

Mareva Orders as Part of the New, Emerging Law of Remedies

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The Mareva injunction¹ constitutes part of the new law of remedies. The aim of a Mareva injunction is, in principle, quite limited: at an interlocutory stage to prevent, for a specified time, certain assets from being removed from the jurisdiction of the court when there is a risk that the outcome of the main legal action may be frustrated by a party making itself 'judgment proof' by removing assets outside of the jurisdiction. Lord Diplock has held that:

A *Mareva* injunction is interlocutory, not final; it is ancillary to a substantive pecuniary claim for debt or damages; it is designed to prevent the judgment ... for a sum of money being a mere 'brutum fulmen'.²

The Mareva injunction operates by freezing assets in the hands of either the defendant to the main legal action or a third party, such as a bank. The High Court has made it clear that a Mareva injunction generally cannot be gained after judgment.³ It is the intersection between Mareva injunctions and third parties that constitutes the most contentious aspect of this remedy.⁴ The High Court examined the issue of Mareva injunctions and third parties, as well as the entire area of Mareva injunctions, in *Cardile v LED Builders Pty Ltd*.⁵ However, the consequences of the High Court's judgment go far beyond the

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¹ Named after the second reported case in which it was made available, *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Reports 509. The first reported case was *Nippon Yusen Kaisha v Karageorgis* [1975] 1 WLR 1093.

² *The Siskina* [1979] AC 210, 253.

³ *Pelechowski v Registrar, Court of Appeal* (1999) 162 ALR 336. This must reduce the utility of Mareva orders, as was demonstrated by McHugh J in his dissent in (1999) 162 ALR 336, [82]. It is inconsistent with *Stuart Chartering Ltd v C & O Management SA* [1980] 1 All ER 718. Perhaps it is possible to limit the impact of *Pelechowski* by observing that it involved the jurisdiction of inferior courts.

⁴ The development of the worldwide Mareva is also another particular contentious point. For this development, see *Derby & Co v Weldon (Nos 3 and 4)* [1990] Ch 65 and *Polly Peck International v Nadir (No 2)* [1992] 4 All ER 769.

⁵ (1999) 162 ALR 294. The decision in *Pelechowski v Registrar, Court of Appeal* (1999) 162 ALR 336, which was decided by the High Court on the same day as *Cardile*, is much more limited.

issue of third parties. It also involved the application of a hybrid approach that places some relief, such as Mareva injunctions,⁶ between the law of remedies and the law of procedure.⁷ But these injunctions remain closely related to the traditional law of remedies. In addition, what the High Court decided in *Cardile* is consistent with a new approach to remedies that has become apparent. A major re-evaluation of the entire area of Mareva injunctions is therefore necessary.

Facts and Judgment of *Cardile v LED Builders Pty Ltd*

Eagle Homes Pty Ltd, which built houses, declared a dividend in favour of its only two shareholders, Mr and Mrs Cardile. Later that same year, LED Builders Pty Ltd commenced proceedings against Eagle Homes, claiming breach of copyright. Two years later, Ultra Modern Developments Pty Ltd, which was also controlled by Mr and Mrs Cardile, registered the name 'Eagle Homes' under *the Business Names Act 1962* (NSW). In 1996, Eagle Homes declared another dividend. Later in that same year, the copyright action was decided in favour of LED. The remedy to be paid by Eagle Homes was not quantified at that time. Following this there was an application by LED for a Mareva injunction against Eagle Homes, Ultra Modern and Mr and Mrs Cardile. This injunction was refused.⁸ On appeal to the Full Federal Court of Australia the appeal was allowed and the injunction was granted.⁹ On further appeal to the High Court of Australia, the Court held that a Mareva injunction may be granted against a third party to the litigation, such as Mr and Mrs Cardile, in circumstances where those orders were needed to facilitate the administration of justice, and held that the injunction was allowed in this case. Quite correctly, the High Court surrounded the exercise of this power with numerous restrictions.

The Transformation from Injunction to Order

According to the majority of the High Court in *Cardile v LED Builders Pty Ltd* (hereafter *Cardile*), the word 'order' should be substituted

⁶ Other injunctions which have involved the application of a hybrid approach include anti-suit injunctions and statutory injunctions.

⁷ This was continued by the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 15 November 2001).

⁸ (1997) 38 IPR 107.

⁹ (1997) 148 ALR 247.

for the word 'injunction'.¹⁰ It is interesting to note that in his Honour's separate judgment, Kirby J referred to these orders as 'asset preservation orders of the Mareva type'.¹¹ For the majority, this important change in terminology is simply to 'avoid confusion as to its doctrinal basis'.¹² For Kirby J:

such have been the changes in the conception of the circumstances in which such orders will be made, and so many and varied are the jurisdictional foundations for the exercise of the power to make such orders, that a continued use of the Mareva label has a potential to mislead. A preferable generic description for the order, called Mareva, would be an 'asset preservation order'.¹³

This change in terminology, which may be perceived as the abandonment of the injunction link, is important and the consequences are uncertain and may be far-reaching. It is arguable that *Cardile* may represent a movement away from this area of law being concerned with remedial principles, rather favouring the placing of Mareva orders under the heading of the law of procedure.¹⁴

The Doctrinal Basis of the Mareva Order¹⁵

In the 1992 edition of their text on equity, Meagher, Gummow and Lehane commented that 'there is no jurisdiction at all to grant a Mareva injunction'.¹⁶ It is obvious that this approach is consistent with that of the majority's in the United States' Supreme Court deci-

¹⁰ (1999) 162 ALR 294, [42].

¹¹ See particularly (1999) 162 ALR 294, [79]. It is interesting to note that his Honour observed in footnote 105 that in England it has been suggested on the front page of *The Times* that the term 'Mareva injunction' be replaced by 'freezing injunction' (note the continuation of the term 'injunction'). This alteration became effective on 26 April 1999 in the Civil Procedures Rules.

¹² (1999) 162 ALR 294, [42].

¹³ (1999) 162 ALR 294, [79], omitting footnotes.

¹⁴ See Tilbury, *Civil Remedies* (1990) vol I, [1006] for a discussion of the relationship between these two areas. It can be suggested that Mareva injunctions never complied with the clear difference between the law of remedies and the law of procedure that Tilbury described in his work. It is possible that it is the dichotomous approach represented by the quotation by Sir John Salmond, cited by Tilbury, which presents the choice as being either the law of procedure or the law of remedies (an either/or choice), which is the problem. It is apparent that Tilbury did not subscribe to this dichotomous choice approach by including Mareva injunctions in his work on remedies, see [7026]-[7041].

¹⁵ The doctrinal basis in England may be different from that which prevails in Australia: see *Mercedes-Benz AG v Leiduck* [1995] 3 WLR 718; but note should be taken of Lord Nicholls, who dissented in that case.

¹⁶ *Equity Doctrines and Remedies* (3rd ed, 1992) [2186].

sion of *Grupo Mexicano de Desarrollo, SA v Alliance Bond Fund Inc.*¹⁷ However, the argument that there is no jurisdiction to grant a Mareva order must now be viewed in light of the comment by Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ in *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)*.¹⁸ This comment clearly shows that the Mareva order is both an injunction and a procedural order stemming from the courts' inherent power to prevent the abuse of the courts' processes.¹⁹ This is consistent with

¹⁷ 144 L Ed 2d 319 (1999). Interestingly, in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 15 November 2001), in their joint judgment, Gummow and Hayne JJ at [94] referred to this decision as authority that in the United States the Mareva order is not a preliminary injunction within the traditional equitable principles.

¹⁸ (1998) 153 ALR 643, 658-9. This was cited by the majority in *Cardile v LED Builders Pty Ltd* (1999) 162 ALR 294, 308 as a correct statement of principle, with only two minor exceptions.

¹⁹ In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 15 November 2001), it was held by the High Court that Mareva orders are not true injunctions. The judgments of Gleeson CJ, Gaudron J, Gummow and Hayne JJ divorce the 'true' injunction from other 'injunctions', that is, there is a true form of injunction. Gaudron J put it most clearly when her Honour stated at [60]:

In recent times, the word 'injunction' has come to be used to mean any order by which a court commands a person to do or refrain from doing some particular act. Thus, it has come to be used in connection with orders of that kind that are specifically authorised by statute. It has also been used to describe orders which a court makes to protect its own processes such as an asset preservation order (sometimes called a 'Mareva injunction') and some anti-suit injunctions.

In cases such as *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, 32-3 [35] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ); *Cardile v LED Builders Pty Ltd* (1999) 162 ALR 294, 307-8 [41]-[42] (Gaudron, McHugh, Gummow and Callinan JJ); *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345, 391-2 (Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) the High Court has been devising a distinction. This distinction is between injunctions in the true sense and other judicial orders that are called 'injunctions' but are not injunctions in the true sense. In other words, there are two varieties of injunctions: the first is true injunctions (which have their origins in equity), while the second variety may be called process injunctions (which include Mareva injunctions, anti-suit injunctions and statutory injunctions). Even though Gaudron J did recognise both that these two varieties may have different necessary elements and the continuing expansion of the operation of injunctions in public law, (see *Enfield City Corporation v Development Assessment Commission* (2000) 199 CLR 135, 157-8 [56]-[58] (Gaudron J)); *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 628-9 [97]-[98] (Gummow J) and Wright, 'The Role of Equitable Remedies in the Merging of Private and Public Law' (2001) 12 *Public Law Review* 40), for her Honour, having these two varieties did not seem to make much difference. However, for the leading judgment of Gummow and Hayne JJ, the existence of these two varieties was crucial in their reasoning.

the approach advocated by Hetherington.²⁰ This inherent power basis has been upheld recently in numerous Australian courts. For example, in *Riley McKay Pty Ltd v McKay*, the New South Wales Court of Appeal unanimously²¹ held that the jurisdiction of the power to award Mareva injunctions was inherent.²² Justice White observed that the 'inherent power of the Court is both a satisfactory and sufficient source of power to make Mareva injunctions'.²³ The Victorian Supreme Court has held that 'the power [to grant Mareva injunctions] was part of the inherent jurisdiction of the Court'.²⁴ Also, in Victoria it has been stated by Vincent J that the power to order Mareva injunctions could be 'easily justified' upon the basis of the court's inherent jurisdiction to control its own process.²⁵ In addition, the Industrial Commission of New South Wales has jurisdiction to issue Mareva injunctions based solely upon its inherent jurisdiction.²⁶ The Federal Court of Australia has jurisdiction to award Mareva injunctions, without statutory assistance, as an incident of the general grant to it as a superior court of record.²⁷ As has already been noted, in *Jackson v Sterling Industries*²⁸ the High Court held that the jurisdiction to award Mareva injunctions was partly based upon the inherent power of the Courts.²⁹ In *CSR Ltd v Cigna Insurance Australia Ltd*, six members of the High Court noted that '[the Court's] inherent power ... is not to be restricted to defined and closed categories'.³⁰ It is not surprising that Kunc, in a recent work on Mareva injunctions, has concluded that '[t]he weight of Australian authority is clearly to the effect that the basic source of power is the court's inherent jurisdiction to prevent abuse of its own process'.³¹ Likewise, Spry, while discussing the bases of the Mareva injunction jurisdiction, has commented that 'it is certainly within the inherent jurisdiction of

²⁰ 'Inherent Powers and the Mareva Jurisdiction' (1983) 10 *Sydney Law Review* 76.

²¹ The bench consisted of Street CJ, Hope JA and Rogers AJA.

²² [1982] 1 NSWLR 264, 269-70.

²³ *Devlin v Collins* (1984) 37 SASR 98, 114.

²⁴ [1988] VR 521, 524 (Brooking J).

²⁵ *Pearce v Waterhouse* [1986] VR 603, 604.

²⁶ *Wheeler v Selbon Pty Ltd* [1984] 1 NSWLR 555.

²⁷ *Hiero Pty Ltd v Somers* (1983) 68 FLR 171. Strictly speaking, as the Federal Court of Australia is created by statute, it possess incidental rather than inherent power.

²⁸ (1987) 162 CLR 612.

²⁹ Unfortunately their Honours made no distinction between the inherent power and the statutory power. However, they did observe that the statutory power 'confirms the inherent power without increasing it'.

³⁰ (1997) 146 ALR 402, 433.

³¹ 'Mareva Injunctions' in Parkinson (ed), *The Principles of Equity* (1996) [2003].

courts of equity, to grant Mareva injunctions'.³² The matter has become confused because it is generally considered in Australia that the jurisdiction is partly based upon the inherent power and partly based upon statute. However, it is certainly true that a number of authorities have pressed the point that the inherent jurisdiction alone is sufficient to support the Mareva injunction. This contention is the starting point of the recent Supreme Court of the United States' decision in *Grupo Mexicano de Desarrollo, SA v Alliance Bond Fund Inc.*³³ As has been recognised,³⁴ it would be accurate to portray the impact of legislation as truncating the development of the inherent power as the basis of this injunction. The existence of legislation confuses the non-statutory basis of the Mareva order, as does the reasoning behind the granting of a Mareva order. The Privy Council's important conclusion that the Mareva order is, as an injunction, *sui generis*,³⁵ should be adopted.³⁶

Importantly, *Cardile* held that the rationale of the Mareva order was the administration of justice.³⁷ It is for this reason that the decision in *Pelechowski v Registrar, Court of Appeal*³⁸ is surprising. In this case, Mr Rahme had obtained judgment against Mr Pelechowski. After entering judgment, the trial judge restrained Mr Pelechowski from dealing, selling, disposing of or encumbering certain land that he owned. However, Mr Pelechowski granted a mortgage over some of this land. The charge of contempt of court was heard by the New South

³² *The Principles of Equitable Remedies* (5th ed, 1997) 515.

³³ 119 SC 1961 (1999). This decision is noted by Collins, 'United States Supreme Court Rejects Mareva Jurisdiction' (1999) 115 *Law Quarterly Review* 601.

³⁴ For example, by the Privy Council in *Mercedes Benz AG v Leiduck* [1996] 1 AC 284, 299.

³⁵ *Ibid* 301.

³⁶ This order is different from other injunctions for two reasons. The first is it is not connected with the subject matter of the proceedings and secondly, it does not prevent the defendant from doing some activity which, if done, would be a wrong attracting a remedy. In this way, the Mareva order clearly remains a remedy. The recognition of the Mareva order as *sui generis* is consistent with the decision of the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] HCA 63 (Unreported, Gleeson CJ, Gaudron, Gummow, Kirby, Hayne and Callinan JJ, 15 November 2001).

³⁷ (1999) 162 ALR 294, [42]. This finding is also supported by the decision in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, *ibid*. This rationale may appear to be more consistent with the Mareva order being covered by the law of procedure, rather than the law of remedies. However, it should be recognised that the law of remedies should also encompass orders that are made for the administration of justice and to preserve the integrity of the court's processes.

³⁸ (1999) 162 ALR 336.

Wales Court of Appeal, where he was found guilty of contempt. It was argued before the High Court that the original court did not have jurisdiction to issue this order. The majority of the High Court agreed that the original court did not have jurisdiction to grant an 'asset preservation order'.³⁹ This is an example of the High Court constructing extremely limited grounds for the award of such an order, but it is not clear how this decision assists the administration of justice, which the High Court has held to be the rationale for such orders. The High Court's renaming it may be perceived as denying this connection to the law of injunctions and may be viewed as casting adrift the Mareva order from the law of injunctions. However, this view should be considered as incorrect. Perhaps it is possible to limit the impact of *Pelechowski* by indicating that the case involved the jurisdiction of inferior courts to grant Mareva orders.

It is interesting to speculate how the Mareva order as identified by the High Court operates in comparison with the Mareva injunction in England. An example of the differences is apparent when the extra-territorial operation of such orders is examined.

The Extra-Territorial Operation of Mareva Orders

The maxim that equity acts *in personam* has an elusive role in modern equity.⁴⁰ Dal Pont and Chalmers describe the maxim as having 'historical significance only'.⁴¹ However, this is inaccurate. For example, *Penn v Lord Baltimore*,⁴² where the Court of Chancery established that it had jurisdiction to enforce an agreement settling boundaries outside of the jurisdiction, is still relied upon. Also, the importance of equity acting *in personam* was controversially stressed by Lord Browne-Wilkinson in *Westdeutsche Bank v Islington LBC*.⁴³ Additionally, it has been relied upon in relation to Mareva injunctions to expand jurisdiction over property not situated in the jurisdiction. All that can accurately be said regarding this maxim is it is only spasmodically employed. The clarification of the application of this maxim would be useful as its application to Mareva injunctions and Mareva orders is unclear.

³⁹ The difference between an 'asset preservation order' and a 'Mareva order' is not apparent.

⁴⁰ It is discussed in Meagher, Gummow and Lehane, above n 16, [342]-[350].

⁴¹ *Equity and Trusts in Australia and New Zealand* (1996) 11.

⁴² (1750) 1 Ves Sen 444; 27 ER 1132.

⁴³ [1996] 2 All ER 961.

In *Mercedes-Benz AG v Leiduck*, the Privy Council confirmed that a Mareva injunction may not be granted to freeze assets in the United Kingdom of a foreign defendant outside the jurisdiction, pending the conclusion of proceedings against him in a foreign state, that is not a party to either the Brussels or Lugano Conventions.⁴⁴ This requirement is closely connected to the fact that the Mareva injunction, being an equitable remedy, must operate *in personam*. In Australia, if the order is no longer an equitable remedy,⁴⁵ it is not apparent how it will develop. It may no longer be an equitable remedy because of

the strain placed upon it by its use to identify new statutory remedies and to its misapplication to identify either *the nature of* or the juridical foundation for the Mareva order.⁴⁶

The Privy Council's decision in *Mercedes Benz AG v Leiduck*⁴⁷ involved a situation where the proceedings were in one country but the defendant's assets were in another. The Privy Council, with a strong dissent by Lord Nicholls, held that a Mareva injunction was not available in such circumstances. This heavily criticised judgment⁴⁸ was only mentioned in *Cardile* by the majority to indicate the lack of a theoretical framework for Mareva injunctions.⁴⁹ In addition to the fact that there is no Australian case law on point, the comments of Lord Nicholls, in his dissent, and the decisions in *South Carolina Insurance Co v Assurantie Maatschappij*⁵⁰ and *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd*⁵¹ may well prove persuasive to the High Court in this form of extra-territorial case.

Subsequent to *Mercedes Benz AG* the High Court held that there should be a terminological change from Mareva injunction to Mareva order.⁵² This linguistic change, reflecting a desire not to introduce confusion into the nature of the order, appears to remove it from being an equitable remedy and so abandons the *in personam* restriction.

⁴⁴ [1996] 1 AC 284. This case has been noted by Collins in (1996) 112 *Law Quarterly Review* 8. Attention should be paid to Lord Nicholls' strong dissent in this case that has been endorsed by Pettit, *Equity and the Law of Trusts* (8th ed, 1997) 592 fn 10.

⁴⁵ And, hence, not limited to operating *in personam*.

⁴⁶ (1999) 162 ALR 294, [27] (emphasis added).

⁴⁷ [1996] 1 AC 284.

⁴⁸ Collins, 'The *Siskina* Again: An Opportunity Missed' (1996) 112 *Law Quarterly Review* 8.

⁴⁹ (1999) 162 ALR 294, [34].

⁵⁰ [1987] AC 24.

⁵¹ [1993] AC 334.

⁵² (1999) 162 ALR 294, [42].

Even Kirby J's 'asset preservation order' is susceptible to this comment.⁵³

In *Ballabil Holdings Pty Ltd v Hospital Products Ltd*,⁵⁴ the Court held that the *Supreme Court Act 1970* (NSW) confers upon the Court the jurisdiction to grant an injunction that restrains a New South Wales based company from disposing or dealing with its assets which are outside the jurisdiction when the order is made, but were within jurisdiction when the action was commenced. This was extended in *National Australia Bank Ltd v Dessaw*,⁵⁵ where it was held that the Court had jurisdiction to grant a Mareva injunction notwithstanding the fact that the assets subject to the injunction were never within the jurisdiction. The judge, Brooking J, justified this finding by reference to, inter alia, the well-established notion that a court of equity, acting as it does *in personam*, may order someone amenable to its jurisdiction to do or refrain from doing an act abroad.⁵⁶ An interpretation of *Cardile* that argues that Mareva orders are not equitable remedies and so do not operate *in personam*, and therefore do not operate where the defendant is within jurisdiction but the assets and litigation are outside jurisdiction, seems intuitively wrong. A link between the history of Mareva injunctions and Mareva orders would suggest that cases such as *National Australia Bank Ltd v Dessaw* would be upheld. Even upon the basis that Mareva orders are based upon the administration of justice, it is not difficult to perceive them as operating in the same way as Mareva injunctions, particularly when international comity demands it.

Although it is likely that *Mercedes Benz AG v Leiduck*⁵⁷ would not be followed in Australia, this should not be viewed as evidence that there is a separation between England and Australia based upon the fact that England is dealing with an injunction, while Australia is grappling with Mareva orders. The reason why *Mercedes Benz AG v Leiduck* would not be followed is because of the persuasive nature of the criticisms it has attracted.⁵⁸ It is likely that cases relating to the *in personam* nature of the Mareva injunction would continue to be ap-

⁵³ Ibid [79], omitting footnotes.

⁵⁴ (1985) 1 NSWLR 155.

⁵⁵ [1988] VR 521.

⁵⁶ [1988] VR 521, 522. See also *Planet International Ltd (in liq) v Garcia* [1989] 2 Qd R 427 and *Coombs & Barei Constructions Pty Ltd v Dynasty Pty Ltd & Coombs* (1986) 42 SASR 413, 419-20 (Millhouse J).

⁵⁷ [1996] 1 AC 284.

⁵⁸ For example, see Collins (1996) 112 *Law Quarterly Review* 8.

plied to Mareva orders. This suggests that the Australian Mareva order is a *sui generis* injunction⁵⁹ or a hybrid of the traditional equitable remedies against the background of considerations of the administration of justice.

Third Parties⁶⁰

A third party who aids and abets the breach of a normal injunction by the defendant is guilty of contempt. This also applies to Mareva injunctions.⁶¹ Thus, as soon as the third party is given notice of the Mareva injunction, it must freeze the defendant's assets that it holds. The plaintiff comes under an obligation to indemnify third parties against any expense or liabilities they are required to incur.⁶² It is obvious that third parties should be told with as much clarity as possible what they are to do or not to do. The courts are rightly concerned with attempting to limit the implications for third parties of Mareva injunctions. This is well illustrated by the Court of Appeal decision in *Galaxie Maritime SA v Mineralimportexport, The Eleftherios*.⁶³

The approach of Australian courts to third parties covered by Mareva injunctions was first enunciated by the decision of the Supreme Court of New South Wales in *Vereker v Choi*.⁶⁴ In this case, Clarke J held that normally a plaintiff should establish a cause of action against the subject of a Mareva injunction, but observed that there may be exceptions to this normal practice. The example his Honour cited involved 'family assets'. The later decision of the Court of Appeal in *Winter v Marac (Aust) Ltd*⁶⁵ involving a family and assets should be noted. Importantly, in the unreported decision of the New South

⁵⁹ As suggested by the Privy Council in *Mercedes Benz A G v Leiduck* [1996] 1 AC 284.

⁶⁰ See, generally, Devonshire, 'The Implications of Third Parties Holding Assets Subject to a Mareva Injunction' [1996] *Lloyd's Maritime and Commercial Law Quarterly* 268 and Devonshire, 'Mareva Injunctions and Third Parties: Exposing the Subtext' (1999) 62 *Modern Law Review* 539.

⁶¹ *Z Ltd v A-Z and AA-LL* [1982] QB 558. However, this is based upon the *in personam* nature of the equitable relief. It is interesting to speculate upon which basis the non-equitable Mareva order would found this power which must still be there or the Mareva order will be ineffective.

⁶² *Searose Ltd v Seatrain (UK) Ltd* [1981] 1 All ER 806 and *Clipper Maritime Co Ltd of Monrovia v Mineralimportexport* [1981] 3 All ER 664.

⁶³ [1982] 1 All ER 796. The case of *Guinness Peat Aviation (Belgium) NV v Hispania Lineas SA* [1992] 1 Lloyd's Rep 190 is also relevant here.

⁶⁴ (1985) 4 NSWLR 277.

⁶⁵ (1986) 6 NSWLR 11.

Wales Court of Appeal of *Coxton v Milne*⁶⁶ Hope JA, with whom Glass and Priestly JJA agreed, held that where the defendant's assets are 'effectively controlled, de jure or de facto, by the third party' and the defendant's assets are insufficient to satisfy the judgment debt, the plaintiff may be entitled to Mareva relief against the third party.⁶⁷ The unreported Federal Court decision of *Tomlinson v Cut Price Deli Pty Limited*⁶⁸ involved a case dealing with the situation where the defendant and third party are under the same control but do not control each other.

There have been expressions of caution from time to time on possible abuses of the Mareva in relation to third parties in possession of the defendant's property. This fear of the possible abusive use of the Mareva order was at the very heart of the appeal in *Cardile*. Therefore, the courts will attempt to avoid imposing a Mareva injunction in circumstances that will place unreasonable restrictions on third parties. In *Galaxie Maritime SA v Mineralimportexport, The Eleftherios*,⁶⁹ a Mareva injunction was granted against the removal of a cargo of the defendant's coal loaded aboard the *Eleftherios*. The shipowner applied successfully to discharge the injunction as it unduly interfered with its ability to perform its obligations under contracts with other parties.

As a result of the adverse consequences of imposing a Mareva injunction, the courts have had some experience in establishing principles in relation to the most common third party, a bank. In *Z Ltd v A-Z and AA-LL*,⁷⁰ the English Court of Appeal held that banks are bound by the terms of a Mareva injunction. As a consequence of this, the Court held that the bank must freeze the defendant's bank account, as soon as they are notified of the order. Excepted from this requirement are payments under a letter of credit or under a bank guarantee, and credit cards. The Court proceeded to make several important observations, including the following.⁷¹ First, the bank is entitled to an indemnity from the plaintiff in respect of expenses reasonably incurred in complying with the order. Moreover, the plaintiff must normally give an undertaking as to damages not only to the defendant, but also to a bank or other innocent third party to pay expenses reasonably in-

⁶⁶ (Unreported, New South Wales Court of Appeal Judgment, 20 December 1985).

⁶⁷ *Ibid* 13.

⁶⁸ (Unreported, Federal Court of Australia, No 425/1995, 23 June 1995).

⁶⁹ [1982] 1 All ER 796.

⁷⁰ [1982] QB 558.

⁷¹ *Ibid* 575-77 (Lord Denning MR), 586-93 (Kerr LJ).

curred by them. Secondly, the bank should be told, with as much certainty as possible, what it is and is not to do. Thirdly, an order to the bank would apply only to the extent of the monetary limit of the Mareva injunction. Fourthly, the plaintiff must follow up notification immediately by written confirmation setting out the terms of the injunction. Fifthly and finally, a joint account would not be bound by a Mareva injunction that was only directed to the defendant's assets generally. It is into this judicial context that the High Court's decision in *Cardile* must be placed.

After carefully articulating the limitations upon Mareva orders, the High Court noted that a Mareva order is bound to have a significant impact upon the defendant.⁷² The Court repeated its cautious approach by holding that the order 'requires a high degree of caution on the part of a court invited to make an order of that kind'.⁷³ This cautious approach applies to examining discretionary considerations.⁷⁴ However, the High Court held that Mareva orders are available against third parties in certain circumstances. The guidelines that the High Court established for the possible award of a Mareva injunction against third parties were:

- i. the third party holds, is using, or has exercised or is exercising a power of disposition over, or is otherwise in possession of, assets, including 'claims and expectancies', 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.⁷⁵

The High Court was at pains to indicate that satisfying these guidelines may or may not gain the plaintiff the desired Mareva order.⁷⁶ This possibility of gaining a third party Mareva order only arose after the Court had considered the other relevant criteria of a Mareva or-

⁷² (1999) 162 ALR 294, [50].

⁷³ *Ibid.*

⁷⁴ *Ibid* [53].

⁷⁵ *Ibid* [57].

⁷⁶ *Ibid.*

der and discretionary considerations.⁷⁷ It is apparent that gaining a Mareva order against a third party will not be particularly easy.⁷⁸

Discretionary Nature of Mareva Orders

A very important aspect of *Cardile* was how it treated the traditional requirement that common law remedies must be inadequate before recourse can be had to equitable remedies, such as injunctions.⁷⁹ This rule has created a remedial hierarchy, with common law remedies, generally damages, being superior to equitable remedies, which only have a role to play where the legal remedies are inadequate. By his scholarship Laycock has shown that this rule does not decide cases but only reinforces the court's decision regarding the appropriate remedy.⁸⁰ It would be easy to dismiss Laycock's work by pointing to its American origins, but this would be unfair.⁸¹ There have been cases in Anglo-Australasian jurisdictions where the traditional approach has been modified.

Rather than beginning the remedial question by looking at whether damages are inadequate,⁸² another approach has emerged. Sachs LJ identified the traditional approach, as well as the transformation, in *Evans Marshall & Co Ltd v Bertola SA*, when he held that:

The standard question in relation to the grant of an injunction, are damages an adequate remedy? might perhaps, in the light of the authorities of recent years, be rewritten, is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?⁸³

This new approach can be seen in an Australian case, *Belgrave Nominees Pty Ltd v Barlin-Scott Airconditioning (Aust) Pty Ltd*.⁸⁴ In this case, the plaintiff was the owner of a building that was to be renovated. The builder that the plaintiff had contracted to do the renovations

⁷⁷ *Ibid* [53].

⁷⁸ This is particularly true as the High Court held that such an order would be rarely ordered where the third party did not hold or was about to hold or dissipate or further dissipate property beneficially owned by the defendant, *ibid* [55].

⁷⁹ *Ibid* [53].

⁸⁰ *The Death of the Irreparable Injury Rule* (1991). See Dobbs, *Law of Remedies*, (2nd ed, 1993) § 2.5(3), which collects the main supporters and detractors of Laycock's approach.

⁸¹ Its relevance for Anglo-Australasian jurisdictions is apparent from the book review by Rickett, (1990) 50 *Cambridge Law Journal* 536.

⁸² This traditional approach represents the remedial hierarchy.

⁸³ [1973] 1 All ER 992, 1005.

⁸⁴ [1984] VR 947.

hired the defendant to install the air conditioning. Afterwards, there were problems about the continued financial viability of the builder. This builder went into liquidation and the new builder contracted with the defendant for the defendant to finish installing the air conditioning. The defendant agreed but later took the installed air conditioning units out of the building. The plaintiff sought the specific restitution of the air conditioning units via a mandatory injunction. His Honour, Kaye J of the Victorian Supreme Court, held that the air conditioning units had become fixtures of the buildings and were thus the property of the plaintiff. His Honour also held that if the plaintiff could not get specific restitution of the air conditioning units, then the renovations to the building would be delayed. This would cause the plaintiff to become more indebted and so it was in the interests of the plaintiff to have the building finished as quickly as possible, which could only be done if the air conditioning units were returned. Kaye J asked himself the question: '[i]s it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?',⁸⁵ rather than the traditional question 'Are damages an adequate remedy?'. His Honour concluded that, because the non-return would mean that the plaintiff would be delayed in completing the renovations and would suffer financial loss, it was not just to limit the plaintiff to damages. As a result his Honour held that the plaintiff could get specific restitution of the air conditioning units.

Further, the concept of the inadequacy of common law damages was considered by Windeyer J in *Coulls v Bagot's Executor and Trustee Co Ltd*, where his Honour held that:

It seems to me that contracts to pay money or transfer property to a third person are always, or at all events very often, contracts for breach of which damages would be an inadequate remedy - all the more so if it be right (I do not think it is) that damages recoverable by the promisee are only nominal. Nominal or substantial, the question seems to be the same, for when specific relief is given in lieu of damages it is because the remedy, damages, cannot satisfy the demands of justice.⁸⁶

Recently, this statement, which downplays the importance of remedial hierarchy by stressing the demands of justice, was quoted by Spender J in *Unilever Australian Securities Ltd v FCT*.⁸⁷

⁸⁵ Ibid 955.

⁸⁶ (1967) 119 CLR 460, 503.

⁸⁷ (1994) 122 ALR 402, 414.

In *Beswick v Beswick*,⁸⁸ a businessman transferred his business to his nephew. In return for this transfer the nephew promised that, following his uncle's death, he would pay £5 a week to his uncle's widow. When the uncle died and the nephew refused to pay the promised amount, the widow brought an action seeking specific performance of the promise. The widow brought this action in two capacities. The first was personally and the second was as administratrix. By citing the doctrine of privity of contract, the House of Lords held that the widow could not be successful in the action she brought in her personal capacity, but she was successful in bringing the action in her capacity as administratrix. The Court held that the widow would not be limited to common law damages. Lord Hodson referred to deciding the most appropriate remedy,⁸⁹ while Lord Pearce found that specific performance was 'the more appropriate remedy'.⁹⁰ It is interesting to note that their Lordships were deciding which remedy to order depending upon considerations of the most appropriate remedy, rather than some pre-determined remedial hierarchy. Likewise, Lord Reid, with whom Lord Guest agreed, held that ordering specific performance rather than damages would produce a 'just result'.⁹¹ Lord Upjohn utilised traditional remedial language, but arrived at a result based upon the concept of justice.⁹²

In *The Stena Nautica (No 2)*,⁹³ a case involving charter-parties and an application for specific performance, May LJ rejected the remedial hierarchy by citing, with approval, the reformulation by Sachs LJ, in *Evans Marshall & Co v Bertola SA*,⁹⁴ of the standard question concerning whether common law damages are an adequate remedy:

Is it just in all the circumstances for the plaintiff to be confined to his remedy in damages?⁹⁵

The general applicability of this reformulation was shown by the fact that both *The Stena Nautica (No 2)* and *Evans Marshall & Co v Bertola*

⁸⁸ [1968] AC 58.

⁸⁹ *Ibid* 83.

⁹⁰ *Ibid* 88.

⁹¹ *Ibid* 77.

⁹² *Ibid* 103.

⁹³ [1982] 2 Lloyds Rep 336, 348.

⁹⁴ [1973] 1 WLR 349.

⁹⁵ *Ibid* 379. This reformulation of the standard question, which destroys the remedial hierarchy, was adopted in *State Transport Authority v Apex Quarries Ltd* [1988] VR 187, 193 (Kaye J) and in *City of Melbourne v Hamas Pty Ltd* (Unreported, Supreme Court of Victoria, 20 February 1987) by Tadgell J.

SA actually involved two different remedies. The former case involved an application for specific performance, whilst the latter involved a prohibitory injunction. Also, in the later case of *Anders Utkins Rederi A/S v O/Y Lovisa Stevedoring Co A/B*, Gouling J referred to selecting the remedy required by 'good conscience'.⁹⁶

However, it should not be concluded from these statements that the law is becoming unprincipled and undisciplined. The general judicial theory behind all of these changes has recently been articulated by Gummow J in *Wik Peoples v Queensland*.⁹⁷ Later, in *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*,⁹⁸ Gummow J discussed judicial methodology and made interesting observations that were perfectly consistent with the more flexible approach to remedies.⁹⁹ In a recent extra-judicial article,¹⁰⁰ McHugh J rejected the theory of pure legal formalism, which has largely been dominant in the surface linguistic behaviour of the courts. Rather than defending pure legal formalism, his Honour advocated replacing it with a composite approach, where matters such as precedent and logic processes based upon induction and deduction are joined by an evaluation of factors, including the need for a change,¹⁰¹ relevant legal material outside the area of immediate legal concern¹⁰² and an examination of the social and economic consequences of the proposed change. According to McHugh J this approach should be adopted cautiously. His Honour quoted and approved Lord Devlin's observation that English judges spent 90 per cent of their time in the 'disinterested application of known law'.¹⁰³ Also, McHugh J indicated that the creative role of the judiciary increased higher up in the judicial hierarchy.¹⁰⁴

In addition, Lord Hoffmann has observed,¹⁰⁵ as was quoted by the majority in *Cardile*:

⁹⁶ [1985] 2 All ER 669, 674.

⁹⁷ (1996) 187 CLR 1.

⁹⁸ (1997) 188 CLR 241.

⁹⁹ Ibid 298.

¹⁰⁰ Justice McHugh, 'The Judicial Method' (1998) 73 *Australian Law Journal* 37.

¹⁰¹ The change might be forbidden by statute or as being inconsistent with established legal doctrine.

¹⁰² This material may include general legal principles and jurisprudential concepts.

¹⁰³ 'The Judge as Lawmaker' in *The Judge* (1979) 3, cited by McHugh, above n 100, 40.

¹⁰⁴ McHugh, *ibid*.

¹⁰⁵ *Bristol City Council v Lovell* [1998] 1 WLR 446, 453.

The reason why an injunction is a discretionary remedy is because it formed part of the remedial jurisdiction of the Court of Chancery. If the Chancellor considered that the remedies available at law, such as damages, were inadequate, he could grant an injunction to give more effective relief. If he did not think that it was just or expedient to do so, he could leave the plaintiff to his rights at common law. The discretion is therefore as to the remedy which the court will provide for the invasion of the plaintiff's rights.¹⁰⁶

It is apparent that the old remedial hierarchy is dead and that the issue now is the search for the just or expedient remedy.¹⁰⁷ This remedial flexibility and true understanding of discretion are not very far removed from the tailoring of the remedy. The Mareva order is part of this process.

The Proper Place For Mareva Orders - The Use of an Analogy to Equitable Remedies

The movement away from Mareva injunctions towards the Mareva order does not mean that all previous learning on the Mareva injunction, which is a remedy, must be abandoned. It could be argued that Mareva orders are part of the law of procedure. A superficial reading of *Cardile* would aid this interpretation. However, upon more detailed reflection and a deeper reading of *Cardile*, it is obvious that it does not constitute a complete movement from the law of remedies to the law of procedure. But it should be noted that the majority of the High Court in *Cardile*¹⁰⁸ still referred to this order as *in personam* and with the contempt sanction still intact. The interlocutory injunction, of which the Mareva injunction is an example, has never been purely a remedy, as was recognised by Tilbury,¹⁰⁹ although he concluded that they should still be treated in his work on the law of remedies. *Cardile* contains many references to remedial notions to be confident that some links to the law of remedies are maintained. It would be accurate to say that Mareva orders occupy some hybrid position between the law of procedure and the law of remedies. This conclusion is reached by examining the history of such orders, looking at the language of the Court with regard to remedial flexibility and the

¹⁰⁶ (1999) 162 ALR 294, [32].

¹⁰⁷ Another way of referring to 'just or expedient' is 'appropriate'. A list of factors to decide the 'just or expedient' or appropriate remedy is listed in Wright, *The Remedial Constructive Trust* (1998).

¹⁰⁸ (1999) 162 ALR 294, [50].

¹⁰⁹ Above n 14, [7002].

High Court's comments on the *in personam* nature of the order, as well as the contempt sanction attached to the order. So, the Mareva order is not purely a creature of the law of procedure, nor is it purely a creation of the law of remedies.¹¹⁰ Such a hybrid position is not unknown to the law. The area of standing to seek an injunction against a public body is one example of another hybrid. It is a mixture of public law and equity. The High Court decision in *Bateman's Bay v The Aboriginal Community Benefit Fund*¹¹¹ revived equity's traditional interest in granting the remedies of declaration and injunction against the ultra vires activities of statutory bodies. In this case the respondent operated a contributory funeral benefit business. The appellants, who were constituted under a statute, proposed to establish a contributory funeral benefit scheme. The respondent sought to restrain the appellants from establishing the scheme, claiming that it was beyond the powers of the appellants, and the respondent claimed that they had standing to do this as the proposed scheme would have a serious financial impact upon its business. At first instance the respondent was held not to have sufficient standing. However, the New South Wales Court of Appeal upheld an appeal from this decision, finding that the respondent did have sufficient standing. The appellants appealed to the High Court, which unanimously rejected the appeal. It found that the respondent did possess standing to seek a declaration and injunction against the appellant councils on the basis of the 'special interest' test being satisfied. The judgment of Gaudron, Gummow and Kirby JJ discussed the historical development of equity's interest in providing remedies against public bodies that act beyond their statutory powers. A striking feature of *Bateman's Bay* is the attention the decision focuses upon the historical intersection of equity and public law. Just as this case recognises the mixture of public law and equity in the question of standing, so there is a mixture of procedural law and the law of remedies in the Mareva order.

To make the hybrid reality of the Mareva order operate well, an analogous approach must be adopted. The analogous approach involves two steps. The first is the explicit recognition that Mareva orders are not purely concerned with the law of remedies, as they also involve the law of procedure. Secondly, under the analogous ap-

¹¹⁰ This does not mean that the Mareva order is half way between procedural law and the law of remedies. It appears to be still quite closely related to the law of remedies.

¹¹¹ (1998) 155 ALR 684. This case is reviewed by Enderbury, 'Equity and Public Law in the Law of Standing' (1999) 21 *Sydney Law Review* 129.

proach, the principles of both the law of procedure and the law of remedies may guide the exercise of the discretion under Mareva orders. The analogous approach endorses the provision of this guidance. This is the approach that has been adopted by the High Court when dealing with *Trade Practices Act 1974* (Cth) remedies. In *Marks v GIO Australia Holdings Ltd*,¹¹² the appellants entered into a long-term loan agreement. This was upon the basis that GIO would charge interest at a specified base rate plus a margin of 1.25% and that this margin would not be altered during the life of the loan. In March 1992, GIO notified the appellants that the margin would be increased from 1.25% to 2.25% from 1 August 1992. The issue of remedy came before the High Court. Gummow J expressly rejected the use of common law analogies in the construction of s 82 of the *Trade Practices Act*, his Honour considered that the 'principles regulating the administration of equitable remedies afford guidance for, but do not dictate, the exercise of the statutory discretion conferred by s 87'.¹¹³ Gaudron J seemingly endorsed this sensible approach.¹¹⁴

This analogous reasoning approach can be adopted in relation to the Mareva order. In this way, some link is maintained with its history, so that predicability is retained. Therefore, the Mareva order, although no longer purely an equitable remedy, is not completely cast adrift and neither are litigants who seek the order unsure of what they are addressing.

Remedial Flexibility (the New Law of Remedies) and Mareva Orders

It is surprising to note that *Cardile* stressed remedial flexibility. But consistent with other recent decisions of superior courts concerning equitable remedies, the Court did precisely that.¹¹⁵

More recently, remedial problems resulting from the overlapping of the causes of action¹¹⁶ and the increasing breadth of equitable doc-

¹¹² (1998) 158 ALR 333.

¹¹³ *Ibid* [116].

¹¹⁴ *Ibid* [24].

¹¹⁵ The difficulty with remedial flexibility may be perceived by contrasting two recent articles in the same issue of the same journal: see Mitchell, 'Remedial Inadequacy in Contract and the Role of Restitutionary Damages' (1999) 15 *Journal of Contract Law* 133 and Edelman, 'Remedial Certainty or Remedial Discretion in Estoppel after Giumelli' (1999) 15 *Journal of Contract Law* 179.

¹¹⁶ J Swanton, 'Concurrent Liability in Contract and Tort' (1996) 10 *Journal of Contract Law* 21.

trines, such as estoppel¹¹⁷ and the constructive trust,¹¹⁸ have led to further consideration of the nature of the cause of action and its relationship to remedies.¹¹⁹ The intersection of tortious, contractual and equitable duties, demonstrated by cases such as *Daniels v Anderson*¹²⁰ and *Permanent Building Society (in liq) v Wheeler*,¹²¹ indicates that the rationale of the remedial approach adopted by the Court has increased in importance. This trend is reflected in cases like *Vadasz*,¹²² where partial rescission of a contract induced via misrepresentation was ordered, and *Sellars v Adelaide Petroleum NL*,¹²³ where damages for lost opportunity were assessed by the same standard, whether the cause of action giving rise to that remedy arose in contract, tort or for breach of statutory provision.¹²⁴

The concept of the 'appropriate' remedy, which is an application of remedial flexibility, has recently been emerging in cases. This has been very explicit in New Zealand cases, which are complicated by the fact that in this jurisdiction the fusion debate has been decided on the side of the fusionists. However, if this complicating issue is put to one side, the issue of finding the most suitable remedy becomes apparent. In *Aquaculture Corporation v New Zealand Green Mussel Co Ltd*¹²⁵ Cooke P held that:

For all purposes now material equity and common law are merged or mingled. The practicality of the matter is that in the circumstances of the dealings between the partners the law imposes a duty of confidence. For its breach a full range of remedies should be available as *appropriate*, no matter whether they originated in common law, equity or statute.¹²⁶

An even more fusionist approach was advocated by Tipping J in *New Zealand Land Development Co Ltd v Porter*.¹²⁷ Perhaps the clearest ex-

¹¹⁷ *Commonwealth v Verwayen* (1990) 170 CLR 394.

¹¹⁸ *Attorney-General (Hong Kong) v Reid* [1994] 1 AC 324.

¹¹⁹ A Blomeyer, 'Types of Relief Available (Judicial Remedies)' in *International Encyclopedia of Comparative Law* (1982) Vol XVI, Ch 4, 4-5.

¹²⁰ (1995) 37 NSWLR 438; 118 FLR 248; 16 ACSR 607.

¹²¹ (1994) 14 ACSR 109; 12 ACLC 674.

¹²² *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102; 69 ALJR 678; 130 ALR 570.

¹²³ (1994) 179 CLR 332; 120 ALR 16.

¹²⁴ All of this raises the extremely difficult issue of the relationship between causes of actions and remedies. For one view of this relationship, see Birks, 'Rights, Wrongs and Remedies' (2000) 20 *Oxford Journal of Legal Studies* 1.

¹²⁵ [1990] 3 NZLR 299.

¹²⁶ *Ibid* 301 (emphasis added).

¹²⁷ [1992] 2 NZLR 462, particularly at 468-9.

position of the 'appropriate' remedy principle was stated by Hammond J in *Butler v Countrywide Finance Ltd.*¹²⁸ In *Brown v Poura*¹²⁹ Hammond J returned to this issue when his Honour observed:

Whether these English authorities are entirely compatible with contemporary New Zealand jurisprudence on remedies is open to question. Essentially, English legal theory and practice on remedies is monistic. That is, right and remedy are perceived to be congruent.¹³⁰ But, in the United States, and increasingly in Canada and New Zealand, our courts proceed on a dualistic basis. The court first makes enquires as to the obligation the court is asked to uphold; it then (and only then) makes a context-specific evaluation of that remedy which will best support or advance that obligation.¹³¹

These observations can be utilised to indicate the difference between the old and new law of remedies. *Cardile* is clearly consistent with the new law of remedies.

A similar approach has been adopted in Canada. In *LAC Minerals Ltd v International Corona Resources Ltd.*¹³² Corona owned the mining rights on certain land. LAC approached Corona with a view to them forming a possible future partnership or joint venture. The parties entered into negotiations. During the course of the negotiations Corona revealed to LAC that the land adjoining Corona's land most likely, on the basis of Corona's results from its drilling activity, contained minerals. Unfortunately, the dealings between the two did not result in any agreed arrangement. When Corona sought to acquire the adjoining land, LAC submitted a competing bid, which was successful. LAC expended money on developing a mine on this land. Corona sued LAC, claiming that there was a breach of both confidence and fiduciary duty, resulting in a constructive trust. The entire Supreme Court of Canada held that there was a breach of confidence by LAC.¹³³ However, only La Forest and Wilson JJ, in separate judgments, found that there had been a breach of fiduciary duty.¹³⁴ A

¹²⁸ [1993] 3 NZLR 623, 631-3.

¹²⁹ [1995] 1 NZLR 352, 368.

¹³⁰ Very importantly, this can be understood to be the old law of remedies.

¹³¹ Very importantly, this can be understood to be the new law of remedies.

¹³² (1989) 61 DLR (4th) 14.

¹³³ The bench consisted of McIntyre, Lamer, Wilson, La Forest and Sopinka JJ.

¹³⁴ Note should be taken of the more recent Supreme Court decision in *Hodgkinson v Simms* (1994) 117 DLR (4th) 161 regarding the existence of a fiduciary relationship in a commercial context.

majority of the Supreme Court¹³⁵ disagreed with the finding by both the trial judge and the Ontario Court of Appeal that LAC had been under a fiduciary obligation. The decision is relevant as a clear example of the separation of remedy and obligation.

The relevant feature of *LAC Minerals* for this discussion relates to the selection of remedy. No judge denied that the constructive trust was available as a remedy for breach of confidence. Importantly, the Supreme Court recognised that liability and remedy are two independent questions. The central question for the Supreme Court was whether the constructive trust was the appropriate remedy following this breach of obligation. La Forest J summed this position up by stating that:

The constructive trust does not lie at the heart of the law of restitution. It is but one remedy, and will only be imposed in *appropriate* circumstances.¹³⁶

It was on the resolution of this point that the majority and minority split.

The separation of legal obligation and remedy in Canada was continued in *Cadbury Schweppes Inc v FBI Foods Inc*.¹³⁷ The case involved a breach of confidence claim concerning a drink made from clams and tomatoes. At the trial level it was held that a breach of confidence had occurred and that the remedy was damages representing the cost of hiring a consultant to help assist in the development of a new juice. On appeal an injunction was awarded. In addition, compensation representing the profits that would have been earned by the plaintiff had sales not been diverted to the defendant's rival drink was awarded. The Supreme Court unanimously allowed the appeal.

The unanimous judgment of the Court¹³⁸ was delivered by Binnie J. His Honour held that the injunction should be discharged and equitable compensation representing the loss suffered by the plaintiff should be awarded. The appeal concerned the remedy, as the breach of confidence was accepted.

The approach of the Supreme Court is not simply confined to breach of confidence cases as the Court noted:

¹³⁵ Consisting of McIntyre, Lamer and Sopinka JJ.

¹³⁶ At 48 (emphasis added).

¹³⁷ (1999) 167 DLR (4th) 577.

¹³⁸ The bench consisted of L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

The equitable doctrine, which is the basis on which the courts below granted relief, potentially runs alongside a number of other causes of action for unauthorised use or disclosure of confidential information, including actions sounding in contract, tort and property.¹³⁹

Binnie J quoted, with apparent approval, the statement by Sopinka J in *LAC Minerals*¹⁴⁰ that:

This multi-faceted jurisdictional basis for [breach of confidence] provides the Court with considerable flexibility in fashioning a remedy. *The jurisdictional basis supporting the particular claim is relevant in determining the appropriate remedy.*¹⁴¹

Thus, the case was stressing remedial flexibility and indicating that the basis of the obligation is important in determining the appropriate remedy. Further to this, Binnie J held that:

In short, whether a breach of confidence in a particular case has a contractual, tortious, proprietary or trust flavour goes to the *appropriateness* of a particular equitable remedy.¹⁴²

The Court quoted the approach advocated by Davies of the cross-fertilisation of remedies across doctrinal boundaries.¹⁴³ Binnie J had quoted from Davies's review of *LAC Minerals*, where Davies had stated:

There is much to be said for the majority view [in *LAC Minerals*] that, if a ground of liability is established, then the remedy that follows should be the one that is most appropriate on the facts of the case rather than one derived from history or over-categorization.¹⁴⁴

Binnie J stated the Supreme Court's position by observing that:

Breach of confidence is the gravamen of the complaint. When it comes to a remedy, however, I do not think a proprietary remedy should automatically follow. There are cases (as in *LAC Minerals*) where it is appropriate. But equity, with its emphasis on flexibility, keeps its options open. It would be contrary to the authorities in this Court already mentioned to allow the choice of remedy to be driven by a label ('property') rather than a case-by-case balancing of the equities. In some cases, as Lord Denning showed in *Seager v Copydex Ltd (No 2)* the relevance of the spe-

¹³⁹ (1999) 167 DLR (4th) 577, 588 [20].

¹⁴⁰ (1989) 61 DLR (4th) 14.

¹⁴¹ (1999) 167 DLR (4th) 577, 588 [22] (emphasis added).

¹⁴² *Ibid* 590 [26].

¹⁴³ *Ibid* 589 [24].

¹⁴⁴ 'Duties of Confidence and Loyalty' [1990] *Lloyd's Maritime & Commercial Law Quarterly* 4, 5. See also Davies, 'Restitution and Equitable Wrongs' in Rose (ed), *Consensus ad Idem* (1996).

cific quality of the information to a remedy will not be its property status but its commercial value. In other cases, as in *LAC Minerals*, the key to the remedy will not be the 'property' status of the confidence but the course of events that would likely have occurred 'but for' the breach. Application of the label 'property' in this context would add nothing except confusion to the task of weighing the policy objectives furthered by a particular remedy and the particular facts of each case ... On these facts, a 'proprietary' remedy is inappropriate.¹⁴⁵

It was held that the appropriate remedy that the Court could award included equitable compensation¹⁴⁶ and Binnie J observed that 'the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation'.¹⁴⁷

The Supreme Court's decision in *Cadbury Schweppes* is important for four reasons. Firstly, it constitutes a clear and unanimous statement of the direction in Canadian law. Secondly, the question of remedy, particularly for equitable wrongs, is not circumscribed by the cause of action relied upon by the plaintiff. The Supreme Court clearly made the remedial issue the 'appropriate' remedy. The approach involves the search for the 'appropriate' remedy. Remedial flexibility was being stressed. Thirdly, the obligation that was breached, and how it was breached, are very relevant factors in deciding the 'appropriate' remedy. Finally, a close parallel was drawn between the approach adopted in *Cadbury Schweppes* to the approach adopted by the High Court of Australia in *Warman International Ltd v Dwyer*.¹⁴⁸

It should not be thought that this is only a phenomenon that is occurring in New Zealand, Canada and the United States. It is also occurring in England. *Lord Napier and Ettrick v Hunter*¹⁴⁹ is one very good example of this process. This House of Lords decision involved the employment of the equitable lien. In that case, members of a syndicate ('the stop loss insurers') had provided stop loss policies for Lloyd's names ('the names'). The managing agent of 'the names' negligently wrote large numbers of policies on behalf of 'the names' in relation to asbestos claims. However, the managing agent did so

¹⁴⁵ (1999) 167 DLR (4th) 577, 599 [48].

¹⁴⁶ *Ibid* 604, [61].

¹⁴⁷ *Ibid*.

¹⁴⁸ (1995) 182 CLR 544.

¹⁴⁹ [1993] 2 WLR 42. See Mitchell, 'Subrogation and Insurance Law: Proprietary Claims and Excess Clauses' [1993] *Lloyd's Maritime & Commercial Law Quarterly* 192, esp 199-201.

without sufficient reinsurance cover.¹⁵⁰ When successful claims were made against the insurance policies they had written, 'the names' then recovered money from the 'stop loss insurers'. After receiving this money, 'the names' then commenced actions against their managing agent. 'The names' claimed against their managing agent for damages, alleging failure to obtain adequate reinsurance. From this action, 'the names' received £116m. This money was held by 'the names' solicitors. The matter before the courts was whether the 'stop loss insurers' possessed a proprietary interest in the fund equivalent to the payments that they had already made to 'the names' under the policies of reinsurance. Eventually the matter reached the House of Lords.

The House of Lords decided in favour of the 'stop loss insurers'. One aspect of their Lordships' judgment is particularly pertinent. This involves the selection of remedy. In this case Lord Goff considered that the equitable lien was the most appropriate remedy. His Lordship observed that:

since the constitution of the assured as trustee of such money may impose upon him obligations of too onerous a character (a point which troubled Saville J¹⁵¹ in the present case), I am very content that the equitable proprietary right of the insurer should be classified as a lien.¹⁵²

Likewise, Lord Templeman held that 'the practical disadvantages [of ordering a constructive trust] would be fearsome. Fortunately equity is not so inflexible or powerless'.¹⁵³ Therefore, his Lordship awarded an equitable lien rather than a constructive trust.

Remedial flexibility was also stressed in *Banque Financière de la Cité v Parc (Battersea) Ltd*,¹⁵⁴ recognising remedial or non-consensual subrogation.¹⁵⁵

In Australia, the movement towards the most appropriate remedy approach is also occurring. *Maguire v Makaronios*¹⁵⁶ is attuned to this concept of remedial flexibility. Perhaps this is most clearly apparent

¹⁵⁰ The insurance provided by 'the stop loss insurers' was only partly adequate to cover the losses suffered by 'the names'.

¹⁵¹ Who presided at the trial.

¹⁵² [1993] 2 WLR 42, 61.

¹⁵³ *Ibid* 55.

¹⁵⁴ [1998] 2 WLR 475.

¹⁵⁵ See Wright, 'The Rise of Non-Consensual Subrogation' [1999] 63 *Conveyancer* 113 for a full discussion of this case.

¹⁵⁶ (1997) 71 ALJR 781.

in the judgment of Kirby J in this case.¹⁵⁷ The joint judgment in *Mauguire*, citing *Spence v Crawford*,¹⁵⁸ held that '[t]he nature of the case will determine the *appropriate* remedy available for selection by a plaintiff'.¹⁵⁹

The High Court decision in *Bathurst City Council v PWC Developments*¹⁶⁰ also indicated that there is a transformation in the law of remedies. It is possible to argue that the most important aspect of *Bathurst* relates to the High Court's observations concerning remedy selection. The decision involved the High Court rejecting the idea of some variety of direct link between the right¹⁶¹ and remedy. The High Court endorsed a separation of right and remedy.¹⁶² This dissociation of liability¹⁶³ from remedy permits an explicit examination of the spectrum of remedies that are available and requires a discussion of the appropriateness of one remedial response over another. This leads to a discussion of the nature of rights and remedies, as well as the relationship between remedies. The remedial constructive trust - recognised by the High Court in *Bathurst* - plays a vital role in the law of remedies. It would be incorrect to assume that gaining an entitlement to an equitable proprietary remedy automatically results in an order for a constructive trust. Once it has been decided that there is an entitlement to an equitable proprietary remedy, the next question is how to decide which particular proprietary remedy is appropriate. The High Court in *Bathurst* held that the difference between Deane J and Gibbs CJ in *Muschinski v Dodds*¹⁶⁴ concerned the appropriate remedy to award in that case.¹⁶⁵ In the Canadian Supreme Court decision in *Sorochan v Sorochan*,¹⁶⁶ Dickson CJC observed that the constructive trust constitutes only one judicially imposed remedy.¹⁶⁷ Austin has commented that the constructive 'trust arises, if at all at the end of the analysis rather than at the beginning and is treated as

¹⁵⁷ *Ibid* 804-5.

¹⁵⁸ [1939] 3 All ER 271, 288.

¹⁵⁹ (1997) 71 ALJR 781, 789 (emphasis added).

¹⁶⁰ (1998) 157 ALR 414. See Wright, 'The Statutory Trust, the Remedial Constructive Trust and Remedial Flexibility' (1999) 14 *Journal of Contract Law* 221.

¹⁶¹ Or legal obligation.

¹⁶² (1998) 157 ALR 414, [42].

¹⁶³ Liability is simply the breach of a right or obligation.

¹⁶⁴ (1984) 156 CLR 41.

¹⁶⁵ (1998) 157 ALR 414, [42].

¹⁶⁶ (1986) 29 DLR (4th) 1.

¹⁶⁷ At 7.

one of the variety of remedial choices'.¹⁶⁸ In the United States there has been a consistent adoption of a remedial approach to the constructive trust.¹⁶⁹ In extra-judicial writing Gummow J has observed that 'the modern fascination with the constructive trust as a remedial device tends to obscure the range of proprietary remedies'.¹⁷⁰ This approach is evident in the High Court's decision in *Bathurst* where the Court held that:

An equitable remedy which falls short of the imposition of a trust may assist in avoiding a result whereby the plaintiff gains a beneficial proprietary interest which gives an unfair priority over equally deserving creditors of the defendant.¹⁷¹

In *Bridgewater v Leahy*¹⁷² the majority¹⁷³ observed that:

In the course of argument on this appeal, there was discussion as to the *appropriate* form of equitable relief if the appeal was successful. In accordance with the authority referred to above, counsel for the respondents stressed the requirements of 'practical justice'. Reference was made to *Vadasz v Pioneer Concrete (SA) Pty Ltd*¹⁷⁴ to emphasise the importance of the consideration that in the particular circumstances of a case the equity may be satisfied by orders having the effect of setting aside no more than so much of a disposition as prevents the moving party 'obtaining an unwarranted benefit at the expense of the other'¹⁷⁵ ...

Once a court has determined upon the existence of the necessary equity to attract relief, the framing, or, as it often expressed, the moulding, of relief may produce a final result not exactly representing what either side would have wished. However, that is a consequence of the balancing of competing interests to which, in the particular circumstances, weight is to be given.¹⁷⁶

It is interesting to note that the minority¹⁷⁷ disagreed with this flexible approach.¹⁷⁸

¹⁶⁸ 'The Melting Down of the Remedial Trust' (1988) 11 *University of New South Wales Law Journal* 66, 75.

¹⁶⁹ For example, Fratcher and Scott, *The Law of Trusts* (4th ed, 1987) vol V. This work was quoted in the Court of Appeal's decision.

¹⁷⁰ 'Unjust Enrichment, Restitution and Proprietary Remedies' in Finn (ed), *Essays on Restitution* (1990) 85.

¹⁷¹ (1998) 157 ALR 414, [42].

¹⁷² (1998) 158 ALR 66.

¹⁷³ Which consisted of Gaudron, Gummow and Kirby JJ.

¹⁷⁴ (1995) 184 CLR 102.

¹⁷⁵ *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 114.

¹⁷⁶ (1998) 158 ALR 66, [126]-[127] (emphasis added).

¹⁷⁷ Which consisted of Gleeson CJ and Callinan J.

In *Giumelli v Giumelli*¹⁷⁹ the process adopted by the High Court was extremely important. The Court divided the case into two parts; the legal obligation¹⁸⁰ and the remedy. Regarding the remedy stage, the High Court made some interesting observations on the constructive trust as a remedy. *Giumelli* is perfectly consistent with its earlier decision in *Bathurst City Council*, where it divided the constructive trust into institutional and remedial varieties. The constructive trust in issue in *Giumelli* was remedial in nature.

It is notable that the Court in *Giumelli* held that the term 'constructive trust' constituted a broad expression, involving many different remedies. These include personal liability under *Barnes v Addy*¹⁸¹ for assisting in or procuring a breach of trust or fiduciary duty. Also, the High Court recognised, in accordance with United States practice, that the equitable lien is a 'special and limited' constructive trust.¹⁸² The sole reason for the High Court's discussion was to identify some of the possible remedies, particularly as the remedy ordered by the Full Court was a constructive trust and the High Court held that the court should 'first decide whether, having regard to the issues in the litigation, there is an *appropriate* equitable remedy which falls short of the imposition of a trust.'¹⁸³ In support of this proposition the High Court referred to *Bathurst City Council*¹⁸⁴ and *Lord Napier v Hunter*.¹⁸⁵

This notion of remedial flexibility continues a trend evident in other equity cases and makes this decision relevant to specialists in this field.

The majority in *Cardile* stated that:

It occurred to us during argument that some limited form of Mareva relief against Ultra Modern in respect of the business name might be appropriate.¹⁸⁶

This has great resonance with the question of appropriate remedy in *Bridgewater v Leahy*.¹⁸⁷ In this case, the majority¹⁸⁸ held:

¹⁷⁸ (1998) 158 ALR 66, [55].

¹⁷⁹ (1999) 161 ALR 473.

¹⁸⁰ Or right.

¹⁸¹ (1874) LR 9 Ch App 244.

¹⁸² (1999) 161 ALR 473, [31].

¹⁸³ *Ibid* [10] (emphasis added).

¹⁸⁴ (1998) 157 ALR 414, 425-6.

¹⁸⁵ [1993] AC 713, 738, 744-5 and 752.

¹⁸⁶ (1999) 162 ALR 294, [59].

¹⁸⁷ (1998) 194 CLR 457.

¹⁸⁸ Consisting of Gaudron, Gummow and Kirby JJ.

The framing, or, as it is often expressed, the moulding, of relief may produce a final result not exactly representing what either side would have wished.¹⁸⁹

The minority in the case¹⁹⁰ were troubled by this approach.¹⁹¹ In *Cardile* the majority referred to recent authorities to support its statement that '[a] court, in granting interlocutory relief, should generally grant the minimum relief necessary to do justice between the parties'.¹⁹² Even in the context of a Mareva injunction the Court was stressing the fact of remedial flexibility, which has become part of the recent Australian legal landscape. As can be seen from the discussion in this part, Australia is not alone in this process.¹⁹³

Conclusion

The *Cardile* decision is easy to dismiss as relevant only to a particular domain within the specialised area of Mareva injunctions. Although the Court had important observations regarding this question, it would be wrong to assume that this was the extent of the relevance of the case. The decision had many important comments to make about the move from injunction to order, the doctrinal basis of the Mareva order, as well as third parties. Further, the initial reading of the decision in *Cardile* may suggest that there has been a move from remedies law to procedural law. This would be a major development if it were accurate. Any attempts to remove this relief from equitable jurisprudence beg many wide-ranging questions, particularly involving the extra-territorial operation of such orders. The decision as it relates to the remedial hierarchy is also of general relevance. Remedial flexibility, which was stressed in this decision, is possibly the decision's greatest impact upon those whose interests lie beyond Mareva relief. However, it has been shown that there has not been a complete transformation of Mareva orders to the law of procedure, with an abandonment of the law of remedies. A hybrid approach to the Mareva order is advocated. Hybrid approaches are not unknown to the legal system. The approach regarding Mareva orders represents a combination of the law of procedure and the law of remedies. It relies upon the use of analogous reasoning, which has been applied by the

¹⁸⁹ (1998) 194 CLR 457, [127].

¹⁹⁰ Consisting of Gleeson CJ and Callinan J.

¹⁹¹ (1998) 194 CLR 457, [55].

¹⁹² *Ibid* [70].

¹⁹³ Wright, *Remedial Constructive Trust*, above n 107, and Barker's review of this work in (1999) 13 *Trust Law International* 204.

High Court. This hybrid approach would solve the problems that have been identified, while being consistent with *Cardile*. In the area of Mareva orders, *Cardile* represents an important contribution to the emerging new law of remedies.