INHERENT POWERS AND THE MAREVA JURISDICTION

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The English Court of Appeal again displayed by the creation of the "Mareva" injunction[1] its singular talent for generating new remedies out of old. Over six years the Court has analysed, shaped and amplified the remedy, recognising that the key to the jurisdiction,[2] as to its extension[3] and limitation,[4] is the danger of defendant abuse of the procedural protection of the courts.[5] But it has failed to find the source of jurisdiction in that abuse.[6]

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[1] The injunction is named after the case of *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509, the second case in which the English Court of Appeal granted the relief.

[2] This was first overtly acknowledged by Robert Goff, J. in *Iraqi Ministry of Defence* v. *Arcepay Shipping Co. S.A. (Gillespie Brothers & Co. Intervening)* (The Angel Bell) [1980] 1 All E.R. 480, 486-487 and *A.* v. *C.* [1980] 2 All E.R. 347, 351, and approved and adopted by Sir Robert Megarry, V.-C. in *Barclay-Johnson* v. *Yuill* [1980] 1 W.L.R. 1259, 1264, and by the Court of Appeal in *Rahman (Prince Abdul) bin Turki al Sudairy* v. *Abu-Taha* [1980] 1 W.L.R. 1268, 1273 per Lord Denning, M.R.; in *A. J. Bekhor & Co. Ltd.* v. *Bilton* [1981] 2 All E.R. 565, 579-580 *per* Ackner, L.J.; in *Z.* v. *A.* [1982] 1 All E.R. 556, 571-572 *per* Kerr, L.J.

[3] E.g. the extension to cases against domestic defendants by Sir Robert Megarry V.-C. at 1264-1266 in *Barclay-Johnson* v. *Yuill* [1980] 1 W.L.R. 1259, later approved and applied by the Court of Appeal in *Rahman (Prince Abdul) bin Turki al Sudairy* v. *Abu-Taha* [1980] 1 W.L.R. 1268, 1272-1273 per Denning, M.R. The logical defect in restricting the relief to cases against foreign defendants was mentioned by Lord Hailsaham at 261 in *The Siskina* [1979] A.C. 210 and later discussed by Brandon, L.J. at 885 in *Faith Panton Property Plan Ltd.* v. *Hodgetts* [1981] 2 All E.R. 877.

[4] E.g. the restriction of function to inhibiting abuse rather than providing the plaintiff with security in advance of judgment. This was first recognised by Robert Goff, J. in *The Angel Bell* [1980] 1 All E.R. 480, at 486-487 whose view was later applied or approved or both by the Court of Appeal in *Z.* v. *A.* [1982] 1 All E.R. 556 and *A. J. Bekhor & Co. Ltd.* v. *Bilton* [1981] 2 All E.R. 565, and by the High Court in *Searose* v. *Seatrain (U.K.) Ltd.* [1981] 1 All E.R. 806; *Clipper Maritime Co. Ltd.* v. *Mineralimportexport (The Marie Leonhardt)* [1981] 3 All E.R. 664; *Galaxia Maritime S.A.* v. *Mineralimportexport (The Eleftherios)* [1982] 1 All E.R. 796.

[5] The term "abuse" is not, however, employed prominently in judicial dicta, apart from those of Robert Goff, J. in *"The Angel Bell", supra, A.* v. *C.* [1980] 2 All E.R. 347, 351 and *Stewart Chartering Ltd.* v. *C. & O. Managements S.A. (The Venus Destiny)* [1980] 1 All E.R. 718, 719 and those of Stephenson, L.J. in *A. J. Bekhor & Co. Ltd.* v. *Bilton, supra,* 585-586.

[6] Jurisdiction has been consistently derived since the *Mareva* case itself (see [1975] 2 Lloyd's Rep. 509, 510) from the power under s. 45 (1) Supreme Court of Judicature (Consolidation) Act, 1925, to grant an interlocutory injunction "in all cases in which it shall appear to the court to be just or convenient"; of that source, s. 37(3) of the Supreme Court Act, 1981, is now generally regarded as confirmatory: *Z.* v. *A.* [1982] 1 All E.R. 556, 561 *per* Lord Denning, M.R., 571 *per* Kerr, L.J. The provision is set out *infra* n. 21.

In some Australian[7] and New Zealand[8] courts the basis of Mareva jurisdiction has been located in the courts' inherent powers to restrain abuse. In consequence the Mareva there takes a more logical shape, addressing directly the need to inhibit judgment evasion. It is, moreover, inoffensive to the equitable principles that govern the award of interlocutory injunctions, and it contains its own natural criteria for award. It will be suggested in this article that the English courts are attempting to straddle two horses; to derive jurisdiction from one source and incompatible criteria from another. In order to argue this it will be necessary to digress into the doctrinal history of the Mareva injunction in the English courts.

1. The Doctrinal History of the Mareva Injunction

In 1975 the Commercial Court, with the support of the Court of Appeal, began granting this new species of urgent relief to restrain a defendant *ex parte* from dealing with his assets pending resolution of a claim in debt of damages which the plaintiff had instituted or was about to institute. The order became known as the "Mareva" injunction.[9]

In the cases that went before the court in 1975 the plaintiffs' cases were so strong on the merits as to "cr(y) out for a procedural remedy of the kind".[10] Action was brought by shipowners against charterers in respect of unpaid hire. The charterers were out of the jurisdiction, they could not be traced, but they had funds in bank accounts in London, which they were likely to transfer out of the jurisdiction in order to frustrate the judgments which the plaintiffs would ultimately obtain through the ordinary processes of law. Kerr, J. in a much quoted passage described the practical problem that called for a remedy:

> A plaintiff has what appears to be an indisputable claim against a defendant resident outside the jurisdiction, but with assets within the jurisdiction which he could easily remove, and which the court is satisfied are liable to be removed unless an injunction is granted. The plaintiff is then in the following difficulty. First, he needs leave to serve the defendant outside the jurisdiction, and the defendant is then given time to enter an appearance from the date when he is served, all of which usually takes several weeks or even months. Secondly, it is only

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[7] *Riley McKay Pty. Ltd.* v. *McKay & Anor.*, 8th March, 1982, as yet unreported decision of the Court of Appeal of New South Wales (Street, C.J., Hope, J.A., Rogers, A.J.A.) at p. 16-17 of the judgment of the Court; *Turner* v. *Sylvestre* [1981] 2 N.S.W.L.R. 295, 302-303 *per* Rogers, J.

[8] *Hunt* v. *B.P. Exploration Company (Libya) Ltd.* [1980] 1 N.Z.L.R. 104, 116-119 *per* Barker, J. who invoked s. 16 of the Judicature Act, 1908 which provides that the Court should have ". . . all judicial jurisdiction which may be necessary to administer the laws . . .". The Court of Appeal of New South Wales in *Riley McKay* (*supra*, n. 7) founded alternatively on the inherent powers and on the New South Wales equivalent of the New Zealand s. 16 (s. 23 Supreme Court Act, 1970 (N.S.W.)), in which the Court found co-extensive power with the inherent powers (see p. 8 of the judgment of the Court).

[9] The order is named after the *Mareva* case, referred to in n. 1 *supra*.

[10] *Turner* v. *Sylvestre* [1981] 2 N.S.W.L.R. 295, 299 *per* Rogers, J.

> then that the plaintiff can apply for summary judgment under Order 14 with a view to levying execution on the defendant's assets here. Thirdly, however, on being apprised of the proceedings, the defendant is liable to remove his assets, thereby precluding the plaintiff in advance from enjoying the fruits of a judgment which appears irresistible on the evidence before the Court. The defendant can then largely ignore the plaintiff's claim in the courts of this country and snap his fingers at any judgment which may be given against him.[11]

Authority precluded invocation of the general equitable injunctive powers,[12] and equally one might have thought recourse to the Judicature Act power to grant interlocutory injunctions "in all cases in which it shall appear to the court to be just or convenient",[13] an enactment usually considered purely procedural in intent and effect.[14] Nevertheless, by a redefinition of the "rights" necessary to invoke injunctive relief, jurisdiction was drawn from s. 45, on the basis that the needs of modern business required it.[15]

Over the following six years the Mareva injunction went through successive evolutionary phases. First, in a series of cases, the judges clarified the boundaries of the jurisdiction, and set some criteria for the exercise of the discretion.[16] They then refined the purpose of the injunction,[17] and consistently with the articulated purpose, tailored its impact[18] and extended its subject-matters.[19] Finally, with the Mareva

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[11] Cited with approval by Lord Denning, M.R. at 660-661 in *Rasu Maritima S.A.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi (Government of the Republic of Indonesia Intervening) (The Pertamina)* [1978] Q.B. 644; by Robert Goff, J. at 485 in *The Angel Bell* [1980] 1 All E.R. 480; by Rogers, J. at 304 in *Turner* v. *Sylvestre* [1981] 2 N.S.W.L.R. 295; by Barker, J. at 118 in *Hunt* v. *B.P. Exploration Company (Libya) Ltd.* [1980] 1 N.Z.L.R. 104.

[12] *Lister & Co.* v. *Stubbs* (1890) 45 Ch. D. 1, 14 *per* Cotton, L.J.; *Robinson* v. *Pickering* (1881) 16 Ch. D. 660 *per* James, L.J.; *Mills* v. *Northern Rwy. Co. of Buenos Ayres Co.* (1870) L.R. 5 Ch. App. 621, 628 *per* Lord Hatherley, L.C.; *Newton* v. *Newton* (1885) 11 P.D. 11, 13 *per* Sir John Hannen, P.

[13] S. 45 Judicature Act, 1925.

[14] *North London Rwy. Co.* v. *Great Northern Rwy. Co.* (1883) 11 Q.B.D. 30, 37-39, *per* Brett and Cotton, L.JJ. accepted in *Mayfair Trading Co. Pty. Ltd.* v. *Dreyer* (1958) 101 C.L.R. 428, 454; see Hanbury & Maudsley, *Modern Equity* (10th ed., 68); Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies,* (1st ed., 1975) paras. 2113-4, and discussion in Spry, *Equitable Remedies,* 2nd ed., 309-313.

[15] *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509, 510 *per* Lord Denning, M.R.

[16] See particularly *Rasu Maritima S.A.* v. *Perusahaan Pertambangan Minyak Dan Gas Bumi (Government of the Republic of Indonesia Intervening) (The Pertamina)* [1978] Q.B. 644; *Third Chandris Shipping Corporation et al.* v. *Unimarine S.A.* [1979] 2 All E.R. 972.

[17] See *Iraqi Ministry of Defence* v. *Arcepey Shipping Co. S.A. (Gillespie Brothers & Co. Intervening) (The Angel Bell)* [1980] 1 All E.R. 480, 486-487, *per* Robert Goff, J.; and see *supra* n. 2 and 4.

[18] See *Iraqi Ministry of Defence* v. *Arcepey Shipping Co. S.A. (Gillespie Brothers & Co. Intervening) (The Angel Bell)* [1980] 1 All E.R. 480, 486-487; *A.* v. *C.* [1980] 2 All E.R. 347, 351, *per* Robert Goff, J.; *Barclay-Johnson* v. *Yuill* [1980] 1 W.L.R. 1259, 1264, *per* Sir Robert Megarry, V.-C.; *Rahman (Prince Abdul) bin Turki al Sudairy* v. *Abu-Taha* [1980] 1 W.L.R. 1268, 1273 *per* Lord Denning, M.R.; *A. J. Bekhor & Co. Ltd.* v. *Bilton* [1981] 2 All E.R. 565, 579-580 *per* Ackner, L.J.; *Z. Ltd.* v. *A.* [1982] 1 All E.R. 556, 571-572 *per* Kerr, L.J.

[19] See Sir Robert Megarry, V.-C. at 1264-1266 in *Barclay-Johnson* v. *Yuill* [1980] 1 W.L.R. 1259; *Rahman (Prince Abdul) bin Turki al Sudairy* v. *Abu-Taha* [1980] 1 W.L.R. 1268, 1272-1273 *per* Denning, M.R.

apparently safe from judicial abolition[20] and accorded legislative force[21] they set about pruning its extravagances.[22]

By the time the first phase was complete, the criteria for award were not firmly settled,[23] but in general the Mareva was available to a plaintiff who could show an undisputed or a strong *prima facie* claim[24] against a foreign defendant,[25] and evidence that the defendant had moveable assets within the jurisdiction[26] which unless restrained he was likely to remove.[27]

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[20] It seems unlikely that the House of Lords will disapprove of the Mareva injunction now; in *Siskina* v. *Distos Compania Naviera S.A.* [1979] A.C. 210, Lord Hailsham (at 261-262) recognised the implications of the assumption of jurisdiction, but he, along with Lord Diplock (at 253), declined to disapprove it then; see comment by Rose, "The Mareva Injunction — Attachment in Personam" [1981] 1 *Lloyd's Maritime & Commercial Law Quarterly*, 1, 2-3.

[21] S. 37(3) of the Supreme Court Act 1981 is generally regarded as confirmatory of a jurisdiction based in s. 45; see *Z. Ltd.* v. *A.* [1982] 1 All E.R. 556, 561 *per* Lord Denning, M.R., 571 *per* Kerr, L.J. It provides:

> The power of the High Court . . . to grant an interlocutory injunction restraining a party to any proceedings from removing from the jurisdiction of the High Court, or otherwise dealing with, assets located within the jurisdiction shall be exercisable in cases where that party is, as well as in cases where he is not, domiciled, resident or present within the jurisdiction.

[22] See particularly *A. J. Bekhor & Co. Ltd.* v. *Bilton* [1981] 2 All E.R. 565, 579-580 *per* Ackner, L.J.; *Z.* v. *A.* [1982] 1 All E.R. 556, 571-572 *per* Kerr, L.J.; *Galaxia Maritime S.A.* v. *Mineralimportexport (The Eleftherios)* [1982] 1 All E.R. 796, 799-800 *per* Kerr, L.J.

[23] See Thomas, "The Sister Ship Action in Rem" [1979] Lloyd's M. & C.L.Q. 158, 160; Gareth Jones, "The Rise of the Mareva Injunction" (1981) 11 *U. Qd. L.J.* 133, 133; Rose, "The Mareva Injunction — Attachment in Personam" [1981] 1 Lloyd's M. & C.L.Q. 1 & 177, 192; Kerr, "Modern Trends in Commercial Law" (1980) 43 *M.L.R.* 1, 11; Charity, "Mareva Injunctions: A Lesson in Judicial Acrobatics" (1981) 12 *J. Maritime Law and Commerce*, 349, 362.

[24] In recognition of the potentially serious consequences for the defendant or his business, the judges generally impose a more rigorous test of "*prima facie* case" than the "serious question" test applied in England on the authority of *American Cyanamid* v. *Ethicon Ltd.* [1975] A.C. 396. The early Mareva cases refer to an undisputed, very strong or indisputable claim (see *Mareva supra*, 510 *per* Lord Denning, M.R., 512 *per* Ormrod, L.J.; *Pertamina* [1978] 1 Q.B. 644, 658 *per* Lord Denning, M.R., 662 *per* Orr, L.J.). Although in *Third Chandris* [1979] 2 All E.R. 972, 984 Lord Denning, M.R. appeared willing to relax the requirement to a "good arguable case" the Court of Appeal has recently indicated the need for a strong case; see particularly Kerr, L.J. in *Z. Ltd.* v. *A.* [1982] 1 All E.R. 556, 572.

[25] Absence of the defendant from the jurisdiction was regarded as essential in the early cases; see *The Pertamina* [1978] 1 Q.B. 644, 659 *per* Lord Denning, M.R. That requirement has now been removed; see *supra* n. 3.

[26] The early cases appeared to limit the injunction to moveable assets (see Kerr, J. in *The Pertamina*, quoted by Lord Denning, M.R., *supra* 658 and *M.B.P.X.L., supra*), such as credit balances in bank accounts (*Mareva, Nippon Ysen Kaisha*), warehoused goods (as in *Pertamina*), ships (*The Rena K.* [1979] Q.B. 377), and aeroplanes (*Allen* v. *Jambo Holdings* [1980] 2 All E.R. 502). However, dealings with overdrawn bank accounts (*Third Chandris*), real estate (*Hunt* v. *B.P. Exploration Company (Libya) Ltd.* [1980] 1 N.Z.L.R. 104), money likely to come into the hands of the defendant pursuant to a contract for the sale of land (*Praznovsky* v. *Sablyack* [1977] V.R. 114) or in terms of a policy of insurance (*Siskina*) have been recognised as appropriate subjects of injunction.

[27] The courts require the plaintiff to set out results of enquiries into the defendant's business, including its size, origins, business domicile, location of its known assets and circumstances of the dispute, from which the judge "like a prudent, sensible commercial man, can properly infer a danger of default" (*Third Chandris, supra*, 987, *per* Lawton, L.J.). The danger will readily be inferred in cases of companies doubtful in structure and solvency and registered in countries with questionable commercial practices (*Third Chandris, supra*, 985, *per* Lord Denning, M.R.) and it may also be inferred where the dissipation apprehended is within rather than outside the jurisdiction (*Z. Ltd.* v. *A.* [1982] 1 All E.R. 556, 561, *per* Lord Denning, M.R.; 571-572 *per* Kerr, L.J.). But the mere fact that the defendant is an extremely wealthy man will not help him if he will not demonstrate willingness and ability to satisfy judgment (*Hunt* v. *B.P. Exploration Company (Libya) Ltd.* [1980] 1 N.Z.L.R. 104, 119-120 *per* Barker, J.). The character of the assets in question is also relevant. Danger of removal is more readily shown in relation to liquid assets capable of removal in seconds by telephone or telex through the international banking system (*Third Chandris, supra*, 985-986, *per* Lawton,

Those criteria derived from the constraints of practical and commercial necessity which had provided a policy justification for assumption of jurisdiction; they bore no significant relation to and were in some respects inconsistent with a general discretionary injunctive power available to parties to protect their pre-trial interests. It was at least unusual for higher courts to so fetter the discretion of lower courts by the imposition of fixed criteria[28] and curious to find an interlocutory remedy available on the application of a party for the preservation of his "rights", not in truth preserving those "rights" but aimed instead at regulating the defendant's behaviour for the apparently collateral purpose of preventing him from "snapping his fingers at any judgment which may be given against him".[29]

The criteria caused some disquiet in the courts as elsewhere,[30] and notably in the only House of Lords consideration, the *Siskina*.[31] The paradoxes at length received the attention of Robert Goff, J., who in the *Angel Bell*,[32] restructured the rationale and took Mareva into its second evolutionary phase. His Honour found that the function of the Mareva injunction was to anticipate the defendant's procedural abuse rather than the plaintiff's remedies as a future judgment creditor.[33]

In the opinion of Robert Goff, J., the purpose of a Mareva injunction was to prevent the "abuse"[34] and "injustice"[35] which would result from foreign defendants "making themselves judgment-proof by removing their assets from the jurisdiction or by disposing of those assets within the jurisdiction to shareholders or others who might be amicably disposed, and doing so before judgment and execution".[36] Its function was neither to freeze assets pending resolution of the plaintiff's claim nor to preserve them for its satisfaction[37] nor indeed to affect a "quasi-winding up" of a defendant company.[38] Although the usual form of the order restrained any

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Footnote 27 (continued)
L.J.). Conversely, real estate and stock charged in favour of others is less likely to be liquidated and removed (*Ex parte B.P. Exploration Co. (Libya) Ltd.; Re Hunt* [1979] 2 N.S.W.L.R. 406, 411. See discussion in Rose, "The Mareva Injunction — Attachment in Personam" [1981] 1 *Lloyd's M. & C.L.Q.* 1, pp. 13 ff.

[28] See Charity, *supra* n. 23 at 351.

[29] Kerr, J. in *The Pertamina* [1978] Q.B. 644, cited with approval by Lord Denning, M.R. at 660-661 in his judgment in the Court of Appeal in that case.

[30] The most general significant source of disquiet lay in the implications *Mareva* has for civil liberties previously protected by a balance of legislative and judicial policy: see *Pivovaroff* v. *Chernabaeff* (1978) 16 S.A.S.R. 329, 334-340 *per* Bray, C.J.; *Ex parte B.P. Exploration Co. (Libya) Ltd.; Re Hunt* [1979] 2 N.S.W.L.R. 406, 410-412, *per* Powell, J.; and see discussion in Rose, "The Mareva Injunction — Attachment in Personam" [1981] 1 *Lloyd's M. & C.L.Q.* 1 & 177, 194-197; Mason, "Declarations, Injunctions and Constructive Trusts; Divergent Developments in England and Australia" (1981) 11 *U. Qd. L.J.* 121, 125-126; and Hetherington, "The Mareva Injunction" (1980) 18 *Law Society J. (N.S.W.)* 55, 55, 63-64.

[31] [1979] A.C. 210, 261-262 where Lord Hailsham of St. Marylebone expressed concern that the Mareva injunction generated a new anomaly favourable to plaintiffs whose defendants were foreign; no ground based on principle distinguished the claim or those plaintiffs from other "similarly placed" plaintiffs who faced evasive domestic defendants.

[32] [1980] 1 All E.R. 480.

[33] *Id.* 486-487.

[34] *Id.* 487.

[35] *Id.* 486.

[36] *Id.* 484 quoting from the judgment of Donaldson, L.J. in earlier proceedings.

[37] *Id.* 486-487.

[38] *Id.* 484 quoting from the judgment of Donaldson, L.J. in earlier proceedings.

disposal of assets within the jurisdiction and any removal from it that form reflected a policy of pre-emptive stealth to preclude evasive action by the defendant rather than one of providing the plaintiff with a fund for satisfaction of his future judgment.[39] Accordingly the injunction could not be used to enhance the plaintiff's position as a creditor[40] nor to preclude *bona fide* payment by the defendant of his legitimate business debts.[41] To permit him to do so would stretch the Mareva "beyond its original purpose so that instead of preventing abuse it would prevent businessmen conducting their business as they are entitled to do".[42]

The legitimacy of Mr. Justice Robert Goff's reformulation was acknowledged in later judgments.[43] The generality of the "abuse" rationale greatly assisted the development of the law. It lent logic to the extension of Mareva jurisdiction beyond commercial and shipping cases against foreign defendants[44] into all areas of litigation where "similarly placed"[45] claimants faced the peril of evasion.[45] It placed logical restrictions on the benefits accruing to Mareva plaintiffs and thus permitted recognition of the interests of third parties in the property subject to injunctions.[47]

Further, the "abuse" rationale provided the launching pad for the third evolutionary phase, in which the judges are limiting the availability of Mareva by requiring compliance with more stringent criteria than in practice have been insisted upon in the past.[48] In *A. J. Bekhor & Co. Ltd* v. *Bilton*[49] Ackner, L.J. issued a stern reminder that the Mareva provided a

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[39] *Id.* 485-486.

[40] *Id.* 486.

[41] *Id.* 486-487.

[42] *Id.* 487.

[43] By Sir Robert Megarry, V.-C. in *Barclay-Johnson* v. *Yuill* [1980] 1 W.L.R. 1259, 1264, and by the Court of Appeal in *Rahman (Prince Abdul) bin Turki al Sudairy* v. *Abu-Taha* [1980] 1 W.L.R. 1268, 1273 *per* Lord Denning, M.R.; in *A. J. Bekhor & Co. Ltd.* v. *Bilton* [1981] 2 All E.R. 565, 579-580 *per* Ackner, L.J.; in *Z. Ltd.* v. *A.* [1982] 1 All E.R. 556, 571-572 *per* Kerr, L.J.

[44] It justified the extension to cases against domestic defendants by Sir Robert Megarry, V.-C. at 1264-1266 in *Barclay-Johnson* v. *Yuill* [1980] 1 W.L.R. 1259, later approved and applied by the Court of Appeal in *Rahman (Prince Abdul) bin Turki al Sudairy* v. *Abu-Taha* [1980] 1 W.L.R. 1268, 1272-1273 *per* Lord Denning, M.R. The logical defect in restricting the relief to cases against foreign defendants was mentioned by Lord Hailsham at 261 in *The Siskina* [1979] A.C. 210 and later discussed by Brandon, L.J. at 885 in *Faith Panton Property Plan Ltd.* v. *Hodgetts* [1981] 2 All E.R. 877.

[45] This expression was used by Lord Hailsham in his comparison of evasions of domestic and foreign defendants in *The Siskina* [1979] A.C. 210, 262.

[46] In the words of Lord Justice Kerr, it has "pervaded the whole of our law" (see *Z.* v. *A.* [1982] 1 All E.R. 556, 571). Mareva has been employed in matrimonial, personal injuries and Fatal Injuries Act cases as well as in commercial matters like the shipping cases where it originated (see *Allen* v. *Jambo Holdings* [1980] 2 All E.R. 502, [1980] 1 W.L.R. 1252 and discussion of Kerr, L.J. in *Z. Ltd.* v. *A.* [1982] 1 All E.R. 556, 571). Very recently the same principle was invoked in the criminal area to justify award of an injunction freezing the bank account of an alleged forger on the application of the police (see *Chief Constable of Kent* v. *V. and another*, 6th May, 1982, unreported decision of the Court of Appeal (comprising Lord Denning, M.R., Donaldson and Slade, L.JJ.).

[47] It called for the restriction of function to inhibiting abuse rather than providing the plaintiff with security in advance of judgment; see Robert Goff, J. in *The Angel Bell* [1980] 1 All E.R. 480, at 486-487 and the later application or approval, or both, of his view by the Court of Appeal in *Z.* v. *A.* [1982] 1 All E.R. 556 and *A. J. Bekhor & Co. Ltd.* v. *Bilton* [1981] 2 All E.R. 565, and by the High Court in *Searose* v. *Seatrain (U.K.) Ltd.* [1981] 1 All E.R. 806; *Clipper Maritime Co. Ltd.* v. *Mineralimportexport (The Marie Leonhardt)* [1981] 3 All E.R. 664; *Galaxia Maritime S.A.* v. *Mineralimportexport (The Eleftherios)* [1982] 1 All E.R. 796.

[48] The previous tendency was to relax the criteria; see Mustill, J. in *Third Chandris, supra,* 650 ff., and comment by Charity, *supra,* n. 23 at 362 on the inconsistencies in judicial application of Mareva law.

[49] [1981] 2 All E.R. 565.

"limited exception" to the ordinary remedies, available *only* to inhibit the frustration of those remedies, and then neither routinely available nor operative beyond the achievement of that singular purpose:[50]

> The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets pendente lite merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would lie open to any claimant to paralyse the activities of any person or firm against whom he makes his claims, by obtaining an injunction freezing their assets (per Sir Robert Megarry V.-C. in *Barclay-Johnson* v. *Yuill* [1980] 3 All E.R. 190 at 193). . . The purpose of the Mareva was not to improve the position of claimants in an insolvency but simply to prevent the injustice of a defendant removing his assets from the jurisdiction which might otherwise have been available to satisfy a judgment. It is not a form of pre-trial attachment but a relief in personam which prohibits certain acts in relation to the assets in question (per Robert Goff J. in *Iraqi Ministry of Defence* v. *Arcepey Shipping Co. S.A.* [1980] 1 All E.R. 480).[51]

In similar vein, Kerr, L.J. in *Z.* v. *A.*[52] attempted by the imposition of restrictive criteria to curb misuse of the Mareva procedure. His Lordship identified two common forms of abuse:

> First, the increasingly common one, as I believe, of a Mareva injunction being applied for and granted in circumstances in which there may be no real danger of the defendant dissipating his assets to make himself "judgment-proof"; where it may be invoked, almost as a matter of course, by a plaintiff in order to obtain security in advance for any judgment which he may obtain; and where its real effect is to exert pressure on the defendant to settle the action. The second, and fortunately much rarer, illustration of what I would regard as an abuse of this procedure, is where it is used as a means of enabling a person to make a payment under a contract or intended contract to someone in circumstances where he regards the demand for the payment as unjustifiable; or where he actually believes, or even knows, that the demand is unlawful; and where he obtains a Mareva injunction ex parte in advance of the payment, which is then immediately served and has the effect of "freezing" the sum paid over. . . . In effect, this amounts to using the injunction as a means of setting a trap for the payee.[53]

To prevent those and other possible abuses, Marevas should be granted only on a strong *prima facie* case accompanied by a high chance of evasion:

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[50] *Id.* 577-580.
[51] *Id.* 577.
[52] [1982] 1 All E.R. 556.
[53] *Id.* 571-572; see also the further identification as an "abuse" of the Mareva jurisdiction by Kerr, L.J. arising from orders that result in "an unwarrantable act of interference with the business of a third party": *Galaxia Maritime S.A.* v. *Mineralimportexport* [1982] 1 All E.R. 796, 799.

> It follows that in my view Mareva injunctions should be granted, but granted only, when it appears to the court that there is a combination of two circumstances. First, when it appears likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum. Second, when there are also reasons to believe that the defendant has assets within the jurisdiction to meet the judgment, in whole or in part, but may well take steps designed to ensure that these are no longer available or traceable when judgment is given against him.[54]

Once abuse became the sole rationale of the jurisdiction one might have expected either of two consequences to follow. Either the courts would discover that the source of Mareva jurisdiction lay in the courts' inherent powers to restrain abuse, or they would regard the Mareva injunction as an exceptional exercise of s. 45, directed solely towards the prevention of abuse, with abuse in doctrine as in logic the key to expansion and limitation as it was to jurisdiction. Each of the possibilities will be considered.

2. **Abuse as the Source of Jurisdiction**

Invocation of the courts' inherent powers could be justified on grounds of logic and convenience.[55] If, as appears to be the case, the Mareva injunction is directed towards, shaped by, and limited to the prevention of the defendant's abuse rather than protection of the plaintiff's interests, it more logically and more appropriately draws jurisdiction from the courts' inherent powers to restrain abuse rather than from the plaintiff-oriented and authority-bound general equitable or statutory injunctive powers. The inherent jurisdiction of the court includes all the powers that are necessary to enable it "to fulfil itself as a court of law"; "to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner".[56] Before judgment entitles the plaintiff to charging orders against the defendant's assets[57] the defendant and his property enjoy an immunity. A defendant who exploits that immunity by removing or disposing of his assets so as to render himself judgment-proof abuses procedures designed for his protection and not his improper exploitation.

That is the basis on which Mareva founds in those Australian and New Zealand jurisdictions where the purity of equity is not readily diluted. In the Supreme Court of New South Wales Rogers, J. in *Turner* v. *Sylvestre*[58]

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[54] [1982] 1 All E.R. 556, 572.

[55] See fuller discussion in Hetherington, "The Mareva Injunction" and "The Angel Bell" (1980) 18 *Law Society J.* (N.S.W.) 55 and 249.

[56] Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems*, 23, 27 and 28.

[57] Such orders tend to be available only on proof of the defendant's intention to defeat creditors *and* likely resultant prejudice to the plaintiff's capacity to prosecute his claim; see *Glover* v. *Walters* (1950) 80 C.L.R. 172, 176 *per* Dixon, J.; *Jira* v. *Burcher* (1961) 78 W.N. 421, 423 *per* Manning, J.; *Felton* v. *Callis* [1969] 1 Q.B. 200; *Elliott* v. *Elliott* [1975] 1 N.S.W.L.R. 148; see also discussion by the Court of Appeal of N.S.W. in *Riley McKay Pty. Ltd.* v. *McKay*, *supra* 12-16, and comparative treatment of statutory remedies in Farmer, *Creditor and Debtor Law in Australia and New Zealand* (1980), Ch. 9, The Forms of Execution.

[58] [1981] 2 N.S.W.L.R. 295.

thought that the Robert Goff rationalisation of Mareva justified recourse to the inherent jurisdiction:

> As I understand his Lordship's approach he takes the view that any superior court has an inherent power to prevent abuse. The abuse for present purposes is the utilization of the court's procedures for defending claims and giving a hearing and the defendant utilizing the time required for such procedures to remove by stealth assets within the jurisdiction. In other words, it pre-supposes a plaintiff who has a wholly justified claim against the defendant. But for the need to go through court procedures, he would be entitled to payment forthwith. The defendant puts the plaintiff to proof of the ingredients of his cause of action by filing a defence and otherwise invoking the procedures laid down for trials of action. During the time it takes a plaintiff to obtain judgment, the defendant utilizes the time to remove all his assets from the jurisdiction. In this sense, it is said the defendant is abusing the court's process.[59]

Subsequently, the Court of Appeal of New South Wales endorsed that analysis, finding a basis of jurisdiction alternative to the inherent powers in the co-extensive[60] Supreme Court Act power which affords the courts "all the judicial jurisdiction which may be necessary to administer the laws",[61] and which in New Zealand is recognised as a proper basis for the Mareva injunction.[62] Either power supported the Mareva jurisdiction which "is designed to prevent conduct inimical to the administration of justice":[63]

> 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 judgment 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.[64]

In England, however, the possibility of relocating Mareva jurisdiction in the courts' inherent powers remains largely unexplored. The reasons for this appear to be two-fold. First, s. 37 (3) of the Supreme Court Act 1981 is

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[59] [1981] 2 N.S.W.L.R. 302.

[60] *Riley McKay Pty. Ltd.* v. *McKay and Anor.*, 8th March, 1982, as yet unreported decision of the Court of Appeal of New South Wales (Street, C.J., Hope, J.A., Rogers, A.J.A.) at p. 16-17 of the judgment of the Court.

[61] S. 23 Supreme Court Act (N.S.W.) 1970.

[62] S. 16 Judicature Act (N.Z.) 1908; see *Hunt* v. *B.P. Exploration Company (Libya) Ltd.* [1980] 1 N.Z.L.R. 104, 116-119 *per* Barker, J.

[63] *Id.* 17.

[64] *Id.* 16.

generally regarded as confirmatory of a jurisdiction based in s. 45.[65] Secondly, the judges adopt a conservative approach to the scope of the inherent powers. It appears that only Lord Justice Stephenson in *A. J. Bekhor & Co. Ltd.* v. *Bilton*[66] has overtly admitted the possibility that jurisdiction is derivable from inherent powers. His Lordship expressed some unease at the conflict between the recently affirmed[67] orthodox authorities on the characterisation of "right" in aid of which interlocutory injunctions can go, and the *Mareva* and *Anton Pillar* lines of cases, but concluded that although the proper basis of Mareva jurisdiction was unclear, it should not be further examined:

> How far those authorities imprison the courts a century later or fossilize their practice is a question which cannot be answered without considering the *Anton Piller* and *Mareva* lines of case. But the House of Lords has reiterated the old requirement that injunctions must protect a legal or equitable right, a substantive cause of action in law or equity, in *The Siskina* . . . [1979] A.C. 210 and even more recently in *Bremer Vulkan Schiffbau Und Maschinenfabrik* v. *South India Shipping Corpn* . . . [1981] 2 W.L.R. 141. Somehow the Mareva injunction must be considered to come within this pre-Judicature Acts restriction, and so the *A.* v. *C.* ancillary order for discovery must also come within it. . . .
>
> Whether the court has inherent or implied power to grant a Mareva injunction in its ordinary form restraining a defendant from removing his assets outside the jurisdiction or disposing of them within the jurisdiction is no longer an open question in this court, and it has received recognition in cl. 37 of the Supreme Court Bill now before Parliament. There is no statute directly conferring it. . . . So it must be presumed to have been within s. 45 of the 1925 Act, its express words or by necessary implication.[68]

In *Bekhor* it has been argued that the jurisdiction to order discovery in aid of Mareva derived from an "inherent or residual jurisdiction . . . (or) . . . general residual discretion to make any order necessary to ensure that justice be done between the parties".[69] The Court of Appeal preferred to base the orders in powers incidental to the statutory injunctive power. Speaking on this matter Stephenson, L.J. appears also to preclude the invocation of inherent powers to significantly increase the courts' remedial powers:

> In my judgment a judge has the duty to prevent his court being misused as far as the law allows, but the means by which he can perform that duty are limited by the authority of Parliament, of the rules of his court and of decided cases. Those means do, however, include what is reasonably necessary to effectively performing a judge's duties and exercising his powers. In doing what appears to him just or convenient

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[65] See n. 21, *supra.*
[66] [1981] 2 All E.R. 565, 585-586.
[67] [1981] 2 All E.R. 565, 585-586.
[68] *Ibid.*
[69] [1981] 2 All E.R. 565, 577 *per* Ackner, L.J.

> he cannot overstep those legally authorised limits, but he can do what makes their performance and exercise effective. He has a judicial discretion to implement a lawful order by ancillary orders obviously required for their efficacy, even though not previously made or expressly authorised. This implied jurisdiction, inherent because implicit in powers already recognised and exercised, and so different from any general or residual inherent jurisdiction, is hard to define and is to be assumed with caution. But to deny this kind of inherent jurisdiction altogether would be to refuse to judges incidental powers recognised as inherent or implicit in statutory powers granted to public authorities, to shorten the arm of justice and to diminish the value of the courts.[70]

It is submitted that there would be distinct advantages in recognising the inherent powers as the source of Mareva jurisdiction. First, the jurisdiction would then exist for the preservation of the court's role as a court of law rather than for the preservation of an unprecedented and controversial category of plaintiff "rights". Abuse would become the correct formal instead of a somewhat anomalous, informal precipitant of jurisdiction. The criteria for orders, both of Mareva injunctions and ancillary relief such as discovery orders, would be determined by reference to the preservation of the judicial function, deviation from the criteria normally relevant to the award of interlocutory injunctions would be unimportant, and all the major authorities could happily sit together.

3. The Interlocutory Injunctive Power as the Source of Jurisdiction

Problems faced in two recent cases by the English Court of Appeal demonstrate the difficulty in deriving jurisdiction from s. 45 and criteria from the abuse principle.

In *A. J. Bekhor Co. Ltd.* v. *Bilton*[71] a maximum sum Mareva order had been granted restraining the defendant from removing assets from the jurisdiction except in so far as his assets within the jurisdiction exceeded £250,000. On an application by the defendant and subject to his undertaking not to change the investment of his assets within the jurisdiction so as to cause them to depreciate in value, the Mareva injunction was varied to allow him to take his car, certain personal possessions and £1,250 per month out of the jurisdiction in order that he might live in Monte Carlo. Later he made a further application for variation, but when his affidavits in support indicated that he was in breach of his undertakings, the plaintiffs successfully sought discovery *inter alia* of (i) his assets as at the dates the injunction was granted, when it was varied, and when discovery was ordered, and (ii) the details of the disposal of any assets between the variation of the injunction and the date of the order for discovery.

On appeal it was held that the discovery orders were unjustified. First, the order went beyond a legitimate purpose for which discovery ancillary to

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[70] [1981] 2 All E.R. 565, 586 *per* Stephenson, L.J.
[71] [1981] 2 All E.R. 565.

Mareva could be ordered; the purpose of the order was to preserve rather than to locate assets.[72] Secondly, the order would "open the way to incriminating and ultimately punishing the defendant for contempt of court in formerly disobeying the Mareva injunction and/or breaking his undertaking".[73]

Thus, discovery orders ancillary to Mareva injunctions could go only for the purpose of locating and freezing the defendant's remaining assets but not to ascertain whether and to what extent the defendant had complied with or defied the injunction or his undertakings to the court.[74] The court, or the plaintiffs themselves, could have invoked more appropriate procedures to "police" the orders.[75] Either the defendant could have been cross-examined on his affidavits in support, or the variation could have been withdrawn.[76]

The reasoning is, with respect, questionable in two respects. First, since the Mareva jurisdiction is exercised for the singular purpose of inhibiting abuse, exercise of inherent ancillary powers can hardly be objectionable on the ground that it will reveal particular instances of abuse which may themselves, moreover, indicate further like abuse. If, as the Court accepted, jurisdiction to grant Mareva injunctions and relief ancillary is precipitated by the danger of evasion,[77] then its exercise is equally appropriate in any such circumstances of danger, whether arising before or after the award of a Mareva injunction.

Secondly, as it is only incidentally if at all that a Mareva injunction results in satisfaction of a plaintiff's future judgment, relief is not withheld because it would not enhance that possibility.[78] Even if that were not so, in fact satisfaction of the plaintiff's ultimate judgment is just as apt to be frustrated by dissipation consequent upon non-compliance with court orders and undertakings as it is by dissipation not already restrained by court order. Only reliable information as to the defendant's then current asset position would enable the plaintiffs to ascertain what further steps they should take to protect their future judgment.

The Court's problem, it is submitted, resulted from the inevitable conflict that arises from deriving jurisdiction from one source, and criteria from another. The plaintiff, in effect, had the worst of both worlds. Section 45 limited the relief to plaintiff protection, and thus precluded an order that

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[72] *Id.* 579 *per* Ackner, L.J., 586-587 *per* Stephenson, L.J.
[73] *Id.* 587 *per* Stephenson, L.J.
[74] See *supra*, n. 72.
[75] [1981] 2 All E.R. 565, 579 *per* Ackner, L.J.
[76] *Ibid.*
[77] [1981] 2 All E.R. 565, 577 *per* Ackner, L.J.
[78] E.g. in *Hunt* v. *B.P. Exploration Company (Libya) Ltd.* [1980] 1 N.Z.L.R. 104, an injunction was given although the subject assets were insignificant in relation to the unsatisfied claim (see 118 and 121 where Barker, J. notes that the value of the assets with which dealings were enjoined were said to be worth only about 2.8% of the judgment) cf. Powell, J. in *Ex parte B.P. Exploration Co. (Libya) Ltd.; Re Hunt* [1979] 2 N.S.W.L.R. 406, 411; in *The Angel Bell* [1980] 1 All E.R. 480, 487 a Mareva injunction was varied to permit payment of debts due to a third party, although if those debts were paid in full, it appeared that there would be little if any money left to satisfy the plaintiff's claim.

could not readily be seen as advancing his interests. The "abuse" rationale, on the other hand, could not support orders given for the benefit of a Mareva applicant, when they could have the effect of establishing a punishable contempt of court by the opposing party.

A comparable difficulty arises when judges undertake the task of confining the Mareva jurisdiction by imposing criteria for award. Section 45 has not provided a rational basis for the injunction, and in consequence it does not throw up rational limitations. When Kerr, L.J. in *Z.* v. *A.* articulated restrictive criteria in the passage quoted above[79] he justified them only on the basis that they inhibited "abuse" of the Mareva jurisdiction. The specific items of "abuse" mentioned were not themselves determined by reference to any clear principle, nor would they be curbed inevitably by the application of the criteria put forth. Equally troubling is the use of the notion of "abuse" in *Galaxia Maritime S.A.* v. *Mineralimportexport.*[80] There Kerr, L.J. identifies "abuse" of the Mareva jurisdiction in orders that result in "an unwarrantable act of interference with the business of a third party".[81] It is not apparent who is supposed to be abusing the jurisdiction in that circumstance; the plaintiff in seeking the order, the court in granting it, or the plaintiff in attempting to enforce it to the prejudice of the third party.

Comparison can be made with the formulation of the Mareva principle by the Supreme Court of New South Wales. That formulation inherently contains criteria of the sort Lord Justice Kerr thought desirable. The requirement of a plaintiff with "a wholly justified claim" for which he would be immediately entitled to payment "(b)ut for the need to go through court procedures"[82] inevitably implies that it must appear "likely that the plaintiff will recover judgment against the defendant for a certain or approximate sum".[83] Again, Lord Justice Kerr's criterion of likely evasion[84] is notably inherent in Mr. Justice Rogers' assumption of jurisdiction on the basis that the defendant will otherwise use the protective procedures of the judicial system to render himself judgment-proof:

> The defendant puts the plaintiff to proof of the ingredients of his cause of action by filing a defence and otherwise invoking the procedures laid down for trials of action. During the time it takes a plaintiff to obtain judgment, the defendant utilizes the time to remove all his assets from the jurisdiction.[85]

4. Conclusion

In conclusion it must be acknowledged that the utilisation of the courts' inherent restraining powers to justify the Mareva injunction

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[79] See the passage quoted *supra,* n. 54.
[80] [1982] 1 All E.R. 796.
[81] [1982] 1 All E.R. 796, 799.
[82] *Turner* v. *Sylvestre* [1981] 2 N.S.W.L.R. 295, 302.
[83] *Z. Ltd.* v. *A.* [1982] 1 All E.R. 556, 572 *per* Kerr, L.J.
[84] *Ibid.*
[85] *Turner* v. *Sylvestre* [1981] 2 N.S.W.L.R. 295, 302.

represents a somewhat unusual exercise of those powers.[86] Nevertheless, because their invocation addresses directly the problem of defendant evasion, the Mareva is able to take a more logical shape, it is inoffensive to the equitable principles that govern the award of interlocutory injunctions and it carries with it its own natural criteria for award. The English experience on the other hand shows that doctrinal difficulties are difficult to avoid where the rationale and the source of the jurisdiction do not merge.

[86] *Turner* v. *Sylvestre* [1981] 2 N.S.W.L.R. 295, 304 *per* Rogers, J.; see also the categories of abuse restrained in the analysis of Master Jacob, Q.C. in "The Inherent Jurisdiction of the Court" (1970) 23 *Current Legal Problems* 23 and discussion by McGill, "The Jurisdictional Basis for the Mareva Injunction" (1980) 3 *U.N.S.W.L.R.* 434, 439-440 where the author argues at 440 that the "abuse" involved in alienating assets to avoid satisfaction of judgment does not constitute an "abuse of process" because no process of the court is utilised to affect it; the author suggests that "(a) defendant's exploitation of a lacuna in the substantive law does not call for a remedy by adjective law in the inherent jurisdiction".