THE JURISDICTIONAL BASIS FOR THE MAREVA INJUNCTION

1. *Introduction*

The refusal of Mr Justice Powell of the New South Wales Supreme Court to grant a Mareva[1] injunction in *Ex parte B.P. Exploration Co. (Libya); re Hunt*[2] deserves further examination both in terms of principle and in the light of later authority. The Mareva injunction was a remedy that arose out of the depressed shipping freight market of the 1970s. Typically, the remedy was sought in actions for non-payment of hire under time charterparties governed by English law where charterers outside the jurisdiction appeared to be unable to pay, yet had assets within the jurisdiction. Given the speed of modern communications, assets within the jurisdiction (especially money standing to the credit of a defendant in a bank account) could be telexed outside the jurisdiction in seconds. Motivated by Lord Denning M.R., the English Court of Appeal awarded *ex parte* interlocutory injunctions to restrain defendants from removing their assets from the jurisdiction when it appeared there was a danger they might do so to avoid the consequences of a judgment against them in a pending claim. From the very first it was asserted that the jurisdictional basis for the Mareva injunction was section 45(1) of the Supreme Court of Judicature (Consolidation) Act 1925 (U.K.) (the New South Wales equivalent is section 66(4) of the Supreme Court Act 1970). No doubt recognising the departure from settled principle that the Mareva injunction represented, Lord Denning has described the remedy as "the greatest piece of judicial law reform in my time".[3]

Judicial refinements of the Mareva principle have continued in the United Kingdom. A most significant development has been its award against a non-foreign defendant.[4] Whether the Mareva injunction will be an enduring monument to the judicial creativity of Lord Denning is nonetheless a matter of some doubt. It still awaits the full consideration of both the House of Lords[5] and the High Court of Australia. Originally

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[1] The name is derived from the second case in which this type of injunction was before the English Court of Appeal: *Mareva Compania Naviera S.A.* v. *International Bulkcarriers S.A.* [1975] 2 Lloyd's Rep. 509. It first received the blessing of the Court of Appeal in *Nippon Yusen Kaisha* v. *Karageorgis* [1975] 3 All E.R. 282, [1975] 1 W.L.R. 1093.

[2] [1979] 2 N.S.W.L.R. 406.

[3] *The Due Process of Law* (1980) 134.

[4] *Barclay-Johnson* v. *Yuill* The *Times*, 24 April 1980 (Megarry V.-C.); approved by the Court of Appeal in *Bin Turki* v. *Abu-Taha* The *Times*, 17 June 1980 (Lord Denning M.R., Waller and Dunn L.JJ.). The necessity that the defendant be absent from the jurisdiction had been criticised: Sir Michael Kerr, "Modern Trends in Commercial Law and Practice" (1978) 41 *M.L.R.* 1, 13 and comments of Lord Hailsham in *Siskina (Cargo Owners)* v. *Distos S.A.* [1979] A.C. 210, 261. See also M. Hetherington, "The Mareva Injunction: Australian Equity" (1980) 18 *Law Soc. J.* 55.

[5] In their only examination of the principle to date (*Siskina (Cargo Owners)* v. *Distos S.A.* [1979] A.C. 210) the House of Lords did not have to consider the question whether the High Court of Justice had jurisdiction to grant the Mareva injunction: *per* Lord Diplock *id.*, 254.

it appeared that the injunction was designed to preserve or "freeze" assets pending action and subsequent execution of judgment. However it is now clear that

> the fundamental purpose of the Mareva [injunction] is to prevent foreign parties from 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 them in pending proceedings [within the jurisdiction].[6]

As Megarry V.-C. correctly observed in *Barclay-Johnson* v. *Yuill*,[7] if the essence of the Mareva principle was the risk of assets being removed from the jurisdiction there is no cogent reason why it should be confined to foreigners (although the risk would be more obvious in the case of foreign-based defendants).

Whatever the "fundamental purpose" or "essence" of the Mareva injunction may be, significant controversy surrounds the jurisdictional basis for its award and explains in part the mixed reception the injunction has received in Australian courts.[8] This judicial diversity of opinion is illustrated by the varied response of judges in the New South Wales Supreme Court. There one is provided with the somewhat unusual spectacle of the remedy flourishing independently in the Commercial List,[9] whilst in the Equity Division Powell J., in referring to its award, expressed "the gravest doubts as to the existence . . . of any jurisdiction to grant a 'Mareva' injunction".[10]

2. *The New South Wales Decision*

Ex parte B.P. Exploration Co. (Libya); re Hunt represented another chapter in the attempts of B.P. Exploration Co. ("B.P.") to ensure satisfaction of a substantial money judgment obtained against Mr Nelson Bunker Hunt in the English High Court of Justice. The judgment did not purport to give B.P. any legal or equitable right to any of Mr Hunt's assets. Mr Hunt had failed to obtain a stay of execution on the judgment. The size of the judgment (in the order of $A.30 million) and the perceived unwillingness or inability of Mr Hunt to satisfy judgment or

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[6] *Iraqi Ministry of Defence* v. *Arcepey* [1980] 1 All E.R. 480, 485. In so holding, Robert Goff J. may have placed the Mareva injunction on an entirely new jurisdictional basis: see discussion *infra* and M. Hetherington, "The Angel Bell" (1980) 19 *Law Soc. J.* 249, 250.

[7] Note 4 *supra.*

[8] Granted in Western Australia (*Sanko Steamship Co. Ltd* v. *D.C. Commodities (A'Asia) Pty Ltd* [1980] W.A.R. 51), Victoria (*Praznovsky* v. *Sablyack* [1977] V.R. 114; *J. D. Barry Pty Ltd* v. *M. & E. Constructions Pty Ltd* [1978] V.R. 185), Queensland (*Ex parte B.P. Exploration Co. (Libya) Ltd; re Hunt*, unreported, Supreme Court of Queensland, 25 September 1979 (Lucas J.)) and New Zealand (*Hunt* v. *B.P. Exploration Co. (Libya) Ltd* [1980] 1 N.Z.L.R. 104 (Barker J.)). Refused in South Australia (*Pivovaroff* v. *Chernabaeff* (1978) 16 S.A.S.R. 329) and New South Wales.

[9] *E.g., Balfour Williamson (Aust.) Pty Ltd* v. *Douterluingne*, unreported, N.S.W. Supreme Court, 11 October 1978 (Sheppard J.). Other judges in the Commercial List have also granted the relief: see Letters to the Editor (1980) 18 *Law Soc. J.* 183.

[10] *Ex parte B.P. Exploration Co. (Libya); re Hunt* note 2 *supra*, 410. Powell J. also indicated that on a number of separate occasions he had declined applications for the grant of a Mareva injunction: *ibid.*

provide security for its satisfaction prompted B.P. to ensure it recovered the fruits of judgment. Mareva injunctions were sought in Australasian jurisdictions where Mr Hunt held assets. Mr Hunt's assets in New South Wales consisted of real estate with plant and stock. B.P. commenced proceedings in the Common Law Division to register the English judgment.[11] B.P. then moved *ex parte* in the Equity Division to obtain a Mareva injunction. The injunction sought to restrain Mr Hunt from disposing of, charging or otherwise alienating the New South Wales assets.

In the result the injunction was not awarded. Although Powell J. expressed grave doubts as to the existence of jurisdiction to grant the relief sought. the possibility that this opinion might be unfounded led the learned judge to decide that the injunction should also be declined on discretionary grounds.[12] For instance, the New South Wales assets were charged in favour of a third party who could deal with the assets unimpeded by an injunction,[13] and that debt may well have absorbed the amount obtainable should the assets be realised. Also, the absence of Mr Hunt from the jurisdiction was another circumstance that would have led Powell J. in the exercise of his discretion to refuse the relief sought. That is, it has never been the practice of courts of equity to make orders that were exercises in futility.[14]

3. *The Jurisdiction for the Award of the Mareva Injunction*

(a) *The Statutory Interlocutory Jurisdiction*

This jurisdiction is embodied in section 66(4) of the Supreme Court Act 1970 (N.S.W.). Section 66(4) provides that interlocutory injunctions may be granted whenever it appears to the Court "just or convenient". Powell J. did not regard that provision as conferring on the Court a new source of jurisdiction; rather in his view it represented the confirmation of the Court's existing jurisdiction to grant interlocutory relief.[15] This view is undoubtedly correct. Since *North London Railway Co.* v. *Great Northern Railway Co.*[16] it has been generally accepted that section 66(4)

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[11] Pursuant to the Foreign Judgments (Reciprocal Enforcement) Act 1973 (N.S.W.) s. 6(1). The Act contemplates that an application for registration may be made *ex parte* since s. 6(3) expressly makes the consequences of registration subject to the provisions relating to setting aside of registration (ss. 8 and 9) and s. 6(4)(a) provides that execution shall not issue on a registered judgment if an application is made to have the judgment set aside. See the comments of Stephen, Mason and Wilson JJ. on the analogous Queensland provisions in *Hunt* v. *B.P. Exploration Co. (Libya) Ltd* (1980) 28 A.L.R. 145, 152.

[12] Note 2 *supra*, 411-412.

[13] *Id.*, 411 citing *Cretanor Maritime Co. Ltd* v. *Irish Marine Management Ltd* [1978] 3 All E.R. 164, [1978] 1 W.L.R. 966. This aspect of Powell J.'s decision has been criticised: M. Hetherington, note 4 *supra*, 61-63.

[14] *Id.*, 412.

[15] *Id.*, 410.

[16] (1883) 11 Q.B.D. 30. For a recent statement see *Gouriet* v. *Union of Post Office Workers* [1978] A.C. 435, 516. For High Court authority see *Mayfair Trading Co. Pty Ltd* v. *Dreyer* (1958) 101 C.L.R. 428, 454. See generally R. Meagher, W. Gummow and J. Lehane, *Equity-Doctrines and Remedies* (1975) paras 2112-2114; I. Spry, *Equitable Remedies* (2nd ed. 1980) 309-313.

and its equivalents operated (in the context of the administrative fusion of law and equity) to repose equity's injunctive power in the common law courts. Accordingly, a party seeking a Mareva injunction faces the insuperable difficulty of proving or asserting equitable or legal rights over the property dealings with which are sought to be restrained. This is illustrated in the *Hunt* case where B.P. recovered in England a money judgment pure and simple that did not purport to give B.P. any legal or equitable rights over Mr Hunt's New South Wales assets. There is authority of venerable antiquity to the effect that an unsecured creditor cannot obtain an interlocutory injunction restraining a debtor from disposing of or dealing with his property.[17] Thus, although Mr Hunt was under a legal obligation to make a money payment to satisfy the English judgment, the traditional attitude of equity would not allow B.P. to restrain dealings with Mr Hunt's general property. That is until judgment (or in this case registration of a foreign judgment) would entitle B.P. to seek and enforce charging orders over particular assets.[18] For once judgment is obtained (or registered) any attempt by Mr Hunt to put his assets outside B.P.'s reach would infringe B.P.'s legal right to execution against those assets. An interlocutory injunction would be available to restrain dealings with those assets; otherwise those dealings would render ineffectual the charging orders sought.

The reluctance of equity to grant an interlocutory injunction, in circumstances where the plaintiff has no rights over the property dealings with which are sought to be restrained, is explicable in both jurisdictional and discretionary terms. (Strictly speaking, of course, the discretionary considerations do not arise unless the jurisdictional hurdles have been overcome). In jurisdictional terms it is asserted that in such circumstances, "the plaintiff is not asserting a legal right in aid of which he can invoke the auxiliary jurisdiction or an equitable right recognised in equity's exclusive jurisdiction".[19] In discretionary terms, a court's assumption of power over the dealings with that property may cause undue hardship to a defendant,[20] for example by impeding the defendant's ordinary course of dealings. Referring to an injunction sought in the circumstances under discussion Lord Hatherley L.C. said:

> It would be a fearful authority for this Court to assume, for it would be called on to interfere with the concerns of almost every company in the kingdom against which a creditor might suppose that he demands, which he had not established in a court of

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[17] *Mills* v. *Northern Railway of Buenos Ayres Co.* (1870) L.R. 5 Ch. App. 621, 628 *per* Lord Hatherley L.C.; *Robinson* v. *Pickering* (1881) 16 Ch. D. 660, 661 *per* James L.J.; *Lister & Co.* v. *Stubbs* (1890) 45 Ch. D. 1, 14 *per* Cotton L.J. See also *Newton* v. *Newton* (1885) 11 P.D. 11, 13 *per* Hannen P.; *Burmester* v. *Burmester* [1913] P. 76; *Jagger* v. *Jagger* [1926] P. 93, 102 *per* Scrutton L.J. For more recent authority see *Scott* v. *Scott* [1951] P. 193 and *Bradley Bros (Oshawa) Ltd* v. *A to Z Rental Canada Ltd* (1971) 14 D.L.R. (3d) 171.

[18] *E.g.*, pursuant to s. 27 of the Judgment Creditors' Remedies Act 1901 (N.S.W.).

[19] M. Hetherington, note 4 *supra*, 60.

[20] *Robinson* v. *Pickering* (1881) 16 Ch. D. 660, 662 *per* Jessel M.R.; I. Spry, *Equitable Remedies* (2nd ed. 1980) 418.

> justice, but which he was about to proceed to establish. If there is this power in any case . . . it would extend to an interference in every possible way with the dealings of the company.[21]

What is notable is the failure of those Australian courts granting Mareva injunctions to deal with the limits of the statutory interlocutory jurisdiction in general, and the traditional attitude of equity in particular.[22] Lord Denning M.R. in *Rasu Maritime S.A.* v. *Pertamina*[23] sought to avoid the traditional attitude on the basis that the decisions supporting it were not made in relation to a defendant who was outside the jurisdiction and who had money or goods within the jurisdiction. The validity of the Master of the Roll's reasoning has been somewhat eroded by his own approval of the granting of Mareva injunctions against domestic defendants.[24]

On the weight of authority, the case for section 66(4) of the Supreme Court Act as a jurisdictional source for the award of the Mareva injunction is untenable. In addition there is the significant obstacle of legislative policy. It is inconceivable that the Supreme Court Act should on the one hand repeal the Arrest on Mesne Process Act 1902 (N.S.W.) (by section 5), abolish the writs of *ne exeat regno*[25] and *capias ad respondendum*[26] (by section 10),[27] and more significantly abolish the writ of foreign attachment[28] (by section 16(3)(c)) yet on the other hand subject debtors failing to comply with an interlocutory injunction to the possibility of prison for contempt[29] (through the surprising vehicle of section 66(4)).

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[21] *Mills* v. *Northern Railways of Buenos Ayres Co.* (1870) L.R. 5 Ch. App. 621, 628.

[22] *E.g.*, in *Balfour Williamson (Aust.) Pty Ltd* v. *Douterluingue* note 9 *supra*, Sheppard J. on the authority of *Public Transport Commission (N.S.W.)* v. *J. Murray More (N.S.W.)* (1975) 132 C.L.R. 336 uncritically followed the English Court of Appeal Mareva decisions. The *Murray More* case contains anachronistic dicta to the effect that the Supreme Court should as a general rule follow the decisions of the Court of Appeal in England (*id.*, 341 *per* Barwick C.J.). Gibbs J. (*id.*, 349) went so far as to say the Supreme Court was bound by the Court of Appeal in England. It is respectfully submitted that, whilst the former view is doubtful, the latter is untenable.

[23] [1977] 3 W.L.R. 518, 526.

[24] In *Bin Turki* v. *Abu-Taha*, note 4 *supra*.

[25] A writ that restrained a person from leaving the jurisdiction without leave of the court.

[26] A writ issued for the arrest of a person against whom an indictment or misdemeanour has been found to ensure that person's attendance in court.

[27] For judicial recognition of the effect of s. 10 see *Elliot* v. *Elliot* [1975] 1 N.S.W.L.R. 148. (The Court has no power under s. 66 of the Supreme Court Act to restrain the defendant in an action for debt from leaving N.S.W.).

[28] A writ previously issued pursuant to Part XX of the Common Law Procedure Act 1899 (N.S.W.) analogous to the American writ of foreign attachment or the European "saisie conservatoire". See discussion of Mustill J. in *Third Chandris Shipping Corporation* v. *Unimarine S.A.* [1979] 2 All E.R. 972, 974; [1979] 3 W.L.R. 122, 125.

[29] For discussion of penalties for disobedience to injunctions see I. Spry, *Equitable Remedies* (2nd ed. 1980) 343-347.

(b) *The Inherent Jurisdiction of the Court*[30]

In a series of decisions in the English High Court of Justice,[31] Robert Goff J. has stated that the principle underlying the jurisdiction for the award of the Mareva injunction is the prevention of an abuse. That is, the abuse of a defendant in removing assets from the jurisdiction so as to stultify the risk of judgment in pending proceedings. The suggestion appears to be that the award of an *ex parte* interlocutory injunction is an aspect of the powers of a superior court in its inherent jurisdiction.[32] At least one commentator[33] has so interpreted the approach of Robert Goff J., stating that the injunction anticipates the defendant's procedural abuse and is necessary to ensure the effective administration of justice.[34] One of the undoubted elements of the inherent jurisdiction is the power of a court to regulate its process and prevent abuse.[35]

Two comments could be made with regard to this interpretation of the Mareva principle.[36] First, although the injunction is awarded pursuant to the inherent jurisdiction and not the statutory interlocutory jurisdiction, there is some difficulty in appreciating how the traditional

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[30] The inherent jurisdiction of the N.S.W. Supreme Court exists independently of its statutory jurisdiction (Supreme Court Act 1970) and is an aspect of the Court's general jurisdiction as established by Letters Patent (or the Third Charter of Justice) issued pursuant to 4 George IV, c. 96 s. 2 (sometimes known as the New South Wales Act 1823) (see *Metropolitan Water Sewerage and Drainage Board* v. *Arapas* [1970] 3 N.S.W.L.R. 174, 179 *per* Asprey J.A.). S. 2 of the Australian Courts Act 1828 (9 George IV, c. 83) provided for the continuance of the Court established by the Third Charter of Justice until the issue of a new charter, an event that was never to occur. S. 22 of the Supreme Court Act 1970 provides for the continuance of the Supreme Court as established. There is legislative recognition of the inherent jurisdiction: s. 61(4) Supreme Court Act 1970.

[31] *Iraqi Ministry of Defence* v. *Arcepey* [1980] 1 All E.R. 480; *Stewart Chartering Ltd* v. *C. & O. Management S.A.* [1980] 1 All E.R. 718; *A* v. *C* [1980] 2 All E.R. 347.

[32] For an erudite analysis of the inherent jurisdiction see I. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 *C.L.P.* 23.

[33] M. Hetherington, "The Angel Bell" (1980) 18 *Law Soc. J.* 249.

[34] *Id.*, 250.

[35] Although the injunction appears to be an infrequent remedy in the inherent jurisdiction. Historically (see I. Jacob, note 32 *supra*, 25) the inherent jurisdiction developed along two paths: (1) by way of punishment for contempt of court and its process (pursuant to which injunctions have been awarded: see H. Whitmore and M. Aronson, *Review of Administrative Action* (1978) 320); (2) by way of regulating the practice of the court and preventing the abuse of its process (an interlocutory injunction was sought to *Southern Cross Assurance Co. Ltd* v. *Shareholders Mutual Protection Association Ltd* [1935] S.A.S.R. 480 against the defendant for unlawful maintenance. The majority (Richards and Piper JJ.) considered that as irreparable damage to the plaintiff had not been proved the relief should not be granted. Only Angus Parsons A.C.J. (*id.*, 497) considered that the maintenance was abuse of process and that an injunction should be awarded in the exercise of *inter alia* the inherent jurisdiction. See now s. 61 of the Supreme Act 1970 (N.S.W.) which prohibits the court from restraining by injunction any proceedings in the court.)

[36] Although in fairness to Robert Goff J. he did state in *A* v. *C* [1980] 2 All E.R. 347, 351 that "there is no doubt that [the Mareva jurisdiction] is in a process of development, and that it is still in the course of throwing up problems which have yet to be solved".

attitude of courts of equity (that a creditor cannot obtain an interlocutory injunction to restrain an alleged debtor from dealing with his property before judgment) is avoided. The interlocutory injunction remains essentially a creature of equity, and mere jurisdictional sleight of hand cannot change the principles upon which it is awarded. Equitable intervention by interlocutory injunction will only occur in aid of the protection or assertion of legal or equitable rights which the court has jurisdiction to enforce by final judgment.[37] As has been demonstrated, the typical plaintiff seeking a Mareva injunction is an unsecured creditor who cannot vindicate either legal or equitable rights over the property sought to be enjoined.

Secondly, there is some doubt as to whether Robert Goff J.'s identification of "abuse" is congruent with "abuse of process" as understood in the cases. Whilst the inherent jurisdiction appears to be without discernable limit, there has nevertheless been judicial crystallisation of its amorphous powers with regard to abuse of process.[38] The abuse to which Robert Goff J. referred was undoubtedly the defendant's exploitation of the immunity he and his property enjoy before judgment entitles a creditor to execute against that property. That is, abuse of "pre-trial advantages".[39] Abuse of process, on the other hand, "connotes that the process of the court must be used properly, honestly and in good faith . . .".[40] It implies that the court's machinery has been utilised as a means of vexation or oppression[41] in the process of litigation. The defendant seeking to put his assets beyond the reach of creditors is no doubt causing injustice to them, but is not employing the machinery of the court to do so. The process of the court is not utilised by the transfer of funds out of the jurisdiction. A defendant's exploitation of a lacuna in the substantive law does not call for a remedy by adjective law in the inherent jurisdiction. The typical intervention of the court in its inherent jurisdiction is by summary stay or dismissal of proceedings.[42]

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[37] *Siskina (Cargo Owners)* v. *Distos S.A.* [1979] A.C. 210, 256 *per* Lord Diplock. See also M. Hetherington, note 4 *supra*, 60.

[38] For English authority see I. Jacob, note 32 *supra*, 40-44 and *Halsbury's Laws of England* (3rd ed.) vol. 30 para. 767. For Canadian authority see *e.g.*, *Fieldbloom* v. *Olympic Sport Togs Ltd* (1954) 14 W.W.R. 26; *Wentzell* v. *Wile* [1941] 2 D.L.R. 393; *Melbourne* v. *McQuesten* [1942] 2 D.L.R. 483; *Orpen* v. *A.-G. Ontario* [1925] 2 D.L.R. 366; varied [1925] 3 D.L.R. 301; *R.* v. *Clark* [1943] 3 D.L.R. 684. See also in N.S.W. *Clarke* v. *Darley* (1898) 14 W.N. (N.S.W.) 129; *Ferris* v. *Lampton* (1905) 22 W.N. (N.S.W.) 56; *Gregory* v. *Comerford* (1909) 26 W.N. (N.S.W.) 42; *Lucas* v. *Neeld* (1897) 13 W.N. (N.S.W.) 144; *Webster* v. *Gipps* (1886) 2 W.N. (N.S.W.) 73; *Fortune* v. *Fortune* (1956) 73 W.N. (N.S.W.) 414. See in particular *Tringali* v. *Stewardson Stubbs & Collett Pty Ltd* [1965] N.S.W.R. 416, 418; [1966] 1 N.S.W.R. 354, 360-361.

[39] M. Hetherington, note 33 *supra*, 249.

[40] I. Jacob, note 32 *supra*, 40.

[41] Although "the description of proceedings as an abuse of process . . . seems to encompass a wider range of situations than that encompassed by either the description frivolous or vexatious": K. O'Leary and A. Hogan, *Principles of Practice and Procedure* (1976) para. 15.307.

[42] I. Jacob, note 32 *supra*, 41. The remedy provided by Part 13 Rule 5 (stay or dismissal of proceedings) of the Supreme Court Rules 1970 (N.S.W.) is in addition to and not in substitution of powers arising out of the inherent jurisdiction.

These remedies are clearly inappropriate and irrelevant to the plight of the unsecured creditor seeking to prevent a debtor dealing with his property. Subject to discussion on section 23 of the Supreme Court Act, the appropriate remedy for any injustice must come from the legislature and not the inherent jurisdiction.

(c) *Section 23 of the Supreme Court Act 1970 (N.S.W.)*

This provision has been unhelpfully described as "peculiar"[43] and "very wide".[44] It provides:

> The Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales.

The marginal note reveals that section 23 was modelled upon section 16 of the Judicature Act 1908 (N.Z.).[45] In a recent New Zealand decision (being yet another chapter in the Hunt litigation), *Hunt* v. *B.P. Exploration Co. (Libya) Ltd*,[46] Barker J. held that the Court's jurisdiction to award a Mareva injunction was the exercise of the Court's general jurisdiction conferred in broad terms by section 16 of the Judicature Act. In so doing Barker J. rejected the competing submission that the Mareva principle should be regarded as an exercise of legislative power in an area better left to Parliament. The learned judge stated he was "unimpressed" by the "assumption of fearful authority"[47] line of cases. Further, there was an old English procedure of "foreign attachment" that provided a perfectly respectable ancestry for the procedure. The possible implications for New South Wales of this decision, given the presence of our section 23, are obvious. The section on its face appears to *confer* jurisdiction rather than *confirm* it. Taking an expansive view of section 23, it may have been possible for B.P. to argue in the New South Wales litigation that, unless an interlocutory injunction should go against Mr Hunt, the Foreign Judgments (Reciprocal Enforcement) Act 1973 (N.S.W.) would be frustrated. That is, a foreign judgment might become registered but incapable of satisfaction due to debtor evasiveness, thus defeating the administration of justice.

Before deliberating upon the cogency of that argument, section 23 requires further examination. New Zealand authority is a significant aid in this regard. The legislative history of section 16 of the Judicature Act was abstracted in *In re Amelia Bullock Webster (Dec'd)*,[48] and revealed that section 16 is a legislative confirmation of the general jurisdiction conferred on that Court by the New Zealand analogue to section 2 of 4 George IV, c. 96 (The New South Wales Act 1823). Accordingly, section 23 should be regarded as essentially confirmatory of the general grant of judicial power and thus read as complementary to the continu-

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[43] H. Whitmore and M. Aronson, *Review of Administrative Action* (1978) 320.

[44] *Holman* v. *Dynabuild Pty Ltd* [1975] 2 N.S.W.L.R. 334, 336 *per* Slattery J.

[45] S. 16 provides: "The Court shall continue to have all the jurisdiction which it had on the coming into operation of this Act, and all judicial jurisdiction which may be necessary to administer the laws of New Zealand."

[46] [1980] 1 N.Z.L.R. 104.

[47] Note 21 *supra*.

[48] (1936) 55 N.Z.L.R. 814, 816 (in a memorandum of counsel adopted by Northcraft J. and appended to his judgment).

ation section in the Supreme Court Act 1970 (section 22) and the judicial power section (section 24). However, judicial interpretation of section 16 in New Zealand has given that section an expansive reading. In the important decision of *Wilkie* v. *Kiely*[49] it was held that section 16 conferred more ample powers upon the New Zealand Supreme Court than those possessed by the High Court in England. With that decision section 16 was converted into a provision of great potential and flexibility, as the decisions demonstrate.[50] The flexibility of section 16 is illustrated by its accommodation of the Mareva principle in *Hunt* v. *B.P. Exploration Co.*[51]

New South Wales decisions on section 23 are notable by their absence. Any judicial references to the section have been tangential.[52] In *Meyer* v. *Meyer*[53] Powell J. considered that section 23 conferred on the Court a jurisdiction to make a child of a marriage a ward of court. It is to be noted that the wardship jurisdiction is an aspect of the Court's general jurisdiction as inherited from the Lord Chancellor in England (see 4 George IV, c. 96 section 9). Thus, at least Powell J. would not regard section 23 as conferring additional power or jurisdiction on the Court. Whilst the limits of section 23 have yet to be worked out, it is suggested that the view that no additional powers were thereby conferred on the Supreme Court is correct. For instance, by the enactment of section 23 the legislature could not have intended to rewrite the law on the award of injunctions. Thus the argument referred to earlier should be rejected on the basis that the Court has no jurisdiction to award the interlocutory injunction sought except upon established equitable principles. The New Zealand decision *Hunt* v. *B.P. Exploration Co.* is representative of a trend of authority giving an expansive reading to the equivalent to section 23. Unless such an expansive reading is adopted here the decision has no implications for the New South Wales law on the award of Mareva injunctions.

4. *Conclusion*

There is little doubt that in law the Mareva injunction is a revolutionary development. As such a development it is still in the process of working itself out. Even by concentrating on the relatively narrow but important question of the jurisdictional basis for its award it is patently obvious

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[49] (1914) 33 N.Z.L.R. 816, 817 *per* Stout C.J.

[50] *E.g., Izard* v. *Scott* (1912) 31 N.Z.L.R. 211 (The Supreme Court of N.Z. has by virtue of s. 16 and the relevant rule of the Code of Civil Procedure jurisdiction to grant leave to issue a fourth-party notice); *Hunter* v. *Hunter* (1937) 56 N.Z.L.R. 794 (Court has jurisdiction to recall and revoke probate, and grant it to another); *In re Amelia Bullock-Webster (Dec'd)* note 48 *supra* (s. 16 is the foundation of the general jurisdiction of the Court with regard to charitable trusts). But see *Pollock* v. *Pollock* [1970] N.Z.L.R. 998.

[51] Note 46 *supra.*

[52] In *Glasson* v. *Scott* [1973] 1 N.S.W.L.R. 689, 699 Larkins J. was of the opinion that s. 23 did not enlarge or confirm the extra-territorial nature of the writ of *habeas corpus.* In *Holman* v. *Dynabuild* note 44 *supra, Slattery* J. would not allow s. 23 to confer a power on the Court to order security for costs in the absence of any statutory provision doing so.

[53] (1978) F.L.C. 77,736, 77,379.

that the law is far from settled. Fundamentally, this unsettled situation is explicable in terms of a tension between the disquiet of equity lawyers and the enthusiastic reception of commercial lawyers. Equity lawyers are concerned at the utilisation of the statutory interlocutory jurisdiction beyond well understood limits. The interlocutory injunction in seeking to prevent assets of a defendant from being put beyond the reach of a possible judgment creditor seems to be assuming the guise of an action *in rem*.[54] Injunctions are, like most equitable remedies, essentially relief *in personam*. To commercial lawyers the Mareva principle has proved to be an extremely popular remedy.[55] This popularity indicates that the remedy is fulfilling a real commercial need. Given this fact, it is to be hoped that either the House of Lords or the High Court of Australia will have the opportunity to consider fully the difficult and contentious question of the jurisdiction for the award of the Mareva injunction. Subject to that eventuality, it is respectfully submitted that the decision of Powell J. in *B.P. Exploration Co. (Libya); re Hunt* was correct. The remedy for injustice caused by a defendant abusing the pre-trial advantages he and his property enjoy lies with the legislature and not the courts.

Ian McGill

[54] In *Ruth Allen* v. *Jamba (Nigeria) Airways*, unreported, Court of Appeal, 20 July 1979 (a part of the text of this judgment may be found in Lord Denning's *The Due Process of Law* (1980) 148-149). Lord Denning M.R. held that the Mareva injunction would be awarded to prevent an aircraft from leaving the jurisdiction pending proceedings for fatal accident compensation. The Master of the Rolls specifically held that the Mareva injunction in these circumstances was parallel to the arrest of a ship *in rem*.

[55] In *Third Chandris Shipping Corporation* v. *Unimarine S.A.* [1979] 2 All E.R. 972, 976; [1979] 3 W.L.R. 122, 126 Mustill J. stated that applications for the Mareva injunction were running at 20 *per* month.