MAREVA INJUNCTIONS

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JURISDICTION

The term Mareva injunction[1] is commonly used to describe injunctions that are granted in order to prevent the defendant from removing assets from the jurisdiction or from disposing of or dealing with them within the jurisdiction in such a way as to frustrate execution under proceedings brought or to be brought by the plaintiff.[2]

It was well established by the nineteenth century that courts of equity would not grant injunctions to creditors to prevent debtors from dealing with their property where the creditor had no legal or equitable interest in the property.[3] This is not to say that there was not jurisdiction to grant injunctions of this kind, and no question of a defect of powers arose: if injunctions had been granted, they would have been enforceable in the same way as other equitable orders. Rather courts of equity considered that in circumstances of this kind it was inappropriate and unjust to prevent a defendant from dealing with his property as the defendant saw fit.[4]

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1. This name is derived from the decision in *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509. Compare with respect to writs ne exeat regno, *Allied Arab Bank Ltd v Hajjar and Others* [1988] QB 787 ("*Hajjar*").
2. A common form of order restrains the defendant from removing assets from the jurisdiction, or otherwise disposing of or dealing with any assets within the jurisdiction, subject to limitations and restrictions which are directed to minimise hardship or injustice and which are discussed hereunder: see, for example, *A J Bekhor & Co Ltd v Bilton* [1981] QB 923, 936 ("*Bekhor*") and *Z Ltd v A-Z and AA-LL* [1982] QB 558 ("*Z Ltd*").
3. See *Lister & Co v Stubbs* (1890) 45 Ch D 1 ("*Lister*") and *Siskina and Others v Distos Compania Naviera SA* [1979] AC 210, 260-261 ("*Siskina*").
4. Different principles apply where, for example, the plaintiff has a legal or equitable interest in the fund or property in question. In this case an injunction may be granted in accordance with general principles and special considerations in relation to Mareva injunctions do not apply.

rendered ineffective, and on this basis they are merely ancilliary to the general process of the court.[17]

Especially since applications are ordinarily made ex parte, it has sometimes been appropriate that orders be made initially only on an interim basis, so that on a specified date submissions by defendants or other affected parties can be heard as to whether they should be continued, whether with or without modifications to their terms.[18] In other instances it has been appropriate that orders should be expressed to take effect until the hearing or further order,[19] although in other contexts courts of equity have generally not granted interlocutory, as opposed to interim, injunctions on ex parte applications.[20] However it appears to be undesirable to lay down an inflexible rule in these regards: on some occasions the making of an interim order may be more just, whereas on other occasions it may appear to be preferable to grant interlocutory relief, on the basis that the defendant will be sufficiently protected by the right to apply to have the injunction discharged or varied.

It is not necessary for a writ or other originating process to have been taken out at the time when a Mareva injunction is sought.[21] Indeed, a Mareva injunction may, where appropriate, be granted at any stage in regard to actual or contemplated proceedings[22] and may, for example, be granted after judgment,[23] or continued after judgment,[24] pending completed execution.

It was at first suggested that Mareva injunctions may be granted only where the defendant is foreign or foreign based, but it is now

17. *Iraqi Ministry of Defence and Others v Arcepey Shipping Co SA and Another* [1981] QB 65 ("*Arcepey Shipping*"); *Jackson* supra n 5.
18. See, for example, *Lambert* supra n 8.
19. See *Z Ltd* supra n 2, 587-588.
20. See generally Spry supra n 6.
21. Where the plaintiff has not caused a writ or other originating process to issue, the plaintiff may be required to undertake to do so forthwith or within a specified time: *In re "N" (infants)* [1967] Ch 512.
22. See Spry supra n 6 as to the exceptional circumstances in which an injunction may be granted before a writ or other originating process issues.
23. *Orwell Steel (Erection and Fabrication) Ltd v Asphalt and Tarmac (UK) Ltd* [1984] 1 WLR 1097 ("*Orwell Steel*"). In *Faith Panton Property Plan Ltd v Hodgetts and Another* [1981] 1 WLR 927 ("*Faith Panton*") the court held that an appropriate injunction could be ordered without reliance upon the Mareva line of authorities. Post-judgment injunctions are discussed infra 185-186.
24. *Stewart Chartering Ltd v C & O Managements SA and Another* [1980] 1 WLR 460, 461.

established that they may be granted also where the defendant is resident within the jurisdiction but there is a sufficient risk that assets may be removed directly or indirectly from the jurisdiction.[25] A further question arose whether a Mareva injunction may be granted where there is merely a risk of disposal or dissipation within the jurisdiction, without the removal of assets from the jurisdiction. As a matter of principle it would not be proper that any limitation of this kind should apply, although clearly the precise nature of the apprehended acts by which assets may be removed or disposed of is often an important matter for the exercise by the court of its discretion. Hence it has been established that Mareva injunctions may be granted where the only danger is of the disposal or dissipation of assets within the jurisdiction;[26] and it has been observed by the English Court of Appeal that section 37(3) of the United Kingdom Supreme Court Act 1981 supports this position.[27]

In England it was initially held that Mareva injunctions can be directed only to assets within the court's jurisdiction.[28] However it has subsequently been affirmed that in appropriate circumstances an injunction may extend to foreign assets.[29]

In the absence of special considerations Mareva injunctions are so expressed as to have an ambulatory effect: that is, they apply, subject to their terms, to assets of the defendant from time to time, including assets acquired after the grant of the relevant injunction,[30] so as to extend to bank accounts, chattels, land and any other forms of or interests in property.[31] However they do not apply to assets of the

25. See *Bekhor* supra n 2, 936 where it was stated that the customary form of order restrained the defendant from removing from the jurisdiction, or otherwise disposing of or dealing with the relevant assets within the jurisdiction; and compare s 37(3) of the (UK) Supreme Court Act 1981.
26. See *Z Ltd* supra n 2, 571. A narrow view was adopted in *Mayall v Weal* [1982] 2 NZLR 385. It may be noted that early discussions of Mareva injunctions contain many restrictive formulations and that the broad nature of the courts' powers has only gradually been accepted.
27. *Lambert* supra n 8, 42.
28. *Ashtiani and Another v Kashi* [1987] QB 888 (*"Ashtiani"*).
29. *Derby & Co Ltd v Weldon (Nos 3 and 4)* [1989] 2 WLR 412 (*"Weldon (Nos 3 and 4)"*). See also the Australian authorities referred to in *National Australia Bank Ltd v Dessau and Others* [1988] VR 521 (*"Dessau"*). Mareva injunctions extending to foreign assets are discussed infra 187-189.
30. *TDK Tape Distributor (UK) Ltd v Videochoice Ltd and Others* [1986] 1 WLR 141 (*"TDK Tape"*).
31. *Lambert* supra n 8. See infra 179 as to specific exclusions for ordinary business expenses, living expenses and other expenditure.

or hardship, on general principles it is appropriate that the plaintiff will obtain judgment and that execution will be frustrated unless the injunction is granted.[45] Conversely the fact that the plaintiff has already obtained judgment and that rights are hence established may be of importance.[46]

Thirdly, a plaintiff who proceeds ex parte is under similar obligations as in other applications for ex parte injunctions.[47] In particular the plaintiff must make a full disclosure of all facts that may influence the court in determining whether an order should be made.[48] It has recently been held that this duty of disclosure extends not only to facts known by the plaintiff, but also to facts that would have been known if the plaintiff had made proper enquiries.[49]

Fourthly, the plaintiff may, in addition to the usual undertaking as to damages,[50] be required to give additional undertakings to the extent that they are appropriate to avoid or minimise prejudice to the defendant or third parties. So it is ordinarily appropriate to require the plaintiff to undertake that, if a writ has not already been issued, a writ will be issued forthwith or within a specified time[51] and that service of material process will be effected on the defendant or third parties forthwith or within a specified time and that the plaintiff will indemnify or recoup third parties in regard to costs or expenditure reasonably incurred in seeking to comply with the order of the court or in regard to liabilities that may flow from compliance.[52] Where appropriate a bond or other security in support of the plaintiff's undertakings may be required.[53]

45. In *Third Chandris* supra n 39 reference was made to the nature of the evidence required in order to ascertain what assets the defendant has within the jurisdiction and whether there is a danger of default through the removal of assets. See also *Z Ltd* supra n 2.
46. *Orwell Steel* supra n 23. As to the grant of Mareva injunctions after judgment, see infra 185-186.
47. See supra n 35.
48. Supra n 39.
49. See supra n 35.
50. See generally Spry supra n 6.
51. Supra n 21.
52. See generally *Z Ltd* supra n 2, where a duty on the part of the relevant defendant or third party to take reasonable steps to minimise costs was referred to.
53. Ibid; *Ashtiani* supra n 28.

Fifthly, if it is appropriate in order to protect the plaintiff's position and render injunctive relief effective, the court may make an order for the delivery up of chattels or such other orders as are desirable to secure the position of the plaintiff.[54] So it may make an ancillary order for discovery or an Anton Piller order if a basis for relief of this kind is established,[55] or any other ancillary order that is appropriate in the particular circumstances.[56] So, for example, cross-examination on the defendant's affidavit may be ordered.[57] However although for these purposes the court may enjoin the defendant from leaving the jurisdiction, that enjoinder should continue no longer than is necessary to give effect to its orders, such as for cross-examination on the defendant's affidavit.[58]

HARDSHIP TO DEFENDANT OR THIRD PERSONS

The nature of Mareva injunctions is such that they are often capable of causing substantial prejudice or hardship to defendants and third persons. These matters must be taken into account by the court in the exercise of its discretion, whether on an original application for the grant of an injunction or on subsequent applications to discharge or continue an injunction, as the case may be. Further, they are relevant, not only for the decision whether a Mareva injunction should be granted at all,[59] but also in deciding in what way the order of the court should be limited or should contain particular provisions for the purpose of avoiding or minimising hardship.[60]

54. *Lambert* supra n 8.
55. See *Z Ltd* supra n 2, supra n 8 and *Derby & Co Ltd and Others v Weldon and Others (No 1)* [1989] 2 WLR 276 ("*Weldon (No 1)*").
56. *Maclaine Watson & Co Ltd v International Tin Council (No 2)* [1989] Ch 286.
57. Compare *Bekhor* supra n 2.
58. *Hajjar* supra n 1.
59. See *Galaxia Maritime SA v Mineralimportexport* [1982] 1 WLR 539 and *Gilfoyle Shipping Services Ltd v Binosi Pty Ltd* [1984] 2 NZLR 742.
60. See generally *Bekhor* supra n 2. Such general guidelines as those set out in *Third Chandris* supra n 39 and *Z Ltd* supra n 2, should not be regarded as necessarily to be adhered to in all cases but are useful as summaries of some of the various matters to which attention should be directed on applications for Mareva injunctions.

An order referring to all the property of the defendant, or even to all property not exceeding in value a particular amount, may cause substantial hardship to the defendant or to third parties who may be unable to ascertain whether a particular disposition is in breach,[61] and hence where the court has sufficient information to enable it to do so, the preferable course is often that it should limit its order to particular specified property, if that property is of an adequate value.[62] Where this is not appropriate an initially wide order may be limited on a subsequent application.

Sometimes, however, the course of specifying particular assets is impracticable, where for example the plaintiff is unable at first to ascertain sufficiently what assets are owned by the defendant.[63] In these circumstances the two general courses that, subject to modifications to enable hardship and uncertainty to be minimised, are open are, first, to make an order in respect of all assets of the defendant, and secondly, to make an order in respect of all such assets save in so far as they exceed in value the amount of the plaintiff's claim.

The first of these alternative courses, that is, the making of an order without a limit, avoids some of the difficulties that may be found by third parties,[64] such as banks, in knowing whether or not a particular disposition is consistent with a limited order.[65] It is, however, apt to cause greater hardship to the defendant, and hence in the absence of special circumstances is less appropriate, than a limited order.

Accordingly it has become recognised that generally the second of these alternative courses, that is, the making of an order that applies only so far as the relevant assets do not exceed the amount of the plaintiff's claim, is apt to cause less hardship to the defendant than an unlimited order and is, on the face of it, preferable.[66] However if an order of this kind were made in an unqualified form it would prejudice banks and other third parties, who commonly would be unable to ascertain whether a particular payment did or did not involve a breach

61. *Z Ltd* supra n 2.
62. See the orders sought in *Lambert* supra n 8 and *Riley McKay* supra n 5.
63. An order for disclosure may be made where appropriate: see *Bekhor* supra n 2 which must be read in the light of *Lambert* supra n 8.
64. As to the obligations of third parties generally infra 182-185.
65. *Z Ltd* supra n 2, 576.
66. Ibid, 576, 589.

of the order. It has been indicated that this uncertainty may be overcome by drafting the order "in such terms that any third party on which it is served is only obliged to freeze whatever assets of the defendant it may hold up to the maximum amount specified in the order".[67] But in differing circumstances differing formulae are appropriate to produce certainty for third parties without injustice to the defendant.

Whichever of these alternative courses is adopted, it is generally appropriate that the order should contain an exception in regard to the ordinary living expenses of the defendant.[68] In order to avoid uncertainty an appropriate weekly or other periodic maximum amount may be set out.[69] Further, if the defendant is carrying on a business it is also generally appropriate that the order should contain an exception in regard to ordinary business expenses.[70] Further, where appropriate the court limits its order so as to permit the defendant to expend either specified sums or reasonable amounts for legal costs or so as to meet other specified present or future obligations.[71] Here it is important to bear in mind that the purpose of Mareva injunctions is to prevent the improper removal and dissipation of assets, and not to affect otherwise the activities of the defendant or to affect the priorities of creditors.

It may hence be seen that since the making of a Mareva order is within the discretion of the court,[72] its terms - as well as the question whether it should be granted at all - depend on the various considerations that arise in the particular circumstances in question. All relevant matters are taken into account by the court, and the order is made that

67. Ibid, 589. The judgment of Kerr LJ contains a discussion of the manner in which Mareva injunctions may be formulated so as to minimise hardship to third parties such as banks.
68. See *Bekhor* supra n 2 and *Z Ltd* supra n 2. In *Arcepey Shipping* supra n 17 an injunction was varied so as to enable a debt to a creditor to be paid. Observations in *PCW (Underwriting Agencies) Ltd v Dixon and Another* [1983] 2 All ER 158 ("*PCW*") appear to go too far to the extent that they suggest that the payment of personal expenses out of assets held by the defendant on trust may be permitted.
69. See, for example, *PCW* ibid. The order may, where appropriate, require that the defendant disclose from time to time the sources from which particular payments are made.
70. Compare *Arcepey Shipping* supra n 17; *PCW* supra n 68; and *SCF Finance Co Ltd v Masri and Another* [1985] 1 WLR 876 ("*SCF Finance*").
71. See generally *PCW* supra n 68.
72. See *Lambert* supra n 8.

is most just in accordance with the interest of the plaintiff, the defendant and third persons. Hence the form of order that is appropriate in one case may be different from that which is appropriate in even slightly different circumstances. In particular it has been stressed that care should be taken in drawing a Mareva injunction to ensure that as far as is reasonably foreseeable it does not cause unnecessary hardship to the defendant or third parties, and

> [W]hile it must of course always be clear that it is open to the defendant, or any third party affected by the order, to apply to have it varied or discharged on short notice, and even ex parte in extreme cases, reliance on such means of adjustment should only be a secondary consideration.[73]

However although considerations of hardship to the defendant or to third parties may, according to the particular circumstances, be of importance or may even be decisive, they are merely discretionary matters the weight of which depends on other relevant considerations.[74]

It has become accepted that ordinarily a plaintiff who obtains a Mareva injunction should give an undertaking "as a term of the order, to indemnify any third party against any costs, expenses or fees reasonably incurred by the third party in seeking to comply with the order, as well as against all liabilities which may flow from such compliance".[75] Where a third party has a right of indemnity the court may order that the third party should recover all costs and expenses, provided that they are reasonably incurred (including, where appropriate, costs of obtaining a variation of the injunction), even though they exceed what would be allowable on a party and party basis, or may make such other order as is just in the circumstances.[76]

Finally, it may be noted that often it is possible to avoid the issue or continuance of a Mareva injunction and any hardship or prejudice that might otherwise have arisen by the provision by or on behalf of the defendant of appropriate security. So, for example, on the provision of

73. *Z Ltd* supra n 2, 588.
74. Observations in these regards of the English Court of Appeal in *Ninemia* supra n 42, 1426 should not be understood to mean that hardship to the defendant provides a conclusive objection to the grant of an injunction, as opposed to a discretionary consideration.
75. *Z Ltd* supra n 2, 586. Here, among other things, the consequences of an injunction on other proceedings, such as bankruptcy proceedings, may be taken into account by the court in the exercise of its discretion: *Felixstowe Dock & Railway Co v United States Lines Inc* [1989] QB 360.
76. *Project Development Co Ltd SA v KMK Securities Ltd and Others* [1982] 1 WLR 1470.

a bank guarantee or some other appropriate security or on the provision of an appropriate undertaking the court may conclude that the plaintiff is sufficiently protected in all the circumstances and that the grant of an injunction is not necessary.[77] Similarly, if a sum is otherwise payable by the plaintiff to the defendant it may be sufficient for all or part thereof to be set aside pending the resolution of the plaintiff's claims, without any need for an injunction.[78]

GENERAL DISCRETIONARY CONSIDERATIONS

Whenever an application is made for the grant, modification or discharge of a Mareva injunction considerations of hardship to the plaintiff or the defendant or third persons require, as has been seen, careful consideration.[79] In so far as the relief sought is of a discretionary nature other considerations, in addition to the strength of the parties' cases, may be of importance, and here the same principles are relevant that are generally relevant in applications for interlocutory injunctions.[80] So, for example, it may be material that there has been acquiescence or laches.[81]

Laches arises where the plaintiff has delayed unreasonably if by reason of that delay it would be unjust to grant the plaintiff the particular injunction in question, either absolutely or conditionally or in a limited form.[82] In the case of a Mareva injunction it is commonly found that unreasonable delay is to the disadvantage of the plaintiff. However if through the plaintiff's unreasonable delay the position of the defendant or of third persons is prejudiced, or it otherwise becomes unjust that an injunction should be granted, and that injustice cannot appropriately be avoided by restricting the scope of the injunction or by imposing conditions or requiring undertakings or otherwise, the court may refuse to intervene.

77. In view of the often drastic effects of Mareva injunctions alternative courses of these kinds are commonly desirable. See generally *Allen and Others v Jambo Holdings Ltd and Others* [1980] 1 WLR 1252.
78. *Seven Seas Properties Ltd v Al-Essa and Another* [1988] 1 WLR 1272.
79. See generally supra 177-181.
80. As to the equitable nature of proceedings see *Babanaft* supra n 13 and *Weldon (Nos 3 and 4)* supra n 29.
81. See *Lindsay Petroleum Co v Hurd and Others* (1874) LR 5 PC 221.
82. And see also, for example, ibid, 240; *Erlanger and Others v New Sombrero Phosphate Co and Others* (1878) 3 App Ca 1218 and *Lamshed v Lamshed and Others* (1963) 109 CLR 440.

Other matters that may be of importance include the extent to which the injunction in question may be impossible to comply with or may be futile, fraud or unfairness on the part of the plaintiff that renders its grant inappropriate[83] and a failure on the part of the plaintiff to disclose matters that ought to have been disclosed, where the relevant application is made ex parte.[84]

It is not appropriate, however, to endeavour to set out exclusive categories of the considerations that are properly taken into account on applications in regard to Mareva injunctions. The court is required to consider all matters that bear upon the justice of granting or withholding the remedy in the particular circumstances, and here although generally the most important matters are the extent of the risk that the ultimate order of the court will be rendered partly or wholly ineffective if relief is not given and considerations of hardship and convenience as between the plaintiff and the defendant and third parties, any other matter is taken into account if it affects the balance of justice in granting or withholding relief.

OBLIGATIONS OF THIRD PERSONS

It has been seen that the extent to which a Mareva injunction may cause prejudice or inconvenience to third parties is a matter that is taken into account by the court in determining whether an order should be made and what its precise terms should be.[85] A further question arises as to the extent to which third parties are bound by a Mareva injunction.

It has been suggested that a Mareva injunction is a method of attaching the assets in question and operates in rem.[86] However the better view is that it constitutes merely relief in personam, in accordance with general equitable principles,[87] by prohibiting the defendant

83. See generally Spry supra n 6.
84. Supra n 39; supra 176.
85. See supra 177-181.
86. *Z Ltd* supra n 2 Denning MR, 573.
87. In accordance with general principles, unless an injunction is limited in material respects it may affect third persons who, for example, with notice aid or abet its contravention or purportedly acquire interests in property to which it relates, contrary to its terms: see generally supra n 13 and *Weldon (Nos 3 and 4)* supra n 29.

from performing specified acts in relation to the relevant assets.[88] It is not directed to alter the priorities of creditors in respect of the assets but is merely intended to prevent their improper dissipation or removal.

Here a distinction must be made between cases where a third party such as a bank is joined as a defendant and cases where, although it is not a defendant, it has received notice of the injunction. In the former case it is bound directly in the same way as any other defendant.[89] In the latter case any aiding or abetting by it of a contravention of the injunction, such as arises where the bank knowingly allows the defendant to withdraw money in breach of the order of the court, constitutes a contempt of court and is punishable accordingly.[90]

Before the defendant or other person can be guilty of contempt, that person must know that the injunction has been granted[91] and must perform acts knowing that they are in contravention of its terms or must otherwise knowingly aid or abet contravention by another person.[92] It has been said, "[i]n the great majority of cases the fact that a person does an act which is contrary to the injunction after having notice of its terms will almost inevitably mean that he is knowingly acting contrary to those terms", although special considerations may arise where the acts of a corporation are in question.[93]

In the interests of both the defendant and third parties the order of the court should be expressed in as clear terms as possible, so that it can be known with certainty what they can and what they cannot do. So

88. *Cretanor Maritime Co Ltd v Irish Marine Management Ltd* [1978] 1 WLR 966 ("*Cretanor Maritime*") where it was held that where appropriate a person with an equitable interest in the property in question may apply to have a Mareva injunction set aside. This decision was not referred to in *Z Ltd* supra n 2.
89. As to the consequences of a failure to comply with an injunction, see generally Spry supra n 6.
90. *Z Ltd* supra n 2. So also a solicitor or adviser of the defendant or of a third person may be guilty of contempt: *TDK Tape* supra n 30.
91. *Z Ltd* supra n 2.
92. In *Bank Mellat v Kazmi and Others* [1989] 2 WLR 613 it was held that in appropriate circumstances a third party may be ordered to pay moneys into a bank account to which a Mareva injunction applies, where there is an undue risk that they would otherwise be dissipated or lost.
93. *Z Ltd* supra n 2, 580. Reference may be made to the discussion in this case of knowledge on the part of a corporation, where, for example, different agents have differing degrees of knowledge.

especially where it is intended to serve a copy of the order on third parties, it is often desirable that the order should provide expressly to what extent assets in their hands are affected by the general part of the order, and it may be appropriate that it be indicated in the order itself that "so far as concerns assets in the hand of third parties, the generality of the order should only apply to such assets in so far as they are identified or referred to specifically, but not otherwise".[94] So if an order is to be served on a bank, it should generally be clear from its terms what accounts are to be frozen, whether bank card transactions or other particular transactions are to be disregarded and whether other assets that the bank may hold are to be affected.[95] Thus it has been said that the order should preserve rights of set-off of the bank in respect of liabilities under agreements entered into prior to the time of making the order.[96] It is not possible, however, to set out inflexible rules as to what a Mareva injunction should or should not contain in regard to matters of this kind. In each particular case it should be expressed with care in view of the persons who are required to comply with its terms and the various practical difficulties that may be foreseen. The possibility that the court may be approached subsequently for amendment of the order may be borne in mind, although this consideration does not prevent the court from expressing its order with care with respect to foreseeable difficulties that are not unduly remote.

Special difficulties arise where there are doubts whether particular property to be affected by a proposed Mareva injunction is owned by the defendant or by a third person. If there is a substantial prospect that ownership by the defendant or any other relevant interest of the defendant will be denied by the third person it is ordinarily desirable

94. *Z Ltd* supra n 2, 592. The position of banks who have notice of a Mareva injunction was discussed by the English Court of Appeal in this case.

95. A person who is affected by an injunction, whether or not a defendant, can apply in the action for its discharge: *Cretanor Maritime* supra n 88. In *Z Ltd* supra n 2, 592 it was said that it may be appropriate for the order to indicate whether the bank is entitled to make payments in satisfaction of pre-existing liabilities, such as through credit card transactions. See also *Bolivinter Oil SA v Chase Manhattan Bank NA and Others* [1984] 1 WLR 392 as to letters of credit and similar instruments.

96. *Oceanica Castelana Armadora SA of Panama v Mineralimportexport* [1983] 1 WLR 1294.

that that person should be made a party.[97] At the hearing of the application for the injunction the principal matters to be taken into account include the precise probabilities that the defendant has a relevant interest in the property and the inconvenience or hardship that might be caused to a party or any other person by the making of an order or a refusal of an order in respect of the property.[98] Although the court does not finally determine questions of ownership on interlocutory applications, it takes into account all relevant evidence touching these questions and may, if appropriate, grant an ordinary Mareva injunction in respect of the property or make a temporary order pending the presentation of further evidence.[99] A third person affected may, whether on a separate application or otherwise, adduce evidence to show that the defendant has no relevant interest in the property and seek the setting aside or modification of the injunction.[100] In these cases the court examines all the evidence and, in accordance with general principles, makes the order that is most just in view of the various probabilities as they are best able to be determined.[101] Similar principles apply where property of the defendant has passed to a third person in such circumstances that there is a substantial prospect that tracing will be appropriate; and a Mareva injunction or related relief may, on the basis that has been set out here, extend to specified property in the hands of the third person.[102]

POST-JUDGMENT INJUNCTIONS

A Mareva injunction may be granted after judgment has been obtained by the plaintiff, as well as before judgment.[103] Although the same general equitable principles apply in all these cases, the fact that judgment has been obtained, and that only execution remains, may be important in the application of those principles.

First, ordinarily the fact that the plaintiff has obtained judgment removes any risk that it may subsequently be found that the grant of a

97. See *SCF Finance* supra n 70.
98. See *Z Ltd* supra n 2; *SCF Finance Co* supra n 70.
99. *SCF Finance* supra n 70.
100. Ibid.
101. See supra 177-180.
102. *A and Another v C and Others* [1981] QB 956.
103. *Faith Panton* supra n 23; supra n 13.

Mabo's arguments against validity included: that the law was not for the peace welfare and good government of Queensland; that there were limits on the powers of the Queensland Parliament to deal with waste lands of the Crown; that Queensland was prohibited from interfering in the judicial process in this way; and that the Government could not deprive persons of property rights without compensation. All these arguments were rejected by the Court. But the argument that the legislation was inconsistent with the Commonwealth Racial Discrimination Act 1975 ("the Racial Discrimination Act"), and thus invalid pursuant to section 109 of the Constitution, was accepted. Section 10(1) of that Act says that, where a law of the Commonwealth or a State provides that a particular right enjoyed by persons of one racial or ethnic group shall not be enjoyed by another racial or ethnic group (or shall be enjoyed only to a lesser extent) then that law shall have no effect.[7]

Mabo argued that the Coast Islands Act discriminately limited or removed property rights of the Murray Island Aborigines. The Court ultimately split four:three in favour of this argument. Justices Brennan, Toohey and Gaudron, in a joint judgment, were not at all impressed with the Queensland legislation describing it as "Draconian"[8] and "destroy[ing] traditional legal rights"[9] and effecting an "arbitrary deprivation of property".[10] Their view essentially was that the Act discriminated against the Murray Islanders vis-a-vis other persons with interests on the Island contrary to section 10(1) of the Racial Discrimination Act.[11] Justice Deane arrived at a similar conclusion in a separate judgment.[12]

7. The effectiveness of this provision in binding the Commonwealth must be doubted. Any post-1975 Commonwealth legislation which conflicted with the Racial Discrimination Act would likely be construed as overriding the former Act due to it being later in time. It is possible (though not, I think, likely) that the High Court might follow the lead of the Canadian Supreme Court in their interpretation of Canada's 1960 *statutory* Bill of Rights in *R v Drybones* [1970] SCR 282 and *Hogan v The Queen* [1975] 2 SCR 574. That document was held to be effective to override later inconsistent Federal statutes. The Bill of Rights was characterized as a "quasi-constitutional instrument".
8. Supra n 3, 213.
9. Ibid, 218.
10. Ibid.
11. Ibid, 218-219.
12. Ibid, 232.

Justice Wilson was in the minority. He took the view that rather than being discriminated against, the Murray Islanders were just being *put on the same footing* as other Queenslanders by the Coast Islands Act. He acknowledged that this view likely would still leave the Murray Islanders with a deep feeling of injustice. But this was the legal position.[13] This judgment certainly shows great respect for the autonomy of the legislative arm of government but it is a fact of life that the Court wields political power also. It has to make judgments, frequently, on whether to defer to the legislature or not. When one bears this in mind, Justice Wilson's triumph of form over substance has little to commend it.

The other minority judges, Chief Justice Mason and Justice Dawson, essentially found themselves unable to draw any final conclusions about the validity of the Coast Islands Act without *first* establishing whether the law now recognized traditional native land rights.[14] Presumably if a majority of judges had taken this view, the assumption of the parties referred to earlier would not have been agreed to and Mabo's case would have been argued out in full.

In the event, the Coast Islands Act was struck down by a majority who doubtless recognized the egregious misuse of legislative power which confronted them. An important consequence for State Governments follows from the case: if traditional native land title *does* exist, then no post-1975 act of extinguishment can currently be effective. Thus the States will need to rely on pre-1975 acts of extinguishment or repeal (explicit or implied) of the Racial Discrimination Act if they wish to negate any otherwise recognizable traditional native land title.

Finally, neither of the minority judgments of Chief Justice Mason and Justice Dawson used the 1971 judgment of Justice Blackburn in *Milirrpum*[15] to help resolve the problems they faced in *Mabo*. *Milirrpum* still represents the law on traditional native land rights in Australia. Very simply put, Justice Blackburn found that no such rights existed in Australia. He acknowledged that the Aboriginal people of Australia lived according to an organized set of laws and rules prior to white

13. Ibid, 206.
14. Ibid Mason CJ, 199; Dawson J, 243.
15. Supra n 1.

annexation *but* he also found that Australia had been settled rather than conquered and deduced from this that any rights which may have existed were extinguished in 1788. The judgment has been subjected to repeated scrutiny, analysis and criticism.[16] It is arguable that the treatment of *Milirrpum* in *Mabo* could signify that, legally speaking, *Milirrpum* is not long for this world.

16. J Hockey "The Gove Land Rights Case: A Judicial Dispensation for the Taking of Aboriginal Lands in Australia?" (1972) 5 FL Rev 85; G Lester and G Parker "Land Rights: Australian Aborigines Have Lost a Legal Battle But..." (1973) 11 Alba L Rev 189; L J Priestly "Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case" (1974) 6 FL Rev 150; B Hocking "Does Aboriginal Law Now Run in Australia" (1979) 10 FL Rev 161; M Barker "Aborigines, Natural Resources and the Law" (1983) 15 UWAL Rev 245; R H Bartlett "Aboriginal Land Claims at Common Law" (1983) 15 UWAL Rev 293.

Review of P N Grabosky, *Wayward Governance: Illegality and its Control in the Public Sector*, Canberra: Australian Institute of Criminology 1989. pp 1-344.

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Illegality by government agencies and agents in Australia is the material for this overdue contribution to the literature on the misuse and abuse of power. Peter Grabosky's earlier work on the effectiveness of regulatory agencies in the environment, consumer and occupational health areas is aptly extended in this review of the nature of government wrongdoing. The insights gleaned from an Australian Institute of Criminology seminar on Government Illegality held in Canberra in October 1986[1] provided further stimulus. At this seminar the thrust was not corruption by individual officials but illegal conduct by agencies and officers in the furtherance of government policy. Grabosky both refines and broadens this definition to include agencies at all levels of government from local council to federal agency and to assess the iatrogenic effects of machinery designed to control government illegality.

In this latest account the author adds to our perception of the problems and, in a brief introduction and more lengthy conclusion, seeks to locate the causes and remedies of "Wayward Governance". A synthesis of public administration, organisational theory, and theories of deviance (especially rational versions like Sutherland's differential

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1. P N Grabosky (ed) *Government Illegality* Seminar Proceedings 1-2 October 1986 (Canberra: Australian Institute of Criminology, 1987).

association) is attempted. This refreshing blend of political science and criminology should encourage others to consider the potential for collaboration on neglected topics such as state crime.

Grabosky has provided a compelling account of the diversity, voracity and sheer bloody-mindedness of some of Australia's bureaucratic crime. Illegal behaviour within government has generally been well understood in the context of police and prison cultures (the first five examples in fact deal with such matters), so it is interesting to observe similar phenomena in more diverse settings. There are 17 case studies, including the institutionalised brutalities of Grafton prison, special branch surveillance in South Australia, sexual harassment in the New South Wales Water Resources Commission, and the systematic electoral fraud, nepotism and financial chicanery of the Richmond City Council. Government illegality also involved diverse organisations such as the Deputy Crown Solicitor's Office, the Australian Dairy Corporation, the Housing Commission of Victoria, the Department of Transport and Works, and the Electricity Trust of South Australia ("ETSA").

Grabosky, applying a simple organising formula (how, why, response and consequences), dissects some familiar and not so familiar scandals, goofs, malicious practices and cover-ups which we Australians have begun to regard as a commonplace cost of government. This collection of malfeasance and calamity (the creation of a nuclear wasteland, the destruction of Australia's longest living life form and the desecration of a priceless cultural heritage) insists that we not only acknowledge but clean our dirty linen. As a society, our capacity for indignation is not inexhaustible, and as this book shows, our ability to institute and bolster effective remedies is considerably more difficult than we suppose. Although the exact extent of the threat of government illegality is unclear, it's danger is more fatal to treasured freedoms than other forms of crime.

Australia, the author suggests, has a relatively good record in terms of illegal government activity: people don't disappear into the bowels of police headquarters never to be seen again (although the odd mental patient may fall between the bureaucratic cracks) and torture is almost unknown in this country (if you exclude Grabosky's description of the calculated terror meted out by prison authorities at Grafton). Grabosky rightly argues that the costs of government illegality are considerable but the real harm is to intangibles like the principle of the rule of law.

While we are all victims, the costs are frequently borne disproportionately by the disadvantaged (Aborigines like John Pat, the custodians of Injalkajanama, migrants deprived of legitimate social security in the 'Greek Conspiracy' case, and ordinary Australians like Jane Hill and the electricity linesman of the ETSA), those who, "have the fewest resources, whether psychological, political or financial, with which to defend themselves".[2]

Grabosky has guided his selection of cases on the slender requirements of recency, and the display of variations in the nature and location of the problem. Consequently, the fundamental question of how representative these examples are and how prevalent government illegality is remains unclear, although by default the problem is apparently widespread. Admittedly, Grabosky starts with the proposition that governments should be and are expected to be moral exemplars in our society, unlike private corporations where illegality may be anticipated by their natural quest for profit.

Grabosky catalogues the causes of governmental deviance in terms of characteristics loosely defined as "organisational pathology",[3] perhaps suggesting that government illegality is abnormal - a highly debatable point. Amongst these characteristics of organisational pathology, a lack of resources in the agency itself gets short measure (in most of his examples, the agencies if anything, had too many resources). However, poor communication, (especially excessive secrecy), organisational fragmentation, bad leadership, the absence of internal monitoring, rapid expansion, little or no external control and extreme goal orientation (ends justify the means) are all factors that foster the climate for illegal activity. Here, the author provides a diagnostic checklist open to empirical scrutiny and a tool other researchers will find useful as a means for analysing risk.

These causes and characteristics are strung together to provide a "provisional theory of government illegality".[4] At best this is a good description of the organisational environment and processes that lead to illegality, but it says little directly about power and the psychology of authority. Such an ambitious conceptualisation warrants more syn-

2. P N Grabosky *Wayward Governance: Illegality and its Control in the Public Sector* (Canberra: Australian Institute of Criminology, 1989) 285.
3. Ibid, 286-294.
4. Ibid, 297-299.

thesis before an articulate "theory" capable of addressing more than descriptive processes emerges. The work will provide the ground for some lively debate, although many public servants will always find the ambiguities of real life decision making - determining what is justified and what is venal - a fine line. The virtue of the case studies is that the more subtle aspects can be recognised by the reader familiar with the culture of public servants and the nature of office politics.

Given the current enthusiasm of public service commissions for decentralisation, performance indicators, targeted auditing, unit accountability and other measures derived from the rubric of corporate planning and rational economics, it would be surprising if these measures did not bite. Grabosky gives little credence to these "administrative reforms" (he is also scathing about the limitations of remedies such as criminal and civil law); although such measures are effective in controlling financial risks, especially at lower levels, they do not prevent other forms of misconduct. Public servants may be scrupulously monitored in relation to their expenses and budgets but this often has no bearing on abuse or neglect of office. For such matters a number of checks and balances external and internal have grown up alongside traditional audits, judicial review and parliamentary overseeing.

Perhaps the best known of these mechanisms is the office of the Ombudsman, given the nickname "the mirror man" by prisoners, because he is always "just looking into it". Resistance, the author argues, especially by police unions to extensions of Ombudsman powers of review, suggests that this form of overseeing is not as toothless as the office's frequent failure to punish wrongdoers and prisoners' assessment would suggest. And in an unexpected way, the energy expended by officials to thwart such probing and to respond to lengthy inquiries, often leads to useful compromises and changes in practice. At worst, such reviews provide cold comfort to otherwise powerless victims and act as a ubiquitous check on bureaucratic behaviour.

Grabosky also reviews the role of the news media, noting that defamation laws and media concentration dilute their role as watchdogs. While freedom of information laws (available in only two jurisdictions - Victoria and the Commonwealth) have proven efficient "window dressing" covered by exemptions and retrieval costs. For the author, such an outcome does more harm than good: the symbolic power of "freedom of information" is fully exploited even though obtaining such information is expensive and easily frustrated. But

worst of all is the plight of the individual who, seeking to address illegality, is frequently vilified or shamelessly treated. Superintendent Daniels, for insisting on the truth about the prostitution business in Western Australia, and Detective Sergeant Phillip Arantz, for exposing the fraud in NSW police statistics are but two of many examples.

The approach that begins with broadly framed injunctions against communication and criticism by public servants should be abandoned and the courts should readily support principled disclosure by serving officials. As Grabosky perceptively notes, "Until appropriate structures are created to encourage principled organisational dissent in Australia, the likelihood that whistle blowing can serve as an effective countermeasure against government illegality is remote".[5]

While the culpability of officials and agencies varies from benign neglect to outright malice, the overriding impression is that government activity is administered in a culture of indifference. The solutions, in the eyes of the author, lie in invigorating our culture of participatory democracy and "... replacing a tradition of secrecy and cover-up in public affairs with an activist democratic culture, a new tradition of candour, openness and self-assessment".[6]

Exposé (author's disclaimer aside) of the kind reviewed here is useful, often putting into perspective what only hindsight can, and reminding us potential whistle-blowers of the byzantine character of Australian officialdom. The case studies, for the most part, make excellent vignettes, with his conclusion a sound explanation of the more instrumental aspects of the problem. Power, the engine for many of these calamities, seems neglected in this otherwise complete account and arguments about under control and over control are undeveloped. Newly created watchdogs such as the NSW Independent Commission on Corruption and the mechanisms created in the wake of the Fitzgerald inquiry were too new for inclusion in this account but will ensure a continued interest in Australian attempts to control government illegality. The works following this perceptively summarised account will be indebted to it. As an introduction to the issue of government illegality in Australia, this book should find itself on all our reading lists.

5. Ibid, 322.
6. Ibid, 331.