most concerned, for any number of reasons, at the number of Mareva applications and the interference with a defendant's affairs that this occasioned. With very great respect, the approach may pay insufficient regard to the rationale which informs the grant of this remedy. Whilst admitting that it was very inconvenient for the plaintiffs that the defendants deliberately transferred assets to the Swiss bank accounts, Lord Justice Staughton felt that:-

> "this should not by itself lead the English courts to adopt what I would regard as a drastic and wholly exceptional measure. Despite the plaintiffs' protests, it appears to me that the assets in Switzerland are safe from dissipation under the present regime."

Staughton LJ regarded it as material that the assets would not be disbursed in Switzerland, even though this fact would not assist the plaintiff in obtaining the assets to satisfy any subsequent judgment debt. Taylor LJ, the third member of the court, simply agreed with the other twojudgments.

Second, the plaintiffs sought continuation of orders that the external assets, including deposits in London, should not be returned to Switzerland. The Vice-Chancellor agreed. Though he felt that the assets properly belonged in Switzerland, he decided, in the very special circumstances. not to assist the defendants who had plainly trifled with the court. The defendants cross-appealed, seeking discharge of the orders, and an order that the assets be returned to Switzerland. The Court of Appeal refused to order that the external assets be returned to Switzerland. So to do would be contrary to the purpose of the Mareva injunction, which is to facilitate rather than hinder the execution of a local judgment. In dismissing the cross-appeal, Staughton LJ remarked that he was "unimpressed with the (defendants') argument that (upholding the cross-appeal) would avoid multiple litigation in different jurisdictions."

Thirdly, the Court directed that the foreign assets other than the ones still in Switzerland be placed in the sole name of the English Receiver. Unlike the order seeking to relocate the assets in Switzerland, the judges felt such an order would not be futile as there was a good chance that the relevant foreign countries would enforce the order against the trustees. The plaintiffs did not seek to have the assets in Switzerland transferred into the name of the Receiver as that could infringe Article 271 of the Swiss Penal Code.

With this somewhat lengthy introduction, I can turn to discuss the difficulties which may be posed by the grant of a Mareva injunction extending to assets world wide.

DISCRETION.

1. FUTILITY.

Should a Mareva injunction ever be refused, where it would otherwise by completely justified simply on the basis that there may be doubt about its enforceability? As I have said it is now clear that there is jurisdiction to make an order, notwithstanding that the assets are out of the jurisdiction, so long as the party against whom the order is made is amenable to the power of the court. Of course, the fact that the assets are outside the jurisdiction may affect the exercise of discretion. It is well established that the court has a discretion to refuse relief on the ground of futility if it appears that the probability of compliance with the is order small; Spry Equitable Remedies [23]. A clear example of this approach can be seen in the judgment of Dillon LJ in Derby & Weldon in exercising his discretion to refuse an order for the transfer of assets from Switzerland (supra p12). On the other side stands

[23] 4th Ed p 41

the approach exemplified by the judgment of Romer LJ in Re Liddell's Settlement Trusts [24] After rejecting the submission that an English Court had no jurisdiction to order a person resident abroad, who had been properly served abroad, to do an act abroad Romer LJ said [25]: "It is not the habit of this Court in considering whether or not it will make an order to contemplate the possibility that it will not be obeyed." Similarly Slesser LJ said [26] "We are not to assume that the lady will necessarily disobey the court" These statements and the approach they exemplify received the approval of Lord Scarman delivering the unanimous judgment of the House of Lords in Castanho v Brown & Root (UK) Ltd [27]. (Also see Kaye "Extraterritorial Mareva Orders and the Relevance of Enforceability" [28]

Brooking J put the better view with force and clarity in National Australia Bank v Dessai when he said [29]:-

> "One thing I regard as clear; it cannot be said that

[24] 1936 Ch 365

[25] ib p374

> the possibility that the defendant will defy the injunction is a reason for denying the existence of power to grant Mareva injunctions in respect of foreign assets, or asserting that, as a matter of practice, Mareva injunctions should not be granted in respect of such assets. Moreover,I should not wish to encourage the notion that a Mareva injunction prohibiting a defendant from dealing with foreign assets is likely to be refused, as a matter of discretion on the ground of his own probable failure to obey it. Before leaving the matter of enforcement, I should say that any practical difficulties that might in a given case, arise from the court's inability to deal with a foreign third party for contempt, is no reason for denying the power to grant Mareva injunctions concerning foreign assets, or asserting that, as a matter of practice, it will never, or only rarely, be exercised."

2. ENFORCEMENT.

It is all very well to proceed on the basis that defendants will abide by the order of the Court and that courts should not be deterred from making orders by an apprehension that the order may not be obeyed but what if that does happen? Absent statute, or treaty, a State will not recognise and enforce the judgment of another State unless, at the least, that judgment is final and conclusive, settling the dispute between the parties once and for all. Mareva injunctions are usually granted at an interlocutory stage of proceedings. Thus, at common law they are unlikely to be enforced by a court

in another country. In Perry & Ors v Zissis & Ors [30], the plaintiffs sought to enforce, inter alia, by the appointment of a receiver, two U.S. judgments in their favour. One was a final judgment the other an interlocutory judgment in the nature of provisional attachment. The Court of Appeal refused to countenance the use of methods of enforcement of English judgments in the case of foreign judgments. Relevantly for present purposes, Roskill LJ, delivering the principal judgment, said of the plaintiffs' counsel [31]:-

> "if he failed on a judgment that was final he could not hope to succeed upon a judgment that was interlocutory."

What about Mareva injunctions granted in aid of a final judgment, as occurred in Babanaft? There seems to be no direct authority on the point. However, Nygh Conflict of Laws in Australia [32] suggests that orders in personam will not be enforced unless they be judgments for a fixed debt. A Mareva injunction is not such an order; rather it is an order restraining the defendant from acting in a certain way. R. W. White, Enforcement of Foreign Judgments in Equity [33], argues that the rule requiring judgments to be for a monetary amount

[30] (1977) 1 Lloyd's Rep 607

[31] ib p615

[32] 4th Ed

[33] 9 Syd.Law Review 630 (1980-82)

never applied in equity. This argument appears to have been overlooked in Trade Practices Commission v Australian Meat Holdings Pty Ltd [34]. The trial judge refused to make an order for the divestiture from an English company of shares, held upon the London register, of a company incorporated in the U.K. Wilcox J was of the opinion that such an order, if made, would not be enforced by an English court.

The unreported decision of McPherson J in the Queensland Supreme Court in White v Verkouille [35] is of interest in relation to this problem. A court in Nevada gave default judgment against certain defendants, including Mr Verkouille, in an action for fraud, deceit, and misrepresentation. The plaintiffs were awarded compensatory and exemplary damages. This judgment was final and conclusive, and could be enforced, at the discretion of an Australian judge, at common law. The Nevada court also appointed Mr White as receiver on behalf of the American plaintiffs, granting him authority to act by proceedings "in and of attachment, execution, or foreign judgment and marshalling" of all assets belonging to Mr Verkouille wherever located in the world. Mr White sought recognition of his appointment in Queensland so he could recover assets located within Queensland. Should his

[34]1988 ATPR 40-876

[35]Unreported 15 December 1989

appointment have been recognised?

The Nevada order supplemented earlier judgments. It was made in aid of the enforcement of those judgments. In this way, it is analogous to the order in Babanaft. Neither the Babanaft Mareva nor the Verkouille appointment of a receiver were of themselves final judgments. They were both ancillary orders made to facilitate execution of the judgment which actually resolved the dispute. Thus, it was arguable that such orders cannot be recognised or enforced at common law. However, McPherson J felt that equity allowed him to recognise the appointment. His Honour quoted as authority, Goulding J in Schemmer v Property Resources Ltd [36];

> "...Goulding J in the Chancery Division in England accepted that there are cases in which "an English court will either recognise directly the title of a foreign receiver to assets located here or, by its own order, will set up an auxiliary receivership in England". He went on to say that to do either of those things the court must be satisfied of a sufficient connection between the defendant and the jurisdiction in which the foreign receiver has been appointed as to justify recognition of the foreign court's order. In my opinion that correctly states the principle upon which this Court acting in its equitable jurisdiction will aid in the enforcement of a foreign judgment."

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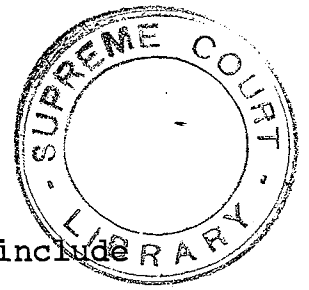
[36](1975) Ch.D. 273, 287



Other authorities supporting his Honour's judgment include Houlditch v Donegal [37], Didisheim v London & Westminster Bank [38], Pelegrin v Coutts & Co. [39], and Re Young, deceased [40]

It was necessary for McPherson J to distinguish the decision in Perry v Zissis. This His Honour did to his own satisfaction. It may be then that, at least in equity, an Australian court may recognise and enforce a Mareva injunction made by a foreign court in aid of final judgment.

The only judge so far who has made any concrete suggestion for any other method of enforcement has been Lord Donaldson MR. In Derby & Co v Weldon (3 and 4), he suggested a method for dealing with a recalcitrant respondent to a Mareva injunction. He said [41].-

> "I think it is a mistake to spend time considering whether English orders and judgments can be enforced against Panamanian companies in Panama. Whilst that is not perhaps the last forum to be considered in the

[37](1834) 2 Cl. & F. 470

[38](1900) 2 Ch. 15

[39](1915) 1 Ch. 696

[40](1955) St. R. Qd. 254

[41]1990 Ch 65,81

> context of such enforcement, it is certainly not the first. If in due time the plaintiffs are concerned to enforce the judgment against Milco, they will be resorting to a jurisdiction where its assets, if any, happen to be.
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> I think that a sufficient sanction exists in the fact that, in the event of disobedience, the court could bar the defendant's right to defend. This is not a consequence which it could contemplate lightly, as it would become a fugitive from a final judgment given against it without its explanations having been heard, and which might well be enforced against it by other courts."

Of course, as Dillon L.J pointed out in the subsequent instalment of this litigation, if there are other defendants then the practical effect of depriving the offending defendant from the right to defend may be meaningless. The other defendants will put all the necessary material and arguments before the court.

Further, adopting this suggestion would raise other problems of enforcement. What would be the consequence if a Mareva order was made, disobeyed, the defence struck out and then final judgment entered without opportunity for the defendant to resist the making of the order. Would a foreign country, where the assets are situated, enforce the final judgment which would have been obtained, without the participation at the hearing, of the defendant? Would any such judgment be construed by a foreign country as having been obtained in breach of the principles of natural justice? Common law will not enforce judgments obtained in breach of rules of natural justice. The

requirements of natural justice relate to the conduct of the case rather than the merits of the actual decision. At times this may be a difficult line to draw. Common law courts are hesitant to impeach a judgment, gained in a foreign jurisdiction, in accordance with that jurisdiction's procedural rules, simply because those procedural rules do not conform to common law procedure, so long as the procedure maintains reasonable, "civilised" standards of fairness. McLeod The Conflict of Laws (1983), says (p 618):-

> "Mere irregularities in prescribed procedure, mistakes of fact or law, or a mistake in the application of legal principles, do not, without more, amount to a denial of natural justice."

In Jacobson v Frachon [42], a French court accepted an expert's report which the plaintiffs and the English court believed to be biased in favour of the defendants. The French judgment was on the merits, as the plaintiffs had been allowed to, and did, object to the report. Their objection was simply dismissed. The French court had however, listened to the objections and therefore had given the plaintiffs their day in court. This decision is not very fully reported and as the judgment of the Court of Appeal in Jet Holdings Inc v Patek [43] shows the

[42](1927) 138 L.T. 386

[43]1990 1 QB 335, 345

editors of Dicey & Morris "The Conflict of Laws" [44]may have misread it.

Refusing to allow a defendant to present a defence in court, as suggested by Lord Donaldson, seems, prima facie, a flagrant breach of natural justice. A basic tenet of natural justice is granting a person a right to be heard or to have the case substantially presented before the court. (cf Atkin LJ in Jacobson). However, for example, a foreign procedural rule disallowing a defendant from personally testifying on his/her own behalf will not impeach the subsequent judgment (see, eg. Robinson v Fenner [45]), as the right to present a defence is not barred.

In Adams v Cape Industries,p.l.c.[46] Scott J, refused enforcement of a default judgment given in Texas. The defendant, an English company, did not reside, or do business in Texas, nor did it submit to the jurisdiction. The defendant had put an Illinois subsidiary deliberately into voluntary liquidation to avoid a possible jurisdictional connection with the Texan court. Nonetheless it was named as one of the defendants in an action brought by some 200 persons suffering

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[44]11th Ed p475

[45](1913) 3 KB 835

[46](1990) 2 WLR 657

from asbestos induced diseases. The English company deliberately did not participate in the U.S. proceedings and was prepared to allow default judgment to be entered. It had no U.S. assets and intended that its resistance should be against any attempt to enforce the U.S. judgment in England. The plaintiffs sought enforcement in England of the default judgment they had obtained. One of the many defences was an allegation that the dictates of natural justice had been infringed. Scott J accepted the defendant's contention that natural justice was denied to the defendant in the quantification of damages because of the U.S. judge's failure to comply with Federal Rules of Civil Procedure. However, relevantly for present purposes the judge said [47]:-

> "I must start with the important circumstance that Cape and Capasco were in default and were thereby taken to have admitted the pleaded allegations made against them save in relation to damage. They had forfeited any entitlement to a hearing save on the issue of damages. There is no injustice in that."

This view was affirmed by the Court of Appeal.[48] What may save Lord Donaldson's proposed procedure from being deemed a breach of natural justice is that it is the defendant's own disregard for the court's order which causes the defence to be struck out. The resultant judgment may be regarded as

[47]ib p717

[48]ib p772 ff.

analogous to a default judgment, usually granted if a party fails to attend proceedings after sufficient notice has been given. A litigant has a legitimate expectation that natural justice, in the sense of procedural fairness, would be afforded to it. (but see Adams [49]) The answer to the present problem may be that the legitimate expectation of the party, in breach of which the court's order is made, is extinguished so long as it remains in breach.

Perhaps, ultimately, an Australian court may recognise and enforce an English final judgment given against a defendant who knowingly breaches a Mareva injunction in respect of Australian assets and who is thereupon barred from defending the proceedings. Australia may not regard this as a breach of natural justice if judges accept Lord Donaldson's suggestion as an appropriate penalty for such defendants. Recognition of "Donaldson" judgments would be contrary to prior authority. If Australia were to recognise a "Donaldson" judgment given in England (or vice versa), I suggest that it would be due to perceived changes in the law wrought since 1988, when it became clear in England that English courts had the power to grant worldwide Marevas against extra-territorial defendants.

Again it may be that, in the hypothetical circumstance I have

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[49] ib p781 ff

described, an English or Australian court may permit enforcement of such a final judgment by way of garnishee proceedings in respect of assets outside the jurisdiction. If the garnishee is within the jurisdiction then, notwithstanding that the debt is recoverable outside the jurisdiction, the making of an order is a matter of discretion. However as Balcombe L.J. recognised in Interpool Ltd v Galani [50] there is no reported instance where such an order has been granted (cf also Kaye "Examination of judgment debtors as to their assets abroad; courts' powers and jurisidiction". [51])

It is fair to mention the reaction of an Australian critic of the suggested methods of enforcement of Mareva injunctions. Crawford "The Extra Territorial Effect of Mareva Injunctions - The Sleeping Giant in Fairyland" [52] said;

> "If that is England's final answer then its world-wide Mareva injunction is a toothless tiger. Not only does it not restrain the overseas banks from honouring cheques presented by a determined defendant but it admits that it is virtually powerless to deal with a foreign (or a British expatriate) defendant with insufficient assets in the jurisdiction to satisfy the judgment and the ability (conceded in ordering the Mareva in the first place) speedily to move assets and probably himself around the globe. It is unrealistic to talk of binding the conscience of a defendant who by resorting to a Liberian or Panamanian address is

[50] 1988 QB 738

[51] 1989 LMCLQ 465

[52] (1990) 18 ABLR 28 @ 46

presumed not to have a conscience."

THIRD PARTIES

As pointed out earlier, orders are in personam requiring the defendant to do something or abstain from doing something. It is a well established feature of the injunctive remedy that a third party with knowledge of an injunction who assists in the breach of it is liable in contempt for having obstructed the course of justice (R v Gray [53]). Nicholls L.J. in Babanaft [54] pointed out that this principle was one of the strengths of a Mareva order. Accordingly plaintiffs have invariably notified domestic banks, with which the defendant was believed to have accounts, of the making of the injunction. Lord Denning explained the result in Z Ltd v A-Z and AA-LL [55] thus:-

> "...once a bank is given notice of a Mareva injunction affecting goods or money in its hands, it must not dispose of them itself, nor allow the defendant or anyone else to do so - except by the authority of the court. If the bank or any of its officers should knowingly assist in the disposal of them, it will be guilty of a contempt of court. For it is an act calculated to obstruct the course of justice...As soon as the bank is given notice of the Mareva injunction, it must freeze the defendant's bank account. It must not allow any drawings to be made on it...The reason is

[53] 1900 2 QB 36, 40

[54] ib p43

[55] ib p573

> because, if it allowed any such drawings, it would be obstructing the course of justice - as prescribed by the court which granted the injunction - and it would be guilty of a contempt of court."

It can be imagined what difficulties this caused domestic banks with hundreds of branches. In Z Ltd v A-Z and AA-LL (supra) the English Court of Appeal, particularly in the helpful judgment of Kerr LJ [56], attempted to alleviate the problem.

Once it was accepted that there was jurisdiction to make orders in respect of foreign assets and therefore in respect of assets sometimes held by foreign banks, or foreign branches of domestic banks, the difficulty was magnified a hundred fold. After all whilst it was possible to punish local third parties for contempt that was not an option where the third parties were outside the jurisdiction. Judges of the English Court of Appeal attempted to meet the problem of foreign third parties by making special orders excluding any direct effect of the order on third parties. The form of such order was first considered in Babanaft (supra). As Kerr LJ pointed out [57] "unqualified Mareva injunctions covering assets abroad can never be justified, either before or after judgment, because they involve an exorbitant assertion of jurisdiction of an in

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[56] ib p586 ff

[57] ib p35

rem nature over third parties outside the jurisdiction of our courts. They cannot be controlled or policed by our courts and they are not subjected to the control of the local courts, as the European Court advised in Denilauler v S.n.c. Couchet Frères [58] they should be." Unfortunately counsel had not fully argued the point and the Court was required by the arguments to make an order which, at least Sir Michael Kerr, did not consider the most appropriate. In Duvalier, the same proviso to the usual form of Mareva injunction was utilised.

However what became known as the "Babanaft proviso" was criticised by Lord Donaldson in (Derby (No. 3 & 4)). He said [59]:-

> "The express reason for including such a proviso was that Mareva injunctions "have an in rem effect on third parties" and that "Mareva injunctions have a direct effect on third parties who are notified of them and hold assets comprised in the order:" per Kerr LJ in the Babanaft case at p25 C-E (sic) I know what was meant, but I am not sure that it is possible to have an "in rem effect" upon persons whether natural or juridical and a Mareva injunction does not have any in rem effect on the assets themselves or the defendant's title to them. Nor does such an injunction have a direct effect on third parties. The injunction (a) restrains those to whom it is directed from exercising what would otherwise be their rights and (b) indirectly affects the rights of some, but not all, third parties to give effect to instructions from those directly bound by the order to do or concur in the doing of acts which are

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[58] 1980 ECR 1553, 1570

[59] ib p83

prohibited by the order. Whether any particular third party is indirectly affected, depends upon whether that person is subject to the jurisdiction of the English courts."

His Lordship commented that he was not sure if the Babanaft proviso was the right answer to the dilemma. He went on:-

"The first objection is that it treats natural persons differently from juridical persons...

The second objection is that it places an English corporate bank in a very difficult position. It may know of the injunction and wish to support the court in its efforts to prevent the defendant from frustrating the due course of justice, but the proviso deprives it of the one justification which it would otherwise have for refusing to comply with his instructions.

The third objection I record without expressing any view on its validity. It is that an order which includes this proviso has ex facie no extraterritorial effect and so is not of a character enabling it to be recognised under the European Judgments Convention and enforced abroad thereunder. In other words, the proviso has a circular effect."

His Lordship then [60] articulated his own preferred proviso;

"Provided that, in so far as this order purports to have any extraterritorial effect, no person shall be affected thereby or concerned with the terms thereof until it shall be declared enforceable or be enforced by a foreign court and then it shall only affect them to the extent of such declaration or enforcement unless they are: (a) a person to whom this order is addressed or an officer of or an agent appointed by a power of

[60] ib p84

> attorney of such a person or (b) persons who are subject to the jurisdiction of this court and (i) have been given written notice of this order at their residence or place of business within the jurisdiction, and (ii) are able to prevent acts or omissions outside the jurisdiction of this court which assist in the breach of the terms of the order."

Neill LJ agreed with the amended proviso [61] and also mentioned that further refinements may become necessary. Butler-Sloss LJ also agreed [62] with the form of order.

ASSET IN FOREIGN BRANCH OF BANK WITH LOCAL PRESENCE.

Malek and Lewis, in their article, Worldwide Mareva injunctions: the position of international banks [63], accept that there is a strong argument that, at present, under English law, head office and all branches of the bank, domestic or foreign, are to be treated as one entity and therefore within the wording of the Donaldson proviso "subject to the jurisdiction". Nonetheless the authors argue that the overseas branches of a bank with its head office within the jurisdiction should be regarded as separate legal entities. The head office should therefore not be liable if an overseas branch disobeys an extra-territorial Mareva injunction. Malek and Lewis recognise

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[61] ib p94

[62] ib p97

[63] 1990 1 LMCLQ 88

that an overseas branch may fairly wish to disobey a Mareva injunction if compliance would breach the law of the state within which that branch was located. If a head office were held liable for the foreign branch's breach, the bank could be in the undesirable position of being forced to break the law somewhere, due to an order made in litigation to which the bank is an innocent stranger.

Already English courts, for some purposes at least, have been prepared to treat foreign branches as separate entities. The authors rely on MacKinnon v Donaldson, Lufkin & Jenrette Securities Corp. [64]. Justice Hoffman set aside a subpoena requiring Citibank's London branch, to produce documents held in its New York office relating to a transaction outside England. Compliance with the subpoena would have breached New York law. Hoffman J made his order as a matter of discretion. He drew attention to the important distinction, drawn by academic writing, between personal and subject matter jurisdiction. He said [65]:-

> "I think that this argument confuses personal jurisdiction, ie, who can be brought before the court, with subject matter jurisdiction, ie, to what extent the court can claim to regulate the conduct of those persons. It does not follow from the fact that a person is within the jurisdiction and liable to be

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[64](1986) Ch. 482

[65]ib p493

served with process that there is no territorial limit to the matters upon which the court may properly apply its own rules or the things which it can order such a person to do. As Dr Mann observed in a leading article, "The Doctrine of Jurisdiction in International Law," [66]:

> 'The mere fact that a state's judicial or administrative agencies are internationally entitled to subject a person to their personal or 'curial' jurisdiction does not by any means permit them to regulate by their orders such person's conduct abroad. This they may do only if the state of the forum also has substantive jurisdiction to regulate conduct in the manner defined in the order. In other words, for the purose of justifying, even in the territory of the forum, the international validity of an order, not only its making, but also its content must be authorised by substantive rules of legislative jurisdiction."

See also by the same author "The Doctrine of International Jurisdiction Revisited after Twenty Years"[67]"

His Lordship could not resist drawing attention to the irony that protection was sought by a U.S. bank, the courts of which country regularly made orders with wide extra territorial operation. A very useful note by Professor Cranston [68] considered the current state of the authorities in the U.S. and what little authority there is in Australia (cf Adsteam Building Industries P/L v Queensland Cement and Lime Co. Ltd (No4) [69]).

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[66](1964) 111 Recueil des cours 146

[67](1984) 196 Recueil des cours 9, 19

[68](1989) 63 ALJ 691

[69](1985) 1 Qd.R. 127

Malek and Lewis suggest that appropriate protection for banks should be incorporated into Lord Donaldson's proviso. They propose the following addition to the Donaldson proviso [70]:-

> "Provided that in the case of banks served with this Order with branches or subsidiaries outside the jurisdiction of this Court nothing in this Order shall require the bank in question or its subsidiaries:
>
> (a) to infringe the laws and regulations of any foreign country or state; or
>
> (b) to refuse to act on the instructions of a customer in relation to account(s) outside the jurisdiction so long as the bank or its subsidiaries have reasonable grounds for believing that the instruction is lawful under the laws of the foreign country or state where the relevant account(s) is located or under the proper law governing the account in question."

Under this form of proviso, a local head office would still be required to notify branches that all steps short of breaching local laws should be taken in order to comply with an English Mareva injunction.

It may be argued that the deference shown to the foreign country by the form of the suggested provisoes goes too far for the purposes of some cases. Take for example a Mareva injunction

[70] ib p94

granted to the Revenue authorities against a resident who had defrauded the revenue but had transferred all his assets to say Panama where it was resting in the local branch of a foreign bank. Instead of the proviso should not the court carry out the balancing exercise suggested by the Restatement (Third) of Foreign Relations Law of the United States Section 403? Some of the possible difficulties have been illuminated by Professor Park in "Legal Policy Conflicts in International Banking" [71].

The liability incurred by a bank in obeying an Mareva order and thereby breaking local law could perhaps be met by the plaintiff undertaking to indemnify the bank. The amount of this indemnity could well become the subject of argument as a bank could suffer damage to its reputation caused by its breach of the duty of confidentiality and mandate, as well as possible monetary penalties. Justice Templeman's order in London and Counties Securities (in liq.) v Caplan [72] may provide a happy median. After finding the defendant guilty of fraud, His Honour ordered that Lloyd's Bank and its foreign subsidiaries be restrained from acting upon the defendant's instructions disposing of any of his foreign assets. However, this order remained effective for only seven days after the defendant issued any such instructions, giving the plaintiff time to commence proceedings

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[71](1989) 50 Ohio State L.J. 1067, 1102 ff.

[72]Unreported 26 May 1978

in the appropriate country, seeking either a local Mareva equivalent, or local recognition of the English extra-territorial order. Thus, the plaintiff's indemnity liability and the bank's injury would only need to cover a week's damage. As well, the order requiring disclosure of bank statements expressly provided that a bank should not be guilty of contempt for failure to comply with the order if compliance would render it liable to criminal process in the jurisdiction in which it was situate.

Malek and Lewis (supra) make the additional point that the third party bank must be totally certain of what the extra-territorial Mareva injunction requires them to do. Any liabilities incurred by the bank which were not authorised by the Mareva will not attract indemnity from the plaintiff.

CONCLUSIONS

It seems that, in confronting a defendant who is resident outside the jurisdiction, although amenable to the jurisdiction of the court, and whose assets are wholly, or to a large extent, outside the jurisdiction, the courts are in considerable difficulties. There is jurisdiction to make an order in personam against such a defendant. Indeed, as Lord Donaldson has suggested, if such a defendant defies the order of the court, the defence to the action may be disregarded and final

judgment entered. A final judgment may be sought to be registered in most countries, and if registered, enforced. However, there is the unresolved difficulty as to whether registration of the judgment would be refused on the basis that natural justice had been denied to the defendant by the refusal to entertain the defence. Furthermore, as pointed out earlier, the defendant may be able to rely upon defences propounded by other parties to the proceedings. That, of course, may not necessarily be a bad thing, because presumably, if the defences are good, then a Mareva injunction would very likely have been inappropriate.

Consideration will have to be given by judges to the enforcement of foreign interlocutory orders in the nature of Mareva injunctions, even absent treaty obligations. The European Judgment Convention achieves this. In a sense, this has an undesirable side effect. It means that, if a Mareva injunction is granted by a Commonwealth country and the order can obtain recognition in England, then, by force of the European Judgment Convention, enforceability can be obtained throughout the area of the European Economic Community. To operate in this back door way would bring the law into disrepute. If the target be, say, assets in Germany, and a Mareva injunction granted, say, in New Zealand, it would not get recognition in Germany of its own force. It is inappropriate that, by obtaining registration in England, the plaintiff should, so to speak by a back door method, obtain enforcement in Germany. On the other hand, it is

interesting to notice the repeated suggestions by Kerr L.J. in Babanaft [73] that the Convention evidences international reciprocity in the recognition and enforcement of judgments and orders issued in foreign jurisdictions. I understand Sir Michael to be saying that even though a country may not be a subscriber to the Convention, its national courts may regard it as expressing international consensus and give effect to it.

The position as to third parties is quite unsatisfactory. Both the Babanaft and the Donaldson provisos expressly exclude third parties from the obligation to comply. It has a sweet air of illogicality to make an order in personam against a defendant on whose part there has been shown a prima facie intention to avoid satisfying the court's possible ultimate judgment and excuse from the obligation to comply the only honest persons who may otherwise be expected to comply.

Unscrupulous, indeed, at time fraudulent persons, have made considerable use of modern techniques of communication and electronic funds transfers to seek to evade judgments of national courts. Surely, it behoves the courts to respond to such challenges by adapting the procedures and rules for enforcement of orders of other courts, in order to ensure that the ultimate aim of the administration of justice, free of abuse, may be maintained.

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[73] ib p30