Freezing orders hot up

By Peter Biscoe QC

This year marks the thirtieth anniversary of the creation of the Mareva order which has been famously described as one of the law's *'two nuclear weapons': Bank Mellat v Nikpour* (1985) FSR 87 (CA) at 92 per Donaldson LJ. Its object is to prevent the frustration of a money judgment or order which the applicant hopes to obtain or has obtained, by restraining the respondent from removing assets from the jurisdiction or dissipating assets. Thus, it freezes assets. The order is typically made ex parte in the first instance, and even before service of originating process.

The order has attracted several names. In the eponymous way favoured by some lawyers, the name 'Mareva' derives from the second English Court of Appeal case in which the jurisdiction to make the order was upheld: *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509, [1980] 1 All ER 213. More self-explanatory names have emerged. The order is now called a 'freezing order' in the English Civil Procedure Rules 1998 and has been called an 'asset preservation order' by the High Court of Australia: *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, *Pelechowski v Registrar,* Court of Appeal (NSW) (1999) 198 CLR 435.

The High Court of Australia has upheld the jurisdiction in no less than six cases: *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, *Reid v Howard* (1995) 184 CLR 1, *Witham v Holloway* (1995) 183 CLR 525, *Patrick Stevedores Operations No. 2 Pty Ltd v Maritime Services Union of Australia* (1998) 195 CLR 1, *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 and *Pelechowski v The Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435. In five of these cases, the appeal was wholly or partly successful. See also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 243 [94], 311-312 [282-286].

The Mareva order has been responsible for leading cases in more general areas of the law such as contempt of court (*Witham*, *Pelechowski*, above), the privilege against self-incrimination (*Reid v Howard*, above; *Ross v Internet Wines Pty Ltd* (2004) 60 NSWLR 436, CA) and the plaintiff's duty of disclosure on ex parte applications (*Behbehani v Silem* [1989] 1 WLR 723, CA).

Originally, the freezing order jurisdiction had a transnational focus because it focused on restraining foreigners from removing assets from the territorial jurisdiction. It was seen as a way of combating potential judgment debtors who make themselves judgment proof by taking or sending their assets abroad. The jurisdiction grew to encompass restraining apprehended dissipation of assets within the territorial jurisdiction; that is, dealing with them in artificial or unacceptable ways. In the end, the distinction that has been drawn is between transfer of assets out of the jurisdiction or their dissipation which may be restrained, and normal activity including unprofitable trading which may not be restrained.

In Australia, unlike England, the freezing order has been freed from the shackles of case-bound law relating to injunctions by *Cardile* (above). The High Court emphasised that it is not an injunction and that the need to exercise the power in such a fashion as to avoid abuse is not facilitated, and may be impeded, by continued attempts to force it into the mould of injunctive relief as administered under that description in equity.

Three important aspects of freezing orders have recently been undergoing development. They are:

- the formulation and harmonisation of court rules, practice notes and precedents throughout the various Australian jurisdictions and New Zealand;
- transnational freezing orders; and
- the privilege against self-incrimination.

Formulation and harmonisation of court rules, practice notes and precedents

The freezing order is invasive. It strikes without warning because it is usually granted, initially, without notice to the respondent. It often affects third parties. It may affect assets and persons abroad. The application is often made urgently. Disobedient respondents have been imprisoned or otherwise punished before there has been any final hearing, and at a time when liability on the substantive issues may be hotly contested. The form of order is important if it is to achieve its objective whilst providing reasonable safeguards for the protection of the respondent, and is therefore fairly complex.

For such reasons, it is desirable that the general principles and practice which govern freezing orders should be clearly stated and quickly accessible in court rules, practice notes and precedents which permit flexibility to meet the circumstances of a particular case and do not inhibit further development of the law. It is also desirable that such court rules, practice notes and precedents should be uniform throughout Australia so that, in this invasive area of the law, all Australians are treated equally.

At present, the situation is unsatisfactory for two reasons. First, rules of court or legislation which refer to freezing orders exist only in Queensland, South Australia, Victoria and New South Wales and differ substantially, and no practice notes or example forms have been published by any Australian court. In New South Wales, r 25.2.1(c) of the recent *Uniform Civil Procedure Rules 2005* simply provides that in an urgent case, the court, on the application of a person who 'intends to commence

proceedings' may grant any injunctive relief, including relief in the nature of Mareva relief or an Anton Piller order. Secondly, differences or inconsistencies, mostly inadvertent, as to the relevant principles have emerged in the Australian case law.

In a remarkable development, the Council of Chief Justices of Australia and New Zealand has appointed a committee of judges representing all Australian and New Zealand superior courts to investigate and, if thought fit, make recommendations for the harmonisation of court rules, practice notes and precedents relating to Mareva and Anton Piller orders ('Harmonisation Committee'). The Harmonisation Committee met in Sydney in April and August 2005 for two full days and has also, of course, worked on this project outside its formal meetings. Lindgren J of the Federal Court of Australia is the convenor of the committee (which the writer has been assisting). The Harmonisation Committee's formulation of draft uniform court rules, practice notes and precedents is well advanced and has reached the stage where review by the rules committee of each court has commenced or is imminent. It is likely that they will be finalised and adopted throughout Australia and New Zealand by mid 2006. The participation of New Zealand (through Baragwanath J) in this endeavour is a valuable precedent for closer co-operation between the courts of the two countries.

The Harmonisation Committee's draft uniform rules follow the *English Civil Procedure Rules 1998* in adopting the name 'freezing order' in preference to 'Mareva order' or 'asset preservation order'.

The Harmonisation Committee's draft uniform rules would resolve the different formulations of one of the threshold requirements for a freezing order expressed in the leading NSW case of *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 319 and would resolve the inadvertent inconsistencies on this aspect which have crept into some Australian cases. In *Patterson*, Gleeson CJ, with whom Meagher JA broadly agreed, said at 321:

> the remedy is discretionary, but it has been held that, in addition to any other considerations that may be relevant in the circumstances of a particular case, as a general rule a plaintiff will need to establish, first, a prima facie cause of action against the defendant, and secondly, a danger that, by reason of the defendant's absconding, or of assets being removed out of the jurisdiction or disposed of within the jurisdiction or otherwise dealt with in some fashion, the plaintiff, if he succeeds, will not be able to have his judgment satisfied.

However, the third judge, Rogers AJA, preferred the English test of a 'good arguable case' rather than 'a prima facie cause of action'. In *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 408 the joint judgment referred to a 'reasonably arguable case on legal as well as factual matters'.

The Harmonisation Committee's draft rules adopt the 'good arguable case' test. A good arguable case 'is one which is more than barely capable of serious argument, and yet not necessarily one which the judge considers would have better than a 50 per cent chance of success': *Ninemia Corp v Trave Schiffahrtsgesellschaft, GmbH ('The Niedersaschen')* [1983] 2 Lloyd's rep 600 at 605; [1984] 1 All ER 398 at 404 per Mustill J. This is a lower standard than a prima facie case which means that 'if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief': *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618 at 622. A good arguable case is a higher standard than the 'serious question to be tried' test applicable in applications for interlocutory injunctions: *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 217-218 [13] per Gleeson CJ citing *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 151. One consequence of a freezing order not being a species of injunction is that the court does not operate in the conceptual frame appropriate to decisions about whether to grant an interlocutory injunction of asking whether there is a serious question to be tried, and, if so, where the balance of convenience lies: *Davis v Turning Properties Pty Ltd & Turner* [2005] NSWSC 742 at [37] per Campbell J.

So far as third parties are concerned, the draft uniform rules adopt, in a non-exhaustive way, the principles in *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 405 [57] where it was said:

> What then is the principle to guide the courts in determining whether to grant Mareva relief in a case such as the present where the activities of third parties are the objects sought to be restrained? In our opinion such an order may, and we emphasise the word 'may', be appropriate, assuming the existence of other relevant criteria and discretionary factors, in circumstances in which: (i) the third party holds, or is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including 'claims and expectancies' (the phrase used by Deane J in Jackson v Sterling Industries Ltd (1987) 162 CLR 612 at 625), of the judgment debtor or potential judgment debtor; or (ii) some process, ultimately enforceable by the courts, is or may be available to the judgment creditor as a consequence of a judgment against that actual or potential judgment debtor, pursuant to which, whether by appointment of a liquidator, trustee in bankruptcy, receiver or otherwise, the third party may be obliged to disgorge property or otherwise contribute to the funds or property of the judgment debtor to help satisfy the judgment against the judgment debtor.
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> It is that principle which we would apply to this case. Its application is a matter of law, although discretionary elements are involved.

While the criteria specified in the draft uniform rules may be sufficient to attract jurisdiction in most cases, the draft uniform rules make it crystal clear that those criteria are not exhaustive and are not set in stone. That is crystal clear from the additional provisions of the draft uniform rules that the court may also make a freezing or ancillary order wherever the interests of justice otherwise require it and that nothing in the rules affects the court's inherent or implied jurisdiction. In this way, flexibility is maintained and development of the law is not inhibited.

Another significant development in the draft rules is that they would permit a freestanding ancillary order, such as an asset disclosure order, to be made without a freezing order necessarily being made at that time. This may be important where the respondent's assets are all or mostly out of the jurisdiction. In this situation a freezing order may be essentially ancillary to a disclosure order (rather than vice versa), for the disclosure order should result in disclosure of the foreign jurisdictions in which the assets are located thereby enabling the applicant to apply in those jurisdictions for more effective freezing orders or alternative relief. This is what happened as a result of the disclosure of assets order in *Republic of Haiti v Duvalier* [1990] 1 QB 202.

Three controversial constraints on the grant of a Mareva order in *The Siskina* [1990] AC 210 would be swept away by the Harmonisation Committee's draft rules. The unjust consequence of those constraints in *The Siskina* was that the defendant, a Panamanian company sued by the plaintiff abroad (because of a choice of forum clause in the contract between the parties), was able to remove moneys from England into a black hole beyond the reach of any judgment that the plaintiff might obtain in the foreign proceedings.

The first of *The Siskina* constraints is that the plaintiff must establish that it has a pre-existing cause of action; i.e. that the plaintiff's cause of action has accrued. The troublesome consequence is exemplified by the case of a debt which does not fall due for payment until next month but the debtor is about to export all its assets and thereby frustrate any judgment which the creditor obtains against it. The draft uniform rules of court would do away with this constraint as a jurisdictional obstacle and would be consistent with a number of Australian cases which have proceeded on the basis that the Siskina constraint is not an invariable requirement: *Coxton Pty Ltd v Milne* (CA/NSW, 20 December 1985, unreported); *Deputy Commissioner of Taxation v Sharp* (1988) 82 ACTR 1; *Patterson v BTR Engineering (Aust) Ltd* (1989) 18 NSWLR 379 (CA) per Rogers AJA; *Chew v Satay House of WA Pty Ltd* (SC/WA, 29 October 1997, unreported); *Official Receiver of State of Israel v Raveh* (2001) 234 WAR 53.

The second of *The Siskina* constraints, upheld in *Mercedes Benz AG v Leiduck* (1996) AC 284 (PC), is that a freezing order can only be granted in protection of a cause of action which the court has jurisdiction to enforce by final judgment. Consequently, the court could not grant a freestanding freezing order where a foreign court (and not the local court) had jurisdiction over the cause of action. That was reversed in England by s25 of the *Civil Jurisdiction and Judgments Act 1982* as amended in 1997, which gives the English Court power to grant freestanding interim relief in aid of foreign proceedings anywhere in the world.

Three controversial constraints on the grant of a Mareva order in *The Siskina* [1990] AC 210 would be swept away by the Harmonisation Committee's draft rules.

In Australia, the Harmonisation Committee's draft uniform rules of court contain a provision which would achieve a similar result. A similar solution, limited to the Australia-New Zealand context, has recently been proposed in a public discussion paper of August 2005 entitled *Trans-Tasman Court Proceedings and Regulatory Enforcement* by the Trans-Tasman Working Group of the Australian Attorney-General's Department and the New Zealand Ministry of Justice. Their proposed solution at p.21 is that: 'Appropriate Australian and New Zealand courts should be given authority to grant interim relief in support of proceedings in the other country's courts'.

Such court rules or legislation would supplement the recent landmark judgment in *Davis v Turning Properties Pty Ltd & Turner* [2005] NSWSC 742, where Campbell J held that the Supreme Court of NSW has inherent jurisdiction to make a free-standing order in aid of the enforcement of a foreign judgment in Australia, whether that judgment has yet been obtained or not. His Honour accepted as correct a suggestion to that effect by Biscoe, *Mareva and Anton Piller Orders* (Butterworths 2005) at paras [5.36] to [5.49]. The Supreme Court of the Bahamas had made a worldwide freezing order against one of the respondents, Mr Turner. Subsequently, Campbell J made a free-standing freezing order in respect of the assets in NSW of Mr Turner and of a related NSW third party company (under the *Cardile* principles). On the evidence, there was a powerful case that Mr Turner had defrauded the plaintiff. No substantive relief was sought in the Bahama or NSW proceedings, but Campbell J was satisfied that it was likely that substantive proceedings would be begun. It did not matter that the precise causes of action that would be relied on could not yet be stated with certainty. Campbell J ordered that the foreign plaintiff's undertaking as to damages be secured.

The third of *The Siskina* constraints is that the long-arm service rules of court do not permit service of a freestanding freezing order application on a respondent outside the jurisdiction even though the respondent has assets within the jurisdiction. Of particular relevance is the typical long-arm rule of court permitting service out of the jurisdiction which, in NSW, is expressed as follows: 'If the proceedings are for an injunction as to anything to be done in New South Wales or against the

doing of any act in New South Wales, whether damages are also sought or not': UCPR Part 11 and Schedule 6 para (n). In *The Siskina* [1979] AC 210, the House of Lords decided that proceedings solely for a free-standing Mareva 'injunction' were not proceedings for an injunction within the meaning of the equivalent English rule. Their lordships followed old authority that such a rule of court does not empower the court to grant an interlocutory injunction except in aid of a substantive legal or equitable right. The interpretation of the English rule of court, as expressed in *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 at 302, was that it 'is confined to originating documents which set in motion proceedings designed to ascertain substantive rights'.

A solution in the form of a new long arm service rule which would permit service of an application for free-standing Mareva relief in aid of foreign proceedings where the respondent has assets within the jurisdiction is provided for in the Harmonisation Committee's draft uniform rules.

Where an order is made which freezes the respondent's assets abroad, there may be problems in relation to third parties outside and not subject to the jurisdiction of the Australian court, such as the respondent's foreign bank.

Transnational freezing orders

By sweeping away the second and third constraints in *The Siskina*, the draft uniform court rules of the Harmonisation Committee would liberate the transnational freezing order.

Freezing orders have transnational elements in two situations. First, where the respondent or the assets the subject of the order or affected third parties (such as banks) with notice of the order are physically located abroad. Secondly, where the order is sought in aid of foreign proceedings in relation to assets in Australia.

The transnational freezing order is significant because of transnational business activity, the multinational corporation and the ease with which persons and assets can now move or be moved between nations. In *Babanaft International Co SA v Bassatne* [1990] Ch 13 at 33D Kerr LJ said:

> some situations, which are nowadays by no means uncommon, cry out – as a matter of justice to plaintiffs – for disclosure orders and Mareva type inunctions covering foreign assets of defendants even before judgment. Indeed that is precisely the philosophy which ... has been applied by the development of the common law in Australia.

The courts of different countries can and should assist each other in this context without forcing their co-operation on foreign courts who do not welcome it. This was emphasised by Millett J in the freezing order case of *Crédit Suisse Fides Trust S.A. v Cuoghi* [1998] QB 818 (CA) at 827G:

> In other areas of law, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention. International fraud requires a similar response. It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former.
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> In the present case it is the disclosure order which is the most valuable part of the relief granted by the judge. Without it, C.S.F.T. would be unable to apply to the local courts for effective orders against assets abroad. Mr Cuoghi makes much of the fact that the order extends to assets in Switzerland, and submits that this is an unwarranted interference with the jurisdiction of the court trying the substantive dispute. The short answer to this is that the terms of the order will not allow it to be directly enforced in Switzerland without an order of the Swiss courts. We do not seek to force our co-operation on those who do not welcome it.

Transnational freezing orders extending to assets located abroad are routinely made in England, and increasingly in Australia, where the respondents are within the court's personal jurisdiction, particularly in cases of international fraud, subject to limitations and safeguards which have become standardised in England.

Where transnational elements are present it is necessary to address three questions. First, whether the court has personal jurisdiction over the respondent. Secondly, if so, whether there is jurisdiction to make a freezing order. Thirdly, if so, whether there are difficulties of conflict of laws, comity or enforceability which affect the discretion whether to make the order or the form of the order.

On the first of these transnational questions, the court has personal jurisdiction over anyone served in Australia or who consents to the court's jurisdiction or who is served out of Australia under the long-arm authority of the rules of court (in NSW, see UCPR Part 11 and Schedule 6).

On the second transnational question referred to earlier, the courts have jurisdiction to make freezing orders and ancillary orders against anyone over whom they have personal jurisdiction even if they reside overseas and even in relation to overseas assets: *Lord Portalington v Soulby* (1834) 40 ER 40 at 41-42; *Baroda (Maharanee of) v Wildenstein* [1972] 2 QB 283; *National Australia Bank Ltd v Dessau* [1988] VR 521 at 526-527; *Derby & Co Ltd v Weldon* (No. 6) [1990] 1 WLR (CA) at 1149-1150; *Agar v Hyde* (2000) 201 CLR 552 at 570-571.

On the third transnational question referred to earlier, the manner in which the court should exercise its discretionary power has been worked out through the cases, particularly the English cases.

Where an order is made which freezes the respondent's assets abroad, there may be problems in relation to third parties outside and not subject to the jurisdiction of the Australian court, such as the respondent's foreign bank. One problem is that the imposition of liability upon third parties for contempt, where they have been notified of a freezing order but failed to act to prevent its breach by the respondent, would be extraterritorial. Another problem is if the law of the foreign country where assets are located requires them to be dealt with in a different way from the freezing order. If the third party in the foreign country obeys the freezing order it may breach the foreign law. If it obeys the foreign law, it may breach the freezing order. Here a third party such as a foreign bank with a branch in Australia is in a potentially invidious position because it is subject to the jurisdiction of the foreign court and the Australian court.

A solution has been found in the inclusion of provisions in worldwide freezing orders which are now to be found in the example form in the English Practice Direction – Interim Injunctions developed by the English Court of Appeal in the following cases: *Babanaft International Co SA v Bassatne* [1990] Ch 13, *Republic of Haiti v Duvalier* [1990] 1 QB 202 and *Derby & Co Ltd v Weldon* (No. 1) [1990] Ch 48, *Baltic Shipping & Translink Shipping Ltd* [1995] 1 Lloyd's Rep 673 and *Bank of China v NBM LLC* [2002] 1 WLR 844, [2002] 1 All ER 717, [2002] 1 Lloyd's Rep 506. The provisos now state that:

> The terms of the order do not affect or concern anyone outside the jurisdiction of the court except the following persons in a country or state outside the jurisdiction of the court:
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> - the respondent or his officer or agent appointed by power of attorney.
> - any person who:
>   - is subject to the jurisdiction of the court,
>   - has been given written notice of the order at his residence or place of business within the jurisdiction of the court, and
>   - is able to prevent acts or omissions outside the jurisdiction of the court which constitute or assist in the breach of the terms of the order, and
>   - any other person only to the extent that the order is declared enforceable by or is enforced by a court in that country or state.
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> Nothing in the order shall, in respect of assets located outside the territorial jurisdiction of the court, prevent any third party from complying with:
>
> - what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country or state in which those assets are situated or under the proper law of any contract between itself and a respondent; and
> - any orders of the courts of that country or state, provided that reasonable notice of any application for such an order is given to the applicant's solicitors.

The Harmonisation Committee's draft uniform example form of freezing order includes provisions which are closely modelled on these English provisions.

These English provisions, with a qualification, were recently adopted in Australia in *Walter Rau Neusser Oel und Fett AG v Cross Pacific Trading Ltd* [2005] FCA 399. In that case, freezing orders were made against a number of respondents. One of the respondents was an Australian bank which operated a branch in Fiji where accounts were maintained into which moneys were placed pursuant to the conduct which was the subject of complaints against other respondents. The bank sought and was granted protection based on the usual provisions in the English worldwide orders. Allsop J decided to add a qualification as follows:

> The [Bank] shall exercise all reasonable endeavours to notify the applicant's solicitors in writing (in advance, if possible) of any occasion whereby it, that is, the Bank, reasonably believes that its obligations, contractual or otherwise, under the laws and obligations of the Republic of Fiji or under the proper law of any contract between the fifth respondent and the ninth respondent require it to pay out from or deal with the account.

This was an order against a bank which was subject to the court's jurisdiction and imposed a significant obligation on the bank. An Australian court would not seem to have jurisdiction to make such an order against a foreign bank in the more usual situation where the foreign bank is not subject to the Australian court's jurisdiction and has not appeared in the proceedings. In that more usual situation the applicant should seek to make the freezing order as effective as possible by serving a copy of it on the foreign bank.

The privilege against self-incrimination

Disclosure of assets orders against individuals are subject to the privilege against self-incrimination. The privilege is not available to companies either at common law or under s187 of the uniform Evidence Act to the extent that the Act has been adopted in various Australian jurisdictions: *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477. The privilege against self-incrimination 'protects the witness not only from incriminating himself directly under a compulsory process, but also from making a disclosure which may lead to incrimination or to the discovery of real evidence of an incriminating character': *Reid v Howard* (1995) 184 CLR 1 at 7 citing *Sorby v Commonwealth* (1983) 152 CLR 281 at 310. Reid was a freezing order case.

Paradoxically, the more criminal a respondent's behaviour seems, the greater his claim to the protection of the privilege against self-incrimination.

In the Mareva context, it has been held that the court should not require compliance with an asset disclosure order until after any claim to the privilege has been decided by the court: *Ross v Internet Wines Pty Ltd* [2004] 60 NSWLR 436 (CA); *Pathways Employment Services Pty Ltd v West* (2004) 186 FLR 330, (2004) 272 ALR 140, [2004] NSWSC 903.

The principle that no person ought be obliged to incriminate himself means that in some cases justice cannot be done between the parties to a civil action. That is because an individual litigant (as distinct from a corporation) can claim the privilege to refuse to provide relevant or even vital information or documents (including existing documents).

In the context of Mareva disclosure orders there has been much appellate litigation about the effect of the self-incrimination privilege on disclosure orders (e.g. *Reid v Howard* (1992); *Ross v Internet Wines* (2004)). In the Anton Piller context the problem is at least as great but tends to be ignored notwithstanding the House of Lord's restrictive judgment in *Rank Film Distributors* (1982).

In Australia the problem can only be addressed through legislation, as *Reid v Howard* makes clear. There have been quite a few calls by judges for legislative reform. The legislature has intervened in Australia and England. But the intervention has been inconsistent. There have been ad hoc abolitions of the privilege in specified situations. There has also been legislation designed to get privileged information into evidence in civil proceedings while affording the respondent a measure of protection in criminal proceedings.

Four specific legislative approaches may be noted.

First, for present purposes, the most notable ad hoc abrogation of the privilege in England has been its abolition in intellectual property and passing off cases, which are the Anton Piller order heartland: s72 of the *Supreme Court Act 1981*.

Secondly, in Australia s128 of the Uniform Evidence Act is designed to abrogate the privilege in civil proceedings while protecting the respondent in criminal proceedings by a rather cumbersome judicial certificate procedure. The recent NSW *Uniform Civil Procedure Act 2005* s87 extends this certificate procedure to interlocutory proceedings. A state court certificate does not, however, provide perfect protection. That is because it is no protection against criminal proceedings in another Australian state or territory.

Thirdly, the pending New Zealand Evidence Bill appears to do two things:

- it abolishes the privilege so far as it relates to existing documents or things: see clauses 56 and 47(3). This is consistent with the view of the House of Lords in *Istel v Tully* [1993] AC 45 that there is illogicality in protecting existing documents and things under the privilege. Indeed, when the leading cases in the Mareva area are looked at closely, it can be seen that the real or central concern has been with an order requiring the respondent to create a document (such as a disclosure affidavit) as distinct from producing existing documents. So, in New Zealand it is proposed that the New Zealand privilege should be limited to oral evidence and new documents and things.
- in relation to Anton Piller orders only, in respect of other information, the bill requires a judge to order that the information is not to be used in any criminal proceedings against the respondent (if the judge is satisfied that self-incrimination is reasonably likely). The New Zealand bill contains no equivalent protective provision in relation to Mareva disclosure orders which seems illogical. It is understood that this is likely to be rectified.

Finally, the Australian Law Reform Commission, the NSW Law Reform Commission and the Victorian Law Reform Commission are jointly reviewing the Uniform Evidence Act. Their recent discussion paper proposes abrogating the privilege in civil proceedings and that the information provided in the civil proceedings could not be used in criminal or civil penalty proceedings other than in respect of perjury or the like: ALRC Discussion Paper 69, July 2005, pp.420-423, 559-561. There are a number of problems with the ALRC proposed draft legislation and the Harmonisation Committee has made submissions to the ALRC in that regard.

An important submission was that Australia should follow the New Zealand Bill in that the privilege should not apply to documents which pre-existed the making by the court of an order for disclosure. It should apply only to documents which are brought into existence in obedience to the order.

Conclusion

Anyone wishing to make suggestions or comments on the Harmonisation Committee's proposals outlined above, may direct them to the writer who will pass them on to the committee.

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